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Abstracts

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Towards a New Contractualism?
The shifting economic and legal regimes

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In the UK, the powerful influences of globalisation, neo-liberalism and individualism are evident in the constructs associated with the Third Way political economy. This has implications for state-market-civil relations at large, and particularly with respect to legal, institutional and policy arrangements for land and property development. The synthesis of social democratic ideas and neo-liberalism in current policy regimes creates intellectual and practical contradictions in reconciling the public interest with liberal market influences. This is evident in the context of promoting the interests of land and property developers, and in reforming the land use planning system, whilst simultaneously seeking to facilitate deeper civil engagement. The emphasis on achieving relative efficiencies and effectiveness in the arrangements for land use planning involves legal and fiscal reforms, the influences of the new institutional economics, and a new managerialism in managing the public realm. An important question turns on the civic dimension of this emerging contractualised governance.

This paper explores the emergence of the 'new contractualism' with its assertions of private property rights in the context of Urban Regeneration Companies and Business Improvement Districts. Both measures reconfigure the state-market-civil relations in defined public spaces, and both involve a greater assertion of private property rights over what would be conventionally constructed as the public realm. Urban Regeneration Companies seek to achieve a new approach to community regeneration through land and property development, and Business Improvement Districts involve a privatised approach to town centre management practices. This paper examines the emerging evidence around new institutional economics, and the role of private property rights in the public realm, and seeks to theorise the new contractualism.

A – 3

Public pre-emption rights in the Netherlands and the Federal Republic of Germany - A comparing overview

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In Germany as in the Netherlands the local authorities are authorised by public law to buy plots within the borders of the commune by pre-emption under special conditions. But the conditions are very different.

In Germany pre–emption is possible for plots within the area of a building plan, if and only after the owner of the plot has contracted with someone else as purchaser. The commune may replace the purchaser by practising her pre-emption right, given by public law.

In the Netherlands, the local authority defines the area of pre-emption right by local statutes and afterward informs the owners within this area, that they are not allowed to sell their plots to anyone before they had offered the plot to the local authority and the local authority has rejected to buy the plot.

The model oft the Netherlands seems to be more practicable and more owner-friendly than the German model. Also the surrounding conditions seem to be more sophisticated in the Netherlands than in Germany.

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Could There be Psychology in Land Use Law: A Behavioral Perspective

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U.S.land use laws and regulations are often explained through references to the U.S. Constitution or to economic efficiency.Indeed,it is sometimes argued that these two are opposite sides of the same coin:private property ownership,capitalism,and freedom are all interwoven (Epstein 1985).However,neoclassical interpretations of economics and the law have recently come under scrutiny because of insights from the field of behavioral economics,which cast doubt on the degree to which Coasian exchanges exist (for more on behavioral economics see,for example,Kahneman and Tversky 1979; Read,Loewenstein,and Rabin 1999;Thaler 1999).As a result,a nascent legal literature is attempting to take both a normative and positive behavioral view of the law (see, for example,Jolls,Sunstein,and Thaler 1998;Korobkin 2003).

The objective of this article is to examine whether U.S.land use laws and regulations are consistent with behavioral psychology.Among the areas that I discuss are regulatory and eminent domain takings,zoning,allowable uses,subdivision exactions,and the absence of compensation by private landowners to the public when government programs increase the value of landowners'property.

I utilize a hybrid approach to discussing these topics by employing a mixture of judicial precedence,actual laws,and,occasionally,empirical studies to make my points. My reliance on a mixture of approaches reflects,in general,the relative youth of the behavioral economic approach to understanding land use issues and the law. At this point,my intentions are modest.In contrast to the "new institutional economics" explanation—where Coasian neoclassical economics is used as the sole lens through which to view land use land use regulations—I do not claim to provide an overarching "behavioral economics and law"paradigm.Rather,I merely show that judicial precedence, empirical studies,and actual land use laws are tantalizingly consistent with insights from behavioral economics.

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Real estate, urban development agents and plans – the implications of the new Portuguese legal framework

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This paper explores the relationship between real estate, urban development agents and plans, and tries to evaluate the implications inherent to the Portuguese Spatial Planning Framework Law (1998).

The first issue is **real estate**, a main resource for spatial planning activity. It presents a unique character which depends on its localization, physical dimension, form, geological and landscape characteristics. As a support element it is not a reproducible good and it presents the characteristic of not being consumed after the first use. However, there are several problems associated to the functioning of real estate. First, *real estate market is imperfect* (with a low transparent behaviour and with scarce and unbalanced information), it produces several externalities and it is object of strong valorisation and capitalization. Second, *real estate offer is scarce and has a speculative behaviour*. Some studies show that land, mainly in Portugal, it is not for sale; its rotation is slow; only circumstantial or family reasons motivate the sell-off; and its value as a strong influence in the price of the final product (housing product). Third, *real estate policies* (particularly in Portugal) *do not have the adequate mechanisms* of land supply, in the right moments and with the intended ends. Finally, some authors refer that there are not externalities compensation mechanisms (land, financial or tax) which *could guarantee* an *adequate real estate supply*, preventing land retention.

The second issue relates to the **urban development agents** and the need to understand their new functions, motivations and behaviours. The reasons underpinning this approach are associated to the emergence of new agents – the financial groups (which appeared with the economic development in the beginning of the Eighties) - and new investment strategy in real estate, using urban projects as financial investments. Within this context, we can considerer two different types of agents: land owners and promoters (investors and constructors). In relation to land owners, it is important to analyse their conservative attitude towards real estate market, creating an artificial scarcity, for which spatial plans are failing in counteracting its perverse effect. Regarding promoters, it is possible to distinguish two types of behaviours: a more traditional one ("*promoter-constructor*"), typically a small company, which concentrates the promotion's different phases; and a more specialized and associated to great economic groups ("*promoter-investor*"), in which urban promotion is assigned to a different number of actors. These different models also show different approaches to attracting potential consumers, focusing not only on existing needs, but specially creating new needs.

The third issue concerns **traditional approach to local spatial plans**. These traditional instruments of urban policy, have been showing great limitation in handling these new realities, mainly due to: their rigid character; an extreme normative dimension; an lack of strategic dimension; ambiguous implementation conditions (how much, who makes and when it is made); deficient articulation with other urban policy instruments; and finally, because they did not incorporate the flexibility factors essential to deal with a strong investment dynamic and strong competition among cities.

Finally, it is important to understand the new **Portuguese legal framework** (Spatial Planning Framework Law, 1998) and how it changed the relationship between real estate, agents and plans: it defined a strategic framework for local spatial plans, by introducing new issues related to sustainability and intergeneration solidarity and spatial competitiveness; it implemented public-private partnership (PPP), with an equity approach, defining compensation processes which guarantee the fair redistribution of resulting costs and benefits among stakeholders; it developed the principle of programmed urban development, through the delimitation of intervention units; Finally, it emphasize the need for a more accurate and consistent public participation process.

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A – 6

Public Urban Spaces and Property Rights: Complicities and Incompatibilities concerning Constitutional Provisions, Legal Framework and Policy Arrangements in Greece

Konstantinos Lalenis

Protection of private property has been traditionally overprotected in Greece. This was reflected in the first Constitution of the new independent Greek State at 1830 and was kept intact in all Constitutional amendments until 1975. The constitutional premise for full compensation of private property, combined with the everlasting financial shortages of the local administration, and the rigidity and ineffectiveness of planning legislation provoked a sharp decline in the quality of urban environment, first anticipated at mid 60s, when urban growth was uncontrollable and land values were fast increasing. Public urban spaces were one of the first sectors to be hit. Their average percentage was reduced to less than 3% of urban land. Public space provided by urban plans was very seldom acquired due to inability to expropriate it, and existing public space was often illegally occupied and built upon.

The dismay provoked by the outcomes of the above practices on urban environment ignited a wave of recent reforms, which were reflected in the 1975 Revision of the Constitution. There, for the first time, the precedence of public good to the private interest was explicitly pleaded. Public urban space was recognized as to secure the quality of life for human societies, especially in big cities. This was further developed in constitutional amendments until now, and reflected on the related legislation.

Considering the above, the current situation appears quite complex. The long history of constitutional protection of property rights on land had created a web of bylaws, legal interpretations, and decisions of the Council of State which occasionally, although outdated, have not yet been nullified, and they are in antithesis with the more recent constitutional provisions regarding the protection of public space. These controversies are reflected on the legislation -the validity of which is regularly questioned in terms of constitutional accordance- and on policies for urban public space -which are usually reluctant to confront a strong tradition of excessive protection of property rights. Thus, public urban spaces and property rights are almost mutually exclusive as notions in the vocabulary of Greek urban reality.

The proposed paper will examine the relationship between public urban spaces and property rights in Greece as interaction between the constitutional level, the policy level and the operational level, through historical phases. It will also analyse the complicities and incompatibilities concerning them, as well as the present dynamics and perspectives.

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The working of the land market for housing in the Netherlands: changed practices within the same legal framework

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The presentation focuses on the working of land markets in the Netherlands, with a special focus on the land market for housing. This land market is highly influenced by the working of the agricultural land market. The other way round, the agricultural land market is influenced by the land market for housing. The presentation starts with a description of the rules which cause this influences.

