

LAND FOR PUBLIC PURPOSES

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Accessing land for
public purposes in Samoa

Chris Grant » Land Administration Consultant

The contribution of **Leota Laki Lamositele-Sio**, Project Manager, ADB Small Business Development Project, Samoa, to the writing of this case study is gratefully acknowledged.

A snapshot

Accessing land for public purposes in Samoa

Samoa has legislation to enable the government to acquire both freehold and customary land for public purposes. The legislation covers what may be taken, how it may be taken and how compensation is assessed and who receives it. While consensus and negotiation are integral to Samoan life and decision making, they are often not applied to how the government acquires land. Due process of law and procedures are often not adhered to and it is common for landowners to be inadequately informed of the processes and of their rights. This causes confusion, distrust and long delays in land development. The government is increasingly conscious of this and is acting to improve the situation.

The system for acquiring land for public purposes in Samoa highlights the benefits of:

- » consulting widely and taking care to reach all affected people
- » properly informing landowners of the consequences of land acquisition, the process and their rights
- » negotiating with landowners before compulsorily acquiring land
- » ensuring landowners have access to independent expert advice during the acquisition process
- » ensuring there is coordination among government agencies
- » ensuring objectivity in the valuation of land and that the land valuation industry is regulated
- » providing dispute resolution mechanisms for landowners.

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Introduction

Samoa is recognised among Pacific nations for the stability of its government and its institutions. Nevertheless, Samoa is undergoing considerable reform and the speed of the reform process is catching many by surprise.

The Government of Samoa's *Statement of development strategy* focuses on enhancing the people's opportunities to improve their quality of life. One objective is 'land for development', with the goal of increasing investment to create employment. The government is committed to reforming the economy and public sector so as to provide a firm basis for achieving this goal and, with donor assistance, has initiated programs to improve land administration.¹

Samoa effectively has a dual land system. The customary system of land tenure is strong and authorities are committed to maintaining this integral part of the Samoan way of life. However, Samoa is subject to the same global pressures for development and improved living conditions as anywhere else. Samoa is attempting to manage the pressure on its limited land resources by balancing the traditional and the western-style approaches to land tenure.

In the past the Government of Samoa appealed to the loyalty and patriotism of people to allow roads and other works for the public good to proceed unimpeded. And many customary landholders agreed to provide land for public purposes without compensation. But this is no longer the case. Today landowners sometimes lodge complaints about compensation long after works are completed, even though a community's land may have been pledged to works designed for the public good. Compensation may not have been claimed because people were not aware of their rights to it. The Samoan community is now better informed and formal compensation is sought in most cases.

Land classifications in Samoa

In Samoa the Constitution classifies all land as customary land, freehold land or public land.

CUSTOMARY LAND

In Samoa, more than 80 per cent of land is held under customary ownership. Customary land is protected by the Constitution for the 'customs and usage' of the people of Samoa and is held in the name of a particular titleholder (*matai*) who has authority (*pule*) over the land.

¹ One program is the Second Infrastructure and Asset Management Project, Component 5—Sustainable Land Administration & Survey, which is funded by the World Bank, and the other is Technical Assistance for Promoting Economic Use of Customary Land, which is funded by the Asian Development Bank.

Every Samoan can access land that provides a livelihood and means of family support. The matai determines how land is distributed among family members for their use.

Customary land is essentially outside the parameters of the formal land registration system and cannot be conveyed or mortgaged. Customary land can be alienated in only two ways.

- 1 Land can be leased to a person or corporation approved by the matai. The Alienation of Customary Land Act 1965 appoints the Minister of Lands to act as trustee for the owners and to sign the lease. The Act requires the Registrar of Lands to register the lease in the Land Registry, a public record administered by the Division of Land Management in the Ministry of Natural Resources and Environment.
- 2 Land can be taken by the government, pursuant to the Taking of Land Act 1964, for a 'public purpose'. The land taken must be registered as public land in the Land Registry.

The majority of customary land has not been surveyed. Boundaries are primarily based on years of occupation and traditional knowledge. The Land and Titles Court resolves disputes over ownership and boundaries. Under the Land and Titles Act 1981, its decisions are meant to be registered in the Land Registry. However, for a range of reasons, essentially to do with the poor state of the records of the Land and Titles Court, this does not occur at present. The Land and Titles Court has initiated a program to improve records.

