SUSTAINABLE URBAN AREAS 23

New instruments in spatial planning

An international perspective on non-financial compensation

Leonie Janssen-Jansen
Marjolein Spaans
Menno van der Veen (eds.)

TU Delft

Delft Centre for Sustainable Urban Areas

Delft University of Technology

New instruments in spatial planning

An international perspective on non-financial compensation

Sustainable Urban Areas 23

New instruments in spatial planning

An international perspective on non-financial compensation

Leonie Janssen-Jansen
Marjolein Spaans
Menno van der Veen (Eds.)

IOS Press

The series **Sustainable Urban Areas**
is published by IOS Press under the imprint Delft University Press

IOS Press BV
Nieuwe Hemweg 6b
1013 BG Amsterdam
The Netherlands
Fax +31-20-6870019
E-mail: info@iospress.nl

Sustainable Urban Areas are edited by
Delft Centre for Sustainable Urban Areas
c/o OTB Research Institute for Housing, Urban and Mobility Studies
Delft University of Technology
Jaffalaan 9
2628 BX Delft
The Netherlands
Phone +31 15 2783005
Fax +31 15 2784422
E-mail mailbox@otb.tudelft.nl
http://www.otb.tudelft.nl

The editors wish to acknowledge the financial assistance of the Dutch government through the Habiforum Program Innovative Land Use, Delft University of Technology and University of Amsterdam.
They would also like to thank the Dutch Scientific Organization NWO-STIP for their grant to the research project on balancing regional developments.

Design: Cyril Strijdonk Ontwerpburo, Gaanderen
DTP: Yvonne Alkemade, Delft
Printed in the Netherlands by Haveka, Alblasserdam

ISSN 1574-6410; 23
ISBN 978-1-58603-978-3
NUR 755

Contents

Preface

Market-oriented planning instruments have recently received considerable attention in many countries. Is it possible to develop innovative, more market-oriented instruments? In the Netherlands – but also in several other countries – the American instrument of Transferable Development Rights has received a lot of attention and has been used as an inspiration for the tailor-made translation of instruments in other planning systems.

We were inspired to address the topic of transferring development opportunities between areas in planning practice by a debate between academics, lawyers, and planning practitioners at an international planning symposium in Annapolis, Maryland (organized by the University of Maryland in the U.S. and Habiforum knowledge center in the Netherlands) and the Van Doorne-Habiforum conference on Transferable Development Rights a year later. We quickly decided that the idea of transferring development opportunities between areas is more than only the transfer of development rights. It relates more to compensation: not in money, but in a non-financial perspective.

The participants' interest in these types of non-financial compensation issues inspired us to probe our own thinking on this compensation issue. A comparative study on non-financial compensation was started, funded by Habiforum and linked to a number of research projects, such as Menno van der Veen's and Marjolein Spaans' research funded by the Delft Centre for Sustainable Urban Areas, and Leonie Janssen-Jansen's research funded by the Dutch Scientific Organization NWO-STIP. Marjolein Spaans' and Leonie Janssen-Jansen's research also fall under the umbrella of the Habiforum Program Innovative Land Use.

The chapters in this publication are representative of a close cooperation between planners, economists and lawyers from both science and planning practice. The exchange of knowledge within the framework of this book has arisen from divergent paths. Draft chapters were discussed with all the authors during a special track on non-financial compensation within the Inaugural Conference of the International Academic Association on Planning, Law and Property Rights in Amsterdam, in February 2007. The more theoretical chapters were discussed during the international research conference by the ENHR (European Network for Housing Research) in Rotterdam, in June, 2007, and the Second Conference of the International Academic Association on Planning, Law and Property Rights in Warsaw, in February 2008.

We would like to thank Habiforum and NWO-STIP for making this publication possible. We are also grateful to the Amsterdam Institute of Metropolitan and International Development Studies at the University of Amsterdam, which covered the expenses for our first seminar in 2007. We also thank the OTB Research Institute for Housing, Urban and Mobility Studies at the Delft University of Technology for covering the costs of the editing and lay-out of this book.

Finally, the contributors to this volume derserve immense thanks for their involvement. We hope this book inspires the reader to be curious about the instruments of non-financial compensation and to wonder what contribution they can make to planning.

Leonie Janssen-Jansen, Marjolein Spaans & Menno van der Veen
Amsterdam & Delft, May 2008

1 Non-financial compensation in international comparative research

Leonie Janssen-Jansen, Marjolein Spaans & Menno van der Veen

1.1 Introduction

Market-oriented planning instruments have recently received a lot of attention worldwide. Although in most developed countries spatial planning still reflects a strong awareness of the need for a more balanced and sustainable spatial development with provisions for additional space for future development, it is increasingly assumed that it is the market, not the state, that should resolve planning problems either with or without minimal (financial) public intervention. In the search for these market-oriented planning instruments, the U.S. concept of Transferable Developments Rights (TDRs), where development rights are transferred between areas, has received considerable attention.