The result is that land in both markets is an object of speculation. An increasing number of actors and stakeholders have become active in both markets in recent years. As a result prices have risen even more. In case of the agricultural land market, prices have risen far above the agricultural value of the land. This makes farm takeovers problematic and investments in nature conservation, water management and recreation difficult to get off the ground, and even then only at high costs to the public purse. In case of the land market for housing, prices are so high that it is more and more difficult to make a profit on the development of the plan. The total costs (land, servicing and building) have risen to the point that extra investments in social housing, the quality of the house and its environment and other public facilities are more and more difficult to be part of the development.

The research on which this presentation is based focuses on market *working*: who are the players, which formal and informal rules influence the outcome and what are the results in terms of quality, quantity and spatial distribution of houses. This is done by analyzing the change which took place about ten years ago: the municipal monopoly on the provision of serviced land for housing was contested successfully by developers. Surprisingly this change did not occur because of legal changes or arguments. Developers started to buy undeveloped land and the existing rules made it possible and profitable for them to do service and develop the land all by themselves. It were the informal rules and practices that changed. Beforehand it was just 'Dutch custom' to leave servicing to the municipalities. What does the reaction of market players then tell us about their possible reaction now with the introduction of the new Dutch Spatial Planning Act which includes the Land Development Act'. Will future developments include more public facilities?

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A - 9

Planning law and property rights for the development of green areas in Flanders and the Netherlands: The importance of minor differences

Evelien van Rij

In both Flanders and the Netherlands specific projects for the preservation and improvement of green areas are carried out. Institutions play a key-role in implementing these projects. Examples of these institutions for the implementation of green space policies are zoning, compulsory purchase and public pre-emption rights. For this presentation institutions in action in the Flemish Park Forest Ghent Project (see for example, Van Herzele, 2006) and various Dutch projects have been studied.
Considering the major differences between various institutional systems for spatial planning, the Dutch and the Flemish legal systems might be considered to be quite similar. However a closer look reveals important differences (see for detailed descriptions of respectively the Flemish and the Dutch legal system, Bouckaert & De Waele (2004) and Van Buuren (2006)). Procedures and regulations for the use of public powers and the division of roles between various layers of government are not alike. Even more striking than the differences between these formal institutions, are the variations between the laws in action. Here the influences of culture and path dependency have the most effect. Central in this paper are the differences between Dutch and Flemish institutions for green area preservation. Comparing these two institutional frameworks is interesting because the similarity of the systems makes it possible to study the consequences of specific dissimilarities. Insight in these consequences helps us to understand the importance of context and the working of different institutions in general. The question then is; what effects do these differences have on the effectiveness of projects for the preservation and improvement of green areas?

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A – 10

The Right to be Heard in Planning Law Procedures: A comparative perspective

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The right to be heard, *Audi alteram Partem*, is part of the-"natural justice", and is an integral part of the administrative law of democratic legal systems. In the field of planning in particular, there are variations among countries in respect of the categories of people and entities that are entitled to be heard and the stage in the planning process in which the right to be heard is granted, as well as many differences in the extent of information to be proffered.

The nexus between the right to be heard and planning theories focusing on public participation warrants analysis, yet this interstitial area between administrative law and planning theory has hardly been explored. This paper seeks to take up the gauntlet.

We argue that the right to a be heard will alter in different theoretical settings. We shall analyze four planning theories (two "procedural" and two "progressive-normative") and develop a framework for analyzing the relationship between the right to be heard and the tenets of each type of planning theory.

The procedural theories to be analyzed are the classical rational-comprehensive approach (Davidoff & Reiner, 1962; Friedmann, 1987) and the "disjoined-incremental" approach (Lindblom, 1963, 1979). The two progressive-normative theories to be analyzed are the advocacy planning approach (Davidoff, 1965) and the communicative approach (Forester, 1999; Healey, 1997; Innes, 1995). These theories reflect different approaches to public participation, and the right to be heard will vary when viewed through the prism of one planning theory or another.

Increased dialogue between planning theory and planning law - two closely related yet mutually oblivious theoretical systems - should contribute both to planners and to legal scholars.

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A – 11

The Italian Transition

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Italian planning tradition is rooted in the 1942 law which introduced the Piano Regolatore Generale (PRG), still in force, to rule any transformation within municipality boundaries (more than 8.000 *comuni* in the whole country). It is a comprehensive tool: both a master plan for long period strategies and a prescriptive documents which allocates property rights and regulates major projects as well as ordinary developments. Moreover, it includes declarations of public utility to assure land for urban facilities.

Public land provision for public spaces, facilities and affordable housing basically relied on the national financial support; it was in principle based on expropriation, but has been rarely used because of the high costs of compensation based on market values.

In the last years, the country faced a deep change in the institutional frame, consisting in a strong decentralization of powers and functions to the local authorities, as usual paired with a progressive decline in the transfers of state revenues. In the meanwhile, basically by initiative of the Ministry of Transportations and Urban Affairs, a multitude of new tool for public/private partnership have been created in order to facilitate urban renewal in spite of the bonds of the general plan.

Nowadays a planning reform is under discussion in Parliament, focusing on two topics:

a) the transformation of the traditional PRG into two plans: a long term structure plan (Piano Strutturale), not legally binding, arranging the main infrastructural, environmental, settlement and conservation issues; an implementation plan (Piano Operativo) establishing entitlements, public actions, and land use prescriptions for the period of the local legislature (five years)
b) the introduction of the transfer of development rights ("*perequazione*"), providing the Piano Operativo of a strong tool to minimize expropriation and grant free donation of land to the municipality for social uses, through the development process itself.

Although tentative practices under regional laws introduced an equalising approach since the '90, reaching some remarkable results in public land acquisition, *perequazione* should be granted by a national law, in order to avoid legal contentions, as well as supported by an explicit exaction policy (Curti, 2006), in order to reduce discretion in the negotiating process. Planning by agreement (Urbani, 2000) is then a consequence and yet a tool to face the responsibilities of local financial autonomy.
Some authors however underline the risk of a "leap in the dark", feared by the public sector, who in principle should determine a plan – led approach to defend the public interest, and by the private sector as well, who is unused to play a planning game where the uncertainty of contributions and results may turn out to be the worse business.

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Nature Conservation Law and Property Rights in Ireland

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Introduction

The future success of wildlife conservation is under threat within the EC. One of the problems to overcome, is how we marry an effective nature conservation regime with the exercise by citizens of their private property rights. Is it sufficient to work within the present property rights regime or is it necessary to fundamentally re evaluate the regime? At present there is a disconnect between the content of private property rights and their exercise and the subject over which they are often exercised – namely land (there are a number of other mismatches between nature conservation law and property law) (this thesis only looks at land). Private property rights do not automatically respect the intrinsic nature of land and its limitations as regards land use activities. The incidents of property ownership are not tied to the natural characteristics of land. The challenge is how to change our concept of property rights to reflect the nature of land.

Chapter 1- What are the constituents of real property? History shows us that property rights are a social and legal construct that can change due to societal demands. The fundamental mismatches between property law and nature conservation law are outlined. What approach can be taken to reduce these mismatches and ensure that land use activities recognise the inherent nature of land itself? - The implementation of the land health and land ethic as advocated by A. Leopold and others.

Chapter 2 - gives an in depth analysis of the two main Community nature conservation legislative instruments, the Wild Birds Directive and Habitats Directive and Irish implementing legislation.

Chapter 3 - more specifically looks at the content of the Wild Birds Directive and Habitats Directive (in particular through the overarching term ‘conservation status’) (and other relevant legislation eg EIA and Liability Directives) and whether they can incorporate a true ecosystems approach to nature conservation and have the potential to recognise land health and the land ethic as proposed by Leopold.

Chapter 4 – an Irish perspective. The problems of incorporating an ecosystems approach into nature conservation law in Ireland : primary and secondary nature conservation law, judicial interpretation of same, property rights enshrined in the Constitution, legal remedies for enforcement – public and private.

Chapter 5 - Conclusion.

Firstly, we have to determine what we want nature conservation law to be - the acceptance of ecology and an ecosystems approach. This should be incorporated into all legislation (regulatory and land use planning) relating to all environmental media (air, water, land, biodiversity). Some attempts are already been seen (Water framework Directive).

How we embed this new form of nature conservation law in how we exercise our property rights is fundamental and the most difficult - the ‘greening’ of the ‘bundle of interests’ of property through the use of the science of ecology may be the way forward.

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Compulsory Purchase for Economic Development: An International Perspective

Stephen Crow

The United States Supreme Court case of *Kelo v. City of New London* has sparked a continuing debate in legislative, planning practice and academic circles in that country as to the desirability of using "eminent domain" (i.e. compulsory purchase) powers for the purpose of promoting economic development. In this case, a development company acting on behalf of the City Council (New London, Connecticut) took powers to acquire residential and other property in order that it could be sold on to a major industrialist in the city thereby, it was said, enabling the firm's expansion, the creation of jobs and hence the restoration of the local economy. While the Court found the powers used to be compatible with the US Constitution, it clearly had no liking for the case, and urged States to review their legislation concerning the taking of real property for the purposes of economic development. The consequent debate has united both right-wing "property rights" advocates and left wing guardians of small people against the depredations of global corporations (Berger and Kayden, 2006).