FREEHOLD LAND

Freehold land accounts for about 12 per cent of Samoa's land. Most of it is in Apia and the surrounding urban area. Because of the limited area of freehold land and the increasing number of people seeking to purchase it, land values are increasing rapidly.

How freehold land is used is not subject to customary authority, even if the land is located in a village. Freehold land is registered in the Land Registry under a deeds system established before independence in 1962. The government is considering a proposal to convert the deeds registration system to a title registration system based on the Torrens system. It is important to note that the proposal applies to only freehold land. There is a false perception by some groups in the community that the proposal is a covert vehicle for government to convert customary land to freehold land.

PUBLIC LAND

Public land is defined as land vested in the state that is free from either customary or freehold title. Public (government) land is presently estimated to be about 34 500 hectares or 7 per cent of Samoa's land mass. The Land Board administers all public land.

Existing laws and procedures

THE CONSTITUTION

Article 102 of the Constitution states that customary land, or any interest in customary land, cannot be disposed of or alienated. Thus customary land cannot be sold or mortgaged. The Constitution explicitly allows the granting of a lease or licence over customary land and the taking of customary land for a public purpose.

Any amendment to Article 102 requires a referendum as well as a two-thirds majority vote of all members of parliament, thus securing the protection of customary land tenure.

TAKING OF LAND ACT 1964

Customary and freehold land can be compulsorily acquired for public purposes under the Taking of Land Act. The Act describes what may be taken, how it may be taken, how compensation is assessed and to whom it is paid.

Freehold land may be taken for a public purpose without using the Act by negotiating with the landowner and registering the transfer. However, the Taking of Land Act is always employed in the case of customary land.

The Ministry of Natural Resources and Environment administers the Taking of Land Act. General responsibility lies with the Assistant Chief Executive Officer, Land Management Division, who also has carriage of the Land Registry and the Land Valuation Section.

The ministry oversees the implementation of the Act and coordinates the negotiation with landowners and the consultation with the agency undertaking the public works for which land is required. In all cases the ministry notifies the landowners whose land is to be acquired and initiates a formal land survey to determine the extent and value of that land.

Procedure for taking land

When the government wants to take land for a public purpose the Minister of Natural Resources and Environment is required under the Act to:

- i) Ascertain from the Land and Titles Court if that Court has determined the matai who has authority over the affected land. [This step is not required in the case of freehold tenure.]
- ii) Cause a survey to be made and a certified plan showing the land to be taken and the names of the owners and occupiers of the land to be taken so far as they can be determined.
- iii) Cause a copy of the plan to be deposited in the office of the Ministry of Natural Resources and Environment in Apia.
- iv) Cause a notice to be publicly notified and sent to each owner, occupier and person having an interest in the land, stating the government's proposal to take the land, the public purpose for which the land is required and that any person affected may give notice of objection within 28 days of the first publication of the notice.

- v) Upon receiving from the Director of Natural Resources and Environment any such objection with any reason (other than an objection to the amount or method of payment of compensation) appoint a time and place in Western Samoa at which the objector may appear before the Minister or some person appointed by him and support the objection by such evidence and argument as the objector sees fit.

If the minister determines that the taking should proceed, the head of state may, by proclamation, take the land for the public purpose.

Compensation for land taken

The Taking of Land Act provides that every person having an estate or interest in land taken is entitled to full and just compensation from the minister as soon as reasonably possible. In ascertaining the amount of compensation the value of land is taken to be the amount that the land might realise if sold on the open market by a willing seller on the specified date. The Act makes no allowance for the land being taken compulsorily.

Compensation is not always monetary. The government may exchange land if it has comparable public land available. The Ministry of Natural Resources and Environment has reported that land of equal value is frequently exchanged when circumstances allow. Compensation can also be made in kind, in terms of favourable access to certain public services or infrastructure (Box 1).

BOX 1 » MAGIAGI HYDROELECTRIC PROJECT

In the village of Magiagi, which is adjacent to Apia, the Electric Power Corporation sought to establish a hydroelectric generation plant. In return for access to the land required, the corporation agreed that the village should retain access to the water resource and receive electricity free of charge in perpetuity.

