

PLPR



INTERNATIONAL ACADEMIC ASSOCIATION on PLANNING, LAW, AND PROPERTY RIGHTS

# Planning, Law, and Property Rights

## Fifth International Conference

May 25–28, 2011

Faculty of Law, University of Alberta  
Edmonton, Canada

The conference is organized with the support of the Social Sciences and Humanities Research Council, the Alberta Rural Development Network, and the Faculty of Law, University of Alberta.



**UNIVERSITY OF ALBERTA**  
**FACULTY OF LAW**



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**Alberta  
Rural  
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# Program

## Wed., May 25 Pre-conference

- 5:00 pm – 6:30 pm Walking tour of downtown Edmonton (led by City of Edmonton Planning & Development)
- 6:30 pm Informal dinner for tour participants (dinner is not a conference event and is not included in the registration)

## Thurs., May 26

- 8:45 am – 10:45 am Registration (Law Centre, 2nd floor) and Breakfast (room 129)
- 11:00 am – 11:30 am Introduction and welcome (room 231/237)  
Local hosts Eran Kaplinsky and Russ Brown; PLPR president, Leonie Janssen-Jansen  
Dr. Carl Amrhein, Provost and Vice-President (Academic), University of Alberta
- 11:30 am – 12:30 pm Mr. Morris Seiferling, Stewardship Commissioner of the Alberta Land Use Secretariat: “Alberta's Land Use Framework” (room 231/237)
- 12:30 pm – 1:30 pm LUNCH (room 129)
- 1:30 pm – 3:00 pm Concurrent sessions
- 1A: Stories of Planning, Law, and Property Rights, moderator: G. Lloyd (room 193)**
- Garrett Power, “City Planning through Land Tenure: Baltimore Maryland’s Ground Rent System”
  - Doug Harris, “A Railway, a City, and the Doctrine of Constructive Taking: Private Property and Public Regulation in Canada”
  - Kenneth A. Stahl, “Ambiguities of Neighborhood Empowerment”
  - Mark Oranje & Elsona van Huyssteen, “Perceptions of the ‘transformatory power’ of Planning Law: An exploratory study of politicians and planners’ views in South Africa”
- 1B: Governance, moderator: W.K. Korthals Altes (room 197)**
- Mike Cuddy & Chris Webber, “Land and Supplemental Governance”
  - Andreas Hengstermann & Thomas Hartmann, “Territorial Cohesion and Flood Protection: Opportunities and limits of a Strategic Alliance”
  - Ásdís Hlökk Theodórsdóttir, “National spatial planning in Iceland – a new beginning?”

- Thorsten Heitkamp, “Spectacle of Irrationality: Housing Boom and Bust in Spain
- 3:00 pm – 3:30 pm COFFEE BREAK (room 129)
- 3:30 pm – 5:00 pm Concurrent sessions
- 2A: Land Markets and (Re)development, moderator: E. Kaplinsky (room 193)**
- Perry Shapiro, “Land Assembly for Redevelopment: A Solution to the Anti-Commons Problem”
  - Leah Brooks, “Sclerosis of the City: Clearly Defined Property Rights and Inefficient Outcomes”
  - Alexander Woestenburg, Erwin van der Krabben & Tejo Spit, “The Cost of Land Acquisition on inner city redevelopment areas”
  - Erwin van der Krabben, “Urban redevelopment projects: American and Dutch experiences”
  - Bart Pasmans, “The development of industrial land in the Netherlands: from public good to private good provision”
- 2B: Commercial Property, moderator: D. Peel (room 197)**
- Bruce Ziff, “Scorched Earth: An Empirical Study of the Use of Restrictive Covenants to Stifle Competition”
  - Leonie B. Janssen-Jansen, “Innovative ways of use of law and property rights to solve the Amsterdam Tragedy of the Offices”
  - Elke Schlack, “From Commercial Space to Commercial Set Design: Opportunities and Constraints Arising from the Private Production of Public Spaces in Santiago, Chile”
  - Jasper Beekmans, Erwin van der Krabben & Karel Martens, “An indicator for decline of industrial estates”
- 5:00 pm – 5:45 pm **Special events:**
- Rachelle Alterman, "Takings International: A Cross-National Perspective on Compensation Rights for Land Use Regulation" (room 193)
  - Phd Students' Roundtable (chair: Michelle Oren)
- 7:00 pm – 10:00 pm **WELCOME RECEPTION, FACULTY CLUB** (Meet at 6:45 p.m. outside of Law Centre if you would like to walk over together)



## Friday, May 27

8:30 am – 9:00 am

COFFEE & TEA (room 129)

9:00 am – 10:15 am

Concurrent sessions

### **3A: Planning and the Environment, moderator: R. Norton (room 193)**

- Edward J. Sullivan and Alexia Solomou, “Preserving Forest Lands for Forest Uses: Oregon Land Use Policies for Forest Lands”
- Julie Rudner, Kath Fraser & Rebecca Leshinsky, “Backdoor Methods: Mechanisms to Ensure Compliance with State Biodiversity Management Policy”
- Thomas Jacobson, “New Demands on Environmental and Planning Law and the Relationship to Property Rights”

### **3B: Perspectives on Sprawl and Smart growth, moderator: Hoi Kong (room 197)**

- Michael Lewyn, “Suburban Sprawl in Canada”
- Judd Schechtman, “Defying Density: Measuring and Indexing Zoning Barriers to Smart Growth and Transit Oriented Development in New York State”
- Ed Morgan, “The Sword in the Zone: Fantasies of Land Use Planning Law”

### **3C, Takings and the Public Interest, moderator: D. Harris (room 201)**

- Kirk Harris, “Understanding Municipal Authority and Planning Practice: The Public Good and the Exercise of the Eminent Domain Authority”
- Alan D. Cander, “Ambiguities in the Language of Blight Designation: Contesting Property Relations Under New Jersey’s Local Redevelopment and Housing Law in Newark’s Mulberry Street Redevelopment”
- Claudio Monteiro, “Compulsory sale of property for planning purposes: An alternative to eminent domain for urban renewal in Portugal”

10:15 am – 10:30 am

COFFEE BREAK (room 129)

10:30 am – 12:00 pm

Concurrent sessions

### **4A: Theorizing Law & Planning, moderator: J. Sheehan (room 193)**

- Grant Gleeson, “Participation in Planning: Will the Gate-keeper cede power?”

- R. Beunen, K.A.M. van Assche & M. Duineveld, “Contested delineations: planning, law and natural resource governance”
- Barrie Needham & Thomas Hartmann, “Planning by law and property rights: the need for a better theory”
- Ravit Hananel, “Planning Discourse vs. Land Discourse: The 2009–2010 Reforms in Land-use Planning Policy and Land Policy in Israel”
- Mark Oranje & Elsona van Huyssteen, “A life-cycle analysis of the role and place of Planning Law in being and becoming a planner”

**4B: Structuring Property Rights, moderator: L. Janssen-Jansen (room 197)**

- Jana Bovet, “Design options for tradable development permits
- Greg Lloyd & Deborah Peel, “Enterprise Zones in Northern Ireland: The territorial reconfiguration of property rights?”
- Marian Weber, “A Transfer of Development Credit Program for the Beaver Hills Initiative Area, Alberta”
- Tim Mallett & Eran Kaplinsky, “Business Improvement Districts, Canadian Style”

**4C: Takings and Property Rights, moderator: R. Brown (room 201)**

- Micha Drori & Rachelle Alterman, “The Property-Rights Pendulum in the Rural Sector A Cross-national perspective of Israel’s rural land policies in comparison with other OECD Countries”
- Lynda Oswald, “Delineating the Boundaries of Judicial Deference in Eminent Domain Cases”
- Ellen Bassett, “Understanding the Impacts of Measures 37 and 49 on Planning Practice in Oregon”
- Nira Orni & Rachelle Alterman, “Were the promises fulfilled? On the new developments in expropriation law in Israel”

12:30 pm – 1:30 pm

**Luncheon Keynote Presentation, William A. Fischel, “Reflections on the Economics of Zoning”** (room 231/237) Lunch will be available in room 129 starting at noon.

1:30 pm – 2:30 pm

Concurrent sessions

**5A: Land Policy, moderator: E. van der Krabben (room 193)**

- F.M. van Straalen, L.B. Janssen-Jansen & A. van den Brink, “Planning for metropolitan landscapes: an assessment of Dutch regional land policy and development strategies”

- Hans-Jörg Domhardt, “The ‘Regional Land Use Plan’: a solution for challenges in metropolitan regions? The example of the metropolitan region of Frankfurt/Rhine-Main”

**5B: Dispute Resolution, moderator: M. Lewans (room 197)**

- Dafna Carmon, “Are Rights of Appeal to Planning Decisions being limited?”
- Deborah Peel & Greg Lloyd, “Planning in a Rights-based Society: See you in Court!”

**5C: Development Agreements, moderator: R. Malloy (room 201)**

- Fred Hobma, “Public-Private Partnerships in Urban Development; some Constitutional and Administrative Law Comments”
- Rebecca Leshinsky, “Use of private planning agreements to support sustainability and climate change values – a case study from Victoria, Australia”
- Willem K. Korthals Altes, “Public Procurement Provisions: a Procustean Bed for Planning?”

2:30 pm – 2:45 pm

COFFEE BREAK (room 129)

2:45 pm – 4:00 pm

Concurrent sessions

**6A: And Justice for All (I) moderator: C. Bell(room 193)**

- Michelle Oren & Rachelle Alterman, “Right to housing in the constitutional context: how relevant to factual housing policy?”
- Eric C. Chaffee, “Land Use Planning and Indigenous Rights: A Critical Analysis of the Alaska Native Claims Settlement Act”
- Robin Paul Malloy, “Sustainable Communities Should Be Inclusive Communities”

**6B: Instruments and Institutions in Land Use Regulation, moderator J. Grundberg (room 197)**

- Hoi Kong, “Instrument Choice in Land Use Regulation”
- Jean-David Gerber, “Integrating land trusts in the land use planning process”
- Don Elliot, “A better way to zone”

7:00 pm – 10:00 pm

**CONFERENCE BANQUET, FORT EDMONTON PARK** (tickets required; buses will depart from the University in front of Law Centre at 5:45pm)

## **Saturday, May 28**

8:30 am – 9:00 am

COFFEE & TEA (room 129)

9:00 am – 10:15 am

Concurrent sessions

### **7A: And Justice for All (II) moderator: R. Leshinsky (room 193)**

- Burak Gemalmaz, “Reconciling the Right of Property and Planning in the Light of the European Convention on Human Rights”
- Bela August Walker, “Zoning In: State Power & the Siting of Drug Rehabilitation Clinics”

### **7B: Innovation in Land Use Regulation, moderator E. Morgan (room 197)**

- Gabi Troeger-Weiß and Swantje Grotheer, “Classic and New Instruments of Spatial Planning and Regional Development in Germany”
- Nelson Medeiros, “A new land use bylaw for the City of Calgary, Alberta”
- Edwin Buitelaar, “The regulation of housing: measuring the stringency of land-use regulation for econometric models of the housing market”

10:15 am – 10:30 am

COFFEE BREAK (room 129)

10:30 am – 11:45 am

Concurrent sessions

### **8A: Land use and the Environment, moderator: E. Bassett (room 193)**

- Andrew Kelly, “Big Houses and Small Gardens: Conflicting Issues at the Australian Urban Periphery”
- Michael Begg, “Planning Around Law: British Columbia’s Land and Resource Management Plans”
- Shari Clare, “Where is the avoidance in the implementation of wetland law and policy?”

### **8B: Water, Water Everywhere, moderator B. Ziff (room 197)**

- John Sheehan & Lynne Armitage, “Rising Sea Levels: an evaluation of the projected impact on real property rights”

- Thomas Hartmann & Tejo Spit, “Managing riverside property: the struggle between water managers and spatial planners”
- Richard Norton, “Public Trust Interests, Private Property Rights, and Michigan’s Great Lakes Shorelines: The Law of Accretion, Erosion, Reliction, and Avulsion on a Great Lakes Shore”

12:15 pm – 2:15 pm

Plenary Presentations (Luncheon) (room 231/237) Lunch will be available in room 129 starting at 11:45 am.