The original U.S. TDR concept boils down to the following. Landowner A (in a so-called sending area) is not allowed by the government to use his land in a particular way which will yield an economic profit. However, the government has to compensate A for this restriction because A will most likely suffer a financial loss as a result of it. Instead of providing A with financial compensation for the restriction, the government issues a development right. This is a right which is valued in terms of money, is transferable and which can be bought by a third party owning land in a receiving area, who without that right cannot realize the desired land use (at least not to the same extent). Landowner A in a sending area sells his right to landowner B in a receiving area, who can then use it to develop his land more intensively than before. The essential purpose of TDRs is to recapture a portion of the extra value generated by increased development potential and to use it as compensation for the reduction of development potential elsewhere (Pruetz, 2003: 87). The U.S. programs in Montgomery County, Maryland and in the New Jersey Pinelands are known world-wide (Johnston & Madison, 1997; MacHemer *et al.*, 2000; Alexander, 2004; Renard, 2007). Both designate preservation areas where down-zoning has reduced development capacity and 'taken' developments rights. TDRs strategically transfer those rights, utilizing little to no public funds through a voluntary process that provides the landowner in the sending area with just compensation for the development rights of the land. It further provides developers with the opportunity to purchase those development rights as development credits which may be used in the designated receiving area to build at a higher level, or for more profitable development (Janssen-Jansen, 2008).

Although the American planning concept seems to be simple in its basic principles, the TDR concept appears complicated and under debate in all its

various applications in both the U.S. and other countries (Renard, 2007). Moreover, the concept has become a reservoir of different planning instruments in many countries. Even though there appear to be many pitfalls to the implementation of the TDR concept and only a few TDR programs have been implemented, they continue to attract considerable interest. In the global trend from government to governance, in which the government takes a step back in planning and relinquishes increasingly more control to the private sector (financing included), there is a demand for such instruments. From this perspective, government creates the preconditions and sets the policy objectives. Citizens and private parties enjoy greater freedom in this setting, as it does not matter to the public authorities how the objectives are attained. In Tokyo, for example, conversion and compensation instruments are used to enable a more intensive land use on the one hand and to create a safer environment with respect to the frequently-occurring earthquakes on the other hand. In the Netherlands, planners see it as a potential instrument to redistribute wealth between profitable and non-profitable developments.[1] Also, in other countries, there is an increasing popularity for these pay-as-you-grow principles. The elaborate land use reform scheme of Professor Donald Hagman, called 'Windfalls for Wipeouts', is used to legitimize this recapturing of profits. The basic idea is that public agencies whose regulations cause property value reductions should compensate landowners for such wipeouts. To be fair, however, public regulations or other government activities that increase property values should be recaptured by the government: the government thus recaptures the windfalls that it creates (Hagman & Misczynki, 1978).

In this book we broaden the scope of the basic idea of Transferable Development Rights (TDRs) and choose the concept of non-financial compensation. Non-financial compensation as a modern planning instrument is thus partly rooted in the American TDR concept, but involves more instruments. It includes all situations where a government has to compensate a landowner for his loss of opportunity or his endeavors, but chooses not to do so monetarily, but by granting him a new building opportunity which can either be sold or used. As a concept, the situation in which a king, emperor or lord finds himself in financial need and grants rights and privileges to his well-off citizens in exchange for money or services goes back to the Feudal and Roman ages. The term opportunity can be linked to the notion of property rights, i.e. a right to use one's property in a certain way that represents a certain amount of money.

---

1 This is the case in the Netherlands. In general, developing offices, business parks and commercial housing is profitable for developers; social housing, green areas, roads and other services are non-profitable. Redistribution between the gains of an area development and the costs of this development might be used as an instrument for more sustainable development.

Non-financial compensation exists when a government compensates a person or company with an interest in land for the loss of one or more of the property rights for that land by creating a new property right that he can either use or sell. It also exists when a planning authority provides an incentive for developers to realize certain planning goals either on their land or on the land of others by creating a property right that can be used or sold when the goals have been realized, rather than directly subsidizing the realization. The latter type of non-financial compensation as incentive structure for spatial developments is becoming increasingly popular in international spatial planning practices. In the final chapter of this book we discuss this variation of non-financial compensation more extensively.

It is paradoxical that a non-financial instrument is about money. However, we prefer the term non-financial compensation as it emphasizes that the government does not compensate landowners by paying them an amount of money but by granting them a right that is worth a certain sum. Non-financial compensation means that a government does not directly subsidize or compensate a landowner (or developer) for his loss or his endeavors. The concept of non-financial compensation is further elaborated in Chapter 2.

1.2 Aim and structure of this book

The aim of this book is to elaborate on the use of non-financial compensation instruments in planning by bringing together different international experiences that are of relevance for current spatial planning practice (as 'best practice' or as 'noticeable practices'), to discuss them in a structured way and to look for a more general approach to these instruments from economic, legal and spatial perspectives.

As the concept of non-financial compensation has been elaborated in different countries, it is interesting to compare the practices. Although all based on the same theoretical roots, the contents as well as the context of the different practices are quite different. Can the different international experiences be helpful with respect to other and new initiatives in non-financial compensation? Can knowledge from one country easily be transferred to other planning systems? What are the opportunities and the challenges?

