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This book is compiled from the abstracts that are selected through the review process and are scheduled for presentation at the International Academic Association on Planning, Law and Property Rights' Third Conference in Aalborg, Denmark 2009.

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EVICTION OF UNLAWFUL OCCUPANTS FROM UNSAFE INNER-CITY BUILDINGS IN SOUTH AFRICA: THE TENSION BETWEEN CONSTITUTIONAL RIGHTS AND URBAN PLANNING PROGRAMMES

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Abstract

The City of Johannesburg has embarked on a major programmed aimed at rejuvenating the inner-city of Johannesburg, South Africa. However, there are many obstacles. Many owners have abandoned their properties in the town centre, mostly because of safety and commercial reasons. Homeless persons moved in on a large scale, despite the fact that the buildings have become derelict and were never designed for residential occupation. It is estimated that there are currently approximately 70 000 persons unlawfully occupy such buildings in the inner-city. In most cases living conditions are appalling. Unsafe electrical wiring and lack of toilet facilities create major health and safety risks. How is the problem addressed from a planning point of view?

Section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 (NBA) empowers a municipality to order any person occupying an unsafe building to vacate the building immediately or within a specified period. Failure to comply is an offence (s 12(6)). On the other hand, s 26(3) of the South African Constitution prohibits persons from being evicted from their homes without a Court order made after considering all the relevant circumstances. This begs the question: what 'relevant circumstances' are to be considered if hundreds of unlawful occupants of unsafe inner-city buildings boldly refuse to comply with the local authority's order to vacate?

In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) the Constitutional Court stressed that s 26(2) of the Constitution imposes a duty on the State to take reasonable measures, within its available resources, to achieve the progressive realisation of the right of access to adequate housing. The Court made it clear that a local authority has an obligation to take into account the possibility of the homelessness of any resident consequent upon a s 12(4)(b) eviction. Most importantly, the eviction of a resident by a municipality in circumstances where the resident would possibly become homeless should ordinarily take place only after *meaningful engagement*, described by the Court as a 'two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives'.

South African law is now quite clear: a municipality will not be allowed to evict occupiers from unsafe buildings without (*i*) giving due consideration to the fact that the people could be rendered homeless as a result, and (*ii*) entering into discussions with the occupiers concerning their future accommodation. Unlawful occupants, including those occupying unsafe buildings, qualify for constitutional protection. This has major implications for urban renewal programmes.

Henk Delport
EVICTION OF UNLAWFUL OCCUPANTS FROM UNSAFE INNER-CITY BUILDINGS IN SOUTH AFRICA: THE TENSION BETWEEN CONSTITUTIONAL RIGHTS AND URBAN PLANNING PROGRAMMES
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From rude illegalism to the rule of law

The shift from regulative to discretionary mode in Israeli coastal planning

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Abstract

On August the 15th 2004 the Israeli parliament, the Knesset, authorized a new law for the preservation of the coastal environment. The new Coastal Conservation Law (CCL) is the first legislation in Israel that states a specific planning policy. Up till the authorization of this law, primary planning legislation in Israel, represented by Planning and Building Law from 1965, was essentially procedural. Thus, the law did not specify planning policies, but defined the procedure for setting guiding principle, usually in the form of Outline Plans. Alas, coastal management policy defined in National Outline Plan no. 13 from 1983 was in effect obstructed and did not manage to protect the shoreline from the invasion of residential and commercial land uses.

To our claim, the CCL symbolizes a shift from the regulatory tradition a discretionary mode of planning. The exceptional framework of the CCL consists of a policy statement regarding planning and building at the shoreline and a platform for evaluating development plans offered by developers and institutions. This platform is made of a commission that considers, approves or rejects plans related to the seashore area on a case-by-case basis, in line with the general policy statement.

This paper reviews several case-studies of coastal planning conflicts that arose before and after the authorization of the CCL and analyses the contribution of the law to protecting the fragile coastal environment. It concludes that the CCL manages to protect the coastline form the invasion of undesirable land-uses. In addition, we find that the discretionary mode creates a significant cultural change, as both developers and local governments refrain from circumventing the coastal preservation policy.

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The Sound and the Fury?
The Impact of Post-*Kelo* State-level Eminent Domain Legislation on Planning and Development Practice in the United States

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Abstract

In June 2005, the United States Supreme Court issued a ruling involving the use of eminent domain for redevelopment in the City of New London, Connecticut. From the perspective of legal precedent, the ruling (*Kelo v. the City of New London)* was unremarkable: the court upheld the right of the city to acquire private property through condemnation and to assemble and transfer it to another private owner in order to facilitate economic development. The ruling, however, proved highly controversial—sparking widespread public outcry and demands for greater protections for private property. This backlash culminated in a flurry of state-level legislation that restricted the power of eminent domain to varying degrees. All told, 42 of the 50 states passed such restrictions (Castle Coalition 2007). Proponents of these legal changes argued that the legislation would curb actual and potential misuse of the power (Berliner 2003). Opponents, in contrast, worried that changing eminent domain powers would negatively affect efforts by government to revitalize urban areas, foster economic development and provide affordable housing (American Planning Association 2005.)

This paper reports preliminary results of an on-going national research project examining the impact of Kelo initiatives upon US planning practice. The research seeks to understand whether Kelo initiatives have had a predicted "chilling effect" upon public planning and decision-making processes. That is, has this property rights backlash made public agencies and their partners less willing to undertake ambitious development projects and/or plans that might utilize eminent domain? Has the legislation negatively affected affordable housing production and economic redevelopment activities? Have routine planning actions (e.g., the adoption of new regulations) or processes (e.g., public hearings) become more difficult and/or contentious? If yes, what are localities doing to adapt to the new environment?

Drawing from semi-structured informant interviews and a national web-based survey of planning and development practitioners, the paper finds that while the property rights movement in the USA remains a force to be reckoned with in most states, post-Kelo legislation has had a rather limited impact upon practice. For some key sectors (development of affordable housing, economic development planning), the legal changes appear to be

neutral or just slightly negative in their effect. Public planning and decision-making processes are somewhat more impacted with a majority of survey respondents indicating that their localities has become less willing to publicly contemplate projects that might utilize eminent domain; these same respondents, however, also indicate that Kelo has made little change in levels of transparency/accountability and conflict/disagreement in public decision-making processes.

We conclude that this generation of American property rights legislation, like prior ones, while generating significant sound and fury has not fundamentally altered planning processes or development activities at the local level (see Jacobs 1999 for a discussion of the prior generation of legislation). We speculate that eminent domain may in fact witness a resurgence in support and use at the local level in the future as communities severely affected by the credit, housing, and mortgage-finance crises reexamine this power to address abandoned housing and facilitate redevelopment.

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A Contrarian View of U.S. and European Property Rights and Land Use Planning: Differences without any Substance

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Abstract

A common and longstanding story in the urban planning literature sees the U.S. approach to land use management as significantly different (even unique) in the context of other developed countries (see, for example, Delafons 1969, Cullingworth 1993, Alterman 1997). Reflecting U.S. history and culture, and this in return reflected in U.S. law, the U.S. approach is seen as less dependent on expert management, more protective of social values of individualism and local control, and centering around the necessary integrity of private property vis-a-vis the role of the state as representative of the greater good (the public interest) (Alterman 1997, Ely 1992, Hamin 2002).

A challenge to this common conceptualization is offered in the context of current policy initiatives in western Europe (primarily) and globally (secondarily).

Two principal arguments are made: 1) that the systems of private property and land use planning in the U.S. and western Europe have, functionally and traditionally, not been as disparate as has been commonly depicted (Jacobs 2008b), and 2) that changing institutional and legal conditions in the U.S. and western Europe are bringing the two places increasingly together (to the extent they have ever been apart) (Jacobs 2008a). This tendency for convergence is specifically reinforced by global property rights initiatives and the social movements which support them. These initiatives and movement seek to build explicitly on an (ideal) U.S. model of property rights (DeSoto 2000, Deininger 2003).

The paper uses a combination of historical, institutional and legal analyses, reinforced by case studies drawn from the author's current research activities.

The paper's central argument is that in the current period of history the basis for trans-Atlantic mutual learning is centered on recognizing the similarities in social pressures, social mobilizations, legal challenges, and planning institutions and outcomes, rather than being distracted by what is often depicted as significant and longstanding historical, structural and institutional differences. As a result, what comes into view is an integrative global initiative to weaken the position of the state and strengthen the position of the property owner.

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No. 105

Compulsory Acquisition of Property Arising from Land Use Planning – An Australian Perspective

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Abstract

Historically compulsory acquisition of private property rights in Australia arising from land use planning only arises in defined and quite narrow circumstances. Compensation accrues to the dispossessed property owner on such occasions, but even this assessment of compensation can be restricted, and arguably unjust.

Attempts have been made to liberalise the grounds for such compensation, however recent legislative amendments notably in the Australian State of New South Wales have arguably confounded such endeavours. The current compulsory acquisition legislation in NSW is canvassed in the light of these recent developments. The rising value of property rights notably in major urban areas of NSW has caused Government agencies to seek ways to ameliorate their legislative obligation to pay full compensation. Current policy settings suggest that the interaction between planning and law will be increasingly important especially as land use regulation is being carefully crafted to ensure the "taking" threshold is not unwittingly traversed, notwithstanding the effective obliteration of almost all private property rights as a result of a highly restrictive zoning.

The key argument in this paper is that the relationship between planning and law is being intentionally misused. This is of great concern in a social democracy such as Australia where private property rights are specifically guaranteed "just terms" compensation in the Australian *Constitution*. However, the six Australian States retain remarkable vestiges of their colonial legislative heritage, one such power is the ability to reduce or even deny compensation for the abrogation of private property rights arising from State action.

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No. 106

Planning permission and the law of nuisance in the United Kingdom

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Abstract

Someone whose property is adversely affected by activities which take place outside his property can invoke the common law of nuisance to seek redress in the courts. For example, someone whose property is affected by smell or noise from a nearby factory can sue the occupier of the factory in nuisance. However, since the late 19th century, a number of cases have established the principle that if the existence of the activity (for example, the operation of a railway) which is causing pollution has been sanctioned by an Act of Parliament there is no redress in law. This is known in the law of the United Kingdom as the defence of statutory authority which ranks as a complete defence.

Since 1947, in order to develop land, one has required to obtain planning permission from a local planning authority. The paper simply discusses the impact of planning permission on the law of nuisance, for example, the extent, if any, to which planning permission provides a complete defence to a nuisance action, or, alternately, whether the fact that planning permission has been granted can be taken into account by a court in deciding if a nuisance exists. The courts have never really felt comfortable in answering this question.

The paper is particularly timely in that recent planning legislation has given central government increased powers to dictate to planning authorities whether planning permission should be granted for major developments such as airports.

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Planning Legislation – a view from Victoria, Australia

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Abstract
In the State of Victoria, Australia, the *Planning and Environment Act* 1987 is undergoing a significant review for the first time in 21 years. System improvements can be learnt from other national and international planning legislative models. Notwithstanding that planning law and practice in Australia is jurisdictionally State based, there is an interest in a more uniform national Australian approach for planning regulation. This paper canvasses the planning legislative system in the State of Victoria, Australia, with the intention of informing other jurisdictions on the workings of planning law and practice in the State of Victoria, Australia. The author is the coordinator of the review process of the *Planning and Environment Act 1987* (Vic) and it is hoped that Australian and international readers of this paper will critically comment on comparable planning law regulation.

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Zoning on purposes as a contemporary alternative for zoning on land uses of open spaces in an urbanised context

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Abstract

The (mono)functional zoning in land use planning has already a long record of service and finds its roots in an historical political and societal ambition of separating functions and activities in space. But above all, the continuous success of this type of zoning is linked to the legal security it creates.

Although a decrease in legal security still seems an invincible problem, the technique of functional zoning in spatial planning is increasingly being questioned. An alternative planning discourse of 'open space as public space', a planning discourse about open space fragments in an urbanised context I developed in the context of my PhD-dissertation (Leinfelder, 2007 and 2009), seems for instance incompatible with this functional zoning … but also three other alternative planning discourses about the relation between city and countryside I discussed in my dissertation do not result in spatial entities that are inspired by land uses, but by differences in dynamics, environmental impact and meaning of places. Based on these observations, a 'rediscovery' of the zoning plan – as a 'strategic' zoning plan – seems necessary. The addition of 'strategic' indicates a more active, more realisation oriented and more selective approach than today's comprehensive and passive functional zoning.

The zoning in a strategic zoning plan is no longer related to the allocation of zones to one or more land uses, but to entities that refer as much as possible to the (societal) purposes for the open space involved. The name of these zones tries to express as much as possible the most relevant spatial characteristics of the entities desired for – concerning dynamics, vulnerability, meaning, … And the juridical rules related to these entities define the conditions in which – maybe yet unknown – spatial projects can take place without mentioning the land uses by name. In other words, development and management of space become increasingly dominant to the traditional allocation of space. Undoubtedly, also landscape as a holistic frame of integration is becoming of more and more importance in such zoning plans. (Selman, 2006)

The strategic zoning plan also has to be considered as a more indicative and temporary frame of reference for private and public actors through which the decision making about specific projects and measures can be coordinated – even when the choices at the moment of the decision are different than those at the moment of the design of the plan. (Van Ark, 2005)

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No. 109

ABSTRACT OF MEASURE 37 ARTICLE ("Year Zero")

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Abstract

The adoption of Measure 37 on November 2, 2004, has significantly altered the land-use planning landscape in Oregon. In brief, the Measure requires either payment for "lost value" of real property due to land-use regulations—or, alternatively, waiver of those regulations—enacted after acquisition of the property by the "present owner." Although the constitutionality of this Measure is currently before the Oregon Supreme Court for consideration, even if the Measure is ultimately found unconstitutional, its effects will continue to ripple through Oregon, as well as the rest of the country, long into the future.

The article opens discussing the Oregon land-use planning system before adoption of the Measure. That system requires the adoption of comprehensive plans and land-use regulations at all levels of local and regional government consistent with a series of uniformly applied statewide land-use goals. Land-use decisions involving individual parcels of land must be consistent with the regulations and the plan. The result is uniformity and relative predictability in land-use decisionmaking. Next, the article explores how the Measure operates based on the experience of public entities dealing with the first claims made under the Measure. Measure 37 imposes a land-use system based on the time an individual took ownership in the property, as well as on unstated and incoherent claims of "reduction of value" rather than a uniformly imposed requirement based on public policy values. The article continues, suggesting how the state's land-use planning program can cope with the Measure in its current form and explores some of the likely areas where the Measure may be amended by either the legislature or through the initiative process. The article closes with predictions regarding the short- and long-term impacts of Measure 37 including loss of farmland, further sprawl, loss of a cohesive and coordinated land-use program, and, most importantly, the onset of sclerosis of the state's land-use planning system.

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EDWARD J. SULLIVAN
Year Zero: THE AFTERMATH OF MEASURE 37

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Clumsy Floodplains
– Patterns of action before, during, and after extreme floods –

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Abstract
Floodplains are contested land. They are attractive sites for building – but temporarily, floods occupy the floodplains (Petrow et al. 2006: 717). In the past, society tried to solve this conflict by building high levees, to protect properties in the floodplains from the inconvenient visitor. This strategy fails: levees protect only against smaller floods; climate change causes more extreme floods. In addition, levees pretend security – land behind them is used intensively (Jüpner 2005: 97-101). Finally, the flood-risk aggravates. In the last decades, approximately each catchment in Germany suffered damages by extreme floods.

Patterns of action can be observed before, during, and after extreme floods (Jüpner 2005: 15). Before, even experiences of extreme floods do not keep landowners from accumulating values in risky allocations. Then, water management relies on the ancient technology: levees along the whole river (instead of making space for the rivers) (Moss & Monstadt 2008: 70). Although policymakers pass laws in order to confine building in the floodplains, still, municipalities permit buildings in the floodplains. These patterns of actions take place iteratively in each floodplain. They materialize in land use. This leads to highly developed floodplains with a strong technological dependency on levees. The situation becomes so entrenched that it will be approximately impossible to change technology (e.g. to make more space for the rivers). Why do these patterns of action sustain land use, which will lead to a technological lock-in?

Land use is framed by the law and property rights (Needham 2006). The legal system in Germany does not only allow, but even sustain these patterns of action. In dry periods, floodplains are profitable land. Landowners are entitled to gather profits from the use of their property (Davy 2006: 56); municipalities have fiscal incentives to grant building permits. In this situation, individualistic patterns of action dominate; buildings in the floodplains emerge. In case of flooding, landowners claim for protection. In this situation, an egalitarian pattern of action can be observed; water management agencies provide sandbags, and provisionally fix levees. Inconspicuous, hierarchical patterns of action drown the egalitarian actions: based on flood management plans, water management maintain and rebuild technical flood protection; political debates on protection policy start, legal reforms follow (Moss & Monstadt 2008: 65). Later, public awareness of flood risk abandons, and the hierarchical patterns fade out. Then, flood protection is not pursued with priority any longer; other topics come to the political agenda. Flood protection fatalistically becomes a question of local implementation. After some while without a flood, the individualistic patterns emerge again. The procedure restarts. Values are exposed to flood risk, flood risk aggravates, values will be destroyed, rebuild, extended, flood risk additionally aggravates (Patt 2001: 2). The technological lock-in aggravates.