- **David Percy, “Thinking about Alberta’s Oilsands”**
- **Keynote Speaker, Jill Grant, “Regulation for Resiliency: Planning for the Long Term”**

2:15 pm – 3:30 pm

Concluding Session (room 231/237)

- Summary
- PLPR Assembly
- Introducing the 2012 Conference and Flag Ceremony



## 1. Public Procurement Provisions: a Procrustean Bed for Planning?

Willem K. Korthals Altes

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In Greek mythology Procrustus stretched or amputated travelers to fit them into an iron bed. The Advocate General to the European Court of Justice Niilo Jääskinen is of the opinion that applying the European public procurement rules to land use agreements by over stretching the meaning of certain criteria for the sake of fitting them within the scope of the procurement rules, will amount to a Procrustean solution (AGECJ, 2010). This paper reviews the argument of Jääskinen. This will be done in relation to the case at hand, the Valencian system of selecting a private urbanizing agent who is in charge for the land readjustment, servicing and financial arrangements of an area zoned as comprehensive development area (Muñoz Gielen and Korthals Altes, 2007). The classification of these Integrated Action Programmes "...as a public works contract would have the practical consequence of discouraging private initiatives in the field of planning and land development (...). The only option left in planning law would then be the classical model where the public authorities draw up and adopt all documents relating to planning and land-use, finance and organize their execution and implementation directly and from the public purse." (AGECJ, 2010, paragraph 76). Jääskinen is in the opinion that the ECJ must show restraint if a broad interpretation of EU law results in interference in national law, such as planning law, not being considered by the EU legislature.

The argument will also be positioned within a more general account of land use agreements (Van der Veen, 2009), and earlier judgments by the ECJ, which have been progressive in fitting more and more activities within the public contract framework (ECJ, 2001; 2007), which has only recently been changed (ECJ, 2010), and their (potential) impact on planning (Korthals Altes, 2006; Korthals Altes, 2010; Korthals Altes and Tjan -Kok, 2010). The paper will also reflect on the judgment by the ECJ on this case.

The principles and thoughts behind European contract law are comparable to the Agreement on Government Procurement (GPA) of the World Trade Organization (WTO), and consequently all partners in this agreement must have enacted these principles in their national laws (Reich, 2009), and European experiences may have their relevance for the relationship between planning and public procurement in other GPA-countries, such as, Canada, the USA and Japan.

2. Preserving Forest Lands for Forest Uses: Oregon Land Use Policies for Forest Lands

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Forest lands are a significant factor in the identity and economy of the state of Oregon, which has much forest land. This article outlines the role of forest lands to both and then discusses state land use policies towards these lands in the face of changing economic, political and social circumstances.

Oregon forest land use policy has been in place for more than forty years and is controversial. The principal landmarks of this policy include the passage of a statewide land use program, by which a state agency, the Land Conservation and Development Commission (“LCDC”) adopts various land use policies (“goals” and their implementing administrative rules) to be applied and enforced by local governments. LCDC has adopted and amended goals and administrative rules by which forest policy is established.

While these policies have been fairly effective in preventing the conversion of forest lands to non-forest uses, they have not always been well-received by timber interests or rural landowners. Three principal controversies are recounted in dealing with the details of the program: (1) the struggle between a goal to preserve forest lands for forest uses and another goal mandating the inventory and conservation of specific resources often found on forest lands to promote conservation values; (2) efforts of the forest industry to preempt local regulation of forest practices set by the state on forest lands; and (3) state initiative and referendum activity dealing with an extra-constitutional requirement of “just compensation” for those landowners whose land may have been devalued by the imposition of land use regulations. In all of these controversies, the timber industry has played an important role.

The authors conclude with some final comments and conclusions about the Oregon programs in these areas, evaluating its effectiveness in meeting multiple, and sometime conflicting, state policy objectives.



3. The use of private planning agreements to support sustainability and climate change values: a case study from Victoria, Australia.

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The purpose of this paper is to explore how the private agreement process in the planning system of Victoria, Australia can be used to support sustainability and climate change issues. Section 173 Planning and Environment Act (1987) allows a responsible authority to enter into an agreement with an owner of land and such an agreement can set out conditions or restrictions on the use or development of the land. It may also seek to achieve other planning objectives in relation to the land. These agreements can be registered on title and run with the land. The reality about such agreements is that planning permit conditions are at times extended and complicated by these agreements. There are now an estimated 27,000 section 173 agreements in Victoria and whilst many have been spent, they continue to remain registered on land titles. The paper suggests that there is scope to move beyond these criticisms in order to make use of planning agreements to promote sustainable use and development of land.

Design/methodology/approach – Planning case studies from the state of Victoria are analysed together with the relevant law and literature.

Findings – The paper discusses exploratory research and hopes to generate international comparative discussion in this area.

Originality/value – Little critical discussion has been presented on the use or misuse of section 173 agreements and it is timely to discuss how they can be used in relation to sustainability and climate change matters.

#### 4. Land Assembly for Redevelopment: A Solution to the Anti-Commons Problem

Perry Shapiro

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Assembling individual pieces of land into large parcels for public purposes often involves the use of eminent domain, including when the assembled land is passed into private hands. Questions of equity and efficiency arise. Firstly, the US and other Constitutions require that owners of compulsorily-acquired property receive ‘just’ compensation. As existing owners are likely to value their property higher than the market, a premium is justified: but how much? Secondly, the efficiency of a forced change in land-use of the assembly cannot be judged by the usual market tests. The efficiency question is more complicated when the conversion and new use of the land generates significant local spillovers. This paper proposes a mechanism—the ‘Strong Pareto’ or SP auction. SP ensures fair compensation for affected landowners. Simultaneously, it ensures that only efficient projects are undertaken. Crucially, the auction design elicits truthful revelation of individual property owners’ reservation prices. It is proved that SP is the most efficient among all mechanisms that guarantee full protection of property, induced truthful revelation of value, are self financing and are realistic (do not require foreknowledge of individual values or beliefs).

The SP auction could be used in ‘public-private partnerships’ for urban renewal, toll roads, ports and port-side facilities, in which eminent domain is used, and the private partner is responsible for building, owning and operating, and is motivated by profit.

## 5. Design options for tradable development permits

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Although land consumption and urban sprawl have long been a cause for concern among politicians, academics and planning practitioners, there has yet to be a significant breakthrough in practice. Not only may this trend have adverse ecological consequences, such as habitat destruction, pollution and loss of prime farmland, but it may also threaten the long-term solvency of the public bodies responsible for providing and maintaining the related infrastructure, such as roads, sewers and social services (schools, hospitals, etc.). In view of this trend, there is a quest for new instruments to complement traditional spatial planning. Introducing tradable development permits (TDPs) as a means of effectively controlling the amount of land dedicated to development is one of the most promising approaches. However, there are still many unanswered questions in designing TDP and their acceptability has been scrutinized frequently.

Set against this backdrop, I will show how a system of tradable development permits (TDPs) could be established at a regional scale in Germany as a means of effectively controlling land development. These TDPs could also address the different needs arising from different regional development contexts, such as demand for developed land, pre-existing institutional structures or distributional goals. In essence, it can be shown, that TDPs could serve as a tool enabling land consumption to be contained effectively, yet still leave local planning agencies free to decide on land-use planning in their area. Although the results were obtained in the context of the German spatial-planning system, they may also apply to other countries in which land use is mainly determined by public planning authorities at different vertical government levels.

All research findings were drawn in the recently completed DoRiF-project which was funded by the German Federal Ministry of Education and Research. As part of a three-year interdisciplinary project, it investigated the chances and possible forms of implementing a system for trading land-development permits in Germany, explored the theoretical framework and analysed the feasibility of such implementation in four model regions and the views of regional and local decision-makers.

6. Scorched Earth: An Empirical Study of the Use of Restrictive Covenants to Stifle Competition

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Restrictive covenants running with freehold land are sometimes used as a means of impeding retail competition. For example, where a firm elects to relocate a retail operation and sell the existing site, a covenant may be placed on the title to that site designed to prohibit a competing retail business from operating on those lands. It is known, for example, that the multi-national grocery chain Safeway has adopted this practice extensively in Edmonton. Likewise, the practice is found in other Canadian and American cities, in relation not only to grocery stores, but also concerning pharmacies, hardware stores, theatres, banks, gas stations, and restaurants. Still, the extent to which covenants are used in this manner is essentially unknown.

This paper will present findings of an empirical inquiry into the use of covenants in a commercial setting in Edmonton. The extent to which the covenants that are currently registered on title comport with the law governing the transmission of these interests will be considered. The paper will also assess the impact of such covenants -- which are capable of lasting forever -- on the public interest, and consider the manner in which the law might respond to align public values and private interests more effectively than is currently the case.

7. City Planning through Land Tenure: Baltimore Maryland's Ground Rent System

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City planning was first conceived as an exact science. After diagnosing social and economic ills, city planners were to use their "police powers" to dictate improvement the city's physical environment. Overlooked or understated in this estimation are the less purposeful shapers of urban morphology. This paper looks at one such influence on one city. It examines the effect of a distinctive form of land tenure on the residential development of Baltimore, Maryland.

Between 1750 and 1970, Baltimore grew from a town of one hundred odd inhabitants living in twenty- five houses to a city where 900,000 residents lived in 300,000 houses. From the start to finish it housed most of its inhabitants in block rows of dwellings with shared party walls and separate street level entrances, and it produced and conveyed these houses as ninety-nine year leasehold estates subject to ground rents. Long term leases were widely used in England, but Baltimore was the only American city to make persistent use of this distinctive form of residential tenure.

This paper considers the feudal background and economic pressures which led Baltimoreans to create long term leases. It explains the utility of ninety-nine year leases as mortgage substitutes, as a source of construction capital, and as a source of investment securities. It considers the downside of ground rents as restraints on alienation, "clouds on title," and as devices for dispossessing unwary householders. It also shows how over its 250 year history, Baltimore's ground rent system may have influenced housing types, homeownership rates, economic and racial diversity, blight and abandonment.

8. Rising Sea Levels: an evaluation of the projected impact on real property rights

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The predicted rise in sea level and associated increasing storm action over the next half century is colliding with settled property law for tidal properties much of which is held on the Australian coast in private ownership. Faster change to the climate is reported with more serious risk than anticipated, with implications for sea level rise now expected at the upper end of projections by the Intergovernmental Panel on Climate Change (IPCC) of around 0.8m by 2100 along the Australian coastline.

In response to the threat of sea level rise, the six Australian States have attempted to provide information to local government and development aspirants regarding adaptation to rising sea levels however unsurprisingly there are cross-jurisdictional differences in sea level bench marks which is of concern given that much existing development along the Australian coast is of very high value

In evaluating this phenomena, it will be suggested that long settled property law particularly the common law doctrine of erosion and accretion will need to be revised to accommodate the impending collision between climate change and tidal private property. Further, the Australian Constitution at s.51(xxxi) sets out guarantees of compensation when private property rights are commuted, but the colonial drafters of the 1890s would similarly never have envisaged climate effects. The tantalising prospect will be raised of whether increasing inundation of tidal private property could be construed as invoking the payment of compensation.

## 9. Ambiguities of Neighborhood Empowerment

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This paper examines a paradoxical trend in American land use and local government law to treat urban neighborhoods as malleable and permeable objects of government power while simultaneously treating suburban neighborhoods as inviolable. While urban neighborhoods are prohibited from exercising land use powers, controlling local schools, or protecting their tax revenue against redistribution, suburban neighborhoods are permitted to incorporate and thereby obtain complete authority over land use, schools, and their tax base.

I argue that this paradox, which has puzzled many scholars, can be illuminated by situating it within a framework initially developed by the Chicago School of Urban Sociology. According to the Chicago school, the modern city had transformed urban neighborhoods from insular ethnic communities into concentric single-use “zones,” which undergo persistent and violent changes in their character as more intensive uses from the inner core penetrate outlying areas. Under this “ecological” theory of neighborhood change, urban neighborhoods were conceived as infinitely vulnerable and manipulable. While the Chicago school writers considered this a laudable development because it would spur mobility and assimilation among the growing immigrant population, they also lamented the decline of moral authority represented by the ethnic neighborhood. They believed that the pastoral settings of the suburb, restricted to single-family homes on large lots, could revive the lost moral authority of traditional folk cultures by reinforcing the primary relationships of the nuclear family, while avoiding the all-encompassing totalitarian moralism of traditional societies. Thus, although the Chicago school held that urban neighborhoods should be porous and malleable, they supported controversial efforts such as redlining, exclusionary zoning and racially restrictive covenants that provided suburban neighborhoods with legal protection against changes in their character. Modern law, in turn, reflects this duality. Courts use the rhetoric of assimilation to deny urban neighborhoods any entitlement to protect their character, while legitimizing suburban autonomy by associating the suburb with the values of community.

