

THE LEGAL DUE DILIGENCE OF LAND ACQUISITION FOR THE PUBLIC INTEREST: A CRITICAL REVIEW

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Abstrak. This study aims to examine and analyze the legal due diligence approach to land acquisition for the public interest. In addition, to analyze aspects of legal due diligence as a preventive effort to minimize land acquisition problems. This research was conducted using a normative juridical approach with analytical descriptive specifications. The literature study was used to obtain the legal materials needed in this research. The collected legal materials are then analyzed using a qualitative descriptive analysis method. The results show that legal due diligence of land acquisition for the public interest has several objectives: obtaining legal status or legal clarity regarding land documents; checking the validity of the right of ownership to land; checking the legal compliance of land rights owners; providing an opinion for legal certainty of a policy taken by the Government. Furthermore, legal due diligence as a preventive effort to minimize land acquisition problems include: information and data must be valid, comprehensive, and objective; the transaction must be carried out in good faith; investigation and evaluate facts on relevant land objects based on research analysis. Therefore, it is recommended that the Government implement legal due diligence of land acquisition for the public interest as a preventive effort to suppress and minimize the risk of potential legal remedies such as lawsuits that will arise in the future.

Keywords:
Due Diligence;
Land Acquisition;
Legal Certainty;
Public Interest.

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INTRODUCTION

Land is one of the needs for development in various sectors. Development can essentially increase human welfare, but on the other hand, it can also cause legal problems. One of the important issues in national infrastructure development activities, such as the construction of public facilities, is the issue of land acquisition. However, the land needed is very limited because most of the land has the status of the right of ownership. On the other hand, land owned by the Government is state-owned land whose control on behalf of the state is very limited. In addition, the land has a

social function and economic value.¹ Therefore, the Government comprehensively and continuously strives to carry out land acquisition for public facilities and infrastructure while still paying attention to the function of land for human life and adhering to the principle of respect and fulfillment of existing legal rights.

The state has an obligation to regulate land ownership and regulate its use, based on Article 33 section (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), which regulates that "*the land and the water as well as the natural resources therein are controlled by the state and utilized for the optimal welfare of the people.*"

From the provision above, it can be understood that the relationship between the state and the land and the water and the natural resources is a relationship of control and not ownership. Therefore, the Government must be able to regulate the use of land for development as well as possible, based on public interest and private interest.²

The implementation of development is growing while the land area does not change. On the other hand, the land needed to implement development oriented to the public interest has become the right of ownership to private land. The private land can still be used for development through the land acquisition process for the public interest.³ One method of fulfilling the need for land by the Government is carried out through the National Land Agency as the State Institution that regulates the executor of land acquisition. This condition indicates that the state takes private land rights from the owner by voluntarily relinquishing rights by providing compensation according to the applicable laws and regulations.⁴

Land acquisition for the public interest is one of the activities carried out by the Government with its duties and responsibilities to promote public welfare. Such a state task causes Indonesia to be classified as a welfare state. The state is given the authority to control the land to realize this welfare.⁵

Based on Article 1 point 2 of Law of the Republic of Indonesia Number 2 of 2012 on Land Acquisition for Development in the Public Interest (hereinafter referred to as Law No. 2 of 2012) *juncto* Article 1 point 2 of Government Regulation of the Republic of Indonesia Number 19 of 2021 on Implementation of Land Acquisition for Development in the Public Interest (hereinafter referred to as Government Regulation

¹Subekti, R. (2016). Kebijakan Pemberian Ganti Kerugian dalam Pengadaan Tanah Bagi Pembangunan untuk Kepentingan Umum. *Yustisia*, 5(2), p. 377.

²Santoso, U. (2016). Penyelesaian Sengketa dalam Pengadaan Tanah untuk Kepentingan Umum. *Perspektif: Kajian Masalah Hukum dan Pembangunan*, 21(3), p. 188.