Of course, we realize that planning systems vary considerably between the different countries discussed in this book. The comparison (and implementation) of planning schemes is difficult because they are all embedded in legal, institutional and economic realities. Urban and rural planning is by definition bounded to the land where it takes place and can therefore never be purely international in the way a sales contract between sellers and buyers in different countries is. Land does not travel. Still, although this makes the nature of our field of research extremely local, it is a fact that people involved in urban

and rural planning do learn from each other, do exchange experiences, and draw up legislation that is inspired by (or even copied from) foreign systems. And although institutional transplantation is shown to be nearly impossible (De Jong, 1999), a structured presentation of international best practices and experiments will prove to be a source of inspiration among those countries. The book thus offers an overview of the opportunities and impossibilities of instruments based on non-financial compensation. By showing different planning innovations and solutions to comparable problems, we hope to provide assistance to planners who face similar problems in their own country.

In the following sections we elaborate on this and present the research framework we use in this study to compare the different cases of non-financial compensation as well as reflecting on the use of the instruments. With this, we hope to contribute to the social and scientific debate on the increasing use of market-oriented instruments in planning world-wide.

In the first part of this book we introduce the roots of the concept of non-financial compensation in spatial planning. We position it in the theoretical literature of comparative research (Chapter 1) and elaborate the concept of non-financial compensation (Chapter 2). In Chapter 1 we also introduce the format according to which the chapters in the second part have been written. This second part consists of the international examples of non-financial compensation in spatial planning. Six chapters examine the three types of cases on the basis of solutions in concrete planning examples for six different countries. Thus Chapter 3 deals with non-financial compensation in Japan, Chapter 4 shows non-financial compensation-experiments in Korea, Chapter 5 continues with a discussion of non-financial compensation-instruments in Spain, Chapter 6 deals with planning innovations in Italy, TDR provisions in the U.S. are dealt with in Chapter 7 and finally, in Chapter 8, the non-financial compensation experiments in the Netherlands are considered. The conclusion in the last part deals with a different perspective regarding development via compensation. The solutions will be held up against the light of legal and economic perspectives in Chapters 9 and 10. In Chapter 11 the cases are compared and overall conclusions are drawn.

1.3 Comparative analysis of non-financial compensation

1.3.1 An introduction to comparative analysis

A wide range of academic literature exists on the cross-national comparison of planning frameworks and planning practices or on trans-national and trans-regional initiatives and their impact on planning in European countries (Newman & Thornley, 1996; Sanyal, 2005; De Jong & Edelenbos, 2007). These

types of comparisons oriented on knowledge distribution can be typified in their aims as inspiration and learning. Transplanting planning instruments and approaches would be beyond the inspiration and learning categories. Research (De Jong, 1999; 2004; De Jong *et al*., 2002) shows the many difficulties that arise with the transferring of planning instruments from one planning system to another. In this section we discuss different types of comparative research and levels of transfer of planning in order to define a research framework for international comparative research on non-financial compensation in spatial planning in Section 1.4.

As explained earlier, a wide range of academic literature exists on the cross-national comparison of planning frameworks and planning practices. There are also many examples where cases are compared in different countries, aiming to create comparative understanding of planning experiences and to identify lessons for comparable planning issues (Blazyca, 2003; Evers, 2004; Booth *et al*., 2007). In this section we will have a closer look at what comparative analysis is and how it can be used. We see international comparative research as a specific form of comparative research.

Pickvance (2005) distinguishes comparative analysis from the juxtaposition of descriptions of a series of cases. He states that sequential presentations of descriptive data are informative about the cases concerned, but comparative in only a weak sense, in that they make the reader aware of differences and similarities. The strength of a stronger form of comparative analysis as a research design is its ability to introduce additional explanatory variables (or to allow variation in variables which have a fixed value in the initial case of interest), and to show that relations are stronger or weaker than initially thought. Comparative analysis also has weaknesses, however, most notably that it requires the commensurability of concepts across cases. Terms like 'environmental regulation' must have consistent meanings to avoid comparing apples with oranges. Another weakness of comparative analysis is that like all non-experimental research it has to rely on 'naturally occurring variation' which rules out many possible, but not encountered combinations of values that are of interest to the researcher. These specific features of comparative research must be taken into account when setting up a research framework and drawing conclusions in the analysis.

1.3.2 Schools of comparative research

In international comparative housing research Kemeny and Lowe (1998) identify three different schools which could also apply to spatial planning. Each is associated with a different level of generalization. When a number of countries are juxtaposed but generalizing conclusions are not made, this is termed juxtapositional analysis. At the other extreme are studies that point at underlying similarities and name differences between countries as 'variations',

'historical contingencies' or sometimes 'exceptions'. These approaches have generally assumed that all modern societies are developing in a particular direction, for example towards a more developed welfare state, an unregulated market, or higher levels of capital exploitation. Such universalistic and global approaches in the comparative literature have been termed convergence perspectives. In between these two extremes there are studies which apply what might be termed as theories of the middle range (Merton, 1957), that propose typologies of systems derived from cultural, ideological, political dominance or other theories as the basis for understanding differences between groups of societies. Such approaches in the comparative housing literature are termed divergence perspectives. Such a middle range theory would use a universalistic method within groups of systems that are described as part of the same family. Here a problem arises; when it is accepted that cultural differences exist and are of importance for a comparison of planning issues, it is hard to generalize between countries.