10. Managing riverside property: the struggle between water managers and spatial planners

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Land aside the rivers provide good locations for urban development. But the use of riparian land crucially depends on water management (Moss 2009). Flood protection is only one of many important issues in these areas. Land use need to be governed to realize certain measures. Water managers have a traditional approach to property regulation: they usually aim at full ownership to realize their plans (UBA 2003). They accept the fact that this takes time and money because they want to have full control over the land.

This is become increasingly challenging in the course of time: water management policy has changed in the last decade – from a technical oriented to a spatial oriented (Moss & Monstadt 2008, Mostert & Junier 2009, Roth & Warner 2007). The European Flood Directive illustrates that, as it claims for flood protection behind the levees. Until 2015, water managers therefore need to establish flood risk plans for the whole catchment areas. These will affect the urban developments in riparian landscapes (Albrecht & Wendler 2009). The traditional mode of governance of water managers – aiming for full ownership of the land – will not be suitable for such area-wide measures.

Spatial planners are used to regulate the land use behind the levees. Planners do not aim at full ownership to realize their planning aims. Planners are more used to restrict the use of the property than acquiring it. This distinction in the modes of property governance becomes crucial when it comes to planning behind the levees. This paper elaborates the legal framing of the modes of governance of spatial planning and water management regarding private property – regulation vs. acquisition – and discusses future challenges in this respect.

The contribution will analyze the German legal system and comment on it from a Dutch perspective. This opens a discussion which shed new light on the modes of governance of land and water authorities.



11. Were the promises fulfilled? On the new developments in expropriation law in Israel

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Over the last two decades there have been changes in the realm of Property Rights and Expropriation in Israel. The changes were particularly in the area of reversion of expropriated land and of designation for expropriation. There were several landmarks during this period of change, which, we assume, have created certain expectations among landowners. These expectations were reflected in the number of appeals to the Court for reversion of expropriated land or for annulment of designation for expropriation. In our work we examine whether these expectations materialized.

The main landmarks were:

In 1992 the Knesset enacted the Basic Law: Human Dignity and Liberty

In 2001 a significant ruling of the Supreme Court - the Karasik case - interpreted the Basic Law.

On 10 February 2010, the Knesset passed an amendment to the Land Ordinance (Acquisition for Public Purposes) – 1943

In our research we collected and compiled court rulings dealing in reversion of expropriated land or in annulment of designation for expropriation, issued over the last two decades, and analyzed them according to the time of appeal, to the outcome of the appeal and several other criteria. We looked for chronological relationship between the landmarks mentioned above and the volume of appeals, and for the relationship between the assumed expectations and the legal results.

## 12. Participation in Planning: Will the Gate-keeper cede power?

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As we move beyond the neo-liberal paradigm in planning in search of a new explanatory theory to guide our way, the very notion of planning is being questioned. Historically, McAuslan's ideology of private property governed land use transactions until the advent of planning laws in England in the early twentieth century.<sup>1</sup> Since that time there has been an ebb and flow between reliance upon the market and government intervention to deliver land use planning outcomes. The guardians of the public interest rail against the neo-liberal agenda to 'devalue' planning by reducing it to being a mere siphon for development. The guardians of the ideology of private property, in turn, disparage state intervention questioning whether there is 'any case for continuing intervention' in light of government failures.<sup>2</sup> In this debate, the function of public participation is relegated to being an island in the flux of power.

In NSW, Australia, an opposition party went to an election (and won government) with a policy to reform the land use planning system to empower the people by returning 'planning controls to local residents' through their councils. Normally, land use planning systems only allow the citizens to make a submission; the people are not allowed real power to participate. To empower the people is emblematic of democratic processes. To implement democratic processes would require the government to depart from McAuslan's ideology of the public interest and to embrace the ideology of public participation. This remains the untried path in land use planning. But to change the status quo requires legislative mechanisms that elevate the voice of the people to the status of power. The bureaucratic decision-maker would be required to do more than simply take into account a submission. It would also mean that the people would have to be prepared to take up the opportunity to be involved. An opportunity emerges with the call to reform the NSW planning system for land use planning to become participatory and democratic. Could the new government be serious?

### References:

1. P McAuslan, *The Ideologies of Planning Law* (1980). McAuslan theorised three ideologies being the ideology of private property; the public interest and public participation.
2. See for example B. Gleeson and N. Low, 'Revaluing planning: Rolling back Neo-liberalism in Australia' (2000), 53 *Progress in Planning* 83, 135. See also Mark Pennington, 'Hayekian Political Economy and the Limits of Deliberative Democracy' (2003) 51 (4) *Political Studies* 722, 13 (emphasis in original).

13. Classic and New Instruments of Spatial Planning and Regional Development in Germany

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This paper examines the evolution of spatial planning and regional development in Germany in the context of demographic and socio-economic structural change. During the last decades requirements concerning comprehensive and integrated planning have risen. Today planning takes account of many more factors than in the past due to a deeper knowledge in all fields concerned. In addition, an acceleration of change of the framework conditions can be observed which requires flexible solutions.

In some areas traditional planning tools are not meeting the needs anymore. New instruments like regional management, regional marketing and project management as well as development concepts emerge. Unlike classic instrument, they are characterized as informal, project-related and action-oriented. The federal and the state planning laws are forming the legal basis for the new instruments, but they are not legally binding in a direct way themselves. They can be a necessary prerequisite for funding or they provide a basis for formal instruments.

The intention is to present classic and new instruments in Germany regarding their field of application, methods, form of financing, etc. with practical examples from research projects like “INTERREG IIIB PUSEMOR – Public Services in sparsely populated Mountain Regions – new needs and innovative strategies” and an outlook on the future of the spatial planning and regional development in Germany.

14. The development of industrial land in the Netherlands: from public good to private good provision

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The wave of privatisation operations in various markets has shown substantial differences in approach as well as outcome (e.g. Helderma, 2007; Roland, 2008; Megginson & Netter, 2001; Sheshinski & Lopez-Calva, 1998; Bortolotti, Fantini & Siniscalco, 2003; Davis, 2000). It seems indisputable that there are lessons to be learned which can benefit future privatisation operations and related strategies.

Recently, the Dutch government has expressed a so called wish for (more) private involvement in the market for industrial property (THB, 2008) which comes down to stimulating private initiatives within a context dominated by public institutions.

At the moment private developers show little interest in selling plots of industrial land, nor to develop the industrial property in order to let it to end-users. Therefore, although the market for industrial land is 'contestable' (Noteboom and Needham, 1995), commercial developers rarely want or are even able to contest the near monopoly that municipalities built up for themselves in the industrial land market. This practice does not promote sustainable development of land and buildings (Van der Krabben & Van Dinteren, 2009).

In this paper relevant international privatisation processes, based on previous research and literature, are explored and potential lessons to be learned extracted. The results are compared and reflected on the current privatisation wish. Furthermore, private and public involvement in the developing process of industrial land in the Netherlands (2000-2010) is compared in a descriptive analysis. By this insight is gained on the most significant variables for current public, mixed and private developments. In the conclusion a link is made between the lessons of privatisation history, current private involvement and the institutional setting.

15. The Property-Rights Pendulum in the Rural Sector A Cross-national perspective of Israel's rural land policies in comparison with other OECD Countries

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In every advanced-economy country where there is an agricultural sector there are also legal and economic regulations regarding rights on agricultural land.

The State of Israel has a land regime which is unique amongst countries with developed economies: The vast majority (about 93%) of the country's land area is defined as "Israel Lands" and is formally national property. In this, Israel differs from all advanced economies in the world today.

Nevertheless, despite the apparent dominance of national land, Israel is today very much a country where the ethos of private property dominates both legally and politically. Indeed, in the land that is leased out in urban areas, a "creeping privatization" has occurred over the years. A land reform bill that was passed in 2009 will gradually turn these rights in the urban areas into de jure private property. But those who hold national land for agricultural purposes - including residential and industrial areas in the rural sector- have dramatically lesser rights than their urban counterparts. They are largely kept out of the reform process.

In this research project, we shall examine the property rights prevalent in the rural sector in selected countries representing a variety of property-rights trajectories: Those that have not been through massive changes in recent years, such as the USA, Canada, England, and several Continental European countries; those that have been undergoing non-revolutionary changes in the rural sector, such as Scotland and the Netherlands; and those countries that have undergone massive change, such as the former Communist countries.

A systematic comparative analysis of rural-sector property rights will provide a prism for reevaluating the role of property rights in meeting the double (and often conflicting) role of the rural sector in advanced-economy countries: on the one hand, economically viable production of food and fiber, and on the other hand – the preservation of the rural way of life, history and landscape in a socially and economically sustainable way.

16. Understanding Municipal Authority and Planning Practice: The Public Good and the Exercise of the Eminent Domain Authority

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The US Supreme Court case of *Kelo v. City of New London*, 545 U.S. 469 (2005) represents an important landmark decision that continues to uphold the broad power that municipalities have in taking private property and defining local "public use." The question is what do we mean by "public use," which is theoretically synonymous with supporting efforts to advance the "public good." The nagging questions remain. What public, whose interests, and how should we interpret the construct of the "public good"?

Historically, US courts have given considerable purview and discretion over these questions of the "public good" to municipal entities as they navigate the day-to-day realities of managing fiscal, social, and community and economic development issues within their boundaries. The taking of privately owned land by municipal entities has been subject to serious critique by the general public whose interest is presumptively being served, but who view governmental authority as simultaneously overreaching, lacking any clarity and precision in terms of its outcomes, while giving priority to "well-heeled" land developers over the interest of private landowners and the public-at-large. There must be an assurance that there will be distributive impacts that advance the public interest and actually deliver public benefits when the powerful eminent domain authority is invoked.

The emerging tool of community benefit agreements may be an important vehicle for creating that clearer nexus between the exercise of the eminent domain power and the "public good." These agreements could serve to lessen the negative public perception and legislative backlash related to the use of the eminent domain authority by municipalities that has often failed to produce significant returns and often thrust significant burdens on private landowners and low-income residents.

17. Planning for metropolitan landscapes: an assessment of Dutch regional land policy and development strategies

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Over the past decade the Dutch regional governments, i.e. the provinces have become more actively involved in land development. Some more than others have abandoned their more traditional reflexive role, adopting land policies, acquiring land themselves or installing provincial land banks.

The 2008 Dutch Spatial Planning Law, supplemented by a Land Development Act and changes in the Expropriation Law has amplified this process. Zoning and land policy instruments have been introduced to strengthen provincial planning initiatives with the aim to improve regional planning processes. The idea behind the increased regional land policy and development tools is to improve the planning and implementation of comprehensive, cross-municipal border developments. In these regional developments the provinces are responsible for the realization of the Ecological Zones, land use in rural areas, provincial roads and larger industrial parks.

This paper will address the question to what extent the regional land instruments are used and whether or not their use improves regional developments. Based on (policy) document analysis and interviews with key informants of regional planning and development processes, we will analyse the land policies of the Dutch provinces in regional planning processes and the way these policies are used in regional planning projects. Canvassing the differences in approaches, and the underlying reasons will help us to understand the rationalities for adopting land policies at a regional level. Three cases will be used as illustration to show how provinces implemented land policy and development instruments.

The paper will end with an assessment of the use of provincial land policy and development in the Netherlands. The result so this paper will increase planners' understanding of the way land policy and development instruments influence planning practices on a regional level.

## 18. Land and Supplemental Governance

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### Introduction

Some North American contractualist models, notably Business Improvement Districts, have found traction in Britain and other mainland European countries. Others, especially residential Common Interest Developments have a low profile. There are however experiments which aim to transfer the BID model to the residential sphere. How will these fare against the admittedly changing hold of the idea that the (Welfare) state tries to be emancipatory – through, for example, inclusionary housing – the default position of many involved in policy making.

The Purpose of the paper is to review the transfer of recent North American area based business regeneration and governance concepts to Western Europe; how they are being translated against evolving notions of the welfare state and the prospects of reciprocal learning.

Approach- The paper takes a pragmatic approach, mapping present models, whilst recognising the factional debates and historical lacuna. It is largely based on secondary sources supplemented by structured interviews to test emerging propositions. The initial focus is the experience in implementing Business Improvement Districts, their expansion to encompass housing in Neighbourhood or Housing Improvement Districts and the role of inclusionary housing in illustrating the intrusion of differences in normative perspective.