A similar debate in Britain, albeit on a smaller scale, relates to compulsory purchase for economic development purposes as exemplified in two cases in Liverpool.

After setting the scene, the paper will explore the merits of each side of the argument, will consider the related issue of "fairness" in compensation" and then go on to compare legislative provision and processes in the UK. In the US, the scope of eminent domain is dealt with by state legislation with (to a large extent) disputes over merits considered in the courts against the background of state legislation and constitutional propriety. UK legislation, following an extensive review (DETR 2000), has recently been amended in the Planning and Compulsory Purchase Act 2004 to provide more clearly for compulsory acquisition for economic purposes. In the UK also, disputes over the merits of an individual acquisition are resolved by a central government minister following a public inquiry.

The conclusion that will be advocated is that the issues involved in compulsory purchase for economic development are never clear-cut and vary greatly from case to case. It is very difficult therefore for hard and fast rules to be formulated. The answer, in the writer's view, lies in the quality of process, in which the cases of the parties concerned can be considered in a fair, open and impartial; fashion against the background of policy and the circumstances as they exist on the ground.

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A - 17

Evolvement of the land development process in Poland

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The subject of my presentation is the land development process in Poland in comparison to Finland. My research aims to understand how the land development process functions and how it may be improved. There is a considerable diversity in methods to develop a land through Europe (Dransfeld et al. 1993, Kalbro 2000). It is caused by different combination of legal, institutional and other arrangements in a country for undertaking the process of land development. A lot of factors play a fundamental role only in determining the characteristic of different traditions of spatial planning (CEC). These are the constitutional law, government structure and the legal framework, but also historical and cultural conditions, geographical and land use patterns, levels of urban and economic development and political and ideological aspirations. There is also very wide range of instruments used to express spatial planning policy. Therefore, there is a complexity of factors which can be taken into consideration.

The further study needs a research perspective which limits the scope of the comparison. A lot of authors agree that any attempt to place the various country systems into a common framework is difficult and must be done with care (Davies 1990). Further the comparability does not mean transferability. However, experience from different countries can give valuable insights, and can be useful when trying to predict possible development of the land market and the kind of problems that could be faced. When studying the literature concerning land development process a lot of authors emphasize the importance of the relation between development plans on the local level and development control (Dransfeld et al. 1993, Davies 1990, Larsson 2006). A comparison raster which was developed for countries concerned in the research includes these two aspects as well as consequences of adoption of local plans, responsibility for plan implementation and municipal land policy tool. Well founded comparison requires deep familiarly with the condition in countries concerns in the research. It is important do not only consider the formal and statutory system but also try to go behind the formal facade. That is why author chooses to make the comparison to one country with the mature system for the land development. The initial comparison with Finland indicates the basic areas which can be taken into consideration when thinking about further development of institutions in Poland - the planning at the local level, the balance between private property rights and the public interest in land, and availability of set of urban land policy instruments which allows to achieve the desired development.

A - 18

Protection of property right vs. expropriation of land for the purpose of constructing public roads.

Miroslaw Gdesz

It is common truth that procedure of purchasing land is an obstacle for construction of infrastructure projects. In the Eastern Europe (esp. in Poland and Czech) the complex and time consuming expropriation have postponed many road schemes. In October 2006 Polish Parliament adopted important legal changes which supplemented provisions for preparing and implementing investments in the domain of public roads.

The purpose of this paper is to describe this regulation and analyze it - firstly, from legal perspective. In this area I examine provisions of this act in the context of the rights of individuals to the ownerships of property. Especially, I focus on constitutional rules and ECHR rules on protection of private property. I also deal with injurious affection issue, because according to this regulation, there is no right to compensation for injurious affection when land is not taken.

The main idea of this changes is an exclusion of public participation in a process of approving permission for construction of public roads (road scheme). This aim is achieved also by simplification of procedure of land acquisition and elimination of negotiation with land owners before expropriation. According to new regulation acquisition a land by agreement will be not possible and the only way –is a compulsory acquisition. An approval of a scheme allows a state or municipality agency to enter and take possession of the land. Compensation is paid later by force of a decision without any negotiation with land owners. Furthermore, the authority, prior to approval of a scheme is obliged to inform affected owners only by a notice in local newspaper without direct notification of landowners. Compensation is paid a few months later, after acquisition. Road scheme is issued separately form planning law.

Secondly, I consider economic issue concerning social benefits of road projects in Poland and I try to response if urgent need for infrastructure development justifies limitation of private property. I suggest that this limitation should be narrowed down only to state road.

I point out that this regulation illustrates that currently in Poland a phase of rapid infrastructure growth has begun to influence the concept of property and its social context.

Finally, I look for a theoretical model of regulation for acquisition of land in which development pressure is synchronized with standards of right protection.

A - 19

The Culture Of Law:
Rules, discretion and the conceptualisation of planning

Philip Booth

It has become a commonplace within British commentary to contrast the 'discretionary' planning systems of Britain and those countries that fell within its influence, and the 'regulatory' planning systems of continental Europe (see Davies 1980, Booth 1996, Newman and Thornley 1996, Tewdwr-Jones 1999, Booth 2003). That the distinction is rooted in differences in legal systems is understood in very general terms. But the discipline of spatial planning has only been partially aware of the profound influence of legal thinking on the intervention in the spatial distribution of activities and in the processes of land use change have been conceptualised.

Drawing upon legal theory, this paper traces the origins of common law and that of the civil code tradition in continental Europe and considers the reasons why they should have diverged. It explores the way in which these traditions affected the conceptualisation of statehood and government, and in turn the principles and practices of local administration. It then presents the way in which the influence of these traditions made itself felt in the construction of statutory planning systems during the 20th century.

The paper examines two particular aspects of legal theory within the opposing traditions that are relevant to discussions about planning:

- It examines first the understanding of the 'rule of law' and how that has been accommodated within planning systems.
- It then looks at the way in which the question of discretionary freedom has been treated by the two legal traditions.

The paper concludes by reflecting on the impact of these legal traditions on the practice of planning. It will consider modes of planning and the content of policy. It will note the difficulty of reconciling different modes of planning without reference to the legal traditions that underpin them.

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A – 20

Urban Tool - Social Impact Assessment Placed in Victorian Planning Law

Rebecca Leshinsky

Property rights, environment effects and the rights of public participation are uncomfortably juxtaposed in urban planning law in the State of Victoria, Australia. In deciding to grant planning permission, Victorian planning legislation mandates for planning decision makers (Council planners, Councilors, Planning Tribunal Members) to consider the 'significant environment effects' for land use and development. Since legislative amendments in 2004, there is also discretionary power to consider the 'significant social and economic effects' for proposed land use and development. A 'Social Impact Assessment', prepared by a town planner and/or social scientist, is an instrument which may canvass such 'significant social effects'. In my PhD research, I am interested in the 'construction' of 'knowledge' and 'reception' therein, by planning decision makers, in their determination of what is in the 'interests of the community'. The social impact assessment, as a knowledge tool and perhaps, as an 'actor' in the planning process, specifies social effects which may then be utilised by decision makers in their 'production' of 'legal facts' to assist in an ultimate determination. Accordingly, a social impact assessment, comprised of sound qualitative and quantitative methodologies, applied to legal and policy issues, may be of 'assistance' to planning decision makers. The town planner/social scientist as expert witness has a role to play in the construction and dissemination of 'knowledge' on social effects for proposed land use and development. The expert witness, however, is only able to 'interpret' and 'depict' the world from the perspective of their specialised expert knowledge. Decision makers themselves interpret social facts in a particular manner. In planning matters, practicality and expediency in decision making often plays a deciding role. Administrative and legal decision makers often take for granted 'universal truths', including those concerning the 'interests of the community'.

Traditionally, the Victorian planning jurisdiction has been more accepting of scientific and economic evidence and less so of the 'knowledges' about social dynamics and social structures. The School of Law and School of Social Sciences, Victoria University, Melbourne, Australia, in a collaborative effort, have been involved in the pedagogy of the expert witness in the preparation of social impact assessments for Victorian town planning matters. I have been a major player in devising and teaching the legal (expert witness) aspect of this course.

I am interested in whether there is greater scope for the use of social impact assessments in the Victorian planning (law) process. Legal knowledge(s) is in itself a young and undeveloped field. My PhD research is concerned with Victorian planning decision making and the 'knowledge networks' social impact assessments may input into such decisions.

Further, there may be a more pronounced position for their use in Victorian urban studies particularly where decision makers are required to rely upon 'social evidence' to make legal determinations - for instance, in housing issues, sustainable development and neighbourhood renewal. It is anticipated that my research may, in a modest manner, be of some assistance to international comparative planning and property law jurisdictions.

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A – 21

Understanding land markets: A review of economic approaches to systems of rules

Edwin Buitelaar

The range of economic theories that are applied to understand the way land markets work has grown in recent years. There is great diversity among them. Mainstream or neo-classical economic theories have the longest history and are still the dominant mode. These theories has been complemented by research originating from law & economics. This is a field of study that adopted all the underlying assumptions of neo-classical economic but added the attention for rules and law. Most researchers investigate what the economic effects are of land use regulations for the market. What are for instance the effects of zoning on house prices? The problem however with many of these neo-classical and law & economics approaches is that they are primarily appropriate for analysing market outcomes, like prices.