Over the years, other attempts have been made to distinguish between types of comparative research, for example in the methodology field. In planning, comparative case study research is a dominant research method, as many studies can be seen as strategic explorations into particular phenomena with the intent to provide an explanation (Masser & Williams, 1986). Pickvance (2001) states that the two conventional types of comparative analysis – universalizing comparative analysis and differentiating comparative analysis – focus on the explanation of similarities and differences respectively. He further elaborates on this distinction by using the categorization of Tilly (1984) into four types: individualizing, universalizing, variation-finding and encompassing:

- an individualizing comparison grasps the peculiarities of a few specific cases, by contrasting a small number of cases;
- a universalizing comparison 'aims to establish that every instance of a phenomenon follows essentially the same rule' (Tilly, 1984: 82, in: Pickvance, 2001);
- a variation-finding comparison seeks to establish a principle of variation in the character of a phenomenon, by examining systematic differences between instances (Thus, it holds that, for example, non-financial compensation is essentially one phenomenon that may vary in its outcomes in different countries (locations).);
- an encompassing comparison defines a system as a whole and then explains the characteristics of specific cases as a function of that system.

In his elaboration of the categorization Pickvance adds the assumptions which researchers make about the underlying causal patterns present (see Table 1.1).

Dobbin (1994) makes his point when he concludes that the culture of a

Table 1.1 Types of comparative analysis according to whether the starting point is similarities or differences

		End point: explanation in terms of	
		Principle of variation	Principle of universality
Starting point	Observed or constructed differences	A. Differentiating comparative analysis	B. Universalizing comparative analysis with plural causation
	Observed or constructed similarities	C. Differentiating comparative analysis with plural causation	D. Universalizing comparative analysis

Source: Pickvance, 2001, p. 23

country and the way people do things is highly related to institutional structure. Culture itself is hard to measure, but can be captured in rules and practices. Sanyal (2005: 14-15) makes the picture even more complex when he states that: "planning contexts vary not only among different nations in the world, but also within nations, particularly those with federal governance structures. What is interesting, however, is to question the extent to which such contextual specifics can be attributed to indigenous cultural traits of planning. (...) The concept of cultural essentialism, in which culture is portrayed as static, home-grown, pure, and immutable, is inaccurate. Rather the presented planning cultures seem to have evolved with social, political, and economic influences, both internal and external; creating hybrid cultures whose complexity can only be understood through deep historical analyses".

Van Dijk (2002: 914), finally, assumes that (1) the comparative analysis of planning systems can be done at a number of levels of increasing complexity, and (2) advising other countries is the most complex aim, therefore the highest level. He distinguishes four levels of comparative cross-national study:

- collecting information about planning systems in other countries ('exhibiting'); or presenting a range of strategies in a clear way;
- valuing each planning system with a relative value ('valuing'); or: giving relative scores to various planning systems;
- revealing the variables that determine the outline of the planning instrument ('explaining'); or: why things are the way they are;
- advising countries that not have a certain type of planning system yet ('advising'); or: countries can benefit from other countries.

This brings us to our key-point: the various aims that underlie comparative research.

1.3.3 Aims of comparative research

Planning research is not only about increasing knowledge. Comparisons are often made with the concrete goal of improving one's own planning system. Oxley (1991) formulates ten objectives of conducting comparative research on housing. His objectives include increasing knowledge and developing ideas for new policies for research. His presumption is that when systems are better understood in their broader context, it is also possible to find ways to make

them work better. When collecting comparative material, arguments that are based on narrow perceptions can be rejected or sets of pre-held judgments can be supported. Further, Oxley also sees comparative research as helpful in determining the relationships between the housing, or other, system and other variables. This might result in obtaining new knowledge and ideas in order to formulate new hypotheses or further comparative research to test well-defined hypotheses concerning the functioning of housing, or other, systems.

Planners and other practitioners look at approaches in other countries hoping that the problems they encounter in their own systems can be solved by using a successful foreign approach. This aim is also part of comparative academic research: if the ultimate goal of comparison is not to learn from and adopt the best practices of the countries researched, then what is? Although academics tend to be skeptical of the chances of institutional transplantation, it is often the ultimate goal of comparative planning research.

In this chapter we distinguish three levels of increasing intensity in the transfer of planning instruments and practice when comparing practices across countries: (1) inspiration, (2) learning, and (3) transplantation:

- *Inspiration* is about collecting and valuating data and information on innovative experiences and practices. Would, for example, the American practice of TDRs be of interest for our research? And what about TDR-like and non-financial experiments in other countries?
- *Learning* implies adaptation of the information collected and evaluated in the inspiration phase, including retrieving underlying ideas, obstacles and changes. This practice is of interest to one country but – as systems are quite different – how can we implement such an idea without its weaknesses? Working together with planners from different countries and 'exchanging' knowledge is essential at this level of learning.
- *Transplantation*: the knowledge transfer is complete and an innovative practice has been adopted by the 'learning' country, often adapted to local circumstances. Of course, we can also find 'transplants' of instruments without any adaptation. Here the 'learning' step seems to be skipped.