Limitations- The material reviewed is selective but reflects recent evolving experience particularly in the UK, where the new Government is promoting localism, and Germany; sufficient to illustrate arguments.

Practical Implications- setting aside the normative frameworks –illustrating that supplementary governance is in prospect on a wide scale arising pragmatically in local contexts –with a special mention of a project in Cardiff, Wales, in which the authors are directly engaged.

Prospective Findings-the extent to which planning and property frameworks align with governance models, the opportunities for innovation and the appetite for change



19. Innovative ways of use of law and property rights to solve the Amsterdam Tragedy of the Offices

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Planners' aims to develop sustainable cities often meet the priorities of land developers and consumers in the local government's decision-making arena. In balancing these demands, municipalities often fail to resist development interest, in particular because they compete with their neighboring units for jobs and inhabitants. Although this is explainable from local governments individual rationality, it often results in suboptimal situations on the regional level, for example the abundance of office capacity in the Amsterdam Metropolitan Area.

The objective of this paper is to investigate to what extent an innovative use of law and property rights could contribute in finding solutions for these collective shortcomings, with the Amsterdam Office Space Tragedy as an example. After elaborating on the way the Amsterdam local governments failed to control land use, this paper will analyze the set of regulatory decisions that have been proposed to address the problem, like transferable development rights. Attention will be paid to the regulatory roles of the different levels of Dutch governments in this respect. Further, the major challenges these proposals will create to the property owners, and the local governments will be discussed. Finally, the paper will reflect on the question whether law and property rights are the best way to deal with these challenges or that other approaches might result in more effective solutions.

20. The “Regional Land Use Plan” – a solution for challenges in metropolitan regions? The example in the metropolitan region of Frankfurt/Rhine-Main

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This new type of a spatial plan was developed during a revision of the German planning law end of the 90s. This “Regional Land Use Plan” targeted the following aims:

- More effective planning in metropolitan regions
- A better impact on new challenges in such regions
- Strengthen the planning system in Germany by conserving one planning level.

At this moment this new plan type is implemented in the metropolitan region of Frankfurt/Rhine-Main. When the implementation began, this metropolitan region was also new organized. The former planning association of 43 extended up to 75 municipalities. Therefore this complex planning process required new strategies and its scientific monitoring was of high interest.

In an ongoing evaluation the experience gathered in the preparation of the draft “Regional Land Use Plan” and the actions required in future were discussed from many views. Also a survey was conducted in all municipalities of the planning association in the years 2005 and 2008. The results emphasized the chances and the risks of the new planning instrument with regard to its planning-practical implementation.

The results are on one side important for the actors in the planning practice, not only in the metropolitan region of Frankfurt/Rhine-Main but also for other metropolitan regions in Germany. On the other side it is a good example for the discussion of some fundamental questions of spatial planning in Germany.

By reference to this example it shows:

- how the challenges in metropolitan regions can be managed through one new planning tool,
- how big the options and limits of a cooperation between 75 municipalities are,
- how the cooperation between authorities of the regional level and urban planning level can be successful and
- chances and obstacles for a progression of a complex planning system.

21. Public Trust Interests, Private Property Rights, and Michigan's Great Lakes Shorelines: The Law of Accretion, Erosion, Reliction, and Avulsion on a Great Lakes Shore

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The State of Michigan (USA) is bounded by four of the five Laurentian Great Lakes—Michigan, Superior, Huron, and Erie. In 2005, the Michigan Supreme Court reaffirmed in a landmark decision that under its Public Trust Doctrine, Michigan's public trust interest along its Great Lakes shorelines extends up to the 'natural' ordinary high water mark (NOHWM), thus encompassing what can be referred to as the state's Great Lakes public trust beaches. The court also noted in dicta that the horizontally fixed 'elevation' ordinary high water mark (EOHWM), established by statute in 1968, relates only to certain regulatory authorities under the act (i.e., it does not establish the spatial extent of the public trust interest). Nonetheless, the court's decision left unaddressed several issues implicated by the use of an 'ordinary' high water mark to determine common law public trust boundaries on a non-tidal and littoral (i.e., as opposed to riparian) shoreline, particularly issues related to the sudden apparent movement of the shore (i.e., avulsion – generally taken to not effect changes in public trust or private property right boundaries), compared to gradual changes (e.g., accretion, reliction, and erosion – all taken to effect changes in boundaries). In a paper presented at last year's conference (and subsequently accepted for forthcoming publication by Coastal Management), I described Michigan's adaptation of the Public Trust doctrine to its Great Lakes shorelands, along with the usefulness and limits of the concept of 'ordinary' high water on a Great Lakes shore and the NOHWM vis-à-vis the EOWHM. For this paper, I continue the analysis by addressing the implications of Michigan's Public Trust Doctrine as applied to its Great Lakes shores with regard to the law of shorelines and concepts of accretion, erosion, reliction and avulsion.

## 22. Instrument Choice in Land Use Regulation

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The theme of instrument choice has been central to Canadian administrative law scholarship for a generation but has been strangely absent from the Canadian municipal and planning law literature. This essay aims to begin to fill this gap. I will argue that issues of land use planning can profitably be studied along three dimensions that are well-known to scholars of instrument choice. The first dimension speaks to the relative capacity of institutions (courts, legislatures, administrative agencies, and markets) to regulate land use issues and raises the question of how responsibility for such regulation should be distributed among institutions. A second dimension of an instrument choice approach to land use regulation is centered on the question of the democratic legitimacy of such regulation. The challenge in this context lies in determining which publics are relevant and ensuring that their voices can be heard in appropriate forums. A third dimension of an instrument choice analysis of land use regulation gives rise to questions of economic efficiency. At least one of the functions of land use regulation is to price the negative externalities that are generated by land uses, and we shall see in this paper how various regulatory instruments solve this pricing problem.

In this paper, I propose instruments that address all these dimensions of an instrument choice approach to land use regulation. In so doing, I will assess the benefits and trade-offs involved in various instrument and institutional design choices. Ultimately, I will argue that land uses are optimally regulated by a range of instruments (zoning regulations, property rules, liability rules, covenants, public-private partnerships, public ownership, informal norms, etc.) and that the central challenge for those interested in land use regulations lies in determining in which circumstances any particular instrument should be deployed and in assessing how to coordinate the deployment of these multiple instruments.

23. Sclerosis of the City: Clearly Defined Property Rights and Inefficient Outcomes

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Markets are efficient when market participants adjust supply and demand in response to market shocks. Does this type of efficiency hold for urban land markets? We ask whether the amount of land assembled – the quantity of individual pieces of land legally joined together – is consistent with that of a competitive market. If economic forces cannot modify the size and shape of land – and the roads, buildings and homes that land borders dictate, cities forfeit economic growth. Our simple theoretical framework describes land assembly under the assumption of perfect competition in the market for assembly. We compare this equilibrium to an environment in which frictions, such as holdouts and public regulation, inhibit market forces. The model yields two empirically testable hypotheses. First, the price of land sold for assembly should not exceed the price of land sold for other uses. Second, because the opportunity cost of assembling large parcels exceeds that of small parcels, small parcels should be more likely to assemble. We test these conjectures using a novel dataset: we follow each of the 2.2 million parcels in Los Angeles County over an eleven year period and observe all instances of assembly. We find that to-be-assembled land trades at a 50 to 65 percent premium, and that developers prefer to assemble larger, not smaller, parcels. This robust repudiation of efficiency in land assembly suggests a sclerosis in urban development and a rejection of an efficient model of urban land markets.

24. Backdoor Methods: Mechanisms to Ensure Compliance with State Biodiversity Management Policy

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In response to the decline in local ecological systems and larger bio-regions, various legislation and other regulations have been enacted to protect remnant habitat at the landscape scale, and to support the rehabilitation and regeneration of endangered and threatened species. An important recent Victorian policy document, *Securing our natural future: A white paper for land biodiversity at a time of climate change (2009)* proposes a number of strategic actions including the development of biolinks, fostering carbon markets, and supporting private property vegetation management

The white paper and supporting frameworks, strategies and guidelines cannot stipulate sanctions for private property owners who do not comply with stated goals, objectives and activities as can be achieved through legislation. However, these 'de-facto' regulations can 'enforce' compliance through incentive mechanisms that reward property owners with project funding and other property management assistance when they participate work with government nominated organisations, participate in specific education programs, and develop property management plans in accordance with suggested approaches. These backdoor methods of compliance, while supporting biodiversity conservation objects, contribute to an unsettling of 'property rights' or reveal how unsettling it can be when the myth of property rights is exposed. From a planner's perspective, this paper explores the inherent tensions between existing and perceived collective and private property rights, and their relationship to land use and development rights when they are ushered through the backdoor of policy development.

25. Big Houses and Small Gardens: Conflicting Issues at the Australian Urban Periphery

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The Australian residential urban garden represents part of the house itself. It can be designed for various purposes, such as backyard barbecues, clothes drying, playgrounds and encouraging planting of indigenous vegetation (Head and Muir, 2007). Yet the modern Australian home is expanding, leading to limited garden private open space (Hall, 2010; Hall, 2007; Syme et al, 2001). This raises three competing issues at Sydney's urban periphery: enhancing environmental amenity, conserving suburban biodiversity and minimising threats from bushfire.

Firstly, amenity is an entrenched concept in Australian planning law. It is often crucial in determining land use decisions (Stein, 2008). Yet members of the community may prefer attractive exotic trees, such as the jacaranda, to ordinary local species such as those found within assemblages of the Cumberland Plain Woodland, a listed threatened ecological community under NSW law. In suburban areas, tree preservation orders are tend to be directed to enhancing local amenity (Kelly, 2006).

Secondly, biodiversity conservation is based on science rather than human enjoyment. Yet as Hall notes (2007, 27), “[p]rivate gardens exhibit a high degree of biodiversity”. On the other hand, urbanisation leads to homogenization of the natural landscape (McKinney, 2008). In view that Australia is geographically unique and biologically rich, conservation considerations have become an entrenched element in preparing and implementing plans and strategies.

Thirdly, Sydney's suburban landscape is characterised by extensive areas of fire-prone ‘zones’. It embraces high level temperatures and low humidity in a sub-tropical climate, falling with a “zone of highest bushfire risk in Australia (Gillen, 2005). Planning strategies that manipulate vegetation at the bushland edge are crucial (Bradstock & Gill, 2001; Bradstock, 2003). Examples include effective urban design, such as setbacks and chosen construction materials (Little, 2003). These factors scarcely sit together comfortably. How might improved planning law and policies play a role here?

26. Contested delineations: planning, law and natural resource governance

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In our paper we will reflect on the relationship between planning and law based upon the discussions about areas that are protected under the nature conservation act. The nature conservation act provides a legal framework for both the designation of protected sites as well as for decision-making about social and economical activities that might have negative effects on the conservation objectives. This implicates that the formal boundaries of the protected area can have legal and economical consequences for land use activities in and around the protected site. These boundaries are therefore subject of much debate.

Using Niklas Luhmann's social systems theory we will analyze the relations and interactions between the planning, legal, and political systems. Each system constructs the world around it in its own way, based upon the application of unique basic distinctions and conceptual frames. The distinction made by one system can make a difference for other systems as they might see their environment changing. Together these systems form a web of linked, but operationally closed systems. In this perspective the delineation of the boundaries of a protected site within a specific system (e.g. law), effects other systems (e.g. planning). Case studies in the Netherlands indicate that the delineation of the boundaries of protected sites within the legal and administrative system complicated the political discussion about the governance of these sites and limited the possibilities for planning to find solutions for existing conflicts. These results help to shed a fresh light upon the ongoing debates about the governance of protected sites and contribute to the development of a framework for the analysis of the relationships between planning and law in the field of natural resource governance.



27. Public-Private Partnerships in Urban Development; some Constitutional and Administrative Law Comments

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Public-private partnership agreements are examples of government making use of private law for achieving planning objectives. Public-private partnerships (PPP's) have extensively been used in urban development projects during the past decade in the Netherlands (and elsewhere around the globe). A lot of experience has been gained regarding PPP's, in particular on the local level. These experiences lead to the following question: which constitutional and administrative law comments can be made regarding the use of public-private partnerships in urban development?

The use of PPP's for urban development purposes is very understandable. Indeed, PPP's can fill the 'void' between (public sector) spatial planning and (private sector) real estate investments. The fundamental weak link between public (land-use) plan and private sector realisation can be strengthened through the use of PPP's.