A field of study that has gained prominence since the late nineties, is new institutional economics, or transaction cost economics. It shares many of the behavioural assumptions – like rationality and utility maximisation - with mainstream economics, but makes some adaptations. It acknowledges that rationality is bounded and that people might behave opportunistically. More than the approaches mentioned so far, new institutional economics is suitable to analyse how markets work – the market process - since it pays attention to property rights, institutions (or rules) and transaction costs.

Although new institutional economics is an improvement towards understanding how markets work, and not only what its outcome is, it also has its limitations. Actors are still not (fully) treated as human beings, but more like machines that act rationally –though bounded – and maximise their utility. In this quest for maximisation, the actors act atomistically and independently from others. In addition, with some exceptions, new institutional economics is predominantly interested in formal institutions, and their restrictive function on actions, and less in informal.

In reality, people are related to each other and perform on the basis of past experiences. Actors are embedded in social structures, which influence their behaviour. In these networks, actions are not only carried out under the pressure of formal rules but also on the basis of conventions, habits and codes of behaviour. The relationship between agents and institutions is mutual and not one way. These issues get more attention in old institutional economics and new economic sociology. The application of these approaches to land markets is embryonic. The mainstream and new institutional economic paradigms to land markets need to be complemented by theories from (new) economic sociology and old institutional economics. The challenge is how to combine both approaches since they seem to rest on different behavioural assumptions and a different ontology.

A – 22

Changing property rights regimes: Economic effects of changing the right to develop in the Netherlands

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This paper will investigate the economic effects of changing the present Dutch property rights regime, in which the owner of the land automatically has the right to develop this right within the limits of the zoning plan. The focus in this paper lies in the relationship between property rights regimes[2] and the real estate development process in the Netherlands. It will draw indicative conclusions about the effects on land use, costs and returns, the distribution of those financial effects, and the distribution of financial risks, and what that could mean for working practices and division of responsibilities in land-use planning and property development (the consequences for local planning processes).

This paper will investigate the relationship on 1) how the connection between user rights and ownership rights is regulated legally and 2) the consequences of that regulation for the practice of land-use planning. It has a practical starting point, and will be illustrated with recent research done by the author for the Dutch Ministry of Planning on the economic effects of changing 'zelfrealisatierecht' (in 2006), using thought experiments.

Land-use planning can have enormous effects on the exercise of property rights and on the value of those rights, especially in the Netherlands. In recent years the relationship between landuse planning and property rights demanded attention, because of the practice that Dutch municipalities follow an active land policy. Those practices are changing, because it is becoming more common that property developers themselves, rather than municipalities, are buying undeveloped land. This has come about partly because of the increased value of the property rights on that land, caused by land-use planning. For example, the existing legislation allows ground leases (erfpachtrechten) as one sort of user rights to be separated from ownership rights (eigendomsrechten): but only if the owner takes the initiative, the owner cannot be obliged to transfer the user rights to another (legal) person. It has been suggested that the development right (bouwrecht) can be separated compulsorily from the ownership right and that the development right can then be sold. That is, with present legislation, not possible. There are current debates about separating user rights from ownership rights by changing the law on the so called 'zelfrealisatierecht' and what this could mean for local planning processes. This change in the property rights regime is investigated. The effects of such a change in the formal legal structure are thought through by means of systematic thought experiments.

The paper has two theoretical bases. One is the theory of property rights, in particular the relationship between the ownership rights and the user rights attached to one parcel of land (see e.g. Munzer 1990). The other is the relationship between property rights and land-use planning (see e.g. Lai 1994). Property rights, the relationship between them and land-use planning, can be investigated using legal theory (the theory of property rights) and economic theory (in particular, the new institutional economics – see e.g. Furobtn and Richter 1991)).

[2] *A property rights regime can be defined as an integrated system that includes private law, public law and other types of law that influence the real estate market. A property rights regime is part of the institutional structure of property development.*

The theoretical importance of the paper lies in applying theories developed in other countries and the practical experiences acquired there to the current Dutch land market practices and institutions. This is interesting because Dutch spatial planning is different from spatial planning in other countries, not least in the high level of ambition of Dutch planning. In applying those theories and experiences, the theories are further developed and made applicable for a wider set of circumstances than the American and British circumstances for which they have been developed initially.

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A – 23

Tax Credit for Conservation –Can it Replace Police Powers?

Philip Hocker

In the USA,there is a tradition of very weak exercise of zoning and state controls to protect public values on landscapes,and to guide private land-use decisions toward benign future communities. However, in contrast to this trend the USA now sees an increasing level of public support and subsidy for open-space and natural-land conservation through the voluntary donation of conser-vation easements (or 'servitudes')on privately-owned property.

A novel financial incentive for these donations is the recent allowance of credits against some states'income tax.These credits are granted to landowners who make "charitable gifts"of restrictive deed conditions binding future use of the donors'land.In two of the United States, the tax credits have been made "transferable"by state law –that is,the credits may be freely sold. Transferability makes the credits more valuable,and donations more attractive, for landowners.

The origin of conservation tax credit transferability in the state of Virginia (10.3 million hectares)will be explained. The presentation will advance to describe the evolution of an active bid-ask liquid market for the transfer of the tax credit, and the progression of market forces.

The presentation will describe the enactment in 2006 of restrictive legislation in both Virginia and Colorado (the one other state with a transferable conservation credit program). Administrative bureaucracies have been given an expanded role by the 2006 legislation,but political forces have worked to maintain functionality of the program.

The presentation will discuss the political advantages,in the USA climate,of a land-use program that relies upon landowner incentive and disavows governmental control.Presenter will also dis-cuss the disadvantages of reliance on a form of randomly-located land-use control that does not establish public-need priorities, and in which substantial public funds are dispensed with little weighing of the public benefit achieved. The presentation will conclude with a discussion of the theoretical advantages of a prioritized program, versus the political pragmatism of landowner-initiated programs currently working.

The presenter, with an associate, first proposed Virginia's transferability legislation in 2002. Presenter now operates a business assisting landowners who wish to sell tax credit. Over four years'operation,presenter's business has managed approximately US$10 million in credit transfers. Statewide, Virginia now confers about US$100 million in credit annually for US$250 million value in land conservation donations. About 20,000 hectares of Virginia land is being placed under perpetual conservation restriction each year as a result of this program.

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A - 24

Public Values, Private Lands: Land trusts and conservation easements in the United States

Jean Hocker

Non-governmental organizations have long played a significant role in land conservation in the United States, supplementing and complementing governmental land use regulation. The considerable success of these NGOs, known as land trusts, is due in part to their non-governmental, non-regulatory nature.

Today, there are over 1,600 land trust organizations in the U.S. Collectively they have helped protect over 14 million hectares by methods that focus primarily on acquisition of land and conservation easements. In recent years, the emphasis on easements has increased substantially.

As used in the United States, a conservation easement is a legal form of partial ownership in land. A land trust organization (or sometimes a public agency) acquires from a property owner only those rights that would negatively impact publicly beneficial ecological or aesthetic values. Depending on the property, these might include the right to subdivide, to build in sensitive areas, or to disturb habitat or riparian land. The property owner retains all other rights of ownership and use. The agency or NGO that holds the conservation easement then has the right and obligation to enforce the terms of the agreement, usually in perpetuity.

Because most land trusts are exempt from federal income tax, and because federal tax laws (and those of many states) provide tax benefits to donors of land and easements, there is legitimate public interest in land trusts and their conservation transactions. The dramatic growth of both land trusts and the use of easements has brought increased public attention aimed at ensuring that these essentially private transactions provide legitimate public benefit. The U.S. Congress and Internal Revenue Service have examined the need to tighten laws, regulations, and enforcement practices governing land trusts and easements and Congress recently enacted some reforms addressing valuation of easement gifts. Simultaneously, however, Congress also enacted significant new tax incentives to encourage greater use of conservation easements.

The presenter will describe the evolution of land trusts and use of conservation easements in the U.S., assess strengths and vulnerabilities, and review current developments in laws and policies and in self-policing actions designed to ensure quality and public benefit. The presenter has more than 25 years of experience in land conservation, as founder and head of a successful land trust and subsequently as CEO, for nearly 15 years, of the national umbrella association for land trusts.

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A – 25

The US Endangered Species Act and the Takings Issue

Thomas Jacobson

A remarkable confluence of social, economic, environmental, and planning policy issues, and related legal questions, has emerged on the border of California and Oregon. A drought in 2001 drew a sharp contrast between two interests: family farmers who for a century have relied on irrigation water provided under the U.S. Reclamation Act of 1902 and three species of fish protected under the U.S. Endangered Species Act. At that time, under federal law, biodiversity interests prevailed. Farmers lost their irrigation water, resulting in a widespread (though not unanimous) backlash against the Endangered Species Act. This, however, was just the beginning. There has been a wide range of additional developments. Among these are:

- The U.S. government convened a review of the scientific analysis required by the Endangered Species Act and on which the water "cut off" was based. Controversy has ensued, amidst charges of politically driven science, laying bare the mechanisms on which the Endangered Species Act is based.