While this resolved the compensation issue, the corporation now has serious concerns about the efficacy of this approach and the potential precedent it has established. It now realises that under this form of compensation it has no control over the use of water or electricity and there is no incentive for the village to economise with either resource or energy use. As a result, the corporation is finding use unreasonably high. Indeed, Magiagi has been anecdotally described by some people interviewed as the 'village from heaven'.

PLANNING AND URBAN MANAGEMENT ACT 2004

The Planning and Urban Management Act aims to ensure the fair, orderly, economic and sustainable development of land in Samoa. The Planning and Urban Management Board was created through an amendment to the Act. The board's specific role in relation to land taken for public purposes is to promote education and community awareness about urban and planning issues, and assist with coordinating the provision of infrastructure and services by ministries and public authorities for the benefit of the community. The board is supported by the Planning and Urban Management Agency, established

under the Act as a division of the Ministry of Natural Resources and Environment. The agency provides the ministry with a useful mechanism for achieving the essential whole-of-government approach to taking land for public purposes.

In administering both the Planning and Urban Management Act and the Taking of Land Act the ministry is in a position to recognise the need for land for public purposes from the outset and to ensure that land is acquired in an open and coordinated manner.

Misunderstandings and issues

The formal process of taking land for public purposes is clear under the law. However, the manner in which this process is undertaken often leads to misunderstandings and problems.

During discussions with stakeholders a number of individuals referred to instances of agencies acting unilaterally, with little or no coordination in undertaking public works. Stories emerged of separate agencies seeking access to the same land for different works connected with a public project. The widening of roads in urban Apia was cited as a general example.

The discussions gave rise to the following stakeholder concerns.

- » Negotiations are generally conducted by officials at an operational level who may not be aware of government land acquisition policy.
- » Villagers negotiating access are usually not familiar with compensation entitlements.
- » Villagers negotiating access may not have appropriate authority over the land.
- » Without overview by the Ministry of Natural Resources and Environment, agreements made are not adequately documented and may not be honoured later.
- » A general attitude of distrust develops when affected landowners do not receive the compensation promised.
- » The priority becomes completing the program of public works without regard to the overall impact on affected landowners.

A summary of other issues raised during discussions with stakeholders follows.

- » **Notices concerning the taking of land are published in the government newspaper *Savali*.**

Savali is not widely circulated and, in the case of family land, does not reach all affected people. Instances were cited where the first time a landowner became aware that his/her land was required for a public purpose was when a surveyor arrived. In addition,

the comment was made that the description of land published in *Savali* was technical, making it difficult for owners to recognise it as their own. Describing land graphically or by photograph could help overcome this confusion.

» **Provisions of the Planning and Urban Management Act can be misunderstood.**

The Planning and Urban Management Act requires that, for the subdivision of land to be approved, land needed for public purposes must be provided free of compensation. At times this appears to be misunderstood. An example was cited where a landowner agreed to cede an area for a road to procure development approval. Approval was gained. However, at a later date and contrary to the agreed condition, the owner forcefully prevented access by the road constructing authority.

» **Land is taken without notification or with little consultation because of the perceived urgency of the works.**

There are many instances where public works have been completed without land being formally proclaimed as public land for the purpose, because of the perceived urgency of the works. Road construction is an example.

» **Customary land often has overlapping or multiple rights, creating difficulties in determining who has authority over the land.**

Often the customary owners of the land to be acquired are not clearly identified and, as a result, compensation may not be paid or may be paid to the wrong person or persons. In some cases compensation may be paid to a matai who may not use it appropriately or distribute it to family members. This can result in a subsequent claim for compensation by family members for the same land.

» **Government uses the Taking of Land Act to convert customary land to freehold.**

Some people in Samoa claim that the government uses the Taking of Land Act to convert customary land to freehold and that land surplus to public purposes is then sold as freehold land by tender. This claim reflects the sensitivity of the issue and the potential for misinformation and misunderstanding. The Act provides that surplus land must be offered to the original owner in the first instance and an adjacent landowner in the second instance. In these cases the land is returned to its customary status.