However, we cannot confine ourselves to the strengths of PPP's. After all, through the use of PPP's public actions become intermingled with the logic of the private market. From the constitutional and administrative law viewpoint, I see four major risks.

The first risk has to do with hybridisation: the blurring of the division of tasks and responsibilities between public and private parties.

The second risk has to do with 'politics at a distance': PPP's having only limited democratic legitimisation.

The third risk is municipality's (potential) problem of conflict of interests. It is party to a private law agreement and at the same time the competent authority for public-law decisions, such as adopting a land-use plan for the PPP project.

The fourth risk has to do with local government's impartiality once it has entered into a PPP agreement. The danger exists that it is no longer free in its choices, for example, relating to public participation responses.

This paper elaborates on these – often overseen – risks of public-private partnerships, using illustrations from cases.

28. Delineating the Boundaries of Judicial Deference in Eminent Domain Cases

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In *Kelo v. City of New London*, the United States Supreme Court, in a 5-4 decision, held that eminent domain takings in which the stated public use or purpose was a “pretext to hide private benefit” would violate constitutional standards. The Court emphasized that an “integrated” and “carefully considered” development plan would be more likely to survive judicial scrutiny.

Several questions were left unanswered by the Kelo Court’s somewhat vague and fractured decision. I focus on a specific issue that relates directly to the respective roles of courts and legislatures in evaluating takings decisions: How do we balance the traditional deference given by courts to legislative determinations of the need to take property by eminent domain (a deference drawn from traditional separation-of-powers notions) with the Kelo Court’s holding that pretextual takings are unconstitutional? How, for example, does a court evaluate the true motives behind a municipality’s decision to condemn? Is it appropriate, or even possible, for a court to attempt to do so? Or, in doing so, does a court stray too far into the realm of legislative decisionmaking? In particular, I examine the difficulty that the legal system has had in articulating the proper role of the courts and legislative bodies in resolving these eminent domain disputes. The goal of my research is to clarify the relative roles of the judiciary and the legislature in eminent domain law post-Kelo and to provide courts with a more coherent framework for addressing claims of pretextual takings.

29. Land Use Planning and Indigenous Rights: A Critical Analysis of the Alaska Native Claims Settlement Act

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In 1971, Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-29h (“Settlement Act” or “Act”) to provide certainty as to the ownership of land and natural resources in Alaska. As reported in 43 U.S.C. § 1601(a), Congress had expressly found that “there [was] an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska based on aboriginal [status].” This “immediate need” for settlement was largely fueled by Alaska’s declaration of statehood in 1958 and the discovery of large oilfields in Alaska during the 1960s. The Settlement Act resulted from lengthy negotiations among Congress, Alaskan Native leaders, and oil lobbyists.

The size and means for achieving this settlement are unprecedented in the United States. Congress required that traditional Alaskan Native groups incorporate to share the benefits of the Settlement Act. In exchange for relinquishing any claim to 365 million acres of land, the indigenous people of Alaska received 44 million acres of land and payments totaling \$962.5 million. All reservations, except for one, were revoked, and regional Native corporations were created to manage the payments and the land. Stock in these corporations was issued to each member of the indigenous population of Alaska. Local Native Alaskan governments were also required to incorporate to receive the benefits of the Settlement Act. Once a local government incorporated, the regional corporations then had the power to transfer funds, land, and other resources to these local corporations.

The success or failure of the Settlement Act has been the subject of great debate. My presentation explores the benefits and harms of the Settlement Act and provides substantive suggestions if the Act is ever amended or if similar legislation is ever proposed.

30. Planning Around Law: British Columbia's Land and Resource Management Plans

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“Planning shouldn’t be set as law. It should just be persuasive, and would have the most effect if people would adopt the plans as a *modus operandi* without being told to adopt them.” So said the designers of the Land and Resource Management Planning (LRMP) process that in the 1990s became a focal point of British Columbia’s environmentalist “war in the woods”. After that war began to rage in the late 1980s, the B.C. government embraced collaborative land-use planning as the means to resolve conflicts with environmentalists and among competing demands for land and resources. After a difficult start marked by mass arrests in Clayoquot Sound, the government divided the province into five regional planning areas and launched eighteen sub-regional “LRMPs”: plans designed to have no legal content or output.

Based on interviews with planners and other land-use regulators, and on a close study of one particular plan, this paper explores the rationale for excluding law from the plans, and the flawed result of British Columbia’s experiment. In particular, it considers the effect of the Forest Practices Code, a forestry regime introduced just after the LRMPs began, and designed to dovetail with the plans. The paper suggests that this legal mechanism, specific to forestry, helped to distort the planning tables into vehicles for the production of two primary outputs, forestry regulations and park designations, and contributed to the forest industry’s domination of the planning process. The paper then speculates about how a planning process designed around a comprehensive legal mechanism might have produced a different result, and what this suggests about the relationship between planning and law.

31. The regulation of housing: measuring the stringency of land-use regulation for econometric models of the housing market

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In recent years the stringency of land-use controls has received a lot of attention among urban economists. Economists attribute high house prices and low housing supply elasticities merely to land-use regulation (e.g. Glaeser, Gyourko & Saks, 2005; Quigley & Raphael, 2005). This paper takes issue with the way most economists measure land-use regulation, rather than with the alleged causal relation between regulation and prices. Planners and lawyers have been virtually absent in this debate, while their knowledge on the working of law in practice could most certainly contribute to the operationalisation of land-use control stringency.

In this paper, I provide an overview of the literature in which the effects of land-use controls on housing markets is measured. I pay particular attention to the construction of variables that aim to depict the stringency of land-use controls, such as those that concern zoning, density and subdivisions. In the evaluation, I conclude that measures are either overly simplistic and inaccurate or too complex and time-consuming, and therefore hard to repeat, especially when the institutional (national) context is different.

As an alternative, the building permit is put forward as an indicator that is both accurate and simple in reflecting the stringency of land-use regulations in the Dutch context, but also allows for application elsewhere. Particularly in countries with a Napoleonic legal system, such as The Netherlands, the building permit reflects the level of stringency, since it is at that point in the development process that building proposals are tested against all land-use restrictions. Using various control variables, such as a housing demand and geographical constraints, this allows for an analysis of house prices and housing supply in which the effect of land-use controls can be isolated.

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## 32. Planning by law and property rights: the need for a better theory

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This paper makes a distinction between two ways of (spatial) planning. One is by rules about how people may use their rights over land and buildings, the other is by agreements between public and private bodies. The first - planning by law and property rights, or regulative planning - is regarded as some as being inflexible, bureaucratic, limited, and stifling creativity. The second - planning by agreement, or collaborative planning - is a remedy for all those ills. We argue for the importance of regulative planning, sometimes instead of and sometimes in combination with collaborative planning, but in all cases indispensable.

However, planning with law and property rights has its weaknesses. For once rights in land have been determined by a combination of private law and public law, changing them can be difficult. If the assignment of property rights turns out to be inconvenient or outdated, spatial planning by legal regulations carries the danger of creating lock-in situations.

Collaborative planning, however, also has its weaknesses. Focusing too much on non-regulative instruments for plan implementation (e.g. with round-table discussions, egalitarian schemes, or market approaches) might not be able to withstand real land use conflicts and creates in that way rather instable (and thus unsustainable) solutions. So, collaborative planning alone is not a way to avoid lock-in situations.

There is a tension in spatial planning between the inevitability of using law and property rights on the one hand, and on the other hand the danger of creating undesirable (e.g. unsustainable or socially unfair) lock-in situations. This requires that planners should pay more attention to laws and rights concerning the use of land and buildings, and to how they can be applied to the best advantage. This is a central dilemma of spatial planning, which, however, has not yet been properly theorized. What are possible issues for the development of such a theory of planning by law and property rights?

33. Territorial Cohesion and Flood Protection: Opportunities and limits of a Strategic Alliance

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Although the European Union has no formal competence in the field of spatial planning, since the Lisbon treaty the EU defines the territorial cohesion as a general goal. This results from the grown weight that the territory of the EU (cf. ESDP 1999) has gained since the 1990s. The competence for spatial planning, however, remains with the member states. Therefore, there is no way for the EU to determine legally binding directives on that issue. Besides discussion about the exact definition of the term territorial cohesion (cf. Green Paper 2008), the challenge for European policymakers is to find instruments which enable its implementation without exceeding the competence of the EU. So, territorial Cohesion seems to remain an abstract goal with a symbolic function for politics (cf. Kunzmann 2006). But more than this, territorial cohesion can be understood as a concept. Battis and Kersten (2008) identified three dimensions of that concept: Territorial balance, Territorial integration and Territorial governance.

Water Management by contrast traditionally pursues technical solutions, thus no such culture of cooperative planning has been evolved, as in spatial planning in the last decades. Particular in flood protection, in recent years a rationality of risk-management and the leitmotiv of providing more space to the rivers have gained acceptance (cf. EU Flood Directive 2007/60/EC). In consequence water management searches for new strategies for an integrative approach for the complex task of river management. Therefore new forms of governance (cf. Hartmann 2011) need to be found. Even though Water management is a quite powerful institution, flood protection is a convincing argument for stakeholders to collaborate within a catchment. Territorial cohesion lacks such an argument.

The creation of a strategic alliance between the European Policy of Territorial Cohesion and water management to develop space is conceivable. The aim of this research is to analyse opportunities and limits of such an alliance in the German planning system.

34. Ambiguities in the Language of Blight Designation: Contesting Property Relations Under New Jersey's Local Redevelopment and Housing Law in Newark's Mulberry Street Redevelopment

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Under the New Jersey Constitution, the redevelopment of blighted areas is a public purpose and public use for which private property may be taken or acquired. New Jersey's Local Redevelopment and Housing Law (LRHL) permits municipalities to delineate areas that may be declared blighted if the governing body determines that within those areas one or more of eight (8) criteria are met. Once areas are declared blighted under the LRHL municipalities may invoke their eminent domain powers to facilitate land assembly for redevelopment. Until recently, the broad and ambiguous language of the eight criteria, which relate primarily to building conditions and land utilization, has made it relatively easy for local governments to declare areas blighted. This has directly threatened private property rights, especially in older communities.

Starting in 2002, the City of Newark invoked LRHL criteria in an attempt to redevelop its downtown Mulberry Street area, much of which consisted of surface parking lots. An intensive case study combining archival research with in-depth interviews and field visits explored the use of blight designation under the LRHL within the city's land assembly process in the Mulberry Street redevelopment area. The research suggests that the municipal governing body invoked the LRHL to blight the area as a means to maintain control over the redevelopment process and its outcome, and ambiguities in the LRHL criteria facilitated this blighting process. However, a grass roots effort successfully capitalized on those same ambiguities to stop the redevelopment process in court. The court's decision to invalidate the Mulberry area blight declaration may have been influenced by growing post-Kelo sentiment against using eminent domain for economic development.



35. Suburban Sprawl in Canada

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The purpose of this paper is to ascertain (1) whether suburban sprawl is as widespread in Canadian metropolitan areas as in their American counterparts, and (2) whether Canadian government policies, and in particular Canadian municipal land use and transportation policies, encourage sprawl. The thesis concludes that sprawl is less widespread in two respects. First, Canadian central cities have not declined to the same extent as American central cities. Second, urban and suburban Canadians are less dependent on automobiles than are Americans. The thesis goes on to point out that in Canada, as in the United States, government land use and transportation policies often encourage sprawl.

36. A Railway, a City, and the Doctrine of Constructive Taking: Private Property and Public Regulation in Canada

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The doctrine of regulatory or constructive taking mediates the boundary between private property and acceptable levels of public regulation of private property in much of the common law world. When the regulation becomes unduly onerous—so as, in effect, to take the property from the private owner—the courts may require the state, under the doctrine of constructive taking, to compensate the owner.

In 2000, the City of Vancouver passed a by-law that limited the use of an old rail line to a public thoroughfare. Under the by-law, the ten-kilometre ribbon of land that wound through the city's west side could be used for rail, for public transit, for bicycles and pedestrians, or as greenway, but not for automobiles, and not for residential or commercial development. The Canadian Pacific Railway (CPR), which owned the line, claimed, under the doctrine of constructive taking, that the city had effectively taken its property interest and therefore that it was entitled to compensation. The mooted value at the time was approximately \$100 million. In its first statement on constructive taking in over a decade, the Supreme Court of Canada denied the claim—the city was not required to compensate the property owner.