- Farmers have sued, alleging a taking of their property (interests in water) by the U.S. government, based on the effect of the Endangered Species Act.

- Native American tribes, long reliant on the coho salmon (one of the protected species) for economic and cultural reasons, have asserted an interest in the controversy.

In many ways, this dramatic set of events is a microcosm of tensions that define a number of current environmental, social, economic, and planning policy debates, and the relationship of several federal laws to those debates. I propose a presentation on the role of the U.S. Endangered Species Act and the "takings clause" of the Fifth Amendment to the U.S. Constitution (the U.S.'s primary property rights protection) in this complex and important controversy. While advocates abound, little has been written that steps back from the events and identifies the values present (family farming, environmental protection, the interests of native peoples, etc.), the relationships between those values, and how federal law addresses those relationships.

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A – 26

Contemporary land Ownership and Problem of Development in Central Area of Metropolitans in Developing Countries. Case Study: Tehran

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City centers are usually facing with the problems for implementation of planning and urban design projects. One of the basic problems of the implementation is the nature of the present laws and property rights of land ownership.

Tehran, the capital of Iran as a multi-center city is now facing with such problems and obstacles. Since last few decades many plans and urban design projects have been prepared and approved by planning and municipal authorities while most have just shelved. An important reason for this might have been the value of urban land.The value for one square meter of central areas like Tajrish(District 1 of Region1 of Tehran) is now has a price about 25-50 thousand$.This means that the municipality of Tehran has to pay a huge amount of money for land acquisition to be able to start the implemention of a project in regard with the improving the circulation system of the district .

Urban lands are usually under the private ownership , therefore it is too difficult for the municipality to purchase and utilize them for public purposes .Hence there is a need for new laws and regulations for property right with respect to land ownership and purposed build form in various projects. Of course emphasizing on people participation is necessary in this regard. Furthermore, the new or revised laws and regulations should be have the power of changing the idea and attitude toward enhancement of public welfare. It means that when a number of citizens who own plots of lands that may have been more useful to the public should be satisfied to give the land voluntary to the municipality and get some other plots at other places instead.

The present paper would discuss the process and procedure for resolution the above mentioned problems through case studies of district 1 in Tehran. So that the gap between plan and implementation will be minimized by the help of new laws and property right.

Keywords: urban development, land ownership, laws, regulations, central area, Tehran

A - 27

Reviving the Brandies Dissent over the 'Takings Issue'

Richard Norton

In 1922, the United States Supreme Court issued its watershed decision establishing the so-called "regulatory takings" doctrine. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393. While noting that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," 206 U.S. at 413, Justice Holmes then declared that "The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." 206 U.S. at 415. This decision was not unanimous, however. Justice Brandies, writing alone in dissent, asserted that, "Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But the restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use." 206 U.S. at 417 (Brandeis dissenting).

For this presentation, I will build upon the already substantial body of regulatory takings literature (e.g., Kmiec, 1988; Rose, 1996; Sax, 1964) by arguing that the regulatory takings doctrine was improperly and poorly conceived from its inception and that its flaws continue through the Courts' adjudication today. In doing so, I will reframe Holmes' decision and Brandeis' dissent by incorporating both notions of public welfare and public wellbeing in place of the conventional anthropocentric vs. ecocentric dichotomy, and notions of private rights and responsibilities in place of the conventional private rights vs. public rights dichotomy (see generally Freyfogle, 2003; Juergensmeyer & Roberts, 2003; Platt, 2004). I will also argue that the regulatory takings doctrine should not be entirely abandoned, but that it should be greatly constrained in terms of its application to local government action. I will propose that public health and safety regulations imposed for the purpose of safeguarding public wellbeing and employing a nuisance law-like conceptualization of property responsibilities should be addressed as deprivations of property rights subject only to "rational relationship" due process review, while mandated dedications of property grounded in notions of public welfare and "public rights" should be subject to regulatory takings review under the essential nexus and rough proportionality tests.

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A – 28

Freedom of Communication in public spaces – Privatization and constitutional law in Germany

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The availability of public space is a precondition for practising those activities that are protected by the fundamental rights concerning communicative processes, e.g. freedom of speech and freedom of assembly. Today it can be observed that public spaces are increasingly under the control of private actors while in the past they had been governed by state actors. Those private actors may influence the communicative process in a way state actors may not due to the protection of the communicative process by fundamental rights. One significant example for this process of privatization in Germany is the emergence of privately owned shopping malls which partly replace classic downtown districts with respect to certain functions. The owner of a shopping mall may ban certain individuals or groups from speaking and by doing this he is able to discriminate against certain contents.

Under German law the access to a privately owned shopping mall is governed by the law of contract and the law of property. Although fundamental rights play a role in construing the law private actors are not directly bound by them. So the described privatization leads to a significant change in the position of the speaker as far as the protection by fundamental rights is concerned. Under German constitutional law, however, fundamental rights are understood not only to be subjective rights of the individual directed against the state. Although this is their main function, obligations of the state to act may be derived from fundamental rights as well. A specific example with respect to the problem of communication in public spaces is the case law of the Federal Constitutional Court concerning the fundamental right of freedom of broadcasting. The Court held first that besides private broadcasters there must be broadcasters organized as public bodies and second that private broadcasters must be regulated to the end of allowing a broad range of opinions being uttered.

On this background the question must be raised whether the ongoing process of privatization must lead to a reaction of the legislator. It will be claimed that a similar approach as in the field of broadcasting has to be adopted with regard to speech in public spaces in general. Therefore, the question arises in which way the state must react. It could be thought of statutory provisions that oblige municipalities to provide own public space. Another reaction would be to impose limitations on the admission of privately governed public space through planning law. And finally, one can think of legislation that obliges the private owner of a shopping mall to allow for free speech.

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A – 29

Stimulating private development of industrial estates in the Netherlands by changing the rules: a property rights approach

Erwin Krabben and Edwin Buitelaar

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From an international perspective the Dutch development market for industrial estates can be considered as a special case. As opposed to the characteristics of those markets in for instance the United States and Great Britain, the Dutch land market for industrial estates is dominated by municipalities who have always felt responsible for supplying sufficient industrial sites at all times, in the light of competition with other municipalities. Therefore they consider industrial estates as public goods (Needham and Louw, 2006). As a result, municipalities have a monopoly on local markets; private developers are almost absent in this market. Although the latter group certainly has 'the right' to develop industrial land, they usually do not exercise this right. Apparently, profit margins in relation to the risk level in this market segment are not acceptable to them. The main reason is that municipalities provide land in abundance at a price that real estate developers cannot compete with.

Recently, at the national (state) level there seems to be a growing dissatisfaction with the present development model, mainly because the outcome of the market is not satisfactory to them. The estates are often of low quality and not sustainable. Referring to 'international standards' with respect to industrial estate development various national government bodies now aim to stimulate the private development of industrial estates.
This paper is based on the assumption that, in order to increase private developers' interest in this market, the market conditions must be improved. Instead of a traditional welfare economics approach we discuss an alternative economic approach to analyze potential market improvements. We make use of property rights theory to assess a number of possible market interventions that may contribute to a shift of industrial land out of the public domain into the private domain; in other words, the creation of a market for industrial estates as 'private goods' (see for instance Webster and Lai, 2003, for a typology of goods ranging from pure private goods to pure public goods). Possible market interventions include changes of law and/or regulations that are relevant to this market segment. The evaluation not only pays attention to 'improved' market conditions, but also to the effects on market efficiency and to supposed distributional effects. References to experiences in the United States and Great Britain (e.g. Tsolacos, 1997) will be used to evaluate the market outcome.

In this paper we aim to explore the potential benefits and disadvantages of the property rights approach, making use of it in a normative way and applying it to the development market for industrial estates in the Netherlands. The conclusion is that the approach theoretically has clear advantages, compared to a traditional welfare economics approach. However, we also emphasize its limitations, since the approach is instrumental. It needs to be complemented by other perspectives that take into account that institutional changes only take place if there is a political and societal momentum. With respect to the Dutch development market for industrial estates, the paper suggests both the amendment of relevant private law rules and interventions to change the way municipalities exercise their property rights under public law.

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A – 30

Planning Rights: An End to Planning vs. Property Rights

Ernest Alexander

Planning is often viewed as conflicting with basic property rights. In one view, public planning is a violation of "god-given" individual property rights. This perspective informs the U.S. anti-planning "Property Rights Movement", which opposes regulative planning and development control. Libertarian philosophers also imply a contradiction between planning and property rights, which are privileged in their rights-based system. Neo-Liberals' opposition to planning is based on their association between property rights and the market.

But property rights are only one kind of rights; there are many other rights and sets of related rights e.g. human rights and civil rights. Institutional rights are one such set: these rights are recognized in the context of a particular institution, e.g. constitutional rights in U.S. law, patients' rights in the UK national health care system. Planning rights (PRs) are a form of institutional rights, i.e. parties' rights in a particular planning system.

In common usage, "planning rights" has had several meanings: for land-use planning and law it can mean development rights; in institutional analysis it can mean planning powers. Most recently, PRs have come to mean rights in a planning system, especially those rights held by parties affected by plans and planning decisions. This is the sense used here. The paper explains abstract PRs, and provides empirical evidence of PRs in a real planning system.