Thomas Hartmann
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So finally, the legal framing sustains a robust but clumsy situation in the floodplains. What could be done to defend an irreversible technological lock in? This question drives the research about patterns of action before, during and after extreme floods.

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The Europeanization of Land Development as Discontinuous Adjustment: The Interpretation of a Düsseldorf Court and its Impact

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Abstract

Land development practice is a context in which planning and markets meet. Within Europe there are rules about the conducts of governments to assure the Europeanization of markets. One of these rules is that the procurement of public contracts must follow specific proceedings.

Europeanization in this paper is used in its most common meaning, that is, as a process of "adapting national and sub-national systems of governance to a European political centre and European-wide norms" (Olsen, 2002, 924). In many contexts there is a large gap between those European rules and local practices of relations between local authorities and market agencies. It is general practice that judgments of the European Court of Justice are only complied for the case at hand, but that general implications for policies are ignored, a practice that has been called 'contained compliance' by Lisa Conant (2002; 2007). As courts may only rule if parties bring disputes before them, further compliance depends on other actors.

Such a pattern of contained compliance seems also be the case for public procurement in relation to land development. Recently there have been several cases that have potentially a large impact on the practice of land development (Korthals Altes, 2006; Elvin and Banner, 2008). In many contexts, however, this has not affected day-to-day practice.

An exception to this can be found in Germany where the *Oberlandesgericht* in Düsseldorf (OLGD, 2007), has ruled in several cases that the European public procurement rules must be followed in cases where the sale of land is part of an urban development plan. This has resulted in much debate, whether this is the right interpretation of this directive (Portz *et al.*, 2008). The European Commission, for example, is in the opinion that there must be a legally binding obligation to execute works, with sufficient sanctions, as an additional criterion (CEC, 2008). Recently, this debate has changed the view of the OLGD that the case was so clear cut that it did not need guidance from the European Court of Justice, and they have asked for a preliminary ruling (2008). Meanwhile the practice has changed in Germany. Published tenders for the sale of land by German authorities in the *Supplement to the Official Journal of the European Union* have risen from 3 in 2006 to 75 for the first three quarters of 2008.

This paper analysis the arguments that are put forward by the OLGD and position them into its legal context. Next to the potential impact on land development, this paper also reflects on the meaning of Europeanization, which is not only a supranational intervention in local practices of urban policy, but which needs also local agencies that call in these powers to have an effect on land development practice.

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No. 112

The Myth of Dutch Planning

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Abstract

In an international perspective, the Netherlands are well-known for their quality of the innovative urban development, based on the need for its citizens. Many international planning specialists praise the Dutch planning system for this result, often emphazing the influence and role of the national government in the Dutch planning processes. However, the reputation of the Dutch planning system might not be as well-deserved as it seems. On paper, Dutch planning is one of the more plan-led systems with different roles for the three governmental layers. In reality, the larger part of the development takes place based on exemptions, granted by the local level, the only governmental level with the authority to make and change (or decide not to adapt as demanded for by a higher govermental layer) zoning plans, resulting in a more development-led urbanization that ofted is quite different from the one proposed in the internationally praised plans. Due to the used flexibility not only is the outcome of the plans different than what was intended, also the way citizens take part in planning procedures differ from the picture international planning specialist have from the Netherlands.

Not for nothing, one of the motives for changing the Dutch planning law (July 2008) was the decreasing legal security due to the increasing development-led practice. Another motive for the new law was handing over zoning competences to higher administrative levels to increase the possibilities to overrule the competences of local governments that 'nimby' national policies by refusing building permits for national projects. This paper will offer a critical view on the 'Dutch planning Mecca' by showing how the planning instruments have been used in practice. Further the paper will explore the possible ways forward the new Dutch planning law will or will not bring.

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No. 113

How to actualize the institutions of legal quality in transactional practices of policy making: The case of urban and regional planning

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Abstract

Most European member states introduced national legal systems of spatial planning and policy making in the 1950s and early 1960s. Initially, most states preferred a relatively modest profile for the national government but more centralism gradually emerged in course of the 1970s and 1980s. The intergovernmental relationships regarding planning are still differentiated in European countries but in all cases - until recently - it was considered as a governmental prerogative to decide upon the destinations of the use of land. Safeguards against misuse of governmental power and against policy instrumentalism were provided via well institutionalized principles of democracy and state and law.

Since the 1980s, however, the hierarchical nature of governmental planning and policy practices has been criticized as being increasingly inefficient. The frames of governance have changed into multi actor and multi level contexts of decision making that not only cross the borders of territorial jurisdictions but also the borders of the distinct systems of regulation via state, market and networks. As a result, practices of policy making have changed dramatically. For the coordination of policy, new practices of 'co-production' between completely different agencies have replaced the hierarchical practices, both in strategic planning and in operational decision making such as in urban projects. The style of management, increasingly, is based on 'negotiation' and 'exchange of interest' instead of political made 'public interest'. Also with regard to the way of regulation, the 'contract' instead of 'hierarchy' has become the characteristic method of regulation.

Considering the general processes of transformation from a goal rational perspective, there are many advantages in the new styles of decision making. Co-production, direct exchange and contracts are tailor-made, very flexible and they may be adapted to all sorts of dynamic interrelationships. Furthermore, they are based on agreement between agencies. On the other hand, principal questions regarding legitimacy and qualified legal policy making might be easily neglected in the new instrumental domain of direct reciprocity.

The paper analyzes the emergence of experimental practices of co-production in the Dutch context of urban and regional development. In particular we will focus on recenly introduced instruments based on the concept op transferable development rights. Further, the paper will explore how the traditional institutional norms of legal quality and democracy might be actualized in the context of these transactional experiments.

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No. 114

Does land readjustment have a future?

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Abstract

The potential for transnational harmonisation of law and practice is generating new academic research, while within planning the search for better methods of assembling land for development is attracting attention. This paper reviews the history of the land readjustment tool in different countries. LR, variously known as land pooling, replotting, land re-assembly, parcellation, repartition, kukaku seiri in Japan, and umlegung in Germany, can offer an attractive legal mechanism for land assembly, especially when public funds for compulsory purchase and infrastructure provision are limited. The method facilitates development by: combining the assembly and reparcelling of land for better planning; financial mechanisms to recover infrastructure costs; and distribution of the financial benefits of development (sometimes known as betterment) between land-owners and the development agency. It can apply in various situations: pre-industial ownership mosaics requiring replanning; town expansion into peri-urban areas of fragmented ownership; redevelopment after disruptive challenges (eg war or natural destruction); multi-level or vertical replotting of urban areas to higher densities; regeneration sites within urban areas where land assembly may be difficult; so-called 'antiquated subdivisions' (where higher densities are sought); and environmental protection areas (eg rearrangement of water-frontage ownerships). In spite of its apparent advantages, the use and take-up of LR in recent years has declined, and this paper attempts some explanations, drawing upon the case of the UK and mainland Europe. The reasons for decline include LR's perceived complexity, lack of political interest, and cultural values relating to property rights. Meanwhile, UN Habitat is promoting the development of new land management tools through its Global Land Tools Network, which may provide an opportunity for future transnational application of the approach.

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Monitoring vacant land pledges
– Land management based on remote sensing technologies –

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Abstract

In 2008, Davy introduced the vacant land pledge, a legally binding contract between the owners of vacant land and the owners of developed land. This way, the owners of vacant land receive a fee for agreeing to leave their land undeveloped. The owners of developed land pay for the preservation of open space as a prerequisite for obtaining the right to develop their land. The vacant land pledge is a market-based land management for preserving open space. But how can we monitor cost-efficiently whether the land remains in fact vacant?

Monitoring vacant land pledges requires detailed spatial information about the current land use in each municipality. To collect spatial information, a variety of data sources exists, e.g., statistics, topographic and thematic maps, and remote sensing data. Maps are interpreted images of the earth's surface with a complicated, long creation process, generalization, and scale restrictions. Remote sensing is a powerful tool for land management. The advantages of remote sensing are manifold. Remote sensing data deliver up-to-date information about the earth's surface with all its components without generalization as in maps. Moreover, new sensors, new data, and new technologies provide promising future prospects. The challenge is a fast and cost-efficient data acquisition as well as low expenses in data processing. Digital data are important to meet the requirements. Digital image analysis methods can be divided into pixel-based and segment-based approaches. Pixel-based approaches analyse exclusively the single pixel value. Segment-based approaches consider not only single pixels but their surrounding area. Segment-based approaches try to copy human cognitive processes to extract image information. Human visual perception does not consider a single pixel, but identifies objects by looking at groups of pixels, surrounding areas and by relating the parts together to understand the entire image.

In the future we need a highly sophisticated technology that delivers results at the push of a button. The paper identifies strategies for a land management monitoring system for vacant land pledges. For the implementation of new technologies aspects such as imagery (scale, spatial resolution, and date), objects in reality, capability of software, skills of staff (sight, knowledge regarding software, analysis, and experience) and time frame for data analysis have to be considered.

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Potential issues for public and private cooperation in Poland within the framework of European Single Market regulations

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Abstract

With the aim of supporting fair trade and transparent competition, European Treaty laid down rules and regulations (such as state aid and public procurement) that also have influence in national urban development practices. Current experiences in a number of European cities show that traditional practices of public and private cooperation in forms of large-scale urban development projects have been affected by these regulations (Korthals Altes, 2006; Elsinga et al., 2008). Since the 1990s, the local governments are confronted with the Single European Market regulations (namely state aid and public procurement rules), which are aiming primarily at fair and transparent competition between the member states. These regulations create impediments for various forms of cooperation between the public and private stakeholders as they tend to be restrictive and inflexible (European-Commission, 2006). One of the main principles indicated by the commission about the success of the PPP projects is "Ensuring open market access and fair competition, in the respect of State Aid principles when Applicable" (EC, 2003). The Article 87 (1) of the EC Treaty implies to urban development/regeneration projects in the PPP format as the experience of number of member states prove that there is always room for state aid in this type of projects where public authority aims at rapid transformation of an area. Green Paper on services of general interest points out that when a public authority decides to award the management of a service to a third party, it is bound to comply with the rules on public contracts and concessions, even if this service is deemed to be of general interest (COM(2003)270). The Public Procurement Directive requires all procurements above certain threshold value to be published in the Official Journal of the European Commission and the contract to be allocated to the lowest bidder. As the experience of member states prove, this is also implied to the urban development or regeneration projects in the PPP format as for these projects the public authorities (mainly local governments i.e. municipalities) seek cooperation from the private sector. The traditional ways and instruments of the local governments for dealing with the private sector has to be altered by these rules but a variety of non-compliance with the principles of procurement rules occurred in time, especially concerning the special planning and zoning instruments which are developed for easy implementation of these complex PPP projects.

Within this framework, the aim of this paper is to focus on a new member state, Poland, where only quasi PPPs exist at this moment due to the legal and formal problems. The current government has been working on the new law with the expectation that PPP will play an important role in urban development, particularly in urban regeneration. Therefore, it is interesting to explore the current understanding of and future expectations from the public and private cooperation in Polish cities. In the paper we aim first to analyze the current experience

and role of public and private cooperation in urban development of Polish cities, and secondly to underline the potential issues within the framework of the European Single Market regulations for the country in this respect.

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A New Generation of Land Use and Planning Laws to Support Growth and Development in the United States that Effectively Addresses Climate Change

Lora A. Lucero

Abstract

The direct connection between the built environment and climate change is clearly established; and the call for addressing that link in our communities' land use plans is ever increasing. The ultimate challenge, however, lies less with planning and more in the implementation of those plans. We can plan for higher density, pedestrian-friendly, sustainable communities which reduce our carbon footprint, but the majority of states in the United States are severely handicapped from ever implementing those plans because they are laboring under antiquated planning and land use laws based on the model Standard City Planning Enabling Act (SCPEA) and the Standard Zoning Enabling Act (SZEA) drafted in the early 1920s. These Acts addressed very different challenges than exist today. In most cases, they do not provide the appropriate legal framework our local governments require to effectively implement their adopted plans and actually build sustainable communities. The United States needs both a federal land use climate change policy, and a Standard Land Use Climate Change Enabling Act which provides the appropriate legal and decision-making framework for land use and development decisions that support smart growth decisions and effectively respond to the challenge of climate change. This paper describes the essential ingredients for the Standard Land Use Climate Change Enabling Act and explains why it is important that the states get on with the hard work of reforming their state land use and planning laws.

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A New Generation of Land Use and Planning Laws to Support Growth and Development in the United States that Effectively Addresses Climate Change
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Theme: The mystery of the eviction of poorest people by the Cameroonian government

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Abstract

Urbanisation issues are of a great actuality nowadays in Cameroon because of the public campaign population's eviction, mostly the poorest, from their habitations, known as states properties.

To illustrate exactly this statement, the actual Cameroonian's minister of land issues and the Yaoundé government delegate have recently ordered the destruction of about more than four hundred houses surrounding the Cameroonian president's palace. Those houses have been destroyed by mechanic engines hired for that purpose by the administrative and political authorities mentioned above. The powerless victims witnessed that destruction.

Recently also, chiefly in August 2008, a popular quarter (NTABA) of the political capital Yaoundé has been totally destroyed according the instructions of the same government delegates. Many other quarters of Yaoundé have experienced the same disaster, for example: Mokolo, Messa, Carriere. Thirteen other quarters are on the list of evictions.

This is sufficient to create a climate of panic among populations in general as much as these events intervene in a context of extreme poverty and the fact that government have not planned to relocate the victims of evictions. This is evident, this society is a tremendous one , a population totally febrile and desperate that commands urgent reflexion on the opportunity and the coherence of such a public action concerning eviction of the poorest.

Beyond the proper analyse of all the implications (political, social, economic and legal) of this public campaign of evictions, it's necessary to emphasize the astonishment of the observatory of the Cameroonian society because of the sudden waking up of the government concerning urbanisation issues forty years after the independence of the country.

The analyse will focus on the points above and tried to answer the following questions:
-Why Cameroonian authorities have suddenly decided to urbanised the political and economic capitals while forgetting the other regions of the country? What explains the absence of a national plan of urbanisation?

-Why the necessity of urbanisation of the Cameroon only appears forty years after the Independence Day?

-Why the Cameroonian government denies public discussions concerning his public campaign of eviction of poorest people?

-Why the civil society have eclipsed from this issue?

-Why the judiciary seems not to be concerned by these social and sad events?

-Why because of the Cameroonian government's decision, thousand citizens and families are homeless?

-Definitely, what is hidden behind the new Cameroonian urbanisation campaign and eviction of the poorest?

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Wal-Mart in the Garden District: Does the Arbitrary and Capricious Standard of Review in NEPA cases Undermine Citizen Participation

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Abstract

The National Environmental Policy Act, enacted in 1969, requires that the federal government or those seeking to use federal funds to construct projects study the environmental and social impacts of said projects. Under the provisions of NEPA, a first level review must be conducted for all projects, not otherwise exempted. If the entity conducting the review deems that the project will result in a significant impact on humans or the environment, an environmental impact statement must be prepared. The decision to prepare an EIS can be controversial due to the fact that the entity charged with preparing these studies ultimately makes decisions regarding the necessity of the preparation of the EIS. This paper explains the NEPA review process and the controversy which may result when the entity preparing the EIS does not respond to public concerns that a proposed project has a significant impact on the environment. The legal history of Coliseum Square Association v. Jackson, 465 F.3d 215 (5th Cir, 2006), provides a glimpse of a growing concern that the standard of review employed in these cases undermines efforts to involve citizens in public comment process. The paper concludes with a discussion of how NEPA might be modified to ensure that citizens are given an adequate opportunity to participate in NEPA review.