³Putra, N. N. (2017, 10 February). Legal Due Diligence "Tanpa Celah" Kunci Hindari Kasus dalam Pengadaan Tanah. *Hukum Online*. Retrieved at the date of 27 May 2022.

⁴Kotalewala, F, et al. (2020). Penyelesaian Sengketa dalam Pengadaan Tanah Bagi Pembangunan Jalan untuk Kepentingan Umum. *Sasi*, 26(3), p. 429.

⁵Sufriadi, Y. (2011). Penyebab Sengketa Pengadaan Tanah untuk Kepentingan Umum (Studi Kasus Sengketa Pengadaan Tanah untuk Kepentingan Umum di Bengkulu). *Jurnal Hukum Ius Quia Iustum*, 18(1), p. 43.

No. 19 of 2021), explains that "*Land Acquisition is the activity of providing land by giving an adequate and fair compensation to the entitled party.*" In contrast, the criteria for implementing land acquisition for the public interest are regulated in Article 10 of Law No. 2 of 2012. Therefore, people who have the right of ownership to land receive compensation from the Government, as regulated in Article 40 of Law No. 2 of 2012. The implementation of the release of objects on the right of ownership to land is regulated in Article 100 to Article 102 of Government Regulation No. 19 of 2021.

From the provision above, it can be understood that the Government has established a regulation to address the problems that will arise from implementing land acquisition for the public interest. In addition, many previous regulations have also been established by the Government. However, it is still difficult for the Government to obtain land for development in the public interest. On the other hand, problems between the Government and the community regarding land acquisition for the public interest can still be found today.

Various legal facts occurred in the issue of implementation of land acquisition for the public interest. For example, the ineffectiveness of land banking⁶, disharmony between legal norms on land⁷, and land disputes⁸. In addition, a community understands that every inch of land is an absolute right of ownership and is protected by the 1945 Constitution.⁹ On the other hand, there are also other obstacles from the side of the recipient of compensation from the implementation of land acquisition for the public interest. For example, they are in another area¹⁰, completing documents related to land ownership rights¹¹, and other evidentiary obstacles. Therefore, due diligence is needed to check the correctness of the documents held by the indemnity recipient. In this case, to avoid legal problems in the future.

Based on the description above, this study aims to examine and analyze the legal due diligence approach to land acquisition for the public interest. In addition, to analyze aspects of legal due diligence as a preventive effort to minimize land acquisition problems.

⁶Zahra, F. A. (2017). Konstruksi Hukum Pengaturan Bank Tanah untuk Mewujudkan Pengelolaan Aset Tanah Negara Berkeadilan. *Arena Hukum*, 10(3), pp. 360-361.

⁷Ginting, D. (2011). Reformasi Hukum Tanah dalam Rangka Perlindungan Hak Atas Tanah Perorangan dan Penanaman Modal dalam Bidang Agrobisnis. *Jurnal Hukum Ius Quia Iustum*, 18(1), pp. 64-65.

⁸Suardi, S. & Istiqamah, I. (2020). Pelaksanaan Pengadaan Tanah untuk Kepentingan Umum. *Alauddin Law Development Journal (ALDEV)*, 2(2), p. 117.

⁹Eskanugraha, A. P. (2021). Musyawarah dan Mufakat sebagai Solusi Pemanfaatan Tanah Fasilitas Umum Masyarakat. *Pusat Pengkajian Pancasila dan Konstitusi Law Review (PUSKAPSI Law Review)*, 1(1), p. 71.

¹⁰Ramadhani, R. (2019). Eksistensi Hak Komunal Masyarakat Hukum Adat dalam Pengadaan Tanah untuk Kepentingan Umum. *Jurnal Penelitian Hukum de Jure*, 19(1), p. 99.

¹¹Suyanto, S. & Mairini, E. (2021). Ganti Rugi Tanah Pengganti Tanah Kas Desa dalam Pengadaan Tanah untuk Kepentingan Umum. *Jurnal Pro Hukum: Jurnal Penelitian Bidang Hukum Universitas Gresik*, 10(1), pp. 2-3.