De Jong (2004: 1055-1056) writes that planners wanting to adopt transplants from countries varying greatly in terms of administrative culture and structure should reckon on considerable institutional complications. Although the adoption process is not impossible because of this, attention should be paid to transforming them in such a way that they meet domestic circumstances, needs and wishes. However, it is generally assumed that transplanting planning institutions from countries with similar political, legal and cultural characteristics is easier. Political, legal, administrative and planning systems in Europe are regularly divided into groups, such as the Anglo-Saxon, Nordic, Napoleonic, other Continental and former Communist systems. In addition, anthropologists have shown that cultural values embraced in different coun-

tries have a strong impact on administrative and organizational processes and that the role planning plays in different societies is linked to aspects of time conception, to uncertainty avoidance and to the extent in which the environment is considered controllable and able to be influenced. This should all be taken into account when setting up an international comparative research framework and interpreting the results. In the next section we define a research framework for international comparative research on non-financial compensation in spatial planning.

1.4 What framework fits the aim of our comparative research?

As mentioned in Section 1.1, several countries are experimenting with forms of non-financial compensation in spatial planning. A method was sought to discuss these different planning instruments without getting lost in facts or becoming only a compilation of material in the form of a juxtapositional analysis. For this reason, a set of three concrete but abstract cases and their possible solutions are taken as the basis, after which planning experts from a variety of countries indicate how within their country (or the country of which they have extensive knowledge) these cases are being handled. These solutions might again offer inspiration for other countries.

We distinguished three ways in which a comparison between cases in different countries (or regions) can take place: inspiration, learning and transplantation. The ways differ in their ultimate aims and thus require different research methods. Generally, when the aim of the comparison is more ambitious, a more in-depth analysis of various factors is required. For this book our primary goal was to offer inspiration for developing non-financial compensation instruments by bringing together different international experiences that are of relevance for current spatial planning practice. However, discussing them in a structured way will allow us to look for a more general approach to these instruments from economic, legal and spatial perspectives and distinguish some learning points which might ease the 'transference' of non-financial instruments between countries.

To provide a more structured way to improve the comparativeness between the cases we formulated three types of cases that have been abstracted from the real world in such a way that they:

- depart from a problem situation within planning practice
- cover many similar cases, and
- can be related to concrete cases in other countries.

These abstract cases were subsequently used by reporters from different countries to indicate how within their country (or the country of which they

have extensive knowledge) these cases are being handled with the use of one or more non-financial compensation issues. We distinguished between cases of conservation, conversion and re-allocation.

- Case 1 (Conservation) – One or more local governments would like to preserve an open area that is now being used for extensive farming. A residential neighborhood will be created nearby. The preservation and maintenance of the green zone is too expensive for the farmer. The local governments do not have any funding available to maintain the green zone. They would therefore like the developers of the residential neighborhood to contribute to the green zone that could even be upgraded into a green recreational and wildlife area. Do the local governments use an instrument to force the developers to do that? In this conservation category, protection – and even upgrading – of the existing land use is important and whether the existing land use is 'open space' or contains monuments.
- Case 2 (Conversion) – A local government would like to demolish existing high-rise buildings in a certain area and replace them with one and two-story (low-rise) buildings. There are no financial resources available to compensate the real-estate owners for the reduced proceeds that they will receive as a result of the conversion. Is there an instrument available that the local government could use to fulfill its goals? In this conversion category the improvement of the current land use is important. Examples of this type of non-financial compensation include the conversion from agricultural into nature reserve land use and from dilapidated into newly-built housing and the financial instruments that are used to realize these conversions. The Dutch Space for Space instrument, through which additional dwellings are realized to finance the demolition of stables in open areas, is an example of such a conversion which pays for itself (and is not dependant upon government subsidies).
- Case 3 (Re-allocation) – A new commercial business area will be created and as a result the landowners will enjoy a considerable increase in the value of their land. Within the area, however, some of the plots have been zoned as green areas. As a result, the owners of these parcels will suffer a decrease in the value of their land, and they therefore do not want to cooperate. Expropriation of these owners is not an option since the local government does not have the financial resources to compensate the owners. Is there another way to compensate the owners of the green areas and thus convince them to include their land in the project? In this re-allocation category, the compensation for non-development is important. Examples of this kind of non-financial compensation can be found in redevelopment areas (for example the 'Valencia model' in Spain), but also in greenfield developments (confer planning obligations). The compensation may be realized within the plan between property owners, but also between local governments if they decide to forego development in favor of their neighbors.

All country chapters have been written in accordance with a particular format in order to ease comparison and learning. Formulating abstract cases and having experts in different countries who translate them into concrete cases in these countries, makes it easier to learn from each other's best practices and to compare the different experiences. In this book, we explore to what extent the different practices and instruments address the problem. Although the planning context and the institutions are different from country to country, the object of research might be quite similar. In this way, studying various institutions can be interesting for institutional designers abroad.

1.5 Comparing non-financial compensation practice in six countries

In the winter of 2006 we approached reporters of different countries in which experiments of non-financial compensation instruments seems to be present based on an extensive literature research. We asked the reporters whether or not the use of non-financial compensation in their countries would be applicable in one of the three abstract cases. In some countries, like Germany, the idea of instruments of non-financial compensation seems to be only theoretical (Einig, 2005).