Applying PRs in planning theory and practice suspends the opposition between planning and property rights. Subsuming property rights under the broader normative framework of PRs integrates them into the very substance of planning itself. Now property rights must be recognized where appropriate, or be balanced against other relevant PRs when necessary. This approach integrates property rights as one set of PRs among many, which can be in conflict in real-life situations. Illustrative cases of such conflicts are analysed.

In most planning processes, PRs are considered at several stages: early evaluation of alternative schemes or programs, more detailed assessment of developed plans or projects (including their political and legal feasibility), and final administrative review of submitted plans or proposals. For contested plans or projects, PRs are an important and often determining factor in judicial review. In the PRs perspective planning is not opposed to property rights: rather, property rights are among the PRs every well-ordered planning system acknowledges as a relevant planning consideration. This account makes property rights an integral part of planning, rather than juxtaposing the two as enemies.

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A – 31

Toward Healthy Cities: Law and Planning
Or
Urban Planning Law when Oil sells for 150 Euros per gallon

James Kushner

American, and increasingly European, urban design contributes to obesity, air pollution, and traffic congestion. Imagine if our communities were designed for health, fitness, and convenience. Can housing and neighborhoods be designed for pleasant walks and car-free living? Can streets be tree-lined and attractive? Can pedestrians enjoy their surroundings and experience rather than being sandwiched between traffic and parking lots?

I propose to make a PowerPoint presentation of how urban planning principles can be modified and implemented through legal mechanisms to generate a more healthful and sustainable urban design. The design of communities is a function of the law and the law in turn dictates how that design affects the delivery and cost of health care. A tentative tile is Urban Planning Law for when Oil sells for 150 Euros per barrel.

A number of urban planning and health policy scholars such as *Howard Frumkin et al, Urban Sprawl and Public Health: Designing, Planning, and Building for Healthy Communities* (2004) and *Lawrence D. Frank et al, Health and Community Design: The Impact of the Built Environment on Physical Activity* (2003) have recognized the relationship between community design and community health. *Healthy Cities* examines legal mechanisms that can change the legal structure and support the generation of urban form that improves health and reduces threats to health from automobile collisions, pollution, sedentary lifestyles and to reduce diseases such as obesity, diabetes, heart disease, and other related illnesses. The goal of this work and the substance of my presentation is to identify the components of urban health care planning, discuss alternative mechanisms to more fully integrate health care into the urban planning system and to discuss how the costs of health care can be financed, reduced, and equitably be imposed on the community. My presentation will focus urban planning initiatives and legal implementing mechanisms. It builds on my recent book *The Post Automobile City* (2004).

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A - 32

Back to Qualitative Planning
Integrating substantive legislation into the planning system

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Abstract

Planning theory, as well as planning laws and systems, is essentially procedural. It focuses on the process of planning decision-making but not on the quality of the decisions and their impact on cities and regions; it emphasizes the role of the many actors that shape the built environment rather the resultant properties of the built environment itself. This is true for the rational comprehensive theory of the 1960s as it is true for the 1990s' post-modern theory of communicative planning theory and for the new computerized PSS and DSS (Planning and Decision Support Systems).

In this paper we claim that planning theory has reached a point in which substantive, qualitative and procedural viewpoints should be re-linked, and then propose an initial framework to demonstrate how this can be done. Our claim rests on a self-organization approach to cities, which entails the need to shift the focus of planning theory, law, and administration from procedures to the substantial qualitative relations between the various urban elements. In our paper, we introduce, first, an example for qualitative relations between the various urban objects and a suggestion as to the way they can conceptualize and activated. Second, a suggestion for a planning system that is, on the one hand, responsive to such qualitative relations, while on the other, capable updating such relations. In the suggested planning system, there is a clear separation between the planning legislator, that sets qualitative statements regarding the built environment based on relations between elements, the planning judiciary, that considers and decides on planning applications, and the executive authority. Both private and public actors are invited to submit their plans to the planning judiciary, that weighs and decides according to qualitative, substantial planning rules.

A - 33

The strategic capacity of regions - A paradox?

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Abstract
Based on the practice of current regional strategic forming in the North wing of the Randstad, de City Region or Eindhoven, and the Brabantstad alliance some new insights are revealed concerning contemporary challenges for the Dutch regions and their strategic efforts in spatial-economic context. While regional scale of policy forming cant be considered new, it is the shift towards competition that leads to additional challenges regional actors face with, while trying to bring their assets together in a competitive complex arena. Parallel to the need to involve a varied palette of actors and generate a rich input for strategic engagements, there is a clear necessity among participants to record sufficient collective progress and be able to achieve enough effectiveness within their coordination attempts. Based on an analysis of current cooperative efforts in three regions in the Netherlands a better understanding is achieved concern the interrelations between the objectives of broad participation and of decisive action. Is there a trade off between the two? Are there ways to bring the two together? How does this fit to the legal planning framework? An institutional approach will be dominant in this paper.

A - 34

Strategic Urban Projects and Planning Law

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Abstract
Large urban development project, targeting multinational activities, are at the forefront of attention in an era of internationalization and competition among cities and regions.
During a four year period of intensive field work, three internationally comparable projects have been studied on aspects of governance and strategic framing: Amsterdam Zuidas, Copenhagen Ørestad and Barcelona Forum. These projects all have ambitions to create new mixed-use environments by innovative planning processes.
In this presentation we will especially focus on the new governance arrangements that are set up in these projects. Frequently they overrule or alter existing systems of planning and law. For most critical academics this is a clear signal of a neo-liberal turn in planning that result in a diminishing respect and interest for the spatial and social embeddedness of these projects at the expense of the interest of big (international) investors. Most project-proponents, on the other hand, argue that special governance arrangements are the only way to make these complex projects move forward and present an image of cooperation and consensus.
We will show that these projects have many tensions and present how they have been played out in an innovative governance context wherein aspects of planning and law have been changed. We will show that an innovative context that alters systems of planning and law lead to practices that can only work successfully when these innovations are connected to advances in strategic framing as well.

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A – 35

The Netherlands:
TDR-like initiatives for exchanging developments

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Abstract
Dutch planners recently adopted a more development oriented planning system and now search for marked-oriented planning instruments. The US-concept of transferable developments rights, where development possibilities are being transferred between areas, thus receives a lot of attention in the Netherlands. However, where in the American planning practice TDRs are used to compensate landowners for takings, the Dutch planners see it as a possible instrument to redistribute between profitable and non-profitable developments. This reflects the shift in Dutch planning towards a more conditional planning (confer concurrency, 'pay as you grow').

The assumption behind this type of planning is that the market itself should be able to resolve planning problems without (or only with little) (financial) public intervention. The Limburg-experiment might be an interesting conservation case. The Space for Space project in Brabant, where the demolishment of stables is being financed with the building of houses on large plots will be the conversion case. Instruments for re-allocation do not exist in the Netherlands. However on a local level the Dutch did create common land exploitation companies wherewith some spatial exchange took place (GrondExploitatieMaatschappij). In the new CBD of Amsterdam, re-allocation issues are also present.

A – 36

TDRs in TOKYO

Paul Chorus

Abstract

Dynamics in Japanese land use are major. The instrument of transferable development rights plays a role in many cases. The redevelopment of the Marunounchi Area is an example of Case 1) Conservation; Protection, upgrade of existing land use. The Marunouchi Area is a part of the area of the traditional business district of Tokyo. It is situated opposite of the Emperor's Palace (Imperial Palace). This has influenced the development of the area quite strongly. For example, out of respect for the privacy of the emperor, until the seventies of the last century their existed a height limit of 31 meters. It was considered impolite to build tall buildings, because then, it was believed, one could see what the emperor was doing. However, after this regulation was abolished most of the current business district was already realized. At the moment buildings that are facing the Imperial Palace are allowed to be 100 to 150 meters in height. This is enabling a major land-owner like Mitsubishi, to upgrade the area. They made together with the other land-owners a redevelopment plan for the area. Preservation is considered as an important aspect of this plan. Historical valued buildings are not demolished. On the contrary, old and new are combined by basically remaining the old structure and building on top of it additional stories. This case shows that preservation does not necessarily imply that developments opportunities are limited. Also conversion; Improvement of existing land use (case 2) is a important land use issue. In current Tokyo one can still find many low-rise high density areas. The layout of these areas makes them extremely dangerous in case of an earthquake. Streets are too narrow making it very difficult for emergency services to reach the area and there is hardly any greenery that can serve as a place for shelter. Since in Tokyo earthquakes are a quite common phenomenon, Tokyo is located on a fault line, the local government sees the redevelopment of these areas as a priority. A wide range of instruments is available for rearranging such areas. One can divide them into two categories: 1) projects to improve public facilities and reorganize lands; 2) projects to improve public facilities and renew buildings comprehensively. Both categories will be discussed by illustrating their workings in practice.

The planning of the developments along the Tsuka Express, a new suburban commuter line between Tokyo and Tskuba, will illustrate how the comprehensive improvement of public facilities and the land works (category 1) takes place. Category 2 is demonstrated by describing several urban redevelopment projects in Saitama, a prefecture situated to the north of Tokyo. Tokyo Station will be the third case; the example of reallocation: compensation for non-development.