METHOD

This study uses a normative juridical research method to analyze legal problems by referring to and originating from legal norms.¹² In this case, laws and regulations are positive law and court decisions with permanent legal force. The types of data used are legal materials, including:

1. Primary Legal Materials include the 1945 Constitution, Law No. 2 of 2012, Government Regulation No. 19 of 2021, and other laws and regulations;
2. Secondary Law Materials that explain primary law include books and articles discussing due diligence to provide legal certainty of land acquisition for the public interest, and materials obtained from the Internet; and
3. Tertiary legal materials are legal materials that provide instructions and explanations for primary and secondary legal materials. The tertiary legal material used by the author is the Big Indonesian Dictionary and related legal dictionaries.

The data was collected using literature study techniques on primary, secondary, and tertiary legal materials.¹³ The collected legal material is then analyzed using qualitative methods with a statute approach, theoretical basis, and expert opinion, which will conclude the research's object.¹⁴

RESULTS AND DISCUSSION

A. Land Acquisition for the Public Interest based on the Legal Due Diligence Approach

One of the legal problems sometimes faced by the Government in land acquisition for the public interest is the completeness of documents related to land ownership rights. The Government in land acquisition is not just checking the law's legality, such as the presence or absence of ownership of land certificates. However, the Government also needs to know the legal facts that form the basis for the issuance of land certificates. In this case, to minimize the occurrence of lawsuits from other parties aware of a procedural defect at the time of issuance of that land certificate.¹⁵

The implementation of land acquisition will always be faced with interested parties, so conflicts are very likely to occur. Ideally, land acquisition for the public interest should not be detrimental or cause a decrease in living standards for the owner of land rights. The land acquisition process for public interest must also be according to applicable laws and regulations. A link between community rights

¹²Diantha, I. M. P. (2017). *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*. Jakarta: Kencana Prenada Media Group, p. 12.

¹³Lestari, P. (2020). Pengadaan Tanah untuk Pembangunan demi Kepentingan Umum di Indonesia Berdasarkan Pancasila. *SIGN Jurnal Hukum*, 1(2), p. 74.

¹⁴Qamar, N. & Rezah, F. S. (2020). *Metode Penelitian Hukum: Doktrinal dan Non-Doktrinal*. Makassar: CV. Social Politic Genius (SIGN), pp. 47-48.

¹⁵Putra, N. N. (2017, 10 February). *Loc. Cit.*

and land acquisition policies will undoubtedly affect the implementation and legal stigma in the community. Policies issued by the Government must provide legal certainty, especially in the implementation and resolution of disputes in the event of a conflict in land acquisition activities.¹⁶

The Government uses a due diligence process approach to minimize the emergence of land disputes related to land acquisition for the public interest. The term due diligence has been known since 1903. Due diligence is the care that a reasonable person exercises under the circumstances to avoid harm to other persons or their property.¹⁷

In its development, the term due diligence has been applied to the business world. Due diligence is a term used for many concepts involving either the performance of an investigation of a business or person or an act with a certain standard of care.¹⁸ It can be a legal obligation, but the term commonly applies to voluntary investigations. For example, most industries apply due diligence in building cooperative relationships. In addition, due diligence is examining or researching various facts or the suitability of information and data from a company or corporation. In this case, the information is analyzed based on interests and is legally accountable to third parties.¹⁹

From the explanation above, it can be understood that due diligence is an investigative process carried out by business people to identify and manage commercial risks.²⁰ Its primary purpose is to confirm facts, data, and representatives of companies involved in commercial transactions to determine the transaction's value, price, and risk. In addition, the long-term goal is to avoid the risk of future litigation.²¹ On the other hand, no overall valid definition of due diligence exists in the existing literature. However, it is only described as a detailed examination of a company before engaging in a business arrangement, such as buying or selling its shares.²²

Due diligence is also known as a legal examination. In this case, it includes audits, examinations, and research from a legal perspective. In addition, legal due diligence includes legal opinions, the results of analysis, and various conclusions from facts obtained from legal audits.²³ Legal Due diligence is carried out to

¹⁶Utomo, S. (2020). Problematika Proses Pengadaan Tanah. *Jurnal Justisia: Jurnal Ilmu Hukum, Perundang-Undangan dan Pranata Sosial*, 5(2), p. 20.