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Public-private cooperation in urban regeneration investment planning

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Abstract

Increasing renovation costs and ever more limited public funding for urban regeneration in combination with a political desire to stimulate the development of a sense of ownership in urban regeneration neighbourhoods has brought about a growing interest in attracting private sector funding. Previous research shows that area-based urban regeneration generates immense private investments, primarily from local property owners, but also from external developers. However, we know little about the motives and backgrounds for the developers' engagement in the urban regeneration. Based on data from a number of case studies and interviews with developers we argue that developers own networks are more likely to lead them to the urban regeneration areas, than knowledge of the urban regeneration itself. Also, the study reveals a mutual knowledge-gap between the municipal planners and developers; planners have limited knowledge of developers' rationalities, and developers have limited knowledge of urban regeneration programs. Nevertheless, there is ample evidence that developers possess crucial competences in relation to the urban regeneration processes, for instance to establish a shared vision of a neighbourhood amongst different local actors involved, to negotiate with private as well as public parts, and – most importantly – to 'sell' the project to the right investors. Hence, there are several reasons for the public planners to increase the engagements with private developers in the urban regeneration. Compared to international research on private investments in the urban re-generation (Adair et al, 2007; Nappi-Choulet, 2006; Guy & Henneberry, 2004), we argue for more focus on the institutional context's role for attracting small-scale investors to the urban renewal. We propose that a lack of institutionalised information channels, boundary objects, inhibits increased cooperation between private sector investors and public planning authority. In the paper we suggest that particularly public planners need to change their views and practices in order to facilitate the levering of private investments, and that the concept of 'boundary objects' (Star & Griesemer, 1989) can be used as a way to bridge the knowledge-gap between public planners and private investor.

Key words: urban regeneration, private sector finance, planning policy, public-private cooperation

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A weak link in a metropolitan area or (less) rationality and (more) power

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Abstract

The paper presents in an *expository* manner the decisional interferences rapports with some administrative structures for a local development issue and how that politics shapes urban policy.

The *issue* has been focused on the case of **a** neighborhood representing a special situation both in the Romanian administrative law and urban planning through tension between rights of the land property and of the land use of a certain field/territory. Planned as a territorial link between two great Danube cities, Galati and Braila, the neighborhood in case is built by the one of the municipality's investments into jurisdictional perimeter of the second. Following the misunderstandings about the administrative attributions of each authority, the metropolitan area is far from the reality.

As the article's authors hold each one different background, geography and law, there are three dimensions of the issue's structure: i)a short drawing of political-administrative framework linked with urban dynamics and hierarchy in the cotemporary Romanian system, ii) the planning competencies associated with different jurisdictional limits and iii)how a territory could be shifted between a power project and a rational development.

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Adoption of legislation on expropriation of privately-owned land in Ukraine

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Abstract

The right to private ownership to real estate can be effected by the draft law "On the organizational and legal principles for expropriating (redeeming) privately-owned land" [1], which has already been accepted in its first reading.

The Verkhovna Rada Scientific Expert Assessment Department in its assessment of the draft law states that the concept "the public interest" is not clearly defined in the document, with it being used variously in different articles. It also points out that a refusal by the owner of land to be bought out could lead to forced expropriation on the grounds of the public interest, whereas according to Article 41 of the Constitution [2], this is only possible as an exception. Such exceptional cases for the expropriation of land in the public interest must be directly specified in the draft law.

The definition of exceptional circumstances must apply not only to expropriation of land under normal conditions, also under state of emergency. It is important that land expropriation in the public interest during state of emergency be defined in very general terms, without stipulating detailed procedure. For example, the draft law should not only cover the suspension of the right of ownership to property (a residential building, other buildings, constructions or planted areas on the land which is being expropriated), but also the return of the property once state of emergency has been cancelled. In addition, the draft law does not envisage the possibility for the former owners of land to receive compensation for the value of the property even before the revoking of the state of emergency.

From the point of view of protection of the right to housing and to own, use and dispose of ones possessions as foreseen in the Constitution, the following must be provided: a mechanism for expropriation of property; procedure for preliminary compensation (in this procedure there should first be a definition and provision of compensation, and only then can the expropriation of property take place); valuation of the property in the case of pecuniary compensation; a control mechanism over carrying out the compensation procedure; liability for violation of the procedure for providing compensation and control over this.

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The poor and the land

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Abstract

In many Western countries, the legal framework for property usually excludes poor people from owning land. The poor only enjoy de facto access to land—e.g., to city space—, but this access is illegal, extra-legal, or legally weak. Property law still seems to work under the assumption expressed by Adam Smith (1776): »Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all.« Today, property is defended not only by the police (as Smith suggested), but also by the welfare state. In Germany and other Western welfare states everybody, who owns real estate and applies for social assistance, has to sell their property prior to being eligible for welfare payments. Spatial planning, to some extent, attempts to compensate the poor for being virtually excluded from ownership in land by the property-welfare-nexus. However, by designating land for affordable housing or launching inner city refurbishment schemes, the planning system reinforces rather than mitigates the exclusionary effects property and welfare. The paper deconstructs this relationship between poverty, property, and planning.

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Property Rights as Complexity: The integration of law, economics, sociology and sustainability

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Abstract

This paper questions the variable interpretations of real property rights that have evolved in the fields of economics and law. The gulf is accentuated by confusion over property rights within the literature, partly fuelled by the differing definitions of real property, the urban planning perspective, and an investigation of the sociological dimension of people, place, and property. Such a background can create impediments when there is a need for new, or alternative, explanations of property rights to address environmental issues in the context of climate change and the sustainability paradigm.

Building on the theoretical challenge of Arnold's (2002) web of interests, the paper uses the constellation of property rights model of von Benda Beckmann *et al.* (2006) as a lens to analyse ideological, legal / institutional and concretised real property rights in an environmental context. This is achieved by drawing on contemporary Australian examples of commodification of property rights in water and issues surrounding property rights in carbon and the other greenhouse gases.

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Planning simulation as a tool for Mobility Management implementation within building permission process – Krakow case.

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Abstract

Law regulations in Poland concerning building permission process practically do not take into consideration issues connected with Mobility Management (MM). In Polish conditions developers and city administration concentrate mostly on number of parking places or, in general, on private car access rather than on sustainable transport solutions. Very often public transport is perceived as non efficient and not enough flexible for future customers and this is one of the most important reasons for developers to create car oriented investments. From city administration point of view, due to lack of legal regulations forcing developers to invest in more sustainable way, car oriented plans are accepted. However there are some opportunities which can help to convince key actors of the process to implement chosen MM measures – it is planning simulation. It is expected that the planning simulation shows the existing conflicts and different interests of private and public units in relation to MM and presents how to implement sustainable transport tools by suggesting possible solutions.

Main aim of conducted planning simulation was to reduce estimated needs for parking spaces and took into consideration new possibilities to use MM in building permission process for chosen investment (Cracow Exhibition and Conference Centre). The paper will present the introduction concerning possible MM tools, description of chosen site, multi variant analysis of investment's impact on traffic conditions in street network and summary of discussions.

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Real estate crisis and valuation
– An approach to solve overvaluation from the German point of view–

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Abstract

The real estate industry is in a crisis. The crisis started in 2000, when the U.S. Federal Reserve Board (FED) reduced the interest rate level despite inflation. This heated up the U.S. real estate market: The housing bubble started to grow. Everyone could buy real estate by getting a property loan on the house, nearly without equity finance. Property credits were easy to get for attractive terms. But many mortgages were so called "subprime mortgages". The valuation of real property increased rapidly. Housing prices peaked in early 2005 and began declining in 2006. The decreases in home prices can result in many owners holding negative equity because a mortgage debt was higher than the value of their property. This finally led to increased foreclosure rates in 2006 and 2007 for U.S. homeowners. The crisis arrived in August 2007 for the subprime mortgage and bank markets: The housing bubble bursts. Failures among European banks are as well the consequences of the crisis on the U.S. mortgage lending market.

One of the causes was a wide-spread overvaluation. The crisis is therefore not only the consequence of different land markets, but also different valuation methods. Of course, each bank has the right to lend money to a higher risk debtor. If a mortgaged property has been overvalued, however, neither the bank nor the general public can know the true size of the risk. Therefore, we need in times of crisis an approved valuation method. The German valuation law differs from the way of valuation in other countries. Could the German valuation methods have protected homeowners from this crisis?

Legal basis for real estate valuation is the federal building law ("*Baugesetzbuch*") and the regulatory framework for valuation ("*Wertermittlungsverordnung*"). This framework provides for three different standardized valuation methods to assess the market value. They are practically approved and used by appraisers.
A committee of valuation experts ("*Gutachterausschuss*") plays an important part in the German valuation system. This committee is established in every larger city in Germany and is an independent institution, even though it is seated in the local municipality. Its main task is to provide objective transparency on the local real estate market. The committee of valuation experts collects every contract of purchase and analyses it to get market information and to extrapolate important data like land values ("*Bodenwert*"). Stability and objectivity in real estate valuation can be guaranteed because of this well- established.

The German methods probably will not be appropriate for every country, but some parts may fit and be helpful. These methods would not have averted the crisis. Homeowners would not have suffered such enormous losses, however, if their properties had not been overvalued in the first place. In the future we need moderating elements in the valuation methods to protect homeowners from overvaluation.

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No. 127

Flexibility in planning and its effects on public-value capturing in England, Valencia and the Netherlands

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Abstract

In the 1960s, flexibility was seen as a negative feature in planning practice, whereas today the planning profession perceives flexibility as a positive asset to face the challenges of growing complexity, opportunism and diversity. The discussion seems to rest between two approaches. On the one hand, planning should be flexible to facilitate a non-linear and multi-layered decision-making system. On the other hand, when implementation is too flexible the public sector loses the controlling power while the demands of the private sector increasingly influence urban development.

This paper focuses on the effects of flexibility on the level of public-value capturing, i.e. the level at which public bodies manage to make developers pay for public infrastructure (infrastructure provision, public roads and space, public facilities and buildings, affordable and social housing) and eventually to capture part of the value increase. Therefore the paper explores an important feature of flexibility: should the legally binding land-use rules be fixed before negotiations between developers and local planning bodies take place, or not?

In a previous paper/article, empirical data from case-based research on Dutch urban regeneration projects provided some knowledge on the effects of this certainty in shaping developers' contributions to public infrastructure. The present paper further develops the analysis by including empirical data from case-bases research on regeneration projects in other two countries: England and the Spanish region of Valencia.

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Capital-Directing Administrative Procedures – Public and Government Participation versus Individual Legal Protection

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Abstract

I. Changes in the system and related challenges facing legal and planning systems within the EU

Due to its principle of procedural environmental protection based on two key elements – public participation and privatization of procedures, EU legislation is imposing restraints on individual legal protection. In view of the pressure to adapt under Community law, the individualistic and substantive policy pertaining to the result of the ruling has been undermined[1]. There can be no objection to the function of transparency and public relations or to the procedural environmental protection as systemizing factors of European administrative law taking precedence; however, insofar as the administrative and planning systems of the Member States continue to reflect considerable differences, as can be ascertained on the strength of the comparative analyses available on various subzones of the EU, it is necessary to ensure that the scope of freedom granted to the Member States to structure the procedures is maintained. Failing this, the legitimacy of the procedures and of individual legal protection within the national administrative and planning systems will be brought into question, causing problematic deferments. In this case, it is essential to guarantee, within the framework of European administrative law, that adequately effective individual legal protection is provided. In view of the persistent symptoms of paralysis which have befallen the integration process, there is a considerably high risk that, in the shadow of a halt in the development of European law, the standard of constitutional protection will be dismantled as the Member States underbid each other and the gap created as a result will not be filled on a European level. In this respect, there is more of a risk that justice for the individual case and appropriate individual legal protection at a constitutional level are outmanoeuvred by the concept of formalized public participation and are sacrificed for the sake of the economy. An important aspect of this change is manifested in the shift of emphasis in the sector of capitaldirecting planning and licensing procedures triggered by rash regulatory cycles on a European and national level.

II. Comparison with the Capital-Directing Planning and Licensing Procedures of other Member States

A comparison with the planning and licensing procedures in the subzones amalgamated in the Greater Region of the various Member States of the EU - Saarland, Lorraine, Luxembourg, Rhineland-Palatinate, Wallonie - shows[2], that, within the various legal protection systems, the

[1] cf. Schmidt-Assmann, General Administrative Law as a Principle of Order, p. 358 f.

[2] Cf. Spannowsky (publisher), Volumes 6, 8 and 9 on the topics: The settlement of large-scale retail businesses; planning and realization of motorways and provision of nature and regional parks – consequences for the development
of the area, series on regional planning, building and environmental law, Kaiserslautern. The books record the results of the research project 'Comparison of the regional planning systems in the Greater Region'. This involves a project organized by the regional framework operation 'e-BIRD', which was carried out on the basis of the European development programme INTERREG III C under the coordination of the Ministry of the

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Member States differ in their priorities on procedural structure in the sector of capitaldirecting procedures and in the framework of the relationship between the constitutional state, democracy, the environment and the economy. In this connection, differences in historical developments are also of significance; what is perhaps of greater interest, however, is how the requirements under Community law have been integrated into the national planning systems. For example, France, Luxembourg and Belgium tread completely different paths. Considerable differences can even be seen in the implementation of the directive for the assessment and the effects of certain plans and programmes on the environment - in the areas of both overall territorial and of sectoral planning (this point can be elaborated).

III. The Relationship between the Constitutional State, Democracy, the Environment and the Economy

The development of a legal system is predominantly determined by the underlying conditions in the intersection of the constitutional state, democracy and the economy. As a result, the correlation between the constitutional state, democracy, the environment and the economy also changes as the procedural changes have repercussions on this relationship, which is determined by the constitution.

In addition to the aspects of the environment and of democracy, transparency provided by mandatory provision of the grounds on which the content is based, the promotion of public and government participation is at the forefront of Community administrative law. These focal points under Community law have a different impact on the individual Member States. Due to the requirements imposed by Community Law, the tension between the constitutional state and the economy is increasing. While the environment and democracy are deeply embedded in Community administrative law and, due to the precedence of Community law, they form a bulwark to protect against national differences by setting the procedural standards to meet the requirements for environmental controls, the constitutional state and the economy of the Member States come into conflict. The reason for this is that the requirements under Community law provoke a considerable increase in procedural costs and other expenditure in relation to the capital-directing administrative procedures and, consequently, from an economic point of view, the ‘additional expenditure’ incurred to safeguard due process on a national level has a negative effect on the books. This creates a dangerous conflict situation for the constitutional state (this point can be elaborated), which can be summarized with the following key phrases:

- restraints on legal protection in the case of procedural errors and limitations under Community law
- acceleration and simplification of the planning process versus due process

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Cross-national comparisons of integrating mobility management and land use planning in the EU and Switzerland: negotiating or enforcing public-private cooperation in the development process?

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Abstract

Mobility Management (MM) is a concept to promote sustainable transport and manage the demand for car use by changing travellers' attitudes and behaviour; at its core are "soft" measures like information and communication, organising services and coordinating activities of different partners. Experience from countries such as Switzerland and United Kingdom shows that MM can be integrated into the development of new sites as part of the process of granting planning permission, in order to reduce reliance on the private car. Based on research in work package (WP) D of the ongoing EU FP6 MM project MAX[1], this paper analyses the current state of practice in integrating and implementing MM through the land use planning system in 9 EU states and Switzerland, and makes recommendations for future changes.

This paper presents a summary of two parts of the research in WP D. The first concerns the current level of the integration of MM and LUP in the EU member and other states covered in the work package (Sweden, Germany, Spain, Lithuania, Poland, Slovenia, Switzerland, the UK, as well as Ireland and the Netherlands). The second part will present the results of planning simulations in five of these countries, where a group of planning professionals from each state considered real development sites and how MM could be integrated with their development.

The paper will summarise these two working stages and provide a view on the current state of policy and practice in these member states, and make recommendations for ways in which the further integration of MM and LUP can be promoted in the different member states.
In particular it will show:

- The state of planning legislation and policy insofar as it promotes, allows, or hinders the use of the planning system to promote sustainable transport.
- The same, but for the integration of MM with planning.
- The degree to which MM measures at the site level can be part of the outcome of the process of granting building permission to site developers.
- The degree to which such integration can be either negotiated or enforced, depending on the particularities of each member state's planning system and laws.

[1] MAX - Successful Travel Awareness Campaigns and Mobility Management Strategies

Tom Rye / Janina Welsch
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Planning and the Common Law Tradition

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Abstract
It is a fundamental tenet of the Planning Law and Property Rights Group that law is an essential element of planning. This paper goes further to argue that legal systems have a fundamental role in shaping both the form and the content of planning. It does so on the basis of an exploration of the common-law tradition in Britain and its impact on the British planning system.

There are four strands to the argument. The first has to do with the way in which common law conceptualised problems and their solutions. At least one legal writer has suggested that British pragmatism has its roots in the behaviour of common law judges, who were constrained to consider cases on the evidence before them and who sought to draw out of those cases general principles of law that might then become criteria for later judgements. The planning system in Britain has inherited this approach and has repeatedly given concrete existence to principles that have been derived from the experience of managing land-use change.

The second has to do with the impact of the common-law tradition on public administration. The fact that there was an almost seamless move from a judicial to a civil local administration in Britain in the 19th century meant a continuity of judicial modes of thinking. But the common law tradition also marked profoundly the statute law the emerged in 19th century Britain to deal with increasingly complex urban problems.