Tokyo Station was built in 1914 and is regarded as the traditional center of the CBD (Central Business District) of Tokyo and has been designated as a National Heritage. Before being designated as such it had to go through a rather rough period. First of all it was severely damaged by the Great Hanshin Earthquake of 1923 and the air raid bombings of World War II.. Another serious threat was posed by the huge development pressures on the area. Tokyo Station is situated in the Marunouchi Area which is the area where most of the major head offices and international head offices are located. There exists a waiting list for companies that want to be located in the area. The land use regulations allow for a rather intensive land use in the area of ten times the plot area (FAR of 1000%), but most of them have been fully utilized. However, the Tokyo Station is a low-rise building and is one of the few buildings that does not fully utilize its development rights. To prevent the owner, Japan Railways East, from demolishing this building, and replace it by a more profitable (read a high-rise building) land use the local government offered a solution by designating it as a 'Transferable Designation Area'. This instrument allows JR East, the owner, to transfer their unused

development rights to other sites in the area. In this way Tokyo Station as a historical building can be preserved while at the same time the unprofitable land use can be made profitable elsewhere by selling the development rights.

A – 37

The space-for-space program for urban development in Korea: the structure and operation of the District Unit Planning process

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Abstract
The cornerstone of the Transfer of Development Rights (TDRs) concept is to separate the right to develop private property from the ownership of the property, thereby transforming the development rights into a tradable commodity. Under the typical TDR program, owners of property in development-restricted areas called sending districts are granted to sever the development rights from their property and to sell those rights to property owners in specified receiving districts. Property owners who purchase development rights are then able to increase the amount of development that can be built on the receiving site above the as-of-right limits on development. TDRs can be used to save historic structures from demolition, prevent conversion of farmland to urban uses, and preserve unique environmental areas and vistas.

The typical TDRs appear to evolve into a range of various forms, each of which is slightly different in its structure and operation. The Korean planning system does not include the typical form of TDR programs, even though it is widely debated that TDRs should be established to promote the public purposes. But Korea has recently initiated a non-coercive program that would be considered TDR-type in its concept. Specifically, an incentive zoning scheme, by which bonuses in development density are provided as of right to developers who meet the requirements set out in the planning ordinances, has been introduced into the Korean planning law. Then, a bonus should be an incentive for a developer to provide an amenity or facility, which is of public benefit, which the developer would not provide voluntarily. Under the bonus incentive program, the developer donates part of her or his site for public purposes in exchange for a density bonus for the rest of the site. Then, the development rights in the section of the site reserved for public uses are transferred to the building which is thereby permitted an increase in development density, by which the developer obtains compensation for the donation to public amenity.
The Korean incentive mechanism must be very close to incentive zoning that is widely used in American cities. However, it could be regarded as a TDR-type program under which the development rights are transferred within the single site, not from sending district to receiving district. It is then indicated that the Korean case might fall on somewhat between Case 1 (conservation) and Case 3 (compensation).

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Transferable Development Rights – U.S. Examples

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Abstract
Transferable Development Rights' (TDR) programs, a form of non-financial compensation instrument, can assist in the allocation of resources to both improve the built environment and to preserve the natural environment. TDR provisions in New York City's land use laws played a role in preserving the character of the Grand Central Terminal in New York City when the United States Supreme Court decided in 1978 that a fifty-five story tower could not be constructed atop the historic eight-story terminal. Similarly, TDR provisions in other United States' cities are designed and used to protect open space, to create green space within cities, to protect and maintain historic properties, and to otherwise generate revenue as an alternative to reliance on public funds.

In a nutshell, US-TDRs and related programs are methods whereby the right to develop, one of the rights inherent in the ownership of property, is statutorily restricted for one set of properties, and provisions are made for the owners of a second set of properties to purchase additional development rights from the owners of the first set of properties. As a result, the owners of properties in set one (sending sites) are compensated for the restrictions on development, and the owners of properties in set two (receiving sites) are the ones who compensate.

This chapter will set forth examples of a variety of TDR programs, each designed to serve the different needs of individual cities which vary in geography and climate, culture and affluence, and background and history. Examples of TDR programs that provide for the funding of the conservation of property, for the funding of a loss of value due to the conversion of property to a more useful form, and programs that provide for compensation to entities in order to motivate them to support a beneficial project will be analyzed. The goal is to share the experiences of three very different cities so as to share maximum information to be used in structuring TDR programs in other cities.

A – 40

The concept of non-financial compensation: What is it, which forms can be distinguished and what can it mean in spatial terms?

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Abstract
Non-financial compensation as a modern planning instrument partly roots in the American TDR concept, but involves more instruments. It includes all situations where a government has to compensate a landowner for his loss of *opportunity*, but chooses not to do so in money, but by granting him a new building opportunity, which can either be sold or used. As a concept, the situation in which a king, emperor of lord finds himself in financial need and grants rights and privileges to his well-of citizens in exchange for money or services certainly goes back to Feudal and Roman ages. The term *opportunity* can be linked to the notion of property right, i.e. a right to use one's property in a certain way that represents a certain amount of money.

Non-financial compensation increasingly receives attention in both planning practice and science across the world. The transferable development rights (TDRs) concept has been source of inspiration. Based on this concept various countries across the world elaborate on the TDR-concept within their own planning context and test it in actual cases. Roughly two types of non-financial compensation may be distinguished: cases in which government authorities compensate individual land owners by granting them a development right and not an amount of money ('compensation of loss of a right') and cases in which rights are being created in the form of subsidies (such as the Dutch Space for Space programme) ('opportunity to development something additional'). Another example would be Korea, which has recently initiated a non-coercive program, which is considered TDR-type in its concept. It concerns an incentive-zoning scheme, which provides bonuses in development density as right to developers who meet the requirements set out in the planning ordinances. What are the ideas and backgrounds of this NFC planning concepts? How does this relate to legal frameworks, but also economic values?

A-41

Non-financial compensation instruments in planning practice: Italian experiences

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Abstract
In Italy, the Regions are responsible for urban planning based on the base of the National law. They are in charge, also, to define the territory regulation into details. This, over the last fifteen years, produced many Regional laws some of which brought innovative experiences in the field of TDR. The result was a diversification that caused different regional practices in different regions.

Case 1 (Conservation)
About this case there are many experiences in the realization of many Executive Plans foreseen in the Municipality General Regulatory Plans
Particularly, the Plans of Apportionment by private initiative (both for residential and productive activities), foresee the opportunity – for the municipality – to negotiate a series of duties with the private promoting during the payment of the primary and secondary urbanization compulsory charges or during the furnishing of the services with the assignment of areas for public activities. The formalized agreement foresees the transfer of the building rights.

Case 2 (Conversion)
A more recent regulation has been introduced by many regions and concerns the possibility, by the private subjects, to introduce a proposal of Intervention Integrated Plan that can be negotiated and be considered as a public plan in variance of the Regulatory Plan.
In that instrument the objectives are: building recovery, reconstruction, environmental qualification and new services with a balance of the public and private interests (urban, financial, etc.). Many experiences were developed in Lombardy and some will be described.

Case 3 (Compensation)
The most innovative procedure that has recently been introduced in some regions concerns the system of the "urban development rights equalization" that allows to transfer the development rights in connection with the transfer of the areas for public use. In Emilia Romagna and Lombardia regions were produced regional laws introducing "equalization" concept and some concrete experiences will be described

A-42

Plan-led *versus* Development-led planning systems in Europe

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Abstract
Most of European legal planning systems are supposed to be ´plan-led´. ´Plan-led´ means that before urban development takes place, there is already an important level of legal certainty about the future building possibilities. Therefore, most of the countries are supposed to approve beforehand legally binding zoning plans that state what is possible to build and what is not. This is the classical approach to differences in Western European planning systems. In this approach, the UK forms a remarkable exception, for it is the only country that does not dispose of a binding zoning plan. Hence, the UK is said to have a ´development-led´ planning system.

This paper summarizes the first results of on-going research to the planning system of several Western European countries (UK, The Netherlands, France, Germany, Italy, Flanders, Denmark, Sweden, Spain/Valencia). Based on the first findings of this research, it seems possible to conclude that this classical categorization partly does not meet the real world. This research found that almost all the studied countries show very similar characteristics as the British ´development-led´ system.

After summarizing the principles of the classic categorization, this paper presents the results of the mentioned research and suggests possibly aspects that could explain why the classical categorization does not seem to match reality.