¹⁷Ruggie, J. G. & Sherman, J. F. (2017). The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale. *European Journal of International Law*, 28(3), p. 924.

¹⁸Manning, J. E. (2010). *Public Trust Betrayed: The Truth Behind the Real Estate Appraisal Industry*. London: Tate Publishing & Enterprises, p. 171.

¹⁹Lumbuun, T. G. (2005). Legal Due Diligence dalam Lingkup Hukum Administrasi Negara. *Law Review*, 5(2), p. 483.

²⁰Bonnitcha, J. & McCorquodale, R. (2017). The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights. *European Journal of International Law*, 28(3), p. 901

²¹*Ibid.*, p. 902.

²²Müller, C. (2021). Challenges and Risks in the Due Diligence Process Answered with an Innovative Approach. *HighTech and Innovation Journal*, 2(1), p. 54.

²³Lumbuun, T. G. (2005). *Loc. Cit.*

achieve three objectives: uncovering potential obligations, finding laws and regulations to overcome contractual obstacles, and forming the basis for the final agreement.²⁴ Aslan Noor emphasized that three legal aspects need to be considered in land acquisition for the public interest: the principle of balance, community involvement, and compensation.²⁵

1. Principle of Balance

Article 2 point j of Law No. 2 of 2012 regulates that "*Land acquisition for the public interest is carried out based on the principle of balance.*" What is meant by the principle of balance is that land acquisition for development can be balanced and in line with the interests of the community and the state. In this case, the Government at both the central and regional levels has prepared funding to ensure the implementation of this principle. Furthermore, Article 5 of Law No. 2 of 2012 regulates that "*the Entitled Party is obliged to relinquish its land at the time of land acquisition for the public interest after the granting of compensation or based on a court decision that has permanent legal force.*" However, in reality, development projects often stagnate because the community refuses to relinquish their land rights. This condition is caused by the lack of socialization of Law No. 2 of 2012, which emphasizes that the community also must relinquish their rights.

2. Community Involvement

Four steps need to be taken in the process of organizing land acquisition for the public interest:

- a. The party implementing the development project for the public interest must provide detailed data or information regarding the location to the Government.
- b. The Government conducts public hearings or consultations.
- c. The Government determines the location of a development project.
- d. Land acquisition is done through the National Land Agency's assessment, deliberation, and release activities.

Land acquisition for reasons of public interest sometimes does not occur because the use of land taken by the Government is not under the original plan or purpose of land release. In addition, the effect tends to cause misery to the community as the owner of land rights. Land acquisition for the public interest is precisely for the benefit of certain companies. In this case, the land is used for industrial development or the construction of a shopping center (mall).²⁶

²⁴Howson, P. (2017). *Due Diligence: The Critical Stage in Mergers and Acquisitions*. London: Routledge, p. 4.

²⁵Noor, A. (2015). Hak Sistem Pemilikan Tanah Bangsa Indonesia dan Kaitannya dengan Penerapan Hak-Hak Derivatif dalam Rangka Agunan Utang-Piutang. *Jurnal Hukum Media Justitia Nusantara (MJN)*, 4(2), p. 26.

²⁶Santoso, U. (2010). Pelepasan Hak Atas Tanah untuk Kepentingan Perusahaan Swasta. *Perspektif: Kajian Masalah Hukum dan Pembangunan*, 15(3), pp. 321-322.