The third has to do with way in which common law and equity dealt with rights to real property. The argument here is that the way in which rights to property are constructed has had a profound impact on spatial planning, insofar as any planning system has to situate itself in relation to the private ownership of real property. This strand of argument has been more thoroughly explored the others in relation to planning, but still remains contentious, particularly in the light of the property rights movement in the USA.

Underlying all three is an attitude to the state and its powers and its modes of decision making. Common law was the result of administrative reform and centralisation of power in the middle ages, but the nature of the courts' role in determining cases inevitably led them to define the powers and responsibilities of authority. The state which had created the common law system was in its turn shaped by common law.

The paper argues that all of these factors came to have an important impact on the way in which spatial and land-use planning has been conceptualised and implemented within the United Kingdom. The impact of common law is visible in the way in which statute law for planning has been drafted, and politicians who have decision-making powers and the

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behaviour of the officials who advise them. It concludes by suggesting that an approach derived from a specifically British case may nevertheless be applied to the impact of other legal systems on planning elsewhere.

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Towards a Participatory National Plan: A Two-Pronged Approach

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Abstract

The National Planning Framework in Scotland forms an integral part of the modernised planning system, and is central to guiding Scotland's long term strategic spatial development. The Planning etc. (Scotland) Act 2006 placed the second National Planning Framework (NPF2) on a statutory footing. The intention is to publish the second NPF at the end of 2008, providing a strategy for sustainable spatial development to 2030. This provides a timely opportunity to consider this revised national planning document.

Critically, the Scottish Government is committed to ensuring that a full range of stakeholders and the public are involved in its preparation. A Participation Statement set out when and in what ways this would be achieved. Importantly, this has involved a number of iterative stages as learning and understanding have evolved during the course of the exercise.

In parallel with this process a Strategic Environmental Assessment (SEA) has been conducted for the NPF (NPFSEA). This process offers a systematic method for considering the likely environmental effects of certain plans, programmes or strategies produced by public sector organisations. The process aims to:

- integrate environmental factors into policy and decision making;
- improve policies, and enhance environmental protection;
- increase public participation in decision making; and
- facilitate openness and transparency of decision making.

It is clear that a fundamental principle of this process is also participation.

Drawing on the available secondary data from the consultation processes this paper will map and explain this innovative approach to participatory national planning in Scotland. It will critically discuss the legislative basis of these two activities in the light of the iterative preparatory stages and interrogate the extent to which these two approaches to participation serve to enhance both planning processes and planning outcomes.

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No. 132

Planning reforms in Northern Ireland: property rights and culture change in institutional reform

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Abstract

Within the United Kingdom, Northern Ireland has had a very distinct history which has influenced its political and institutional infrastructure. Whereas in England, Wales and Scotland have an established history of local governance and land use planning capacities, Northern Ireland has sustained more centralised arrangements. Here central government has discharged responsibilities for development planning and development control. Local authorities have engaged in this centralised system in a relatively marginalised way – acting essentially as a statutory consultee to the determination of planning applications. The responsibilities for the preparation of local development plans is likewise a central function. Whereas elsewhere in the UK, planning is both a technocratic and a democratic exercise in Northern Ireland it is principally a technocratic exercise. These characteristics have resulted in a very specific form of planning, provision of infrastructure,and decision making processes. More significantly it has promoted a culture around protectionism of private property rights, challenges to centralised decision making and a limited awareness and articulation of the wider public interest.

In 2007, the Northern Ireland Assembly Government initiated a process of reform and modernisation of the land use planning system. This substantive recrafting of the land use planning system and its intended implementation is to take place in parallel with a review of the regional economic development strategy (the spatial planning framework) for Northern Ireland. Significantly, the planning changes will be effected through a reform of local government which will represent a democratisation of local rights and responsibilities. This paper considers the nature of these parallel threads in the context of realigning property rights and the required culture change in implementing planning and institutional reform.

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Public participation in the 3G infrastructure development in Sweden

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Abstract

The infrastructure for 3G has been under development in Sweden since late 2000. Following from the so called beauty contest four operators within three years were to build competing systems to cover 99,98 percent of the population by the end of 2003, giving the administrative system an extreme challenge. Issues widely debated has been the alleged hazardousness of the electromagnetic radiation from the base stations and the public's possibility to affect where the bases stations are to be put up, which brings the participative aspects of the 3G infrastructure development into focus. The assessment of the system, the several thousands of base stations' impact on the environment, has been made one base station at a time as the operators apply to put up a mast.

This paper shows how participation on regional and local levels is regulated in the infrastructure of the third generation of mobile telephony, 3G, in Sweden. In addition to this "law in books" description, a comparison to the public participation as it is found empirically in the application of the regulations is made, representing the "law in action". This two-sided approach forms the important foundation for the following three research questions:

1. *How is public participation regulated in the case of developing 3G in Sweden?*
2. *What does the application of this regulation look like, empirically?*
3. *Is the regulation functional for public participation in the 3G case?*

The first question asks for a mapping of the regulations, how the lines are drawn in existing law. The second question asks for a broader perspective, a perspective that seeks understanding of the practical side of participation in the application of the legal regulations. The third research question refers to whether or not the participation, as it is regulated, can be said to fulfil its purpose, to incorporate public values into the decisions.

To be able to empirically answer these questions a set of data consisting of ca 250 building permits in the County of Blekinge between 2001 and 2005 is used, in addition to the legal regulations, preparatory work and case law and two national municipal questionnaires regarding building permit praxis from 2003. Legal documents depict existing law and the Blekinge data, as well as other data, shows its application. The paper is in part financed by MiSt and the Swedish National Environmental Protection Agency since much of the data was collected within a MiSt study concerning sustainability issues of the 3G development (Larsson 2008) and has been complemented with more data, for instance on the so called 12:6 consultation on County administrative level, for the purpose of focusing on participative aspects in this paper. The paper is concentrated from a more extensive version to be published in Baier, ed. (2008, or beginning of 2009).

Stefan Larsson
Public participation in the 3G infrastructure development in Sweden

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No. 134

The regulatory framework and the social capital - comparative study of land development process in Poland and Finland

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Abstract

Institutional environment consists of formal rules of property rights regimes and informal social rules dependent on cultural factors, belief systems, and values. These formal and informal rules constrain and facilitate the functioning of the market. Application of new institutional economic approach to the study of the land development process indicates the significance of the allocation of rights and liabilities in the process of land development. The way the rights are delimitated and allocated in relation to land can be related to all kind of failures like externality and other efficiency problems in the provision of land. The assumption in this paper is the property rights regime together with social capital as parts of the institutional environment of the process of the production of space, ultimately determines the outcome of the land development.

In this paper an attempt is made to discuss how different delineation and allocation of rights and liabilities structure the land development process and how the social capital influences the final results.

There is an enormous variety of possible rights in land. In land development process the complexity is even increasing by adding the component of changes in time. The attention is given to the public rules, focusing on planning and expropriation regulatory framework from the scope of the property right regime in land development process.

The method of data analysis is qualitative within the scope of this study, which is typically assigned to explorative research. In order to find out the various links running from the regulatory framework and social capital to methods and problems in developing building land the case study research is undertaken. In the comparative research concerning functioning of land and property markets the comparison contrasts usually the UK against the continental Europe. In this research the two new countries, which are not intensively studied in the literature, are added to the discussion.

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No. 135

A Regional Planning Approach to Resolving Governmental Immunity Issues

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Abstract

Courts in the United States are frequently asked to resolve issues of intergovernmental immunity from local zoning regulations; that is, when one governmental entity—a state agency, a special purpose district or a local general purpose unit of government—seeks to locate facilities or carry on activities within the boundaries of another local government. These cases arise in a variety of situations, from the need to site locally-unwanted land uses such as landfills, sewage treatment plants, juvenile treatment centers, airports and jails, to uses such as schools, athletic complexes and nature conservancies that may be generally desirable but disruptive to community plans for development. Growth trends virtually guarantee that these disputes will only escalate in the future. By 2040, when the population of the United States is projected to reach 400 million, approximately 267 million Americans will live in just 10 mega-regions, occupying only one-tenth of the nation's land area. Hundreds, and in some cases thousands of municipalities exist in each of these mega-regions. As these municipalities add population and expand into undeveloped lands it becomes increasingly difficult for state and local governmental units to find acceptable sites for public facilities and activities without intruding on the territorial boundaries of other governmental units.

State legislatures in all but limited circumstances have failed to act to provide more guidance on intergovernmental zoning immunity issues. This has left state courts to address such conflicts on an *ad hoc* basis, leading to inadequate and often unpredictable results. While other commentators have written on this subject, it has received little recent attention. Furthermore, these essays have mainly focused on which of the commonly prevailing judicial tests are most appropriate for resolving these conflicts. This paper asserts that a legislative solution to the intergovernmental immunity problem that incorporates, and relies on comprehensive, regional land use planning is needed.

This paper proceeds in four Parts. Part I briefly discusses the origins of the intergovernmental immunity problem in principles of state sovereignty. Part II reviews the four existing judicial approaches to resolving the problem and the strengths and weaknesses of each. Despite the steady migration of state courts toward one of those approaches none have proven effective in providing predictability or the degree of rationality essential to a changing, urbanizing landscape. Part III looks at the few examples of state legislation designed to resolve the problem, almost all of which deal with specific types of facilities rather than broadly with the fundamental sources of the conflicts. In Part IV this paper proposes to fill the void left by unpredictable judicial tests and inadequate legislation by setting forth the framework for a model state law that builds on the American Planning Association's (APA) Growing Smart model statutes for siting state facilities and developments of regional impact (DRI), while making adjustments to reflect the reality that most states have shown little willingness to take such comprehensive approaches as suggested by the APA.

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We have identified a half-dozen quality Law Review articles on governmental immunity. We have documented over 70 cases across the United States so far, covering the four dominant court tests: governmental/proprietary; eminent domain; superior sovereign; and public interest balancing test. In addition, we have identified at least 30 state statutes addressing various approaches to siting specific locally-unwanted land uses which are often the subject of governmental immunity lawsuits. We are using the APA Growing Smart Chapters on siting state facilities and Developments of Regional Impact to compare a proposed new statutory framework against.

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NOTE: We are only submitting the abstract for review, not the paper. We are proposing to write a paper for presentation at the conference, but not for publication with conference proceedings, as we are drafting a longer Law Review article on the subject.

Two paradigms in Swedish wind power planning

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Abstract
The paper analyses the permit process for Swedish wind power development in terms of two paradigms of spatial planning and environmental management, and makes a comparison with the Swedish 3G mobile phone infrastructure development. Swedish Parliament has set a goal of 10 TWh annually wind electricity for 2015, and the Swedish Energy Agency has proposed 30 TWh from wind power by 2020. Present 900 windmills would have to increase to 3000 to 6000. A government commission has examined the possibilities of making the permit processes more efficient to allow for rapid development. A proposal has recently been published. It has been criticised for letting environmental permit procedures replace local planning as the instrument of spatial planning of development.

Swedish wind power deployment – like the 3G infrastructure – is mainly governed by two legislations with different histories and partly different purposes, the Planning and Building Act (PBA), and the Environmental Code. At present windmills require a building permit and in the case of a wind farm a municipal detailed development plan in accordance with the PBA. Under the Environmental Code larger generators require a permit and smaller ones need to be registered. The PBA processes are municipal whereas the environmental come under the County Administration or the Environmental Court. Sweden has a strong local dominance in the spatial planning system. The outcome of a national development agenda with land use implications will rely on implementation in a local context.

These two sets of legislation can be seen as expressions of two competing paradigms of environmental governance, *the planning paradigm* and *the environmentalist paradigm* for short. They are theoretical constructions based in an analysis of professional cultures of planning and environmental management (Emmelin & Kleven 1999, Emmelin & Lerman 2006). They were used also in the analysis of the Swedish 3G development (Larsson 2008; Larsson & Emmelin 2007). 3G was developed between 2000 and 2007, with four licence winning operators supposed to build competing systems each covering more than 99,98 percent of the population by 2003. The coverage at that time was substantially lower and the municipal permit handling was blamed and it was considered that this “could not have been foreseen”, helping operators avoid sanctions for breach of licencing conditions. Larsson’s thesis (2008a) shows that a slow municipal permit process can not explain the lack of coverage.

Development of wind power as well as of the 3G infrastructure in Sweden are interesting fields of conflict between national goals for technological development and local spatial planning and governance of land use. They are also instances of the legislative and

paradigmatic struggle of the PBA and the Environmental Code. We examine the implications of the attempts to simplify permit processes as an element in this struggle.

The paper is based on a study which includes the legal design as well as interviews with key figures in the Swedish wind power development made by Larsson (in prep) and a study of the 3G development (Larsson 2008) within the research programme "Tools for environmental assessment, MiSt".

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Suspending the law: planning informal settlements in the West Bank,

Erez Tzfadia

Abstract

Formally, the State of Israel does not plan and construct new Jewish settlements in the occupied territories as part of the 1993 Oslo agreements with the PLO. Nevertheless, 132 new informal Jewish settlements (known as "outposts") have been built since in the West Bank, some of them on privately owned Palestinian land.

Informal planning is usually associated with underdevelopment and economic distresses that force poor communities to build their homes illegally (Davis, 2004). This informal planning order, which has been associated with the growing affects of neo-liberal globalization and social polarization, threats the legal order and even state sovereignty (Roy, 2005).

The informal settlements in the West Bank are a result of alternative setting: its origins in a planning doctrine which suspended and implemented the law by the state. Or, put it differently – the alternately suspensions and applications of the law, which has been the Israeli way to enforce its control over the Palestinians and the occupied territories, trickle into the planning practices of the outposts as a result of ethno-national and territorial motivations. This argument brings Agamben's (2005) 'state of exception' into the field of informal planning, territorial control and colonization.

Indeed, informal settlements in the West Bank were built by informal support of the state authorities, the Israeli army and local authorities. However, in recent years, and particularly since the evacuation of Israeli settlements in Gaza Strip, the Jewish settlers retain their own autonomy to plan and built this type of informal settlements. By doing so, the settlers deny the state law, and willing to obey Jewish theological law. It means that the alternately suspensions and applications of the law by the state are getting out of the control of the state. The ethno-national logic, which advocated the suspensions of the law in order to achieve territorial control, is now standing "over" the law.

The research on informal planning and suspending the law in the West Bank is based on interpretative analysis of policy actions, interviews with settlers and officials and documentations. The research is part of a project on 'Gray Urbanism' in Israel, founded by the Israeli Science Foundation.

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No. 138

When house building comes closer

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Abstract

When in connection with changed planning house building comes closer, animal husbandry may get into a difficult situation as a result of intensified demands on "the polluter". The general starting point is that the polluting/inconvenience-causing enterprise must pay. The question is, however, if the animal husbandry is quite without protection. In this contribution focus is on the different forms of protection that may be discussed in Danish law. To which extent are the interests of animal husbandry safeguarded in connection with the Danish planning system? Can demands be made according to the environmental protection act, which it is neither technically nor economically possible to fulfil, or will this conflict with the administrative law principle of proportionality? Can the planning authority be held liable according to damage law or according to compulsory purchase views? As mentioned, focus is especially on animal husbandry which is confronted with new sensitive neighbours. But it is not only an urban edge problem. Similar problems arise in relation to industrial enterprises in the so-called urban transformation areas.

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Critical evaluation of legal and institutional context of urban planning in turkey: the case of Istanbul

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Abstract

The extent of informal urban developments, exceeding % 50 of the built environment especially in the rapidly urbanized metropolitan cities of Turkey, is acknowledged as an obvious indicator of the inadequate legal context of planning which does not embrace the dynamics of urban development. Such an ascertainment requires a comprehensive critical evaluation of the legal context of planning with spatial references and is also the starting point of this study.

The Planning Law, which has come into force in 1985, was a democratic revolution in the planning field as it routed the planning consent to the local governments. Although the decentralization of the planning rights was valued in terms of democratization, the contents of the Law have been criticized from the very beginning due to its structural inconsistencies. The Planning Law basically reduces the planning process to physical interventions without any tools to supplement the spatial decisions with socio-economic policies. The Law also consists of numerous articles with references to different laws and institutions without performing a holistic, integrative approach. In other words, The Planning Law itself paradoxically can be labeled as the foundation of the fragmented urban structure with a severe lack of coordinating bodies. Besides, the radical increase in the number of planning adjustments reveal the fact that the democratization of the planning consent was not able to increase the adoption capacity of the planning decisions.