» **Difficulties arise when assessing the value of customary land.**

The Taking of Land Act states that compensation must be based on 'market value', yet customary land cannot be sold or mortgaged in a market situation. This dilemma has been largely resolved by a court decision arising from the Salelologa Township case (Box 2). The appeal court ruled that for the purposes of assessing compensation there is no longer any distinction between customary and freehold land.

BOX 2 » SALELOLOGA TOWNSHIP

The government acquired, by proclamation, close to 1215 hectares of customary land to develop physical infrastructure for the Salelologa Township on Savaii, Samoa's second main island. The acquisition was to encourage Savaii citizens to remain on the island and spend their energies developing its land and human resources.

The acquisition began in 1997–98 and continues to be vigorously disputed by the affected landowners because of the extent of land taken and the low compensation offered.

The compensation offered was determined as a result of a number of formal meetings between the political leaders and the village leaders of the day. It included a commitment to preserve forest land as part of the town site. It also included monetary compensation of Tala 4.5 million (US\$1.6 million). This amount was not necessarily based on market value because market value principles do not apply to land held under customary tenure. Two independent valuations subsequently assessed the value of compensation for the Salelologa Township to be in the order of Tala 45 million (US\$16 million). This figure was based solely on market value.

The amount of government compensation was hotly disputed and, as required under the Taking of Land Act, referred to the Supreme Court. On appeal the court decided that 'there was to be no distinction between freehold and customary land' for the purposes of assessing land value for compensation. This landmark decision has essentially resolved the dilemma faced by the government in assessing market value of customary land.

Many of the people party to the original meetings have moved on and the case remains pending. In the interim the government has returned 970 hectares of land to the original owner(s).

Addressing issues

LAND VALUATION FOR COMPENSATION

By normal definition market value requires a willing seller and willing purchaser. This is not the case when the landowner is not a willing seller. In other jurisdictions, while market value may be used as a basis for assessing compensation, there is usually an amount paid (*solatium*) in excess of market value to recognise the compulsory nature of the transaction.

Under the provisions of the Taking of Land Act, the only avenue landowners have for resolving disputes about compensation is the Supreme Court. Taking such action against the government is a daunting prospect and beyond the experience and capacity of most affected landowners. It no doubt contributes to the long delays that characterise many land acquisitions (Box 3).

BOX 3 » VAITELE STREET

Vaitele Street is a primary road linking the airport and the city of Apia. The World Bank's Second Infrastructure and Asset Management Project is providing finance to widen the street and several bridges. Construction required land from 158 holdings. Because most of the land that needs to be acquired was in Apia and the surrounding urban area, only 26 affected landholdings were under customary tenure.

The project began in 2003 and, by April 2007, 70 freehold landowners had received compensation and 13 customary landowners had been identified for compensation. For the remaining customary land, the Minister of Lands, Surveys and Environment requested that ownership be resolved through the Land and Titles Court.

The World Bank insisted that the land acquisition for Vaitele Street comply with its Land Acquisition and Resettlement Framework. The overall aim of this framework is to ensure that affected landowners are fairly compensated for their losses and receive assistance to at least maintain their pre-project situation. The framework is based on the World Bank's operational policy on involuntary resettlement and outlines these principles to govern project implementation:

- » avoid or minimise involuntary resettlement where feasible
- » assist displaced persons to improve their former living standards, earning capacity and production levels or at least restore them
- » encourage community participation in planning and implementing resettlement
- » provide assistance to affected people regardless of the legality of title to the land.

After making reasonable attempts to determine landownership and negotiate compensation, the usual practice in Samoa is for the government to enter the affected land. Under these circumstances the assessed amount of compensation is deposited in a trust account held by the Public Trustees Office pending a future claim by the eligible landowner.

However, the Land Acquisition and Resettlement Framework requires that issues surrounding ownership be resolved and that compensation be negotiated and paid *before* works begin. This has added substantially to the time taken to complete the Vaitele Street construction program. Because of the delays often encountered in determining customary landownership through the Land and Titles Court, the impact of the framework is greater when customary land is involved.