This paper provides a legal history of *CPR v. City of Vancouver*. It then uses the historical discussion as a basis from which to consider the doctrine of constructive taking in Canada, the capacity of a legal doctrine to shape an urban landscape, and, more generally, the role of courts in mediating the appropriate boundary between private property and public regulation.

## 37. Sustainable Communities Should Be Inclusive Communities

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Sustainable communities must account for the ability to provide for residents aging in place and for inclusion of people with mobility impairment. Almost 20% of American families have a family member with mobility impairment and mobility impairment increases dramatically as a population ages (as is the situation in the U.S.). Inclusive design is not simply about making a home safe and accessible for a given resident, it is about making it possible for the mobility impaired to be able to visit friends and family in any home or building in our community. Not only is the issue one that is far greater than most people perceive (impacting almost 20% of American families, as opposed to the common idea of it impacting only one percent of the population that uses a wheel chair) it is made worse by the fact that most homes stay in the housing stock for about 100 years but the typical American moves to a new home on average about every 7 years. This means that the negative externalities of exclusionary housing design effects generations of families in a way that is not accounted for in the absence of good government planning.

The market on its own cannot account for the mismatch of changing housing design needs and the impact of current consumer choices. As a consequence, the mobility impaired often find that they are unable to safely and easily visit the homes of family, friends, neighbors, and colleagues because their housing is designed with exclusionary and unsafe features - features that would not be permitted if the property were a public place, a place of public accommodation, or publicly funded housing.

The project looks at disability law and policy in terms of property development and land use regulation. The work will be part of a book that I am currently working on for Cambridge University Press, titled "Property, Place and Disability".

38. Where is the avoidance in the implementation of wetland law and policy?

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Many jurisdictions in North America use a “mitigation sequence” to protect wetlands: First, avoid impacts; second, minimize unavoidable impacts; and third, compensate for irreducible impacts through wetland restoration, enhancement, creation, or protection. Despite the continued reliance on this sequence, there is broad agreement that the first and most important step, avoidance, is ignored more often than it is implemented. The key objective of this talk is to summarize research explaining why wetland avoidance is commonly overlooked in the permitting process, and to advance what we consider to be key policy modifications or alternatives to incentivize wetland avoidance as a workable alternative to compensation. We draw on literature published between 1989 and 2010, as well as 33 semi-structured, key-informant interviews conducted between 2009 and 2010 with actors familiar with wetland policy in Alberta, to address key reasons why “avoidance” as a policy directive is seldom effective. Five key factors emerged as being central to the failure of decision-makers to prioritize wetland avoidance above compensation in the mitigation sequence: 1) a lack of agreement on what constitutes avoidance; 2) current approaches to land-use planning do not identify high-priority wetlands in advance of development; 3) wetlands are economically undervalued; 4) a “techno-arrogance” is associated with wetland creation and restoration that results in increased wetland loss, and; 5) compensation requirements are inadequately enforced. Largely untested but proactive ways to reinstitute avoidance as a workable option in wetland management include: watershed-based planning; comprehensive economic and social valuation of wetlands; and long-term citizen-based monitoring schemes. By critically examining factors that influence wetland permitting decisions, improvements can be made to wetland law, regulation, and policy such that losses can be prevented, rather than following the pattern of permitting losses and hoping that compensation replaces lost wetland area, values, and functions.

39. The Sword in the Zone: Fantasies of Land Use Planning Law

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The theme of this paper is that the contradictory impulses found in land use planning law are impossible to overcome. The analysis takes place at two levels. In the first place, the case law on the decision-making authority of municipal bodies and their provincial review boards will be examined in an effort to clarify, if possible, the question of whether land development raises issues that are at heart law or policy, and, consequently, whether they are entitled to intervention or deference by reviewing courts. That case law, which forms a shell for land use planning approaches, is then filled in with an examination of divergent approaches toward fashioning the 'livable city'. The regulatory flux between density and sprawl, and the tension between more recent 'new urbanist' designs and traditional suburban development plans is explored, demonstrating that neo-urban hub developments are premised on a false vision of collective social experiences while suburban garden developments are premised on the hollow dream of an idyllic society.

In the result, land use planning law has come to reflect the power struggle between planners' subjective visions and developers' self-interested desires more than any objective theory of 'livability'. This paper therefore endorses substantial deregulation of the field. Paradoxically, this advocacy of privatization does not proceed, first and foremost, out of respect for the value of the market as efficient regulator; indeed, the recent commodification of planning control may have, in Coasean fashion, introduced efficiencies into the land market by concentrating the economic power of more diffuse community interests. Rather, this paper proceeds out respect for the rule of law values inherent in public regulation and administrative control – values which government land use planning has found impossible to achieve.

40. From Commercial Space to Commercial Set Design: Opportunities and Constraints Arising from the Private Production of Public Spaces in Santiago, Chile.

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Within the current debate on public space there exists a field of study devoted to public spaces produced by incentive zoning. These spaces are located on private ground and the developer receives greater development rights in exchange for the piece of land they provide for public use.

Kayden's evaluation research about incentive zoning in New York in 2000 states that 40% of these spaces are of marginal use and Smithsimon demonstrates in 2008 that developers are intentionally producing desolate spaces that repel public use. This then poses the question of the influence of private producers of public space on its spatial qualities.

The case of New York City is well studied and reported, however, today we can find several publications about this urban practice in Tokyo, Yokohama, San Francisco and even in Latin American cities, as in the case of Santiago, Chile. Unlike in New York where these spaces are located in business districts, the private spaces of public use in Providencia, Santiago, are located in commercial areas. In these cases most developers find it advantageous to build public spaces because it promotes their activity of trade. However this mercantile imperative brings with it a particular spatial expression, program and use of the space.

This research, from a sample of 62 cases, dating from 1972 to 2008, explores the role and objectives of the developers in producing these spaces, how far they set the stage, design the scenery and define the clientele.

Considering that local governments are finally those who must bear responsibility for the results of incentive zoning, the study concludes with comments for a regulation of publicly used spaces and poses the question about which could be the appropriate legal status of these spaces to meet the requirements of a publicly used space.

41. Planning Discourse vs. Land Discourse: the 2009–2010 Reforms in Land-use Planning Policy and Land Policy in Israel

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Land policy and land-use planning policy are two types of public policies that pertain to space. In general, land-use planning policy deals with practical and everyday aspects, whereas land policy involves historical and cultural issues and thus is more abstract.

These differences also influence the discourse about each of these types. Usually, planning discourse is professional and universal, whereas land discourse is more emotional, local, and particular.

This paper examines the degree to which significant differences in the historical and ideological underpinnings of land policy and land-use planning policy in Israel find expression in the public campaigns in Israel in 2009–2010 against the government's attempts to carry out substantial reforms in each. The findings of this study point to substantive differences between the contemporary land discourse and planning discourse in Israel.

The findings also reveal that implementing the proposed reforms may greatly reduce the differences between the two policies in the near future. These trends, which as we shall see are not unique to Israel, may affect the ability of groups and individuals to influence the spatial agenda.

## 42. Spectacle of Irrationality: Housing Boom and Bust in Spain

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Spain is one of the European countries with the biggest housing market booms up to 2007. In only ten years (1997–2007) housing prices increased more than 200% in the national average. Over the same time period housing production rose to record levels with more than 650.000 housing units completed in 2006, far outreaching the natural demand of approximately 300.000 units a year. The abrupt end of the housing boom in 2007 showed manifold consequences: more than 700.000 new housing units in large-scale urban developments of peri-urban location are still unsold and a huge dead stock of housing plots, suitable for the construction of approximately 2.7 million additional housing units, threatens the financial sustainability of Spanish developers.

Today there are many unanswered questions regarding the consequences of the Spanish housing market boom-bust cycle. What was the rationale behind? How did reforms in Spanish Land Law affect the housing boom? Is there any chance that the remnants of the housing boom will be integrated in the future-orientated spatial development of affected municipalities and regions? What public and private strategies have been adopted? And finally, will the Spanish Spatial Planning System learn from the territorial consequences of the housing boom-bust cycle?

On the basis of empirical evidence collected in Spain over the last few years the paper will try to find answers to the issues raised. In particular it will analyze the rationale behind the Spanish housing boom-bust cycle as well as its territorial consequences and will discuss possible measures adopted so far for a better control of future urban development.



43. Reconciling the Right of Property and Planning in the Light of the European Convention on Human Rights

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The European Convention on Human Rights (ECHR) enshrined right of property as a human right. When any interference with the right of property identified by the European Court of Human Rights, it then ascertained whether the interference in question struck a fair balance between the interests of the right holder and those of society as a whole. There must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The protection of the right of property would be largely illusory and ineffective in the absence of any equivalent principle. Accordingly, right to compensation under domestic legislation is material to the assessment of whether the contested measure respects the requisite fair balance and, whether it imposes a disproportionate burden on the property holder. In this regard, one can observe that Court has made a distinction between “deprivations” and other interferences as “control”. While a deprivation of property without payment of an amount will normally constitute a disproportionate interference, control of property without compensation will not.

Planning can be viewed as conflicting with the right of property, as the Court decided that planning is an interference with property rights. Then unavoidable questions arise: Whether right of property must be balanced against planning interests, when will compensation be necessary for planning interventions and what amount may be considered satisfactory. For the answers, I shall focus to the jurisprudence of the Court concerning planning and try to identify the principles with a view to reconcile the right of property and planning. Such an approach may provide an opportunity to consider that right of property and planning co-exists at the same time.

#### 44. A Better Way to Zone

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It's time to think creatively about zoning. After 90 years of constantly tweaking Euclidean zoning and adding layer upon layer of “fixes”, we're still not satisfied. And while form-based zoning works well in some places and for some purposes, it is still another “fix” that often results in one more layer of regulation and that complicates rather than simplifies zoning. The combined effect of all our “fixes” is a system that is very hard for citizens to understand, complicated to administer, does not produce the cities we want, and will not meet the challenges of the 21st century.

This session is based on 25 years of experience planner, lawyer, and educator in both the public and private sectors that resulted in the publication of *A Better Way to Zone* (Island Press 2008). The book reviews how the simple idea of zoning got derailed, discusses the evolving concepts of property law and government regulation, and was named by Planetizen as one of its “Top 10 Books”. Most importantly, the book goes identifying problems with current zoning approaches and identifies ten principles to reform zoning. It discusses initiatives that would simplify zoning structure, allow more flexibility for the market, encourage creative housing options, de-politicize approvals, and keep zoning better connected to the needs and challenges of our cities. It also tackles difficult legal issues involved in zoning reform, including the protection of private property rights, reforming the treatment of non-conformities, and preserving due process rights while streamlining development review procedures.

## 45. Zoning In: State Power & the Siting of Drug Rehabilitation Clinics

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In the United States today, hundreds of localities severely restrict or ban the presence of drug rehabilitation clinics, creating obstacles to rehabilitative treatment in an attempt to protect their communities. Inspired by this quandary and in the context of discriminatory land regulation in general, *Zoning In: State Power & the Siting of Drug Rehabilitation Clinics* proposes a new way to approach zoning. Traditional theoretical approaches to property law have started with the right to exclude as one of the most crucial rights in the bundle of sticks. Zoning law is the quintessential example of this, as it is fundamentally about the collective right of property owners to segregate uses and users. From the City of Euclid to later cases such as Village of Belle Terre, courts have upheld the rights of local government to exclude. Since its inception, however, the framework of local exclusionary zoning has resulted in illegal discrimination. *Zoning In* responds to this seemingly intractable problem by re-envisioning property law as inclusionary.

This piece draws from the standards of general welfare to assert that the protection of individual civil rights should be an integral zoning obligation. Property law is rooted in the state's ability under the police power to regulate for the general welfare of their populace. In light of anti-discrimination norms modeled in both federal and state law, notions of general welfare and the purpose of zoning should be expanded to include civil rights. More generally, the vision of zoning should move past exclusionary regulation to incorporate inclusionary principles: to focus not on zoning out, but zoning in. In the specific case of drug rehabilitation clinics, inclusionary zoning principles would ask states to affirmatively zone in clinics and designate areas where they can exist as of right, thus superseding local discriminatory regulations and creating space for these needed resources.

46. National spatial planning in Iceland – a new beginning?

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A national spatial planning framework instrument has recently been introduced for the first time in a new Planning Act in Iceland. The provisions for the national spatial planning framework in the new Planning Act are a result of a debate that has gone on, with intervals, for over two decades, where conflicts between central control and local government have been at the forefront. The Icelandic planning system has, similarly to planning systems in the other European Nordic countries, a strong local sovereignty.