The book analyzes experiments and practices of non-financial compensation in Japan, Korea, Spain, Italy, the U.S. and the Netherlands according to the format of the three abstract cases described in Section 1.4. Table 1.2 gives an overview of the cases presented in the book. For the research, countries from different continents were selected, all experimenting with instruments and cases of non-financial compensation in spatial planning. For each country we asked the reporter to sketch the planning context in which the selected case studies take place, describing the cases in accordance with our format and concluding with a summarizing table of the cases along the following themes:

- Period in which case was introduced
- General objective of proposed instrument
- Characteristic factors
- Particular economic and social circumstances that have determined the instrument
- Fit within planning and legal system: what relation to spatial plans
- Whether specific laws and regulations were drawn up
- Spatial level at which case is tackled
- Relevant public actor(s) and role
- Balance between private and public exchange
- Parties which financed the case
- Possibility for public participation.

Table 1.2 Overview of the cases discussed in this book

	Conservation	Conversion	Re-allocation
Japan	Marunouchi district (Tokyo)	Safer and more efficient land use (Tokyo)	Tokyo station
Korea			Sinseol-dong (Seoul)
Spain	Natural areas preservation Preservation of listed buildings (City of Almería)	Francia Avenue (City of Valencia)	Orriols (City of Valencia)
Italy	Cappuccini area (Schio)	Cremona	General Town Planning Scheme of Rome
U.S.	City of Malibu (California)	Hudson Yards (New York City)	Portland (Oregon)
Netherlands	Limburg experiment	Space for Space (Province of Noord-Brabant)	GEM in VINEX, Sports in the South Axis (City of Amsterdam)

The country chapters can be seen as sequential presentations of descriptive data, but in accordance with a common framework to ease the comparison between the different cases. This study does not aim to explain causal relations; it aims to mirror different approaches to an abstract problem in order to inspire, learn or even transplant planning practice experiences. With our research framework for a comparative study of cases addressing non-financial compensation we have addressed the conditions set out in the literature.

Our book concludes with a discussion of the similarities and differences in the approaches of the authors of the country chapters by comparing the definitions used. Furthermore, we compare the problem-solving capacity of the (proposed) solutions in each country for the abstract problems mentioned above. To what extent are problems solved and with which instrument? As each chapter concludes with a summarizing table, we also present a structured evaluation of the different cases throughout the book. In the concluding chapter we reflect on the three levels of increasing intensity in the transfer of planning instruments and practice (inspiration, learning and transplantation) for the six countries examined in the book.

References

Alexander, G.S. (2004), Propriety through Commodity? Why have legal environmentalists embraced market-based solutions?, in: Jacobs, H.M. (Ed.), **Private Property in the 21st Century: the Future of an American Ideal**, Cheltenham: Edward Elgar, pp. 75-91.

Blazyca, G. (2003), **Restructuring Regional and Local Economies: Towards a Comparative Study of Scotland and Upper Silesia**, Urban and Regional Planning and Development Series, Aldershot: Ashgate Publishing.

Booth, Ph., M. Breulliard, C. Fraser & D. Paris (2007), **Spatial Planning Systems of Britain and France: A Comparative Analysis**, London: Routledge.

De Jong, W.M. (1999), **Institutional transplantation: how to adopt good transport infrastructure decision-making ideas from other countries?** Delft: Eburon.

De Jong, M. (2004), The Pitfalls of Family Resemblance: Why Transferring Planning Institutions Between 'Similar Countries' is Delicate Business', in: **European Planning Studies** (12), pp. 1055-1068.

De Jong, M., K. Lalenis & V.M. Mamadouh (Eds.) (2002), **The theory and practice of institutional transplantation. Experiences with the transfer of policy institutions**, Dordrecht: Kluwer.

De Jong, M. & J. Edelenbos (2007), An Insider's Look into Policy Transfer in Transnational Expert Networks, in: **European Planning Studies** (15), pp. 687-706.

Dobbin, F. (1994), **Forging industrial policy: the United States, Britain and France in the railway age**, New York: Cambridge University Press.

Einig, K. (2005), Regulierung des Siedlungsflächenwachstums als Herausforderung des Raumordnungrechts, **DISP** (160), pp. 48-57.

Evers, D.V.H (2004), **Building for Consumption, Academic Dissertation**, Amsterdam: University of Amsterdam.

Hagman, D.G. & D.J. Misczynski (Eds.) (1978), **Windfalls for wipeouts; Land value capture and compensation**, Chicago: American Society of Planning Officials.

Janssen-Jansen, L.B. (2008), Space for Space, a transferable development rights initiative for changing the Dutch landscape, in: **Landscape and Urban Planning**, doi: 10.1016/j.landurbplan.2008.06.002.

Johnston, R.A. & M.E. Madison, (1997), From Landmarks to Landscapes, A Review of Current Practices in the Transfer of Development Rights, in: **Journal of the American Planning Association** (63), pp. 365-379.

Kemeny, J. & S. Lowe (1998), Schools of Comparative Housing Research: From Convergence to Divergence, **Housing Studies** (13), pp. 161-176.

MacHemer, P.L., J. Thomas & R. Hamlin (2000), **Transferable Development Rights, a Policy Brief for the Michigan Legislature**, Michigan: State University.

Masser, I. & R. Williams (1986), **Learning from Other Countries: the cross-national dimension in urban policy-making**, Oxford: Geo Books, Alden Press.