A-43

Making land available - Large Areas for Temporary Emergency Retention

Thomas Hartmann

In the future, there will be more extreme flood events and the current flood protection will not be able to cope with them. The concept of Large Areas for Temporary Emergency Retention (LATER) is a solution to reduce flood-caused damages. It is based on the idea that we can reduce the risk in one area along a river by controlled flooding of an upstream area. Yet, we will cause harm upstream to avoid harm downstream. Therefore, we have to intervene in the allocation and the distributional aspects of land use by regional land policy strategies. First, we have to determine the intervention objective and then the allocation rule. Afterwards we have to find the rules of distribution.
The intervention objective is: make LATER available! Available means, that the areas can be flooded in the case of extreme flood-events. The allocation rule is: achieve a net benefit increase! The harm upstream should not be bigger than the avoided harm downstream. Hence, the concept affects the property rights of many landowners in different ways: Some owners would be constricted in their land use; other owners would enjoy a better flood-protection. Therefore, it seems to be just to take and give compensation for this. The distribution rule is: achieve disposable compensations!
This PhD is dealing with the question, how to organise the intervention in the land use and in property rights. The plan to implement LATER would influence the property rights. We could cope with this by mitigating the law. The approach I peruse to achieve LATER, is to create generally accepted rules and determine them by the law. Hence, I develop strategies that reallocate protection and redistribute the losses and gains to support LATER. In detail, I investigate in the following ideas: Reallocate the damage-potentials by a regional readjustment. We could mobilize the compensation in this case by a Pigouvian tax. More market based is the idea to establish a compulsory for natural hazard insurances. The risk-adapted insurance contributions would mobilise LATER. Also, we could invent a property right in floods by selling flood event concessions. In this model, big private companies manage the flooding in a long termed period and therefore could collect dues by the landowners. A more libertarian strategy is to organise a market for tradable inundation-rights. This is a property right that one can sell to others like an easement. In the final analyses, I will compare the different strategies based on criteria that will help me to find the best strategy for different application-cases.

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The New Dutch Spatial Planning Act

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Dutch administration is qualified as a 'gedecentraliseerde eenheidsstaat'. Competences are executed on a decentralised level as much as possible. The Netherlands are mainly territorially decentralised, therefore traditional geographical territories are used (provinces and municipalities, but national government is part of the system as well).

Another characteristic of Dutch administration is its compartmentalisation. Most public sectors originate in the late 19th and early 20th century. Legislative activity responded to societal needs, such as social housing, water management, early environmental quality – air, water, etc. –, nature protection, public health, but also spatial planning. These different sectors of the Dutch public domain have evolved autonomously, and have grown their own bodies of legislation, ministries, civil servants etc.

The current Spatial Planning Act (SPA) therefore contains specific instruments for the different territorial administrations (municipal, provincial and national) and assigns the dominant role to the municipal administrations. The provincial and national level nonetheless also have spatial planning instruments.

In my presentation I will give an overview of the current instruments and of the instruments in the new SPA. I will discuss one of these instruments more closely: the physical plan (the local zoning plan; it distributes different types of land use), which is in both the current and the new SPA, but will change in some respects under the new SPA.

A- 45

TDRs in Spain

Francisco Blanc Clavero

In Spain, as a general rule, landowners do not have the right to be compensated for the restrictions to develop, build, or use the land imposed by planning provisions. However, in some limited cases compensation is possible. Due to several legal reforms, for example the Valencia Regional Planning Law during the last decade more possibilities for the exchange of land are possible. Trade of development rights with the purpose of preservation of natural areas is an unusual concept in Spain. Conversion cases that are dealt with are ‘reservation of development rights’ and ‘compensation of existing uses in Land Readjustment’. Re-allocation is now a very common practice all around the Valencia Region.

A-46

Developing an analytical framework for alternative land use controls: preliminary remarks

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This paper presents initial thoughts on the subject of urban regulatory mechanisms that may lead to alternative means of land use control and development. It is part of a broader research that examines the impact of dominant land use controls on the built environment and on the urban quality of life. It assumes that the dominant instruments of land use planning such as functional zoning, homogeneous land occupation parameters, and others, which focus on the lot and on the private landownership to establish occupancy controls failed to control urban development, at least in Brazil. Thus, we should rethink the way we envision urban land use planning, especially its instruments. At this moment, I try to develop an analytical framework for that purpose.

The basic assumption is that contemporary urban society has a specificity of its own, and thus requires new instruments to deal with urban land use. Although my focus is on Brazilian urban realm, I believe that the general context is the same in other places, since issues such technological change, globalization of the economy, public security, and the fiscal crisis of the State are present in most nations. These issues conforms a social scenario where urban legislation no longer meet the needs of urban development, especially in cities where social inequalities are high, and access towards formal land market is difficult. This puts in the center of the debates the role of urban legislation and the issue of politics and power. In order to think new forms of land use control, one has to scrutinize the logic of law and the logic of planning and their significance in promoting a better urban environment, here understood as the right to housing and decent quality of life.

I will draw my discussion from three authors: Michel Foucault's analysis of power within bureaucratic apparatus, Henri Lefebvre's humanist critique of urbanism and Boaventura de Souza Santos' critique of legal systems. This work draws also from the present debates on critical socio-legal theory, where scholars are trying to answer the question of how to conceptualize law that would express universal values but could respond to the specificity of a plural and unequal society and attempts to bring those issues to the context of urban legislation.

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The Problem Of Land Expropriation In Implementation Of Traffic And Transportation Proposed Plan

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Tehran, The capital of Iran as one of the great chaotic metropolis of the world, is suffering from implementation of traffic and transportation proposed plan.
At first, traffic and transportation plan proposed by "Soferto Consultant Engineers" in about 1947.Their plan where supposed to solve the main problem of traffic which was flowing from east to west. Their proposed a structure plan supported by number of express way running mostly from east to west and some from north to south. It is more than 30 years that their plan has not been yet implemented.The main problem which the municipal authority has been facing so far is the problem of land expropriation for implementation of the plan. Therefore study and various alternatives to occupy land implementation of the proposed T.T.P for the welfare and benefit of the public are required. So that the best way of compulsory land occupies to implement the proposed plan of the city can take place. In this paper previous law and regulation should be discussed and various alternatives will be analyzed and the most efficient one shall be advised.

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Compensation Rights for Decline in Land Values Due to Planning Decisions: What Comparative Research Can Teach Us ?

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Abstract

In every country where land-use regulations function, they might – and often do – reduce the current or potential economic value of real property. (The contrary is of course true as well, but this is another issue). The question is: Are there compensation rights for reduction in property values due to a planning, zoning, or development-control decisions (excluding "expropriation")? The law and practice in different countries address this issue in very varying ways, along a wide scale of degrees and formats. In the United States this issue – known as the "takings issue" (more precisely: regulatory takings) has become a very contentious topics and a hotly debated one along the lines of "property rights".

I selected this topic for comparative research because it addresses an inherent "raw nerve" of planning law and practice that has extensive social, ethical, economic and indirectly – environmental implications. It should be of universal concern and that merits a cross-national exchange of knowledge. Yet, despite the inherent intellectual challenge that the issue entails for planning law and practice, this will report on the first systematic comparative research on this topic.

The international differences among the approaches to this issue can potentially offer a rich set of experiences from which to learn. But the nuances are complex, and require in-depth research of law, jurisprudence, institutions, and practice. In designing this research, I wanted to include a variety of countries with a variety of constitutional and legal systems. Ten countries – all democracies with post-industrial economies – were selected. This has meant many laws, court decision and experts with many languages. I therefore organized a group of leading experts – one or more from each country.

To enable systematic comparison, I prepared a checklist of questions to serve as common benchmarks. These include:

History, emergence, rationale; Constitutional consideration; The grounds for a compensation claim; Types of injurious decisions; Distinction between direct and indirect impacts; Time and procedures; Social and ethics consideration; Incidence and distribution; Possible impact on planning practice and on public and environmental goals; Likely economic and fiscal impacts

The research is now in advanced stages. The paper will provide a comparative analysis of the findings and will point out the opportunities for cross-national exchange of knowledge.

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The impact of planning law reform on regional spatial planning in Poland.

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System transformation in the 1990's brought about fundamental changes in how spatial planning was practiced in Poland.

The Spatial Management Act of 1994 eliminated the hierarchical structure of the planning system and gave almost exclusive authority to the gminas (lowest level of territorial self - governments). Among the factors that determined this change was the new principle that plans could only be adopted by representative bodies, which did not yet exist in regions at the time of the reform.

The original intent was for this redistribution of authority to be temporary, leading eventually to system where the voivodeships (regional self-governments) would take on increased authority in the planning process. However they were illusory assertions, since the Spatial Planning and Management Act of 2003 did not introduce significant changes in this regard.

According to these Acts, one of the key missions of the regional spatial development plans was to secure lands for public investments of regional and national interest, as well as to coordinate their implementation within the region. Such investments were supposed to be accounted for in the various development programs (transport, environment, entrepreneurship, etc.) However, such expectation was never met because these programs were developed only after the majority of the regional plans were elaborated and adopted.

At the regional level, spatial planning is pursued by 16 regional self-government (voivodeships). The practice of planning at the regional level leads to a number of dilemmas. Some of them are content-related and procedural: they result from ambiguous statutes, inconsistencies in planning policy at the state level, constantly changing organizational and competence associations and from inconsistent sectoral policies regulations. Regions are searching for balanced solutions that meet statutory duties and that at the same time enable the practice of effective spatial policy. Other, more general, dilemmas arise from the vague definitions of what regional spatial planning actually is and ought to be in Poland

In this presentation, I will take a closer look at some specific aspects of the practice of regional planning in Poland. I will also comment on recently proposed changes to planning law, with a special regard to planning at the regional level. This will not aim at any research statement but rather may open discussion how Polish regional planning will evolve in near future.