3. Compensation

Article 9 section (2) of Law No. 2 of 2012 regulates that "*Land acquisition for the public interest is done by giving adequate and fair compensation.*" The provision can be understood that the compensation is in the form of equal compensation, even more, significant where the land owner must have a life change that is more dignified than before. Therefore, it is very reasonable if the compensation received by the land owner exceeds the average or general price. However, in reality, many people still refuse to give up their land rights because they think the compensation value is under the value they expect. During the negotiation process between the Government and the people with land rights, compensation will be temporarily deposited in the local district court. Article 42 section (1) of Law No. 2 of 2012 regulates that "*if the Entitled Party refuses the form and or amount of compensation based on the results of deliberation ..., or the decision of the district court/Supreme Court ..., compensation is deposited in the local district court.*"

Therefore, to prevent early land acquisition problems for the public interest, the first step that is very urgent to be carried out is due diligence by taking into account the possibility of the land having problems or not. Legal due diligence will generally present important legal facts, which can become important information when mitigation is carried out. This legal due diligence does not just carry out verification between one document and another. This legal due diligence also includes verifying the permit-issuing agency and reviewing the location in question. The purpose of legal due diligence is to ensure that:

1. The project complies with all national laws and regulations related to land acquisition;
2. No reputational risk for landowners and Government;
3. There are no problems, disputes, or unpaid payment obligations.

Checking and evaluating legal documents by the land acquisition team appointed by the Government, basically to conduct a legal analysis of one or more land ownership documents, with the aim of:

1. Obtain legal status or legal clarity on land documents and other supporting documents;
2. Check the legality of the owner of land rights;
3. Check the legal compliance of the owner of land rights;
4. Provide legal opinion or legal certainty on policies implemented by the Government.

The documents mentioned above must be carefully examined to determine whether they comply with the applicable laws and regulations. In addition to document inspection, other things 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 are aimed at ascertaining the truth;
2. Document research must be related to land objects;
3. Research should be based on court information, financial statements, directors' statements, and other sources of information.

Meanwhile, the evidentiary documents from land rights owners include:

1. Land certificate;
2. Proof of land tenure (land certificate, tax stake, and other documents);
3. Deed of sale/purchase/granting/land inheritance;
4. Land sale and purchase binding agreement;
5. Deed or agreement to release land rights;
6. Land title documents at the local National Land Agency office.

Another examination is every land case in court/arbitration, including:

1. Information and documents regarding land cases, whether civil, criminal, commercial, or administrative;
2. Data in the form of information and minutes of documents if the land object has ever been sued;
3. All decision documents are issued by judicial and or arbitration bodies if the land object has been litigated.

Therefore, to obtain material information or facts, legal due diligence is carried out through:²⁷

1. Examination of the completeness of documents;
2. Examination of the parties conducted through questions and answers or interviews;
3. The examination is carried out in a due diligence meeting;
4. Joint visits to land acquisition sites;
5. Confirmation (cross-checking) to other related parties or agencies on land objects.

B. Legal Due Diligence as a Preventive Effort to Minimize Land Acquisition Problems for the Public Interest

Legal due diligence is carried out to obtain objective data related to the land acquisition plan. Legal due diligence aims to minimize the occurrence of lawsuits from other parties aware of a procedural defect at the time of issuance of that land certificate. So that by conducting legal due diligence, the land acquisition for the public interest has the status of not having any legal problems.²⁸ However, if there

²⁷Mamuntu, J. F. C. (2019). Kewajiban dan Tanggungjawab Profesi Konsultan Hukum dalam Rangka Perlindungan Investor (Investor Protection) Pasar Modal. *Lex Privatum*, 7(2), p. 30.

²⁸Putra, N. N. (2017, 10 February). *Loc. Cit.*

are still problems due to the greed of certain parties, then the legal facts that have been obtained through legal due diligence will serve as evidence. In this case, to prevent the problems presented by the party.