Merton, R.K. (1957), **Social Theory and Social Structure**, Glencoe: Free Press.

Newman, P. & A. Thornley (1996), **Urban Planning in Europe: International Competition, National Systems and Planning Projects**, London: Routledge.

Oxley, M. (1991), The aims and methods of comparative housing research, **Scandinavian Housing and Planning Research** (8), pp. 67-77.

Pickvance, C. (2001), Four Varieties of Comparative Analysis, **Netherlands Journal of Housing and the Built Environment** (16), pp. 7-28.

Pickvance, C. (2005), **The four varieties of comparative analysis: the case of environmental regulation**, paper for Conference on small and large-N comparative solutions, University of Sussex, September 22-23.

Pruetz, R. (2003), **Beyond Takings and Givings, Saving Natural Areas, Farmland and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges**, Burbank: Arje Press.

Renard, V. (2007), Property rights and the 'transfer of development rights': questions of efficiency and equity, in: **Town Planning Review** (78), pp. 41-60.

Sanyal, B. (Ed.) (2005), **Comparative Planning Cultures**, London: Routledge.

Tilly, C. (1984), **Big Structures, Large Processes, Huge Comparisons**, New York: Russell Sage Foundation.

Van Dijk, T. (2002), Export of Planning Knowledge Needs Comparative Analysis: The Case of Applying Western Land Consolidation Experience in Central Europe, in: **European Planning Studies** (10), pp. 911-922.

2 The concept of non-financial compensation in spatial planning

Marjolein Spaans, Menno van der Veen and Leonie Janssen-Jansen

2.1 Introduction

In this chapter we will further elaborate the concept of non-financial compensation. We will discuss why governments (i.e. planning authorities) use non-financial compensation as a planning tool, why governments have to compensate for the loss of a property right and – the other way around – why governments have the right to recapture increased market value.

The term non-financial compensation has its roots in agency theory, which accepts that in a principal-agent relation, non-financial compensation schemes will sometimes result in a greater commitment by the agent than financial incentives. Examples of non-financial compensation schemes are developmental opportunities for employees, on-the-job training programs or alternative work schedules. Non-financial compensation may thus provide an extra incentive for an agent to stay at or join a company or to work harder in a scheme that is ultimately profitable for him. In other words, non-financial compensation exists in cases where agents are also financially compensated for their efforts.

The perspective we take in the cases in this book differs from agency theory, most notably because in these cases the value of the non-financial compensation can be unclear, although it is always regarded as sufficient to compensate a property owner for his loss. The main difference between a financial and a non-financial compensation scheme is that in the latter situation the government does not financially compensate a landowner for his loss of rights, but instead gives him a right that represents a financial value.

This could be the case in the examples that are used in agency theory. On-the-job training programs and developmental opportunities provide employees with skills that allow them to make more money in the future. But sometimes other examples such as 'the right to dress casual' are mentioned and these examples are not incorporated in our research project. That does not mean that truly non-financial compensation schemes cannot exist in the context of spatial planning. On the contrary, one example could be when landowners have to contribute some of their land for public use and do not receive anything in return but a park or an esplanade that may or may not lead to an increase in the value of their properties. From the developers' perspective these often voluntary agreements generally have a strategic element, as they hope to be asked again in the future to be involved in new developments. In the examples we use in this book, however, non-financial compensation always means that a financial payment by the government is replaced by the granting of a right that represents financial value in order to give landowners an additional incentive to join the development.

2.2 Why governments use non-financial compensation schemes

Non-financial compensation in spatial planning means that a government does not directly subsidize or compensate a landowner or developer for his loss or his endeavors. Non-financial compensation exists when a government compensates a person or company with an interest in a piece of land for the loss of one or more of his property rights for that land by creating a new property right that he can either use or sell. An example is when a plot of land that could be developed in many ways becomes subject to rules that confine its development to low-rise buildings. In some countries the landowner has to be compensated for this loss of opportunity. When the planning authority (usually local government) that took away the right does not have the financial resources, instead of compensating him directly (financially) or engaging in 'partial taking' (Bruce, 1998) it may give the private landowner a new right that he can either sell on the market or gives him the right to develop property elsewhere. Non-financial compensation also exists when a planning authority provides an incentive for developers to realize certain planning goals either on their land or on the land of others and the government does not directly subsidize that realization but creates a property right that they can use or sell when they have realized the goals. These types of incentives are non-financial incentives.

Taking the point of view of government in this chapter and not the point of view of the private parties, we use the term non-financial compensation for both situations. In both cases government creates a new property right to compensate the developers and private parties to compensate them for their losses or their endeavors. It would be interesting to take the position of the private parties into account and focus on situations where they choose to or are forced to compensate for externalities of their market strategies in kind instead of paying for them. That is however not the focus of this chapter. The example of the European legislation on nature compensation through the Birds (1979/409) and Habitat (1992/43) Directives (European Commission, 1979; 1992) thus does not fit into the framework set out in this chapter[2].

2 The European Union issued the Birds Directive (1979/409) and the Habitat Directive (1992/43), setting stringent criteria for the protection of designated natural habitats and species. Article 6 of the Habitat Directive, for example, imposes all sorts of obligations on the member states. Each plan or project which is not directly connected with site management must be meticulously screened for its potential spatial effects. The plan or project in question may be approved only "after having ascertained that it will not adversely affect the integrity of the site" (6.3). The compensation principle set out in Article 6 sub 4 comes into effect if it turns out that a project or plan will indeed have an adverse effect on a site and therefore be in breach of the regulations.