The case of the national planning framework raises challenging questions about roles of statutory planning instruments and institutions, relationship between central and local government and public participation.

The paper analyses the main arguments for and against the introduction of a national spatial planning framework instrument in Iceland, how the discourse on national spatial planning has developed, who the main actors have been and examines it in comparison with national level planning in the other Nordic countries and the UK. The paper also attempts to identify the main challenges for the further development of this new planning tool and its implementation, both with regard to “soft” and “hard infrastructure”.

Iceland, being a highly developed, small nation state in Europe of 320 thous. inhabitants, can be seen as an interesting example to study planning system and practice in a nation-system in a European context as it offers an opportunity to study a western developed system, and gain an overview over a whole system and its different channels, institutions and actors. The study of the introduction of the new national planning tool also gives an opportunity to reflect on the implications of the economic crisis of 2008 on spatial planning, following decades of strong neo-liberal influence on the planning system and practice.

47. Are Rights of Appeal to Planning Decisions being limited?

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The right to appeal the decisions of planning institutions is anchored in the planning laws of many countries. The scope of the right of appeal may vary from country to country; it may even vary within the same legal system, from case to case and from time to time. The right of appeal may be narrow and limited or it may be broad and may include third parties' right of appeal.

The scope of the right of appeal is fertile ground for debate between those who favor broadening the public's influence in planning processes and broadening the right of appeal (Purdue 2001, Ellis 2002) and those who would limit that right.

The desire to limit it derives from the view that too broad an interpretation of the right of appeal will lead to undue pressure on the planning system, a prolonging of the planning processes, and many drawn-out court cases.

In England, the right of appeal is far from being entrenched. The main issue debated every few years is third parties' right of appeal. In 1984, the Environment, Food, and Rural Affairs Committee of the House of Commons recommended broadening the right of appeal but changed its recommendation two years later. In 2004, as part of the planning reform, this issue came up again, but even this reform made no change in the status of third parties.

Moreover, in the last reform of England's Planning Act in 2008, the right of appeal was limited even more. The declared purpose was to limit the number of appeals, in light of the increase in recent years (White Paper 2007). One amendment to the law abolished the right of appellants to select the type of proceeding in which the appeal would be heard and handed the decision to the Planning Inspectorate (section 319A TCPA 2009). Another amendment gives the Secretary of State the authority to enact regulations for imposing fees (section 303ZA TCPA 2009).

The New Government's declared policy (Open Source Planning, Green Paper 2010) seems to follow the same pattern of limiting the right of appeal. However, The Green Paper introduces a new concept of limiting the grounds of appeal whilst making the appeal system symmetrical.

In this paper I will show that this trend is not unique to England but can be also found in the Netherland and Israel.

48. Compulsory sale of property for planning purposes: An alternative to eminent domain for urban renewal in Portugal

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The taking of property that is not intended to be owned and used by the public has long been admitted both in the United States and in most European countries, as it is revealed by the regular use of «excess of condemnation» as a planning tool in the late 19th and early 20th centuries.

Recently, the United States Supreme Court's June 2005 decision in *Kelo v. City of New London* confirmed the common legal understanding that eminent domain can be used by state and local governmental bodies to promote economic development, even if the taking implies the transfer of property from one private owner to another. The fundamental legal requirement defined by the court in the Kelo decision is that the use of eminent domain must be previously justified within the use of planning powers.

In both situations the use of eminent domain is focused on the planning procedure and not on a material definition of public use or public interest. The decisive question is not whether property is to be owned or used by the public but how the decision concerning its ownership and use is taken in the interest of the community.

This procedural approach has been taken further in the Portuguese urban renewal legislation passed in 2009 with the set forth of “compulsory sale” as an alternative to eminent domain. Compulsory sale may be used when the owner of a blighted building has no means or is not willing to restore or rebuilt it in accordance with the plan adopted for the area and therefore is forced by the authorities to sell its property through a public auction directly to another private owner that accepts to execute its provisions.

The use of compulsory sale, as eminent domain, guarantees the accomplishment of the planning goals established for the area while the publicity given to the property transfer procedure reduces the risk of misuse of public powers in the exclusive benefit of a single private owner.

49. Right to housing in the constitutional context: how relevant to factual housing policy?

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About a third of the world's 140-odd reported constitutions provide a right to housing. A content analysis of the relevant constitutional clauses seems to tell little about their implementation in policy. In order to study the constitution-policy gap of the right to housing we have adopted an approach used in the realm of property rights. Where property rights have been looked at as a package of two components: substance and procedures. Proportions of the two components vary and so does the understanding of procedures as property (entitlements). We apply the package approach to the right to housing.

After analyzing the substantive meaning of the right to housing through a survey of the full set of reported constitutions, we then look at the procedures for implementing them. Procedures are a series of actions usually grounded at non-constitutional law. Some common procedures may include: declaration of violation; time-delayed provisional remedy; creation of a regulatory regime to solve a defined and concrete problem; government committee of inquiry to report on the situation prior to litigation; preventative damages, including injunctive relief; orders to enact legislation; and other. Procedures can indicate how broad the right is in a comparative terms. At this stage of the research, we are conducting a pilot study on a small selection of countries.

This paper is part of a broad comparative study focusing on the similarities and differences, among selected countries around the world, in the legal protection of housing rights granted by their respective constitution. Rather than a classic legal analysis, we look at the right to housing through the prisms of public policy and housing theory

50. An indicator for decline of industrial estates

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The aim of this paper is to test an indicator that can represent the process of decline of a specific type of urban area: the industrial estate. The identification of a reliable indicator enables the systematic analysis of processes of decline of industrial estates, which has received little attention in the vast body of literature on urban decline.

Existing studies on urban area decline concentrate on residential neighbourhoods or inner city areas. Furthermore, most of these studies analyse the causes and effects of decline in one particular area, city or metropolitan area. We concentrate on a largely ignored type of urban area and use quantitative methods to find an indicator that enables us to compare between urban areas on a larger scale (i.e. nationwide).

First, an indicator for decline is developed. To this purpose, a connection between two types of literature is made: literature on the valuation of property (see, e.g. Baum, 1991; Salway, 1986; Dunse and Jones, 2005) and literature on urban (area) decline (see e.g. Galster et al, 2003; Cheshire and Hay, 1989). Similar processes that influence the value of properties, most notably obsolescence, can be considered as important causes of decline of industrial estates. Therefore it is argued that the change in value of properties can be used as an indicator for decline.

Secondly, the first results of fieldwork among 600 industrial estates in the south of the Netherlands will be presented. Based on an existing inventory of the state of decline of these 600 estates, it will be tested whether the proposed indicator of decline can accurately identify processes of decline of industrial estates.



51. Perceptions of the ‘transformatory power’ of Planning Law: An exploratory study of politicians and planners’ views in South Africa

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Planning is no stranger to the schism between ‘wanting to do the right thing’ and ‘actually making it happen’. This was once again demonstrated in post-1994 South Africa when the country embarked on (1) a journey of national reconstruction and transformation, and (2) the pursuit of more sustainable, more just and more efficient ways of living. While Planning was initially treated with a strong degree of disdain for its contribution to the creation and maintenance of the previous Apartheid model, it rapidly came to be viewed as a potentially very powerful tool in this transformatory endeavour.

Yet, as elsewhere, the country did not escape the ideal-outcomes gap. Despite the creation of a whole new legal and policy framework, the results have been disappointing. While this has not prevented the pursuit of better ways of realizing the stated restructuring objectives, it has also resulted in a growing body of questions about the actual transformatory power of State institutions, including Planning Law. While this engagement with Planning Law has led to lively debates, it has reportedly also led to growing unease between politicians and planners, who, it is said, in many cases, hold different views about the transformatory power of the institution. To date, reports on the ‘unease’ and the difference in perceptions are anecdotal and unexplored.

In this paper the authors engage in an exploratory study of the similarities and differences in perceptions of planners and politicians of the transformatory power of Planning Law. This is done through an analysis of (1) a rich series of planners’ life-histories recorded by one of the authors for her PhD-studies, and (2) detailed and structured interviews with planning practitioners and politicians.

52. The Cost of Land Acquisition on inner city redevelopment areas

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Inner city redevelopment is said to be often a very difficult job, among others things because of the high costs of redevelopment, compared to the returns on inner city redevelopment investments (Van der Krabben & Needham, 2008). One of the major costs concerns the costs related to the acquisition of land. Sometimes the price paid for land even exceeds the residual value of the plot (Needham et al., 2004). This paper presents the research proposal on this specific topic. Research is conducted on various aspects determining the prices being paid for land on redevelopment locations and the share of acquisition costs in the total costs of redevelopment.

First, the nature of the problem will be analyzed in more detail. The size of the acquisition costs is compared to the total costs of various projects, brownfields as well as greenfields. Cases also differ over time. The purpose of the research is to analyze the impact of various aspects influencing the prices being paid for land. Five potentially influencing factors, of different kind, will be examined: the current value of land and properties (before redevelopment); the chosen development model (the type of cooperation between private and public sector); landownership constraints to the supply of building land (Adams et al., 2001); the adequacy and transparency of information available to developers and investors (Adair et al., 2006) and, finally, the rationality of the actors in the process.

In order to find a good mix of instruments for urban redevelopment, also with respect to new forms of governance, this paper aims to contribute to a better understanding of urban regeneration projects.

53. Defying Density: Measuring and Indexing Zoning Barriers to Smart Growth and Transit Oriented Development in New York State

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Supporters of “smart growth” and “transit-oriented development” (TOD) have questioned sprawl as the prevailing growth form and have advocated for a more compact built environment. A number of studies, notably Ewing et al. (2005), have claimed that smart growth and TOD have significant energy savings and climate benefits. Although in the United States focus has largely been on fast-growing regions of the South and West, TOD concepts are perhaps more applicable in already urbanized areas with existing transit infrastructure in the Northeast.

Despite its reputation as a growing urban metropolis, permitting development is challenging in the New York suburbs. In New York, as in much of the country, TOD must surmount many legal and institutional barriers to implementation. Zoning laws and local plans of all Metro-North train stations in Westchester County (n = 44) were measured and indexed according to a newly developed barriers index.

Correlations, regressions, and ordered logit models were used to analyze relationships between municipality characteristics and barriers to TOD. Results indicate that zoning and other municipal barriers do serve to limit development in TODs, although the extent to which barriers exist vary widely. Further, barriers are negatively correlated to distance from New York City as well as high center designations. Municipalities that are already dense and diverse are most permissive of new development, and those that are low-density tend to prohibit development most extensively.

The current legal system continues to tolerate exclusion of new development despite the evidence of the pernicious nature of these policies on the sustainability, affordability and social equity of our metropolitan areas. Growing in transit-supportive locations has many benefits but likely cannot be achieved without reform to the legal scheme and incentive structure driving municipal land use decisions.

54. New Demands on Environmental and Planning Law and the Relationship to Property Rights

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Environmental concerns have been major public policy considerations in the U.S. and throughout the world for most of the past half century and we have responded with a range of laws to protect the environment. The ground, however, may have shifted. Current environmental concerns – climate change from greenhouse gas emissions, increasingly globalized issues associated with water supply and quality, demands on our energy systems, etc. – may be such that the conceptual frameworks of environmental law that have characterized much of the last fifty years are no longer adequate. Furthermore, widespread acceptance of the principles of sustainability and a growing trend to adopt the kind of fundamental, systems-based approach to environmental protection those principles represent are placing new kinds of challenges before our legal systems.

This paper will focus on how the demands of environmental protection have changed, what this may mean for our systems of environmental and particularly planning law, and how the ability to make needed changes relates to private property rights. It will do so through the lens of evolving experience with California's recently enacted climate change-related laws: Assembly Bill 32 (2006), which mandates reducing greenhouse gas emissions to 1990 levels by 2020, and Senate Bill 375 (2008), which links planning for land use, transportation, and housing with the goal of reducing GHG emissions.

This topic is important because it addresses central questions of how we will implement critical new environmental strategies. Often, even when we reach consensus on the need for environmental protection, implementation hinges on establishing clearly who will bear responsibility (financial costs, lost development opportunities, etc.). These questions go to fundamental social and governance relationships that require reassessment as the world and our view of it change.