In this context, it is targeted to explore the legal and institutional structure of the urban planning system in Turkey in a framework which is made up of five criteria and to make a critical evaluation with references to the specific urban development issues in Istanbul. The first four criteria couple with the structural components of the built environment whereas the cross-cutting fifth criterion refers to the systemic problems. The criteria and the spatial references benchmarking the critical evaluation are as follows:

1. The legal context of conservation referring to the transfer of the world famous cultural heritage of Istanbul to the next generations
2. The legal context stimulating the spatial expansion of the city through the cutting edge investments leading the economic development of the city or the mass housing projects
3. The legal background enabling the expansion of informal settlements at a cost of degrading environmental quality
4. The legal context facilitating the transformation of the current building stock (transformation of the built environment is based on three different, sometimes conflicting, dynamics: the necessity of improving the urban life quality as well as eliminating the risks of destructions in case of an earthquake; the spatial expansion

which is limited by the natural thresholds; the transformation of the economic structure of the city due to the shift in the globalization process)

5. The systemic problems of the legal context regarding the fragmented structure of planning consent, lack of coordination, inadequate tools of participation and the lack of socio-economic plans complementing the spatial decisions

The paper will be concluded by the systematic exposure of the critical issues of the legal and institutional structure of the planning system in Turkey in order to stimulate the discussions and enlighten the current restructuring process in Turkey.

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Land reform: Economic viable for the agricultural sector?

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Abstract

The article will be based on an interpretive field study consisting of personal interviews to develop a model to reach the government's socio economic and economic objectives. The emphasis will be placed on the latter. The purpose of this model is to find a middle way (to merge) between the land reform policy and the production output of the agricultural sector. Pressures such as unemployment, competitiveness of the agricultural sector, skills transfer, etc. needs to be addressed. Any land reform criteria should take aspects such as employment, land ownership, real estate prices, and the country's image into consideration. It should not only address land ownership of the previously disadvantaged, but also keep the status quo in terms of production outputs of commercial farms (or rather to improve). The focus should rather be to improve the production output of the agricultural sector. Although the Department of Land Affairs drives their objectives to be in line with that of national government, it must not be done in isolation. The broader scale / picture must be kept in mind and therefore the impact of the land reform programme on important factors such as inflation targets, export targets, GDP, employment levels, skills transfer, etc. should be addressed. A holistic view must therefore be taken. Two core objectives of the national government in this regard are:

- The provision of tenure security that creates socio-economic opportunities for people living and working on commercial farms and in communal areas, and
- The redistribution of 30% of previously white-owned agricultural land by 2014 for sustainable agricultural development.

The farmers' unions in South Africa are of opinion that government is not reaching these targets, or reaching some of it, but to the detriment of important economic indicators. To make land reform a win-win solution for all, government should support the productive farm owners through a joint partnership agreement. Government has to fund experienced farmers or skilled, young farm managers to consult or transfer knowledge to the new farm owners. Financial incentives and production targets linked to land ownership must form part of the criteria. Criteria for land reform policy must be an economically viable programme and not an unbalanced social programme only. A triple / triangle partnership between private farmers, government and new land owners will ensure better success for all concerned.

Keywords – Restitution, redistribution, land reform, agricultural sector, production output

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No. 141

THE PROPERTY PARADOX:
Is Zoning a Property Right or State Regulation?

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Abstract

Property rights stir the imaginations and raise the ire of Americans from coast to coast. In the U.S., perhaps no other right enjoys such broad and unbridled support from all sides of the political spectrum. The wide-ranging and vociferous reaction to Kelo v. New London, the recent Supreme Court case that validated a city's right to take private property for economic development, is exemplary.

The protection given to property in American law is consistent with American constitutionalism, yet the rhetoric about property rights is, for the most part, simply rhetoric. Private property rights have been slowly eroded for centuries as the government has extended the reach of the regulatory state. Yet, despite the chorus of voices clamoring for restoration of property rights, the connection between broader societal interests and property ownership is thoroughly muddied. This is particularly so with regard to government involvement in land use regulation.

Confusion about the balance of rights impacted by land use regulation dates back to Euclid v. Ambler, when the right of a municipality to protect its citizens from detrimental land uses through zoning was first recognized. Euclid itself was called a paradox, since it was decided by a court bent on overturning regulation that interfered with property rights and free enterprise. Justice Sutherland upheld the ordinance believing that the power to zone emanates from the natural property rights of homeowners rather than the police power of the state. This association with property rights veils the use of the heavy hand of the state to advance private interests. The result is that any attempt to regionalize land use decisions, apply smart growth principles, or make zoning responsive to state law is seen as an attack on private property, as opposed to the reverence of private property that it truly is.

Today, a reveneration of property rights in the reframing of the debate over land use controls can aid governments with concerns about sustainable development, smart growth, equity, and climate change. In an era in which the greatest challenge to sustainable development is legal barriers enacted by small, parochial municipalities, we desperately need a reframing of the property rights debate. The result will be stronger cities, fewer isolated minorities, a cleaner environment, cooler planet, and yes, higher property values.

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FROM UTHWATT TO BARKER AND BEYOND: PLANNING GAIN AND BETTERMENT EXTRACTION IN THE UNITED KINGDOM

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Abstract

The 1947 Town and Country Planning Acts (the Acts) in the UK adopted an approach to land use planning in which decisions on planning applications are made against the policy background of a generalised development plan. Generally, under the terms of the Acts, anyone wishing to develop land by carrying out a substantial physical operation or by making any significant change to the use of land or buildings must first obtain a licence in the form of planning permission from the local planning authority (LPA). Although the Acts left the ownership of land, in terms of its legal title, unchanged, they profoundly changed the property rights governing land development. The effect of the Acts was to nationalise land development rights and to give the planning authorities the power to re-privatise those rights on a partial and discretionary basis.

The Acts adopted an approach to betterment taxation as recommended by the 1942 Uthwatt Report. Betterment taxation did not, however, pass the test of time; after three attempts by Labour administrations to introduce it, it was finally abolished in 1985 by the Conservative administration of that time. Despite official denials and whatever stated government policy might be, planning gain as originally introduced as Section 52 of the 1971 Town and Country Planning Act has in part operated as an informal betterment tax the proceeds of which have been used to benefit local communities[1] (Bowers, 1992).

The Barker Review of Land Use Planning (2006) included various proposals for reform of planning gain including the introduction of something called Planning Gain Supplement[2] (Barker, 2006). Following Barker, Corkindale (2007) suggested four potentially legitimate purposes of planning gain:

- To siphon off economic rent arising from the artificial scarcity of planning permission for new development; and
- To pay for public infrastructure investment contingent on new development;
- To pay for environmental mitigation resulting from the adverse environmental impact of new development; and
- To compensate third party interests adversely affected by new development, including the adverse environmental impact of new development.

This paper rehearses the arguments for betterment extraction and for greater clarity in the objectives of land use planning policy in the UK more generally. If planning gain is to be the

[1] This was superseded by Section 106 of the 1991 Planning and Compensation Act that introduced the concept of 'planning obligations' which, in essence, is the same as planning gain. Planning gain exists when a developer obtains planning permission by providing, at his own expense, an asset or service to the community that would not have been provided but for the need to obtain planning permission (Bowers, 1992).

[2] The latest incarnation of this concept is the proposed Community Infrastructure Levy originally introduced for consultation purposes earlier this year (Department for Communities and Local Government, 2008) and, at the time of writing, going through Parliament.

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mechanism for betterment extract, more thoroughgoing reform than is currently envisaged will be desirable.

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Shore protection in Sweden. Efficiency or waste of space ?

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Abstract

In Sweden the Right of Public Access enables everyone to roam freely in the countryside. And, since 1975 all Swedish shores (sea, lakes and watercourses) are protected from any building activity which; a) prevents or deters the public from entering an area in which it would otherwise have been able to move freely or b) significantly affects the living conditions of animal and plant species.[1]

The regulation has its origin from discussions in the 1930s aiming at securing free public access to shores close to the major cities.[2] Shore protection was introduced during the 1950s along shores of particular value to the public. In 1975 shore protection was introduced on all shores in the country.[3]

There are 385 000 km of shores in Sweden (ten times the circumference of the earth). Ten percent of these are built-up areas. In the county of Stockholm there are 14 000 km of shores and 26 percent of these are built-up areas. In the most northerly county – Norrbotten – there are 86 000 km of shores, of which four percent is occupied.[4] The purpose of this paper is partly to show how access to shores that have not been built on, and the pressure to build, differs between different parts of the country, partly to discuss whether or not it is fair to have the same legal rules regardless of local conditions.

The background is that the general formulation of the regulations has given rise to a 30 year long discussion, where municipalities in sparsely-populated areas have criticised the shore protection.[5] [6]However, so far an absolute building ban prevails all along shores in Sweden that have not yet been built on. Building activities are not even allowed in areas where the value to the public is almost non-existent.[7] There is no adjustment made to the benefit of building in the individual case. This paper questions whether or not this is an effective way of utilizing the land resources of the country.

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No. 144

Megapolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States

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Abstract

This paper and presentation draws on my research and analysis of urban planning and sustainable development issues in the United States related to automobile-dependent regional sprawl. The paper discusses how unsustainable regional automobile-dependent sprawl is now legally required throughout most metropolitan areas of the United States as a result of local zoning, growth management, and parking programs. The paper focuses on why a metropolitan framework for promoting sustainable development is necessary in the United States to achieve a more sustainable urban growth paradigm. The paper examines the potential benefits of creating a metropolitan governing framework to identify and regulate "growth areas" in a region and how linking these areas to regional transit planning is necessary to achieve the development of higher-density, mixed use, and intensive urban core job/housing areas where people could live, work, shop, and play without the use of the automobile. The paper further discusses potential legal and political issues and institutional arrangements related to creating this type of regional sustainable development framework for urban planning. In short, the paper focuses on the necessity for the creation of some "sustainable development" metropolitan framework for local urban planning in the United States in the twenty-first century.

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EVOLVING A NEW LAW FOR PUBLIC LAND ACQUISITION AND ADMINISTRATION IN NIGERIA

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Abstract
The vesting of Nigerian public lands in the hands of the State Governors is a feature of 1978 Land Use Act (LUA). Over the years, implementation of the LUA is bedeviled with problems resulting to injustice, loss of land market, lack of equity, transparency, unnecessary bureaucracy and inaccessibility of land to the urban/rural poor. Therefore, the criticisms range from inadequate provisions of the existing law in areas of public land acquisition, payment of compensation, inappropriate application of the provisions of the LUA by the State, isolation of the Local Government (LG) councils/ community leaders and urban poor in the implementation of LUA. These criticisms are justified based on the empirical study conducted. It was discovered that the LUA is too technical for common man to comprehend, very expensive and burdensome, it is oriented towards governmental needs only. The objective of the study is to analyze the current practices in public acquisition and administration in Nigeria and to find possible and effective solution to solve the problems. To ensure success, it is advocated that respect for existing property rights, access to credit markets and a need to evolve a law. Attention need to be paid to the fiscal viability of the land reform agenda of the present Government in Nigeria.

Keywords: acquisition, land tenure, ownership, land management, urban poor.

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No. 146

The Influence of Brazilian, Colombian and Spanish Urban Legislation in the recently passed "Territorial Ordering and Sustainable Development Law" of Uruguay.

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Abstract
The 18th of June 2008, the law numbered 18.308 was passed by the Parliament of the Oriental Republic of Uruguay, such ruling also called the "Territorial Ordering and Sustainable Development Law", has become a benchmark in the development of civil and urban law in this small Latin American country.
The process of elaboration of the law's project was well based in comparative law experiences, specially the Brazilian "Estatuto da Cidade" of 2001, the Colombian "Estatuto de Bogotá" of 1993, as well as the recently Spanish "Land Law" of 2007.

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The Right to exclude and the Right not to be excluded:

The exclusionary effects of Planning Regulations from a Legal Rights Perspective

Iris Frankel-Cohen[1] and Rachelle Alterman[2]

Abstract

Planning Regulations, it is claimed, have the potential to exacerbate residential exclusion of the socially or politically disadvantaged from certain residential areas. This paper focuses on the legal rights perspective of this issue. This perspective is aimed to demonstrate the "tricky" role legal rights might play in the planning decision making and the limited validity of the rights' theory as a whole. Yet, legal rights should not be dismissed or underestimated. Rather, they should be used by the planners with social responsibility toward the various components of the society they plan for.

The rights are integral part of the legal system which consist the normative aspects of the planning decision making. As such, one can expect them to constitute a clear criterion to just and legally right planning. A brief review of the relevant legal rights concerning exclusion from residential areas reveals the weakness of this hypothesis (Campbell & Heather, 2002). The vagueness of the legal rights, the different meanings they might have and their different possible effects, make them a platform rather than a clear and righteous guide to just planning. Consequently, the moral quality of planning (still) depends on the moral values of the planner and the social, economic and political forces that might influence it (Campbell ,2006).

Most of the judicial decisions concerning exclusionary planning in the USA are based on the right to fair housing and due process. But, the academic discourse refers to various rights in this context, such as the housing right, the property right, equality right, freedom and autonomy, communitarianism and the right to the city. Each of these rights might have different meanings. The property right might be interpreted in a libertian manner (Hayek, 1974) or in a political manner that includes social responsibility (Rose ,2006). The housing right might be classified as a civil right or as a freedom right (King, 2003), as a negative one or a positive one, and it could contain a minimum standard of physical living or a place of cultural and mental fulfillment. Consequently, planning decision-making entails the interpretation of rights and the balancing of various rights of different individuals or groups. This process might justify the use of planning regulation as a means to exclusion as well as encourage its blocking.

Legal rights have also a fundamental role in planning theory. Some writers claim these rights consists the deontological justification for planning regulation and for planning as a whole (Stein &Harper, 2005). Our claim is that due to the legal rights' characteristics, they can not constitute a full justification to planning. The scope and the way of intervention must be rooted in a deeper moral concept that influences the interpretation of the rights and the designation of the planning process.

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The legal concept of rights is a fundamental component of the planning process. Still, planning decisions that concern various rights and have significant social effects such as exclusion - require the moral discretion of the planner.

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The Long Road from Planning to Expropriation

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Abstract

Planners are always torn between ideals and reality, between theory and practice, between wishes and constraints. The constraints are very often the shortage of land or of money or of both. Compulsory purchase is one of the solutions for the shortage of land. It is commonly agreed that expropriation infringes on private property rights but it is allowed when justified and compensated. Ample literature and jurisdiction have been written about various aspects of expropriation: the public purpose, just compensation etc., but there are more ways of violation of property rights than the actual physical taking.

One of the factors that affect the peaceful enjoyment of the landowner and cause a violation of property rights is the element of **time.** We can divide the time element into three major segments:

1. The period between the planning and the designation for expropriation
2. The period of the expropriation procedure
3. The period between the completion of the procedure and the implementation of the public use

The third period is a juristic issue which is not dealt with in this paper. The second period of the expropriation procedure takes a long time by nature, as a result of the administrative and bureaucratic actions to be taken. If there are judicial procedures, the time is even longer. In this paper we will concentrate on the first period.

Ideally, planning should be long range. The implementation of plans could occur years after planning. In order to secure their plans, the planners and the authorities require a land reserve for future public purposes. However, they usually do not have the financial resources to acquire all the land needed for future purposes. Quite often the solution is to plan, designate the land for expropriation and wait until the need arises. The interest of the planners, representing the public interest, is to designate the needed land for public purposes at an early stage and to secure the possibility to acquire it at an undetermined future time. Unfortunately, the planners' interest conflicts with the interest of the landowners and of the real estate market. The real estate market needs stability and certainty, and for that purpose the period between designation and expropriation, including compensation, should be as short as possible.

The land under delayed expropriation is harmed in several ways[1]:

- The value of the land is diminished
- The land is not transferable
- There is uncertainty about the future, which hinders the owner from planning and investing in the land

To resolve this conflict between planning and property rights, a balance should be found between the two interests, and the duration of time between designation and expropriation should be proportional.

[1] As we will illustrate in the paper, using judgments of the European Court of Human Rights

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Knowing the Social – How do Planning Law Decision Makers know about social impacts?

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Abstract
In order for planning law decision makers to be able to make robust and more equitable decisions, it is suggested by the author that they should consider all relevant impacts in proposed use and development of land. Currently, planning legislation in the State of Victoria, Australia, only mandates the consideration of significant environmental impacts. The author asks whether there is scope for law reform and in doing so, she has empirically interviewed a sample of planning law decision makers as well as analyzed a sample of State of Victoria planning case law to try and understand how planning law decision makers currently make use of social impacts and accordingly social facts in their decision making. The author suggests that as planning is a social discipline, social impacts/facts must be a consideration for planning law decision makers.

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No. 150

THE ONGOING PROPERTY RIGHTS DEBATE

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Abstract

In the United States, historically, land use regulation began as a method to protect landowners against damage to real property and/or the public due to the inconsiderate, negligent or dangerous acts of landowners on their land. Regulations were promulgated to curtail in some fashion certain dangerous and noxious land uses such as slaughter houses, tanneries and explosive device manufacturing plants, to name a few. Somehow, these modest beginnings have evolved to the point today where property-rights advocates are pinned against environmentalists with a very confused group of landowners in between. These landowners are signing land regulation petitions and voting on issues based on fear coupled with a lack of understanding of the ultimate effects of their actions. This article will discuss the effects of the 2005 Kelo decision wherein the US Supreme Court ruled that a municipality could use its powers of eminent domain in order to stimulate economic improvement.