The Land Acquisition and Resettlement Framework is essentially a result of World Bank experiences with projects elsewhere and is not unique to Samoa. The bank insists it be applied because acquisitions of land in Samoa have sometimes been haphazard with insufficient consultation and notification. To a large extent the issues raised during stakeholder discussions add weight to the World Bank's position.

Although complying with the framework has added significantly to project completion time it has had the desired effect of increasing discipline in the land acquisition process and reinforcing the need for full and transparent consultation as a prelude to taking land.

The determination of fair land values is a critical element of compensation when taking land for public purposes. Samoa does not have a system of land tax and there is no program of annual valuations of freehold land. Land valuation has been ad hoc and valuers have not been regulated by law. As a result, there often have been large differences between valuations of the same area of land.

The need for a uniform and reliable system of land valuation has been recognised by the Government of Samoa. Draft legislation, the Valuation Act, and regulations aimed at standardising the registration and licensing of valuers were being prepared in 2007. Adopting this legislation will strengthen the valuation profession in Samoa. It will also help to introduce mediation to resolve compensation disputes.

MEDIATION OF COMPENSATION DISPUTES

The use of mediation to resolve disputes over compensation is being considered by the government. In the case of disputes over land values the following mediation process, which has been successfully applied elsewhere, could be considered for Samoa.

- » The government's valuer (the Principal Valuer of the Ministry of Natural Resources and Environment) assesses the land's market value.
- » An independent valuation is obtained if the affected landowner is dissatisfied with the compensation offer.
- » A qualified independent valuer arbitrates when the government's valuation and the landowner's valuation differ, and makes a determination accordingly.
- » The parties in dispute agree to accept the independent valuer's decision as final.

This process depends on a private valuer being available to provide an independent valuation service. Currently such a service is not available but it may develop if the proposed legislation to regulate land valuation is enacted. If enacted, the Valuation Act will establish a solid foundation for adopting a mediation process in the future.

EMPHASIS ON CONSULTATION

While anecdotal in many cases, issues raised during stakeholder meetings reflect the potential for misunderstanding (at best) or misinformation (at worst) on the sensitive issue of taking land.

Consensus and negotiation are central to Samoan life and decision making. Recognising this cultural norm, the government is increasingly conscious that time and energy invested in the widest possible consultation will minimise obstacles to development.

There are many ways to facilitate consultation, including:

- » the Association of Village Mayors (*Pulenu'u*)
- » the Committee of Government Women, comprising representatives of local women's committees who are designated as government agents (the female equivalent of the Association of Village Mayors)
- » the village parliamentary representative, who is usually aware of public works affecting his constituency
- » the Ministry of Works, which can use committees that advise the minister and comprise prominent matai from the district to facilitate consultation.

In a relatively small country such as Samoa, it is not unusual for people with matai or other chiefly status in the villages to also have senior positions in the bureaucracy. If conflict of interest can be avoided, these people can help with consultation.

FAIRNESS AND EQUITY

For most villagers the taking of land is an unusual event, perhaps once in a lifetime. Because they do not have the negotiating experience and expertise of the government, in the interest of fairness and transparency villagers should have access to appropriate expert advice, at no cost to them, during negotiations.

Lessons

CONSULT WIDELY AND PROVIDE FULL INFORMATION

LESSON 1

In view of the number of people affected by the taking of their land—individuals, families and whole villages—it is important to consult as widely as possible to gain landowner approval and acceptance.

LESSON 2

To gain approval and acceptance members of the affected community require complete and accurate information on:

- » the purpose for which the land is required
- » the process by which land is to be taken
- » their rights to receive fair compensation and to object to the process.

For most landowners, especially customary groups, the taking of land for public purposes is an unfamiliar experience. Unfortunately landowners are often not made fully aware why the government is acquiring the land or of their rights under legislation.

PROVIDE EXPERT ASSISTANCE

LESSON 3

To promote fairness and to minimise the potential for conflict and future legal challenges landowners need to have access to experts who can either provide them with advice during negotiations or act on their behalf.

Affected landowners usually cannot bring to the negotiating table a level of expertise and experience to match that available to the government. Fairness and transparency would be enhanced if landowners had access to expert assistance to match the negotiation position of the government.