55. Planning in a Rights-based Society: See you in Court!

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“Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.”[1]. Mechanisms for redressing abuses of power are an integral part of a democratic society, based on the “free-standing principle that every action of a public body must be justified by law” [2]. Judicial review involves a judge reviewing the lawfulness of a decision made by a public body, such as a planning authority, and is concerned with the way in which a decision has been made rather than the planning merits of a particular case. There are three main categories of public law wrongs commonly used in cases of judicial review – illegality, fairness, and irrationality and proportionality.

The growing interest in judicial review in planning in the UK raises questions about who is involved and why and whether the process secures appropriate planning outcomes. Commentators have pointed to the increased use of judicial review, suggesting that it has become “a vehicle to vent frustrations and disappointments with the planning system as well as an instrument to protect commercial interests ... [and] a central part of third party opposition strategy” [3]. Notably, when a planning application is approved, the only way for a third party to challenge the decision in the UK is by judicial review in the High Court. This situation stimulated debate about whether there should be a right of administrative appeal against the granting of planning permission, similar to that for an applicant whose application is refused [4]. With reference to recent examples of judicial review led by community and commercial interests in the UK, this paper will outline some of the emerging trends in relation to this form of redress.

56. Enterprise Zones in Northern Ireland: The territorial reconfiguration of property rights?

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Devolution took place in the UK in 1999. New political administrations were created in Scotland, Wales and Northern Ireland. Internal regional arrangements were put into place in England. Devolution still involves important relations between the Westminster Parliament and the devolved administrations. There remains an important strategic overview function discharged in Westminster. In December 2010, for example, the Northern Ireland Affairs Committee of the Westminster Parliament initiated an inquiry into Northern Ireland being designated an enterprise zone. This proposal reprises an interest in the measure – which involves fiscal relief and simplified planning arrangements – which was initially introduced in the early 1980s. In this instance, however, the designation is being considered for an entire political and administrative territory. This raises questions as to the reconfiguration of property rights, planning arrangements and the relations between state-market and civil society in Northern Ireland. This is taking place against processes of devolution, decentralisation and the promotion of localism.

Local context is all important. Since devolution in 1999, a process of modernisation and reform has been put into place. This is running alongside, and is intergal to reform of local government and the strategic spatial planning agenda for the regional economy. In late 2010, a Planning Bill was published bringing forward proposals for a more proportionate, strategic and forward looking planning framework. Parallel proposals would enable the transfer of the planning functions to new local authorities. The Planning Bill includes provision for the designation of simplified planning zones which would represent a diluted reconfiguration of state, market and civil relations. This paper will consider the implications of this radical shift in planning law and property rights in Northern Ireland.

## 57. Urban redevelopment projects: American and Dutch experiences

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Recent studies have paid attention to the problematic nature of urban redevelopment projects (e.g. Van der Krabben & Needham, 2008; Adams *et al.*, 2010). In many grey- and brownfield projects – in contrast to most of the greenfield projects – the profitability of the development is problematic. Usually, in greenfield projects, a substantial difference exists between the residual value of the ‘old’ use (e.g., farming land) and the residual value of the ‘new’ use (e.g. building plots for housing construction). The original land owner and the land developer (e.g., a municipality) then bargain about the price to be paid for the farming land. As long as the price is below the residual value of the land, the land developer will be able to cover his development costs and may even make a profit. In the case of urban redevelopment, the difference between the residual value of the ‘old’ or alternative use and the residual value of the new use is often much smaller (among other things because of the size of the redevelopment costs). In this case, the land developer is often not able to cover all the development costs and he will make a loss.

Between 1990 and 2008 a remarkable development took place in the Netherlands. Average housing prices increased from around 80,000 euro in 1990 to around 230,000 euro in 2008. In the same period, the average costs for building a house increased only from around 70,000 euro to around 130,000 euro. The consequence is that the average residual value of land, related to housebuilding, increased enormously (from 10,000 euro per dwelling to 100,000 euro per dwelling), resulting in an enormous potential for profitable developments. What we have learned, however, from many recent urban redevelopment projects, is that those developments very often are not cost-effective and that government subsidies are inevitable to achieve those projects. A possible explanation for this can be found in the municipalities’ redevelopment strategies. Increasingly, urban redevelopment projects are launched by municipalities as highly ambitious *flagship projects* to regenerate the city. Because of those ambitions expressed at the start of the project, the bargaining position of the municipality (the land developer) as opposed to the bargaining position of the original land and property owners has become much weaker. In other words, the original land and property owners claim higher prices and are able to acquire a larger part of the residual value. Moreover, many municipalities invite property developers to participate in an area development company for the land development, because they find it too risky to do it on their own. Property developers agree to participate, under the condition that they will have the first right to buy building plots against fixed prices, after the redevelopment took place. We assume that, because of this typical coordination structure, the property developers are able to negotiate relatively low prices for the building plots and are also able to acquire a larger part of the residual value.

To understand the impact of the redevelopment strategy on resource allocation in Dutch cities, this paper analyzes and compares urban redevelopment projects in an international context. A number of case studies of redevelopment projects in American cities are conducted, to compare redevelopment strategies and their impact on resource allocation.

58. A life-cycle analysis of the role and place of Planning Law in *being and becoming* a planner

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Planning Law provides one of the primary frameworks in which planners perform their regulatory tasks and play their developmental roles. For many planners it is a hindrance; for others the bedrock of their trade and a cornerstone of their identity and/or their 'entitlement' to professional status. For some, it is something 'to use' to get their development proposals passed, but to be steered clear from as far as possible, when it does not serve their objectives. And, for many young planners it is something that provides a power base when experience has not yet been gained and their confidence levels are still low, their 'professional voice' has not yet been found and/or their 'professional authority' has not yet been established. As such it plays a key role in their career and personal growth paths and plays different roles in their lives over time.

The interaction of Planning Law with the journey of being and becoming a planner, and the ways in which (1) planners interact with and (2) perceive Planning Law at different points in their careers, has received very little attention in planning research. Nor has the ways in which it enables and frustrates/inhibits personal growth of the planner as a person and a professional. As for the world of planning education, here it at best receives a semester or two of focused attention, and even then it is generally treated as a set of impersonal rules and codes of conduct that frame and regulate action.

In this paper, the authors engage in an exploratory life-cycle study of the interaction between Planning Law and the *process* of becoming, and the *activity* of being a planner. This is done through an analysis of (1) a rich series of planners' life-histories recorded by one of the authors for her PhD-studies; and (2) detailed and structured interviews with planning practitioners. While the research was conducted amongst South African planning practitioners, and as such is sure to show many traces of the country of origin, it promises to have value for a wider planning audience.



59. A Transfer of Development Credit Program for the Beaver Hills Initiative Area, Alberta

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A Transfer of Development Credit (TDC) program is being explored in the Beaver Hills/Cooking Lake Moraine area of central Alberta to balance conflicting land use demands. The Beaver Hills (also known as the Cooking Lake Moraine) is located in central Alberta immediately east of the City of Edmonton — one of the fastest growing metropolitan regions of Canada. It is an extensively treed, upland area consisting of rolling to hummocky terrain rich in native wetlands and aspen dominated Boreal mixed wood forest habitat which supports a high diversity of vegetation, waterfowl, mammals and birds. Faced with increasing demands from recreational, urban and rural residential land uses, the Beaver Hills ecosystem is disappearing and requires special consideration for conservation. In TDC programs, private landowners with land designated for conservation may sell development credits to developers in areas designated for more intensive development. By selling development credits landowners receive the financial benefit of development on their land while preserving it in its desired state.

The paper will outline recent legislative changes in Alberta to enable TDCs and outline policy and regulatory challenges and options in implementation of a TDC program. In this paper we explore the challenges of designing a TDC program through the Beaver Hills case study, with particular focus on policy and legal aspects of municipal and regional planning including scope for inter-jurisdictional agreements, tax implications; statutory/non-statutory municipal plans; and the role of conservation easements or other deed restricting mechanisms versus long term contracts in creating development credits.

60. Understanding the Impacts of Measures 37 and 49 on Planning Practice in Oregon

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In 2004 Oregon voters passed a regulatory takings measure known as Measure 37. The measure required local governments to pay landowners whose property had lost value due to land use regulations associated with the state's land management program, or waive the regulation and allow development to proceed. A flood of claims were filed: as of 2006 approximately 6,857 claims covering 792,327 acres of farm and forest land (Martin, et al, 2007). The cost of the claims was estimated at 19 billion dollars. Only one claim was paid; for the rest local governments opted to waive the regulation. In 2007 Oregon voters passed Measure 49, which was formulated to limit the impact of Measure 37. Under this law, aggrieved landowners are allowed some limited development (1-2 houses), but larger scale projects are not able to proceed (Bassett, 2009). This measure includes prospective takings language for regulations enacted after January 2007.

This paper presents the preliminary results of a research project investigating what effect the ballot measures have had on county-level planning practice, both during the period of M37 claim filing (period 1) and now in the aftermath of Measure 49 (period 2). Based on interviews with key informants active in or familiar with county planning practice, preliminary findings indicate that impacts have varied across counties. In period 1, counties characterized by great disagreement between county commissioners, legal counsel, and planning staff about the property rights issue report more negative impacts on day-to-day practice than those with greater unanimity on the issue or agreement on how to proceed. Despite this, few counties report significant impact on current practice. Property rights concerns are still present in Oregon communities, but the M49 compromise appears to be holding—assisted in part by the economic downturn and moribund real estate markets.

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## 61. Integrating land trusts in the land use planning process

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I examine how the acquisition activities of land owning NGOs contributes to land use planning policies. There are two highly visible strategies to influence land uses. The first one, acquisition, is direct. It consists in either gaining outright ownership of the land, or various forms of partial title, including conservation easements. The second one, regulation, is indirect; it relies on the legal instruments of public policy, in particular land use planning, in order to influence the behavior of landowners.

Linking these two strategies in a coherent way often remains a challenge. On the one hand, local authorities are empowered by the law to plan for conservation, but they are not well equipped to do so (lack of competence, expertise, political will). On the other hand, many small conservation NGOs are active at the micro level with few supra-local considerations.

Focusing on an important private conservation effort in Southern Quebec, this article aims at better understanding the position of land owning organizations toward land use planning. It shows how conservation NGOs relying on property rights “discover” the importance of land use planning, position themselves within this broader regulatory context and attempt to coordinate their action at a regional scale in order to complement their acquisition strategy.

## 62. Business Improvement Districts, Canadian Style

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Business Improvement Districts are reputed to be a Canadian invention, yet while they continue to operate (under various names) in municipalities across the country, very little is known about the legal environments in which they function. This paper attempts to fill the gap by presenting the preliminary findings of a research project into BIDs in Canada. At this stage, the enabling legislation in the various provinces is compared and analyzed. How are BIDs initiated, sanctioned, managed, and financed? What powers and responsibilities can they legally assume? The main research questions will also be identified: How easily do BIDs co-exist with their neighbours and the surrounding community? To what extent is the legislative framework conducive to generating economic activity, injecting life into urban commercial areas, and most importantly, to improving the overall welfare of our cities?

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## 63. A New Land Use Bylaw for the City of Calgary

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Provincial legislation that enabled Alberta municipalities to enact zoning bylaws were first contained in the 1929 Town Planning Act. Over time, the powers of municipalities to regulate land use have morphed and evolved and have also included experiments with development control models; but with respect to 'zoning', the system today is conceptually similar to the use classification model first proposed in 1929. This framework has proven to be challenging with respect to managing land use in large urban areas where a myriad of social, economic and political matters are linked to land use.

In 2003, the City of Calgary embarked on a major project to review and rewrite Calgary's 1980 Land Use Bylaw (LUB). As a planning implementation tool, the objective of the LUB project was to accommodate contemporary planning theory by implementing fine-grained land use policy in response to the rapid growth in Calgary since 1980. The implementation of the new LUB in 2008 resulted in a better understanding of the limitations of the land use provisions in the Municipal Government Act (MGA). Despite these limitations, Calgary's new Land Use Bylaw pushes the boundary of traditional land use regulation in Alberta by introducing new types of development controls, such as contextual building setback standards and maximum use sizes, to help manage the complexity of land use in a large city.

Philosophically, the land use bylaw enabling provisions in the MGA reflect a system of land use control that has its historical roots in regulating physical development mostly through prohibition and exclusion. As Calgary has grown, planning policies have become more complex and often try to address new development, redevelopment and social issues with zoning tools that were not originally designed to balance this range of private and public interests. Any future amendments to the MGA should consider expanding the range of regulatory powers available to larger municipalities so that planning policy can be better implemented.

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