Cities and regions have the responsibility to pass planning laws to protect the natural and built environment. In order to accomplish this, the laws should, in part, curtail sprawl and its harmful consequences and provide for appropriate growth management. A variety of tools are available to meet these ends: historic preservation laws and urban growth boundaries are among them. This article will discuss instances where it appears property rights advocates have used examples of inappropriate destructive land use decisions such as blanket destruction of neighborhoods via government redevelopment (including improper use of eminent domain) to convince the public that any government regulation of property is harmful.

A key example of this difference of opinion between property rights advocates and environmentalists has been taking place in Portland, Oregon over several years. A planning program adopted for Oregon in 1973 created urban growth boundaries around all cities to curtail sprawl and to protect the environment. In November 2004, Measure 37 which weakened such land use regulations was passed. It required “just compensation” to property owners whose use of their property was restricted and whose property values were decreased as a result of government regulations. In a dramatic about-face, Measure 49, fashioned to curtail development allowed by Measure 37, was passed in November 2007.

Oregon is not unique in with respect to these issues as other states and cities throughout the United States are experiencing similar conflicts; however, it is doubtful that Oregon’s changes will not create an eventual ripple effect across the country. This article will discuss the effect that the passage of this latest Measure may have in other states.

Key Words: Kelo, property rights, public use, public purpose, economic revitalization, economic development, eminent domain, takings, Measure 37, Measure 49, urban growth boundaries

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Applicability of Land Readjustment Method in Urban Renewal: An analysis for Turkey

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Abstract
It holds great importance for a tool to be found that is capable of fulfilling specific functions (land assembly, self-finance, the protection of social capital, resulting in a certain time, etc.) in the renewal of urban built-up areas. LR is seen as a potential tool for providing solutions to the problems occurring in traditional urban renewal processes. However, there is limited information on the use of LR method in urban renewal areas. The paper tries to understand whether LR is applicable in the renewal areas with different qualities when compare with the other methods. That is, it examines whether LR method is best-fit tool for the renewal areas in different ownership structure and characteristics in terms of fulfilling these functions when compared to other urban renewal methods. The methodology of the study bases on the results of questionnaire survey with municipalities in metropolitan areas and big cities in Turkey focused on specific urban renewal projects. With this questionnaire survey, the characteristics of potential urban renewal projects, main principles related to urban renewal processes, the methods that will be used or are used and the reasons for selecting methods, difficulties with urban renewal projects and satisfaction levels related to existing methods are determined and in this sense the applicability of LR are discussed. All discussion contributes to well understand the use of the LR method in urban renewal projects.

Keywords: Land Readjustment method, urban renewal areas, inner city areas, Turkey.

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The use of land readjustment for implementation of development projects

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Abstract

The land acquisition for development projects is not always running fluently in Estonia at present. Private developers acquire land for development on auctions or buy it from the other private owners and there are no problems as a rule. The problems appear often if the municipalities will need land for the public needs. It may by for road construction e.g.

The reasons for the problems come often from the Estonian land related legislation and from the fact that there are four different categories of land ownership at present. The first three categories are: private, municipal and state land. Beside that there is land which is not reformed jet. In some respect we can say that it is state land also but at the same time it is not state owned land according to the correct meaning of the property rights. This land is not registered in the cadastre and in the title book for example.

Municipalities can apply free of charge for land that is not reformed jet if it is needed for the public needs and there are no claims for restitutions. There are certain preconditions to get land from the state free of charge. The road construction is an eligible reason that municipality can get land free charge. Reality is somewhat complicated.

It may happen that land that is needed for public needs is in private ownership already. Next to this place can be land that is not reformed and at a moment this area is so called free land. It would be reasonable to give this free land to the municipality and municipality will organise the rearrangement of land in this way that property will moved to other location. It means that no need for expropriation. However, representatives of state (civil servants in state authorities) are arguing that it is unlawful if municipalities will get land free of charge and will use this area for land exchange or readjustment – even thought such procedure would finally serve public interests. The aim of the paper is to investigate the possibilities to use the land readjustment as a tool for land acquisition by municipalities.

The case study methodology is been used to carried out the research. The area that is needed to improve the traffic conditions in Tartu town is been investigated. The question is about the building new bridge to improve the connection between two parties of the town. The problems of land acquisition for the project arise because of several reasons. Most important of them are the following:

- Different interpretations of the legislation by different parties (state officials versus officials of local authorities;
- Different interested parties have different attitudes, approaches and understanding about how the problem should be solved.

Different options to solve the problems are compared in the study. Main attention is been paid to the analysis of the possibilities to use the land readjustment as a tool for land acquisition if land is needed for development projects.

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Urban planning in private property conditions in Ukraine

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Abstract

Cities development is accompanied by absorption both undeveloped land and build up area. In Ukraine approximately 50% of the built-up lands have been transferred to private property from beginning of land reform. In Ukraine the main peculiarity of land market is existence of primary and secondary markets. The first one contains the state and municipal land and second – private land. Furthermore establishment of local self-government confers wide powers to region and local government levels. In that conditions land acquisition for cities development becomes very complicated task. Territory necessities for building of social, engineering and transport infrastructure are determine by working up of urban plans and expertise of them. Unfortunately unordered legislative field exists between the urban planning process and land use management. This none regulating doesn't correspond with present-day land relations. It is very important to determine the land which will be needed for city development at the near future by means of land use planning. In condition when the land market is forming it should be given maximum consideration.

At present day In Ukraine compulsory purchase can be done in consent owner agreement only or by court decision. At the same time compensatory payments is pied to owner with accordion to market value of property. One of the impartial reasons of the situation is absence of land use planning experience in private property conditions. Nowadays it is highly distributed the situation when today land sites are privatized and within the nearest future it should be acquired for social needs. So, some questions request to be defined juridical for common and owner interest: status of land which are provided for development in accordance with urban planning, reasonableness and practicability and procedure of compulsory purchase, legal ground for compensatory payments etc. The legal determination of series problem question excludes possibility of land speculation and corruption prosperity.

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Coastal areas in Greece: the legislative framework concerning their development and/or protection, and the influence of social, political and economic factors

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Abstract

Greece has one of the highest percentages of coastal zones in Europe, with a coastline length of 15000 km. In these zones the population density is more than double than the national average, the economic activities are very intense, tourism is flourishing and pressures for urbanization are increasingly high. At the same time, coastal zones are usually characterized by significant natural beauty, there are numerous sensitive ecosystems in them, and there are also countless sites, monuments and settlements, which are important elements of Greek cultural heritage. Therefore, there is a controversial coexistence of potential of economic development, and the need of high degree of protection.

Protection of coastal areas is provided by the Greek Constitution, which, in article 24, characterizes seashores as public good. At the same time, a web of legislative acts, produced by the central administration in the form of presidential decrees, ministerial decisions etc. tend to void its public character. They seem to adopt an approach of "economic" priority, often under the pressure of political and financial actors seeking profit.

The first legislative tool (L.2344/1940), which has been applied for 60 years, defined the seashore as public good, but failed to clearly set the boundaries of protected zones and the terms of their protection. Consequently, speculation was wide spread, further encouraged by the lack of effective spatial planning, and the indecisiveness to eliminate illegal construction. By all means, the characterization of coastline as a public good was infringed.

A new law (L.2971/2001), which has been in force up to date, aimed at rationalizing the use of the seashore, but still in the direction of using it as a driving force for local development. It was rather an effort of managing the means of producing gains out of the use of the seashore, and avoiding the undesired effects of unplanned and arbitrary initiatives of private actors. The latest sectorial plan on the national level, the Regional Framework for Tourism, which is currently discussed in the National Parliament, also seems to promote the same principles and further facilitates the almost unlimited creation of new holiday settlements and resorts.

Another important factor which significantly influences the status of the coastal areas in terms of their development and/or protection is the Council of the State, which often overturns laws, decisions and acts produced by the administration, in terms of their lack of legitimacy and non accordance to the constitutional provisions. The Council of the State through its jurisprudence tries to secure the public character of the seashore and the free access of the general public to it.

In the present paper, the development of the legislation concerning the coastal areas in Greece is examined, and its objectives are analyzed. An assessment is then attempted, of its implementations up to the present. The related decisions of the Council of the State are also mentioned, and their effect on the coastal zone management is examined. Finally, the social domain within which the above are functioning will be described, and the interaction of its social, political, and economic forces with the administration and the judiciary will be analyzed.

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Key words: seashore, coastal area, coastline, public good, public space, economic development, environmental protection, jurisprudence.

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No. 155

Distribution of Costs and Profits in Urban Development

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Abstract

Most countries have a system - procedures and tools - for foreseeable, clear and fair distribution of costs and profits in urban development.

However, the distribution of profits and costs between the municipality and the developers/investors/landowners is in Denmark rather fragmented and not very transparent as the distribution is regulated throughout the whole planning and environmental regulation system. Development agreements – an "old" tool in many countries - have only recently become possible in Denmark and only under some special circumstances.

This paper aims to clarify how costs and profits are distributed between the municipality and the developers/investors/landowners in Denmark.

It is analysed how the Danish planning and environmental regulation system handles this issue. Based on the analysis an overview will be constructed. Finally, the paper discusses whether this is a fair distribution, and who holds the best "set of cards" in the distribution of profits and costs in the urban development process.

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Fair Allocation of Social Housing: an outlook on the Italian experience

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Abstract

Making land and finance to provide Social Housing is a crucial objective in recent Italian laws at national and regional level and in many urban policies.
The paper intends to give an evidence of the outputs in this field, which has been neglected for a long while, but is widely dealt with in current debate and instruments.
It first examines shadows and lights in the on going normative frame, where many innovations try to support variously targeted housing policies, facing the strong decline in public funds.
It then discusses the alternative approaches and their limits, from the state-led policies to the negotiation system, along which private developers are asked to contribute to the supply of social and affordable housing, and lastly to the promotion of the competitive mechanism, as a tool to achieve more inclusionary zoning in the redevelopment projects. An outlook of some interventions in medium to large sized cities and regions is provided, in order to identify how different experiences have enforced social housing policies, in the supply both of land and of dwelling units. Various urban planning regulations and tools, such as equalization in TDR, planning gain and negotiations, linkage polices and bonus incentives, have been recently introduced in several municipal plans. Few although interesting explorations have been carried out in order to treat the fair allocation of social housing at the intermunicipal level: in metropolitan areas, this problem is entangled with the construction of a multiethnic city and with the shaping of a good transportation system. Newly introduced Structure plans should aim to solve wide area problems, but the organization of local government is still unfit to regulate the housing and land markets.
Finally, the paper intends to explore more theoretical strands such as what are the relationship of land policies for social housing with the land use planning system, undergoing a strong change in Italy in last years.

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No. 157

Using Planning Law Fracture to Map the Mind of the Property Developer

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Abstract

One of the first pieces of new legislation to be passed when South Africa became a democracy in 1994 was a Planning Act called the Development Facilitation Act of 1995. This Act was meant to (1) provide a temporary, "speedy" avenue for submitting applications for land development, (2) remove the need to use apartheid-tainted planning legislation, and (3) expedite the process of providing access to land for the poor. Of crucial importance was the understanding that the Act would in due course be replaced by a new post-apartheid Planning Act, and that it would until then run in parallel with the legislation inherited from the apartheid past. In practice this meant that property developers had two options when considering applying for development rights: (1) the "new" Development Facilitation Act with an application to a provincial government, or (2) the "old" apartheid-era legislation with an application to a municipal/local council.

Thirteen years have passed since 1995 and the much anticipated new Planning legislation has still not materialized. During this time the "temporary" Development Facilitation Act became a permanent feature of the South African Planning scene, with an added interesting phenomenon taking place: Property developers began embarking on a careful selection process, in certain cases using the Development Facilitation Act, in others opting for the old apartheid legislation, which had by now lost its apartheid baggage and simply provided "just another possible route for submitting land development applications".

This unique and particular case of "Planning Law Fracture" and the decision-making process around which legislative route to use, spawned, provides an ideal opportunity to study on a more generic level what the determinants are in the decision-making model/thinking of property developers, i.e.: what do property developers value (more): (1) networks, or more specifically familiarity with known, local government officials and municipal decision-making processes, (2) speedier decision-making, (3) lower costs, and/or (4) the ability to side-step municipal strategic plans and spatial frameworks on the one hand, or increasingly more restrictive environmental protection measures in the provincial sphere of government on the other?

This paper utilizes this opportunity, using a series of semi-structured interviews being conducted for a research project into the decision-making process in land development in a selection of cities in South Africa. While the specific case is unique to South Africa, the decision-making processes are sure to have a far more generic, global reach.

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DO YOU MIND IF THE GOVERNMENT CONSTRUCTS A SEWERAGE FARM IN YOUR RURAL SUBDIVISION

(The saga of Mundoonan Rest Area and the replacement of existing septic system with new oxidation ponds).

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Abstract

This paper is an actual case study of a proposed acquisition of of approximately 5,100 m2 of rural land for construction of new sewerage system consisting of oxidation ponds and evaporation transpiration beds. The proposed acquisition is situated on a middle site of a fully statutory approved 6 lot rural subdivision with prevailing winds and effluent overflows raising concerns with the land owner.

The paper will demonstrate how compensation was assessed as the presenter is the property valuer engaged under contract by the Acquiring Authority.

Keywords: Land Acquisition (Just Terms Compensation) Act 1991, compensation for a sewerage farm over subdivisional land, dispossessed owners rights to compensation. airborne pathogens, sales of rural land affected by sewerage farms, marketability and loss of value of residue lands in subdivision.

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Planning vs. mapping in a legal context

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Abstract

Planning for environmental protection purposes attracts an increasing interests, e.g. as expressed in the EU Water Framework Directive. In Denmark, environmental planning aiming to protect water, biodiversity and landscape, has been an integral part of land-use planning and of the Danish planning system for several years. On the basis of Danish experiences this paper will focus on the legal aspects related to the distinction between mapping and planning, with regard to topics such as political enactment, public participation, legal principles, political management and control.

Mapping is seen as creating geographically bound data. The result of mapping is a set of facts, and does not need a political enactment to be valid or to create a valid basis for decisions. Planning is seen as a decision-making process in which the decision is a plan or planning provisions, and the decision is made by political enactment of the plan. The fundamental difference between mapping and planning is reflected in the two different purposes of public participation. One purpose is to have the public contribute information to ensure that the bases for public authorities' decisions are sufficient and complete. The other is to have the public actually participate in the decision-making process with political or normative viewpoints.

When it comes to environmental or administrative legal principles, some differences between mapping and planning may also be emphasised. Mapping is done through a process wherein the inquisitorial principle is the ruling principle. The public authority acts to ascertain the complete facts, in order to arrive at a solid basis for the plan or decision. In the planning process, other principles are in effect. Planning is executed in an adversarial sphere, wherein the interests and participants represent their arguments, and the precautionary principle is applicable, when the mapping has not provided sufficient information or data regarding possible effects on the environment. Applying the precautionary principle at the mapping stage anticipates the planning and decision-making.

Some basic differences in political and/or legislative control of the processes of mapping and planning might also be noted. Planning as a process is normally legally bound by a set of procedural rules – often with the purpose of controlling when and how the respective stakeholders are involved. Setting up such frameworks or models to ensure a correct process is one of the express purposes of the law, but it is characteristic of the planning process that also the balancing of interests can be regulated politically and legally, so that due weight is given to certain interests. The planning process as well as the outcome of the process can be politically controlled. Ideally, mapping as a process should be led only by the ambition to obtain the accurate data; not selected (convenient) data. For this reason, political and/or legal control of the mapping process might prove problematic. The use of models in the mapping process could raise similar legal objections.

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No. 160

Do we Need a "Tort of Takings"?

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Abstract

The recent refusal by the Supreme Court of Canada to grant leave to appeal in the matter of *Jean Coutu Group (PJC) Inc. v. Metcalfe & Mansfield Alternative Investments II Corp.* affirms that Canadian law limiting the state's power to expropriate is solely extra-constitutional. The absence of constitutional limitations upon the state's power to take is not, however, the end of the inquiry. Common law courts have long viewed fundamental rights as encompassing more than recognised justiciable rights under written constitutions. As such, while the common law accepted the state's power to acquire forcibly private property for a public purpose, that power could only be exercised on payment of compensation to the private property holder. Exceptionally, the state can and does immunize itself from this compensatory obligation by clear legislative language, or by necessary implication on the rare occasion when the very purpose of the statute was to strip with impunity the property holder of its rights.