NEGOTIATE FOR LAND RATHER THAN COMPULSORILY ACQUIRE IT

LESSON 4

Irrespective of the legislative framework, when a government consults, coordinates and negotiates with landowners, the outcomes are usually more successful and fair, avoiding costly protracted disputes.

How the sensitive issue of taking land for public purposes is handled often determines the extent to which obstacles are put in the path of development. Consensus and negotiation remain key features of Samoan communities and most other Pacific island communities. Governments in the region are increasingly acknowledging this cultural norm and are starting to adopt a coordinated approach based on the widest possible consultation with

communities affected by development. The powers given to government under legislation to acquire land compulsorily should be used only as a last resort and in these cases special care needs to be taken to ensure compensation is fair, to avoid costly and ongoing disputes.

ADOPT A WHOLE-OF-GOVERNMENT APPROACH

LESSON 5

Having one agency responsible for and coordinating the acquisition of land for public purposes can ensure that information is relevant and timely, and that negotiations are undertaken at the correct level on both the government and landowner sides.

Coordination among government agencies involved in acquiring land for public purposes is essential. Sometimes a lack of coordination has resulted in proper processes not being followed and government officers taking on improper responsibilities.

DETERMINE COMPENSATION FOR LAND REGARDLESS OF ITS TENURE

LESSON 6

To determine the value of customary land that is to be acquired for public purposes, it is appropriate to assume that it has inherent economic value irrespective of its tenure status.

Although customary land has no 'market value' because market value principles do not apply to customary tenure, it should be assumed that the land can be sold on the open market when valuing it for compensation. Once the land is converted to public ownership, its previous tenure arrangements are irrelevant. This approach was recently confirmed in the Samoan Supreme Court, which found that in terms of assessing compensation there should be no distinction between customary and freehold land.

REGULATE AND LICENSE LAND VALUERS

LESSON 7

To increase the objectivity of land valuations used to determine compensation for government acquiring land for public purposes, governments in the Pacific may want to consider regulating and licensing professional land valuers and providing access to mediation for landowners who wish to challenge land value determinations.

A problem with land valuations is that the market in land is not large and the number of land valuers is small. This often results in considerable differences in the valuations of customary land obtained by the government. This has significant implications for the level of compensation received by landowners and is the source of tension and disputes. Landowners need user-friendly ways to challenge land value determinations made by the government, as it is a quite daunting prospect to take a dispute to an appeals court.

Appendix: People consulted

With the valuable assistance of Australian High Commission staff, especially Asenati Tuiletufuga, key people were consulted over the period 16–20 April 2007:

- » Hinauri Petana, Chief Executive Officer, Ministry of Finance
- » Luagalau Foisaga Eteuati-Shon, Chief Executive Officer, Ministry of Women, Community and Social Development
- » Afoa Arasi Tiotio, Chief Executive Officer, Samoa Land Corporation
- » Tu'u'u Dr Ieti Taulealo, Chief Executive Officer, Ministry of Natural Resources and Environment
- » Masinalupe Tusipa Masinalupe, Chief Executive Officer, Ministry of Justice
- » Roina Vavatua, Chief Executive Officer, SUNGO, and board members
- » Aumua Ming Leung Wai, Attorney General
- » Le'aula Tavita Amosa, Assistant Chief Executive Officer, Ministry of Women, Community and Social Development
- » Le Taua Paul Philips, Assistant Chief Executive Officer, Ministry of Works, Transport and Infrastructure
- » So'oialo Lalau David Fong, Assistant Chief Executive Officer, Division of Land Management, Ministry of Natural Resources and Environment
- » Peleiupu Fuata'i, Principal Officer, Drafting Division, Ministry of Natural Resources and Environment
- » Patea Setefano, Principal Valuer, Ministry of Natural Resources and Environment
- » Klaus J Stunzer, President, Samoa Chamber of Commerce
- » Seve Keilani L Soloi, Soloi Survey Services
- » Hon. Tagaloa Tuala DC Kerslake, President, Land and Titles Court
- » Toleafoa Solomona To'ailoa, Samoa Law Society
- » Patrick Fepuleai, barrister and solicitor
- » Pupualii Senio, representative of village mayors
- » Salota and Atalina, Government Women representatives, Ministry of Women, Community and Social Development

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