As previously explained, legal due diligence is not just an examination of documents but also the entire process until the issuance of the certificate of right of ownership to land.²⁹ Therefore, legal due diligence is an activity that requires accuracy, expertise, and competence in obtaining and analyzing information and data related to the land.³⁰ So legal due diligence is an in-depth investigation of various aspects of land acquisition for the public interest.³¹

Data on land used during legal due diligence must be valid and comprehensive. In this case, it includes all legal data and information related to the land. In addition, the data collected must be objective. In this case, it covers all aspects of the valuation of the land price. Meanwhile, erroneous information and recommendations usually come from incomplete data or information. Without complete data and information, the risk will not be accurately concluded. If the risk cannot be concluded accurately, the value of the transaction cannot be determined.³² Therefore, the party must provide information in the legal due diligence process to help increase the value of the transaction to be carried out by the parties.

On the other hand, the availability of complete data will also significantly affect the continuation aspect of the transactions that the parties will carry out, in this case, including conditions that are detrimental or beneficial to the community as the owner of land rights. Therefore, disclosure is related to good faith, which is the basis of all civil agreements.³³

Legal due diligence is the efforts and endeavors of the parties to avoid any loss between them. In addition, for the sake of perfecting the transaction itself. In civil law, any transaction always contains an element of offering and an element of acceptance. The due diligence process is carried out to ensure the conditions of the parties' offer and will not experience legal problems if the object of the transaction is submitted.³⁴

On the other hand, the importance of legal due diligence efforts is also a mitigation effort against the possibility of the risk of legal problems arising due to negligence which results in losses to related parties. Legal due diligence is a preventive effort to suppress and minimize the risk of potential legal remedies such as lawsuits that will arise in the future. Legal due diligence is investigating

²⁹Ibid.

³⁰Kurniawan, I. G. A. (2020). Valuasi Merek sebagai Jaminan Kredit Perbankan: Relevansi dalam Pembentukan Lembaga Penilai Kekayaan Intelektual. *Jurnal Magister Hukum Udayana*, 9(4), p. 767.

³¹Ratnasari, F. & Triyonowati, T. (2019). Analisis Pengaruh Akuisisi terhadap Kinerja Keuangan Perusahaan Bank Permata Tbk yang Terdaftar di BEI. *Jurnal Ilmu dan Riset Manajemen*, 8(8), p. 4.

³²Christiawan, R. (2020). *Uji Tuntas Hukum (Legal Due Diligence)*. Jakarta: Sinar Grafika, p. 2.

³³Ibid.

³⁴Ibid., p. 3.

facts and evaluating relevant facts based on analysis. The investigative logic of this analysis requires that once a fact is identified, it brings up the next question.³⁵ In this case, how are these facts measured against the legal due diligence standard? How to implement an analysis that is carried out through various approaches to get a conclusion? How are the conclusions related to the quality and impact of the implementation of company management? How do we find ways to reduce these adverse impacts? How do we design the best solution to adapt or revise company policies and other practices as needed through collaborative efforts involving various stakeholders?

CONCLUSIONS AND SUGGESTIONS

Based on the results and discussion above, it can be concluded that legal due diligence of land acquisition for the public interest has several objectives: obtaining legal status or legal clarity regarding land documents; checking the validity of the right of ownership to land; checking the legal compliance of land rights owners; provide an opinion for legal certainty of a policy taken by the Government. Furthermore, legal due diligence as a preventive effort to minimize land acquisition problems include: information and data must be valid, comprehensive, and objective; the transaction must be carried out in good faith; investigation and evaluate facts on relevant land objects based on research analysis. Based on the description of these conclusions, it is recommended that the Government implement legal due diligence of land acquisition for the public interest as a preventive effort to suppress and minimize the risk of potential legal remedies such as lawsuits that will arise in the future.

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³⁵Rambe, R. & D., T. L. (2014). *Panduan Due Diligence (Legal Audit, Legal Opinion, Legal Reasoning)*. Jakarta: CV. Varia Advokat, p. 4.

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