The nature of such a compensatory rule – conditioned as it is upon words in a statute – is, however, unclear. Is it a rule of statutory construction, or is it a substantive rule of common law? The distinction is not merely one of characterization, but is in fact a lacuna in English and Canadian judicial construction of the common law of takings at its most fundamental level. If a taking is effected under the Crown's prerogative power in a non-statutory form, then the property owner would be entitled to compensation only if the rule were to be understood as substantive. More importantly, if the compensatory rule were *not* substantive, then its engagement would require channeling of the claim through a pre-existing cause of action, failing which a compensatory entitlement would entail recognition of an hitherto unrecognised underlying cause of action: a "tort of takings".

This may be a greater concern for English law than Canadian law. The weight of English authority tends to view the compensatory rule as one of statutory interpretation. While Canadian courts have not expressly considered the compensatory rule's nature, the balance appears – albeit just barely – to have tipped towards recognition of a substantive, common law right to compensation.

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Building faith: regulatory obstacles to religious institutional uses, and the case of the Zoroastrian Temple in Toronto

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Abstract

This paper chronicles the efforts of a religious group over a period of thirty years, to establish a temple and to adapt it to its changing needs. The paper highlights the political and regulatory obstacles to religious institutional uses, particularly in residential areas. The first part of the paper goes back to 1978, when the Zoroastrian Society of Ontario became interested in acquiring certain residential property of minor cultural and historical significance in Toronto for the purpose of using it as a place of worship and accessory uses. Prior to purchasing the property, the Society sought and obtained from the local planning authorities written confirmation that their intended use would be lawful under the applicable zoning and land use policies. However, soon after the Society signed an agreement for purchase and sale, the local ratepayer group petitioned council to amend the zoning to exclude from the area all but single-family uses. The extraordinary manner in which council proceeded to amend its land use regulations for the sole purpose of defeating the Zoroastrians' plans became the subject of the court's famous ruling in *H.G. Winton Ltd. v. North York*. The court quashed the amending bylaw, enunciating the doctrine of "bad faith" in the exercise of legislative powers.

H.G. Winton remains a landmark decision in Canadian planning law, although its rationale has not, arguably, been entirely satisfactorily explained. What were the real reasons behind the neighbours' opposition to the proposed temple? Did any of their concerns constitute a "planning" justification for municipal action, and if so, was the municipal legislation void for purely procedural failures, or was there something else at stake? *H.G. Winton* continues today to serve as particularly useful vehicle for examining the nature of the zoning power and its limits.

But new lessons continue to emerge from the story of the Zoroastrian temple. The second part of the paper fast forwards to 2002, when the Zoroastrian community decided to enlarge and refurbish the aging building, which has become a focal point for a small, but growing community. Plans for a new facility were developed in 2006, but an application for site plan approval, which is a prerequisite to a building permit, is only now before the City. The paper traces the Society's efforts to navigate the regulatory thicket, including a heritage property designation, as well as potential resistance from local residents, reminiscent of the original opposition to the temple, in order to realize its plans. The paper concludes by drawing some general observations about the unique legal issues associated with the siting and approval of religious institutions.

Eran Kaplinsky,
"Building Faith"

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No. 162

Sneaking *Lochner* Back In Through the Gravel Pit: Adjudicating Substantive Due Process in U.S. Planning and Zoning Law

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Abstract

The U.S. substantive due process doctrine requires that regulations affecting individual liberties and property rights be reasonable, raising the question: who ultimately decides whether a regulation is reasonable, and based on what criteria? During the early 20th century, an era now epitomized by the case *Lochner v. New York*, the U.S. Supreme Court used the substantive due process doctrine to aggressively strike down federal and state laws that did not comport with the socio-economic views of the Court's justices. Recognizing the hazards of overreaching, the Court abandoned this approach by the late 1930s (Nowak and Rotunda 1995). Since then, the federal courts generally defer to legislatures, upholding regulatory decisions unless they are clearly irrational.

Regarding real property specifically, the courts have similarly held that when the stated purpose for a given land use regulation is at the very least "fairly debatable," then the courts will defer to the legislature's assessment of the reasonableness of that regulation (*Euclid v. Ambler*). Michigan has followed the federal courts' lead and generally strikes down a local zoning regulation only when it is clearly arbitrary and capricious (Fisher et al. 2008). This is true, however, except for local regulations that prohibit the extraction of mineral resources. In a case currently before the Michigan Supreme Court (*Kyser v. Kasson Township*), the Michigan courts—applying an earlier supreme court decision—have held that a zoning regulation may prohibit the extraction of minerals (typically gravel) *only* when the mining operation would clearly yield unmitigable "very serious consequences." This rule effectively flips substantive due process on its head, creating the presumption that the regulation is unreasonable and compelling the locality to show otherwise; it sneaks *Lochner* back in through the gravel pit.

The application of the substantive due process doctrine in U.S. planning and zoning law raises a fundamental question: what role should a local master plan play in informing the reasonableness of a local regulation of private land use (typically through zoning) and, conversely, how should a court evaluate the locality's use of that plan when assessing whether the regulatory decision reached was indeed reasonable? Planning law scholars have long grappled with this question, focusing especially on the function of the plan and the requisite degree of consistency between the plan and the zoning code (e.g., Haar 1955; DiMento 1980; Sullivan 2006). The *Kyser* case speaks directly to this question because the Township did everything right and yet it lost in court: it studied local geology; identified a gravel mining district based on that study; adopted a zoning ordinance consistent with its plan; and then refused to rezone plaintiff's property to a gravel mining district consistent with its plan and zoning code. For this paper I will briefly review the substantive due process doctrine and the *Kyser* facts. Then I will discuss the adjudication of substantive due process in zoning cases using insights provided by the issues disputed in *Kyser*, focusing in particular on the proper role of the plan, the use of land suitability analysis in planning, and consistency between plan and regulation.

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No. 163

Public Access to Private Land: England's Countryside and Rights of Way Act, Sweden's Allemansrätt, and Cultural and Legal Impossibility in the U.S.

Heidi Gorovitz Robertson

Abstract

People have been campaigning for greater access to the English countryside for well over 100 years and the sentiment for increased access preceded the direct efforts likely for centuries. The Countryside and Rights of Way Act of 2000 (CROW Act) was enacted in direct response to this desire to increase recreational opportunities for the public similar to those that have long existed in Scotland.

The CROW Act allows non-owners of land, as of October 2005, to walk on certain areas of privately owned open country and registered common land, walking anywhere they would like on the land, and no longer limited to marked footpaths or rights of way. On private lands that are designated as 'access land' the public may now walk freely, subject to some local restrictions or exclusions. This new law raises issues in property, tort, and, should anything like it be enacted in the U.S., constitutional law. Most interesting from an American perspective, however, this law presents a new statutory limitation on the private landowner's property right to exclude. It limits private landowners' right to exclude, in favor of a positive right of the public to free access to designated private lands. In the U.S., and certainly in Britain, many landowners feel their rights are already severely limited by the positive rights of others, conferred either by statute or common law. This newest limitation on property rights is affecting large numbers of landowners in Britain. This paper begins by investigating from where the right derived in terms of the statutory development of access rights in England.

In working to understand the variety of international approaches to public access to private land, this paper investigates the possible connection between British conceptions of public access to private lands with those perhaps brought forth by the Viking colonists of Britain. The lands from which the Vikings arrived have an approach to public access that is far more liberal than any other I've found. In particular, Sweden's Allemansrätt, and related versions of the concept throughout Scandinavia, provide the public open, reasonable, and responsible access to private lands throughout the country. This concept has been part of the culture, if not the law, in Sweden for centuries.

This paper will describe the development of law in Britain regarding public access to countryside and commons land prior to the enactment of the Countryside and Rights of Way Act of 2000, and how the Act has changed those rights. It will consider the development of the law in Britain and how it compares to and perhaps derived from concepts brought forth by Scandinavian colonists. Finally, it will consider whether the English and Scandinavian concepts of public access to private land might be applied in the U.S. Fundamentally, it will pursue an understanding of the legal theory behind England's newest statutory limitation on the property right to exclude and whether it is either supportable or desirable in the U.S. To do so, it will explore not only the history and application of the English law, but also comparable policies and laws elsewhere, in particular in Scandinavia.

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COMPENSATION RIGHTS FOR DECLINE IN LAND VALUES DUE TO LAND USE PLANNING DECISIONS: The findings of cross-national comparative research

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Abstract

In every country where land-use regulations function, they often cause a reduction in the current or potential economic value of real property. Do landowners have a right to claim compensation from the planning authorities? (The contrary is of course true as well – the betterment capture issue). The law and practices on this issue different greatly among countries. I selected this topic for comparative research because it addresses an inherent "raw nerve" of planning law and practice. It has deep economic, social and ethical implications and should be of universal concern. Yet, this paper will report on the first large-scale systematic comparative research ever conducted 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. Thirteen countries were selected. Comparative analysis of such a scale required a method that would be able to span many legal systems and, many languages. I therefore organized a group of leading planning-law experts – one or more from each country. To enable systematic comparison, I prepared a framework of questions to serve as common benchmarks. This framework was first checked out in a pilot round, and then adjusted. The framework includes: History, emergence, rationale; constitutional law regarding property; statutory grounds for a compensation claim; types of compensable injurious decisions; distinction between full takings and partial takings; between direct and indirect impacts; extent of compensation (if due); length of time and procedures; social consideration; incidence and distribution; possible impact on planning practice and on public and environmental goals; likely economic and fiscal impacts.

The findings show a surprising high degree of variation among countries – including those with common legal traditions. The 13 countries are grouped into three clusters of countries: with minimal compensation right, with moderate or ambiguous, and with broad compensation rights. There is greater similarity – though not full – where "categorical takings" are concerned (where all economic value is extinguished). The most dramatic differences are regarding "partial takings". The differences are many, and require fine-grained analysis. The comparative analysis points out the opportunities for cross-national learning regarding this fundamental issue.

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No. 165

The Power of Planning Theories on Law

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Abstract

Relationships between planning law and planning theories reveal an intersection of two different realms of power: on one hand, the legal system, on the other hand, the discourse of planning. Michelle Foucault's ideas inspired an examination of the reflection of planning theories in law and regulations. The main issue is, whether the two systems of power, both creating exclusion: the legal system – by universal and obvious prohibition, and the planning discourse - by latent division and rejection, can be negotiated. In this presentation, I will review two notions of Foucault, by comparing the attributes of law and regulations to those of some planning theories: Rational Planning, Strategic Planning, Communicative Planning, Collaborating Planning, Deliberative Planning and Phronetic Planning.

Foucault's idea about the immanence of power at every kind of activity presents a multi-sourced, productive and latent power. It opposes the bipolar (ruler/subject) power relationships that reside at the base of law and regulations: the overt sovereign detains power; subjects are to obey law and regulations. Progressive planning theories, on the other hand, support participatory planning, (also) as a mechanism of dispersing power, more similar to Foucault's vision of various sources of power.

Foucault described an ever-changing schema of power-relations, and offered to investigate it, instead of dealing with "empowering the powerless", as participatory theories do. Phronetic planning and, to some extend, strategic planning, relate to dynamic power and to ways of incorporating it into the planning process. Participatory planning theories relate to this concept at the micro-local scale, as for by communicative, collaborative and deliberative processes – participants are expected to change positions. The concept of dynamic power relations is definitely opposed to the stability of the sovereign power of law and regulations, where only the ruler holds the constant power.

Given a mutual ground to planning discourse and to law and regulations, the question is, what are the power relations between them, and how do they ever-change by some total strategy that, looking back, seems to be intended.

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Definition of "public purpose" in Polish land use law

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Abstract

The main aim of this paper is to analyze legal definition of "public purpose" in Polish legal system and discuss influences of this definition on land use system.

The paper begins with a presentation how an interpretation of public purpose has changed in Poland over last twenty years. During communist regime 1945-1989 every activity of authority was included in the scope of public use, so after a decline of communism Poland rejected a descriptive definition of public purpose. The main idea of such approach was a limitation of very broad interpretation of public purpose.

As a result of such reform, currently an action that purports to benefit the society as a whole is not automatically treated as public purpose. This term is understood in very formalistic way. The paper criticizes inflexible and casuistic catalog of public purpose activities which is contained in article 6 of Land Administration Act 1997. Such approach to public purpose eliminates from a scope the term: public parks, social and affordable housing and windmill electricity.

The paper suggests that legal definition of public purpose should to refer to a general idea of public use. Further the paper indicates that this definition is still out of date and rooted in communist approach to land use; also very often is limited by courts only to activity of state and municipalities. The paper highlights key problems concern public purpose doctrine as "private public purpose" and use of public purpose for private projects, especial infrastructure projects.

In the next part influences of this regulation on land use system is discussed in the context of ad hoc planning decision for public purpose projects and benefits derives from designation of land for public purpose in land use plan.

Finally the paper deals with application of public purpose tools for redevelopment and economic development and compares Polish regulation and practice with other countries experiences (U.S., U.K. and Slovakia).

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No. 167

ARRANGING THE PRIVATE PROVISION OF PUBLIC SPACES BY USING PROPERTY RIGHTS

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Abstract
Public spaces are accessible to all. For that reason, they are usually provided by a public authority. However, they can also add value to surrounding property. For that reason, it is in the interest of owners and users of that property that the public spaces are of good quality. Those private owners might therefore be interested in providing and maintaining the spaces at their own expense. For those spaces to be public, the interests of the public would need to be safeguarded. This paper investigates how public spaces could be provided by private parties in such a way that the interests of all parties were met. It starts by listing the tasks that need to be carried out - provision, control, maintenance, possible redevelopment – irrespective of who does that. Then it looks at the interested parties and what their particular interests in public spaces are. It then investigates whether those interests could be met by particular arrangements of rights in landed property. Finally, it looks at what a public authority would have to do to make those arrangements legally possible.

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No. 168

Compensation to neighbours for nuisances – the case of the Danish Permanent Energy Act

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Abstract

The paper concerns the proposed legislation on permanent energy in Denmark. As part of the legislation owners of property will be entitled to compensation, if the presence of new windmills reduces the property value by more than one percent. This sort of rule is unprecedented in Danish law relating the right to compensation for nuisances inflicted by neighbours. The existing rules giving right to compensation for nuisances inflicted by neighbours are based on case-law. Generally speaking compensation is only granted when the nuisances exceed what must be tolerated (the limit of tolerance). What sort of and degree of nuisances must be tolerated depends on the character of the area. The Danish Supreme Court has in recent cases stated that the limit of what must be tolerated depends on what can reasonably be expected as part of the general development of society. As can be seen the rules are very different: The existing rules are vague and of a somewhat discretionary character. The new rules are a lot more objective, at least on the face of it. Generally legal experts have been critical of these new rules – amongst other things of the fact that we now will have a special set of rules relating to nuisances from windmills. The paper, however, will more openly discuss the pros and cons of the new type of rules compared to the existing law: Does the new type of rules give greater protection of property rights? In what ways is the protection greater? Is the protection lesser in some cases? How is the position of the landowner creating the nuisance different? The protection isn't just a matter of whether there is a right to compensation, but also depends on how access to justice compares, who decides whether compensation should be given, and on how foreseeable the legal position is – from the point of view of either party.

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No. 169

Municipalities Law and changes of their borders in Turkey

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Abstract

In Turkey, municipalities ranges are determined by population. There are some changes with the new regulations about municipalities. These changes are reflected to spatial dimensions also. Some of the municipalities are omitted because of their low population. Some of them adding to the first step municipalities. In the Law of 5747 number that related with the Main City Municipalities adding the smaller ones has been discussed positive and negative aspects in the process of decision of Supreme Court until November 2008. It was ended now. With the decision of these changes there will be some problems as planning of land, ownership of settlements, historical settlements identity problems in Turkey's municipalities. Therefore, in this paper it will be discussed the law and its possible effects on land. This law before objections of the Supreme Court, 863 municipalities was closed because of their population was under 2000. Discussion about the issue will be taken to planning of land, immovable heritage areas, effects on ownership of public and private, economical and social effects of the investments perspectives. With the law of the municipalities cities borders are changing also. Services or investments will also be discussed related with the areas like these. Besides organizational responsibilities, urban rant problems will be created also. Paper will bring some suggestions to the problems and will conclude with probabilities of application of them in Turkey.

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The adaptive efficiency of planning systems: an international comparison

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Abstract

At a time of continuous changes, there is a need for constant adaptations and innovations. Spatial planning systems, like many other systems, also have to be adapted continuously to a world of increasing variations and recurrent changes of various types. In this paper we address this issue of the adaptability of planning systems. We analyse the adaptive efficiency of the planning systems in Belgium, Poland and the Netherlands. Aiming to explain the differences between the three countries we focus on differences in the land-use regimes of those countries. We consider the land-use regime as the interaction between the property rights regime, the land-regulation regime and the co-operative regime: the co-ordinating mechanism regarding the use of land.

The concept of adaptive efficiency has been introduced by North (1990). He defines it, from an economic perspective, as 'the kinds of rules that shape the way an economy evolves through time', as well as, 'the willingness of a society to acquire knowledge and learning, to induce innovation, to undertake risk and creative activity of all sorts, as well as to resolve problems and bottlenecks of the society through time' (North, 1990: p. 80). From a planning perspective, the adaptive efficiency concept can be linked to (1) the capacity of the planning system to offer resistance to external pressures that may bring the related land-use regime towards a less desired state, (2) the capacity of the planning system to take advantage from external pressures that may bring the related land-use regime into a more desired state, and (3) the capacity of the planning system to develop new initiatives to bring the related land-use regime towards a more desired state (or to avoid lock-in). We distinguish the adaptive efficiency concept from theories of institutional change (Buitelaar et al. (2007). The first concept evaluates whether 'the society' is better off with the changes in the planning system, while institutional change theories explain why changes took place.

To demonstrate the impact of the land-use regime on the adaptive efficiency of the planning systems we have carried out three case studies in, respectively, Belgium, Poland and the Netherlands, of (national) policies to control urban sprawl. In the case studies we pay attention to both residential and industrial land development. The case studies also pay attention to the external effects that may be caused by policies to control urban sprawl and the ability of the planning system to respond to them efficiently.

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Jean-Marie Halleux, Szymon Marcinzak and Erwin van der Krabben
The adaptive efficiency of planning systems: an international comparison

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Participation in practice

Dafna Carmon & Rachelle Alterman
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Abstract

In Israel, as in many other countries, the right to participate in statutory planning is manifested in planning law[1] by the objections procedure. This procedure allows objectors to be heard by planning committees, and the committees are legally bound to hear their objections.

In recent years, we have seen two contradictory trends in Israel. On the one hand, lawmakers have tried repeatedly to limit the scope of objections. Amendment 23 to the Planning and Building Law 1965, enacted in the mid-eighties, added the requirement that objectors submit an affidavit supporting the factual basis of the objection. Amendment 43, enacted in 1995 states that planning committees may impose a fine on objectors whose objection is deemed not to be in good faith. On the other hand, the courts have moved toward broadening the right to object by broadening the range of people who are entitled to object and the range of issues that constitute the basis for objection.

These contradictory trends raise many questions about how the right to object is interpreted and implemented in practice by the planning committees.

In this paper we present findings of two studies we conducted in Israel: an interview survey and an in-depth survey of objections in planning cases. The interview survey was carried out between December 2005 and July 2006. The subjects were the relevant officials in the local authorities and consisted mostly of planners, legal advisers, and elected officials.

The objections survey was conducted in the Central District Planning Commission between 1998 and 2000. We sampled some 20 plans in each year and all the objections to those plans. The sample constitutes about 25 percent of all the plans presented to the planning commission in each of the years, but not all the plans aroused objections. In all, we examined 65 plans, to which there were 171 objections involving 840 objectors.

The findings were surprising. Not only did we find that actual practice in Israel broadens the law and interprets it in favor of the residents, we even saw cases in which practice "rebels against" changes that the law seeks to introduce in order to limit the right to object. Moreover, we found cases in which practice is the "innovator"and the court rulings follow in its footsteps.

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Property Rights and Global Climate Change

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Abstract

Global climate change will impact the use and enjoyment of land. There has been considerable research on the likely physical and social impacts, but, there has been little effort to examine the impact that these changes will have on the law of property entitlements. Historically, property law- in civil, common and mixed systems - has been assumed to a set of abstract, universal principles that can be adapted to changes in the ways in which societies use land. The primary functions of the law have been to promote title security and alienability. Both functions are severed by laws that recognize exclusive entitlements which decrease the risk that other private parties or the state can disturb an owner's title. In contrast, global climate changes introduces new risks to property holders such as boundary shifts between private and public ownership, the steep loss of value from "Acts of God" rather than state regulation and new pressures for state regulation to adapt to climate change.

The paper will examine two issues. First, it will discuss existing examples of property rights which have a built expectation of change such as water boundaries to speculate about the lessons they teach for incorporating the risks of climate change into the law of property." Second, it will explore how global climate change may introduce the concept of moral hazard into the duty of state to compensate victims of excessive regulation. The law often encourages property owners to develop in the face of known natural hazards because they know that the either the state cannot force them to avoid the hazard or that they will be compensated I the hazard occurs and destroys their property.. Global climate change may provide a new and more legitimate and powerful justification for regulations which compel landowners to avoid activities that put their property at risk.

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A better deal

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Abstract
Rules of thumb for the negotiation and drafting of development agreements in urban development projects

In Western economies, planing authorities cannot realise urban development projects without participation of market parties. Therefore, these projects involve forms of public private partnerships and require cooperation between public and private parties. This requires parties to close agreements that contain the specific conditions under which they are willing to cooperate for the realisation of an urban development project. We labeled these agreements 'development agreement'. The paper draws on urban development projects that were studied between 2004 and 2008 in Amsterdam (Zuidas), London (King's Cross) and New York City (Battery Park City and Hudson Yards). As the projects evolve over time, conractual agreements have to promote values as trust, flexibility and oooperation.
The paper wil provide some general principles (rules of thumb) for the drafting and negotiation of development agreements for these projects. These principles do not claim to provide a full picture of all specificities of the project but they do claim to provide a general approach, applicable for urban development projects that is of use for both planners, negotiators, and lawyers.

Keywords: contracts, relational contracts, international comparison, urban development

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Comparative lessons on Compensation in spatial planning

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Abstract

The American instrument of Transferable Development Rights has received a lot of attention in many countries as market oriented planning instrument. It has been used as an inspiration for the tailor-made translation of instruments in other planning systems, resulting in ideas of transferring development opportunities between areas much broader than only the transfer of development rights. It relates more to compensation: not in money, but in a non-financial perspective. Non-financial compensation is about governments compensating landowners non-monetarily for opportunity losses or or loss of endeavors. It can also be used as incentive structure to realize planning goals via the market.

The paper draws on the forthcoming book of the same editors (Compensation in planning, IOS 2008) that offers an elaboration of the concept of non-financiale compensation together with a systematic comparison of the use of several non-financial compensation instruments in planning by bringing together different international experiences, The book provides a background and overview of innovative instruments of non-financial compensation. In the paper we will draw some general lessons for scientists and planners based on comparisons of various approaches to compensation.

Keywords: TDR, compensation, spatial planning

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Rural Land Development in China and Rethink of the Existing Urban-Rural Planning System

Lin YAN, Li YU

Abstract

"Rural development", normally refers to variety of economic, social and political process, which could be observed from vantage point of land development. However, the situation could be exceptive when land development right was controlled by government. The rural land development in China is such a typical example for this.

The land ownership in Chinese can be divided into two main categories of the State Ownership in urban area and Collective ownership in rural area separately, enjoying three rights, ie., the right of using, the right of transferring, and the right of gaining benefit since 1978. Within this relationship, the state is the biggest shareholder who wins the most advantages over others benefiting not only in buying cheap agricultural production, but also in dealing with rural land-use type which indirectly affected the three rights. This could be proved by the slow rural development and the polarisation between urban and rural areas, and is reflected in the updated urban and rural planning system that was under its execution when the latest City and Countryside Planning Act coming into effect since January 1st 2008. It is the first in China to involved rural areas into the national planning system. According to the Act, rural planning should address rural development issues according to the standardised model of urban land-use planning, such as appraising and indexing rural land and controlling land development projects. This kind of operation, however, is argued as a redefinition of the national priority of rural land through legislation, which makes the new urban and rural planning system a most controversial issue in China now.

By introducing rural land-use mode in China, and especially focusing on some distinct changes in rural land development in recent years through case studies, this paper is trying to explore some new trends of rural development in China. By analyzing some aspects of the new urban and rural planning system, as well as the implementation effects of rural planning experiments, the authors raise a question whether the "standardization" of rural planning could meet the requirement of rural development in China. The authors suggest that its is necessary to rethink the relationship between rural planning and rural land development, and the role of local government in the existing urban-and-rural planning system.

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Beauty or Identity-Stability Rationales for Debating Historic Preservation Policy: An Analysis of Israeli Jurisprudence

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Abstract

In his paramount essay on "Law & Aesthetics", professor John J. Costonis delved into the rationales that function as foundations for the aesthetic-regulation debate. Costonis alleges that the trend is to justify aesthetic policy in a simplistic, naïve and subjective manner. He continues to claim that policy makers as well as the judiciary, tends to rely on "Beauty" whilst justifying an aesthetic course of action. Costonis criticizes this as an abuse of the aesthetic idea, and dismisses the idea of "Beauty". He suggests that courts should de-emphasize subjective trends in justifying aesthetic policy. Instead, he portrays an opportunity for the judiciary to base its decisions on rationales which are legally defensible. Costonis acknowledges that aesthetics is a social construct. Accordingly, instead of being hypnotized by the futile idea of "Beauty", he advises the judiciary to rely on Social Stability and Social Identity as key considerations in justifying design and aesthetic-based policies, including the policy of historic preservation.

Costonis' aim is to better the aesthetic debate in the US, allowing policy makers and courts, as reviewers of policy, to avoid defective trends that transform aesthetics into an ideology of power. Nevertheless, Costonis' recommendations are transferrable to many countries which face the constraints of historic preservation, and therefore, face the need to justify current practice whilst preventing arbitrariness as well as constitutional harms.

This essay draws upon Costonis' recommendations as guidelines for reinforcing the practice & adjudication of historic preservation. It looks at contemporary legal reasoning in Israeli jurisprudence and explores whether courts have fallen into the naïve and somewhat appealing idea of "Beauty" as a rationale for justifying historic preservation. We attempt to find traces of the (futile and vague) "Beauty" criteria in local case-law, from which Costonis forewarns. Further, we seek alternative, clearer and more intelligible rationales for historic preservation measures, such as the ones prescribed by Costonis- namely, achieving community stability and protecting its identity.

Our analysis also explores the assumption that Israeli courts have avoided "tough questions", distancing themselves from a thorough attempt to justify the practice of local historic preservation. We also hypothesize that if an attempt *is* made by courts to reinforce current preservation policy (by referral to its societal aims or justifications) it is executed in a manner which dramatically favors regulators and other policy makers, but fails to confront administrative and constitutional hurdles.

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No. 177

Land use planning and the provision of affordable housing in the Netherlands: an underdeveloped relationship

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Abstract
In many countries, there are ways in which the provision of affordable housing can be secured through the planning system. In America this is called 'inclusionary housing'. In the Netherlands, such a device has been absent until the 1st of July 2008, when a new Planning Act was implemented. The aim of this paper is to trace why it took so long to include the option to designate land for affordable housing into planning law and why the change occurred. It is argued that continuity was caused by reliance on and success of the public land development model. The change was provoked by changes on the land market and changes in the social housing sector that challenged the public development model and created a window of opportunity.

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No. 178

Challenged democratic legitimacy in informal ad-hoc regional associations in the Netherlands: a possible way forward

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Abstract

Spatial problems increasingly transcend administrative boundaries. Answers to these new spatial dynamics have to be found in city-regional arenas and urban networks, where a multitude of different interests and conflicts are involved. The urban regions, which are often politically-administratively undefined, are becoming the relevant playing fields in which policy decision-making and implementation of spatial developments occur. Within these networks the more traditional ways of problem-solving often result in dead-end streets due to conflicting interests. To overcome these administrative dead-locks, several informal public organizations have been evolved in the Netherlands over the last decades. These alternative, ad-hoc policy arrangements co-exist next to formal units. Though to some extent the regional spatial decision-making seems to improve policymaking, organizing democratic legitimacy on these rather vague (administrative) levels seems challenging. Research revealed that there is uncertainty about the democratic quality of the decision-making and these doubts relating to new regional arrangements endanger their legitimacy.

In this paper we will elaborate to what extent these informal regional associations struggle with issues concerning democratic legitimacy. Based on interviews, we will analyze the way a regional cooperation (BPZ) within the province of South-Holland and the Amsterdam Metropolitan Area deal with these issues of - crippled - democratic legitimacy. Based on the experiences brought forward in the cases, the paper will propose a possible way forward to improve democratic legitimacy with and within informal policy decision-making bodies. This way to advance democratic legitimacy builds upon Ulrich Beck's notion of 'subpolitics' which stresses the significance of sources of power outside and beyond existing representative institutions. The proposed model deals with thinking about democratic legitimacy along the lines of the 'house of democratic legitimacy'. This model starts with the notion of 'institutional legitimacy' which is about acting according to one's essence - noblesse oblige. It emphasizes the confidence in the rulers by the ruled - whereupon the other elements of the model (input-legitimacy, legitimacy through legality and output-legitimacy) will be balanced faster and in a more natural way.

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Old wine in new bottles? An introduction to the new Norwegian planning and building act.

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Abstract

The new Norwegian Planning and Building Act is the culmination of a rather long and time-consuming preparatory process. Two different government departments were involved, and a large number of stakeholders participated and contributed to the making of the legislation.

The necessity of modernizing the existing legislation is given as one of the main reasons for the adoption of the new act. The primary objective of the new Act is to provide a legislative framework, aiming, at increasing the efficiency and simplification of the existing planning system.

There is an increasing concern, shared by many local authorities, regarding the new regulations. Whether those concerns are real or not is too early to assert. However, there is little doubt that the new Planning Act may contribute to a centralization of power by reducing the influence of the local councils. This could result in a situation in which the municipalities will have a less clear role regarding planning matters.

The paper will present the new legislation by providing an outline of the structure and contents of the new Planning Act.

Since the implementation of the new Planning Act is very much dependent on the capacity of the municipalities to implement it, the paper will analyse the impact the effects a derogation of the powers of the city councils will have.

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The collisions between various planning regulations in Poland in the view of a new Planning Act proposal.

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Abstract
In recent decades planning legislation in Poland has been undergoing substantial changes as an effect of socio-economical transition of the "90"s. as well as the accession to the European Union in 2004. Unfortunately Polish planning system cannot be described as coherent and stable and it has been widely contested by almost all parties involved in planning process: planners, administration authorities of all levels, investors and property owners. It is characterized by inconsistency of legal regulations and yields large number of conflicts among various instruments in planning policy. The Planning Act itself is lacking efficiency in response to rapidly changing economy and is being constantly "patched" with the specific additional Acts in order to enable some necessary investments (e.g. so called "Highway Act" and others). It is also lagging behind some sectoral regulation that follow faster the certain UE directives, mostly environmental ones.
The aim of this paper is to discuss the problems emerging in planning process in Poland as a result of colliding legal regulations or gaps in the system. The majority of such conflicts is related to the inconsistency of The Planning Act with other important Acts that strongly influence the planning process as for example: The Environment Protection Law, The Geological Law, Road Law, Water Law and many other. One main group of conflicts resulting from legal regulations inconsistency can be called the "conflicts of definition" and is related to the different meaning or interpretations of the same issue in different Acts. The second group is related to the "conflicts of competence" where the roles and rights of different actors and levels in planning process have been not clearly defined and sometimes overlap.
At the moment in Poland we experience the ongoing debate on new Planning Act. Curiously it started almost immediately after the Planning Act went into force in 2003. Since than, the successive Polish governments were announcing radical improvement of Planning Law. At least 4 different versions of the Act were publicly debated, however none of them found the way to be finally enforced. The paper will also discuss if the emerging new planning regulations proposals aim at smoothing some conflicts in planning practice or, in the contrary, might cause some additional ones.

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No. 181

The tragedy of the Nature Commons in Denmark

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Abstract

The tragedy of the commons as Hardin told the tale back in 1968 fits in many senses well with what actually has happened in Denmark. Through the last two centuries the "natural capital" – what we today prefers to call *biodiversity* - has been eroded. A steady decline in habitats and number of species has been the order of the day.

Hardins perspective though seems rather narrow as he talks of private property as the answer to this tragedy. But history tells another tale. It seems like private property is the very cause behind the erosion or overuse of the common in the first place and that the common as it lay open for our eyes today is sustained and created by the public policies, regulations and plans without which a common would not have been able to survive on its own.

The debate on the nature common has been going on throughout the last century reaching back to the late 1800s. As a general rules apply, that first when it has been documented that biodiversity is on the decline we have started to protect the remaining parts. This was done by regulations and planning that protected the bits and pieces that were left. As the decline became obvious the regulations have been tightened and concomitant with a growing concern for nature this has fostered new policies that today form the basis for sustaining the remaining nature in Denmark.

The establishing of the nature commons in Denmark is in this paper seen as a constructed part of reality, kept in existence by the very laws and regulations that aims at protecting it. To look at the common thus entail that we look closer into the web of rules and customs that creates and sustain it. This definitely invites an analysis based on institutional theory. So based on Elinor Ostroms ideas and concepts, a conceptual framework will be established that can explain some of these developments and constrains found in the history of the Danish nature commons. In this paper we thus aim at describing the process where a common is constructed by giving an historical account of this developments from 1805 to 2005.

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