2.2.1 Two types of non-financial compensation

We distinguish between single-purpose and multi-purpose types of non-financial compensation. A single-purpose type of non-financial compensation exists when the non-financial compensation scheme is not a planning tool in itself but only exists as a way to compensate the landowner for his loss. It relates to the compensation of a loss of right and could be considered as a passive instrument as it is only used as compensation. A multi-purpose type of non-financial compensation exists when the scheme not only compensates the landowners, but is also used as a tool to reach a certain spatial planning development goal. This type of scheme relates to an opportunity to develop something additional and implies an actively deployed scheme.

An example[3] of a single-purpose type of non-financial compensation is the well known Penn Central case in New York where the owner of the station was also granted the right to use his unused development rights off-site, but here the motive was only to compensate him for his loss of development rights, not to promote the construction of a new high density neighborhood.

The case of Tokyo Station is an example of a multi-purpose scheme. Tokyo Station is a historic building next to the Central Business District of Marunouchi in Tokyo. The owner of Tokyo Station had the right to build at a Floor Area Ratio (FAR) of 9 where the station was built at only FAR 2. His plan to build two towers next to the station was fought since the buildings would 'overshadow' the historic building of the railway station. He was then granted the right to sell the development rights he had left to other sites in the Central Business District of Marunouchi, which was rezoned because the City of Tokyo wanted to encourage development in the highest possible densities. The two motives therefore were the conservation of the Tokyo station and promotion of the construction of high-density buildings in the areas that could receive the TDR (Chorus, 2007). The Highline project in New York City is also an example of a multi-purpose non-financial compensation scheme. Here, when it was decided that an elevated rail track would not be demolished but converted into a public park, TDRs were used not only to compensate landowners for their loss of development rights but the scheme was also used to promote the construction of high-rise buildings in a special zone in the borough of Chelsea.

Another example is the Space for Space program in the Netherlands (*Ruimte voor Ruimte*). In this program, developers agreed that they would only receive the right to develop expensive housing projects after compensating those farmers financially, who (on a voluntary basis) decided to stop their in-

3 The examples of Penn Central (New York) and Tokyo Station are discussed more extensively in the country chapters.

tensive livestock industries and have their lands converted into natural parkland or agricultural land. The right to develop one's land is a property right that the developers have to buy from the farmer who quits his intensive livestock farming activities. Since there may be a problem of phasing, the right is not directly purchased from the farmers; instead the money is paid to a farmers' compensation fund. In the Dutch legal system some legal barriers arise with a system that forces the developers to purchase the rights directly from the farmers. The program is regarded as an example of non-financial compensation because the government does not pay the farmers to stop farming in the area but gives them a property right (the right to develop housing projects). For the developers the program is an example of non-financial compensation, because they receive the right to develop profitable housing projects when they pay for the conversion of agricultural land into nature land.

The examples show that a planning authority may use a non-financial compensation scheme to compensate landowners for their loss of economic value or to provide an incentive for them to realize a certain planning goal. Such planning goals include social housing, environmental goals, conservation of historic sites, conversion of sites, or the prevention of urban sprawl (Pruetz, 2003). These goals could add up to an infinite list but we take a more abstract point of view and focus on the motives behind planning authorities using non-financial compensation schemes. We discern four general motives:

- compensation for lost opportunities
- lack of public resources
- increasing ineffectiveness in the management of urban plans
- improvement of the overall quality of urban and regional space.

The first two motives are generally examples of single-purpose non-financial compensation schemes, since they are only meant to compensate. The latter two can result in multi-purpose non-financial compensation schemes. The four motives do not exclude each other; they can all apply to the same case at the same time. This would be the case when an existing land use plan does not result in reaching the results for which it was drawn up. It does not succeed, for example, in its aim to protect the green zones from the expanding city. A new plan is now drawn up at a regional scale in which the surrounding green zones of the city are protected while at the same time higher-rise buildings will be allowed in an area where the planning authority wants to create a high quality mixed neighborhood including both office and residential use. As a result some property owners, who have already made some investments in the legitimate expectation that they could build residential low-rise buildings in the green zone, are now left with land that is worth virtually nothing. The city does not possess any financial resources to compensate these landowners; it therefore decides to compensate the landowners with development rights that they can either use or sell in the neighborhood where the

city wants to promote the construction of high-rise buildings. In such a case, the reasons to use the non-financial compensation scheme would be: compensation of lost opportunities of the landowner in the green zone, the lack of financial resources as the local government does not have the money to compensate and cannot accomplish the goals itself, ineffectiveness of the former urban plan as this did not succeed in protecting the green zone and the improved quality of space through concentration of urban growth within the boundaries of the existing city and the safeguarding of the green zones.

2.2.2 Negotiated developments

The popularity of non-financial compensation schemes falls within a trend that at least exists in the western world and western-based systems (e.g. the Asian tigers), whereby the traditional borders between state and market are being eroded. Nowadays, a complex web of relationships between governments and the market exist. Related keywords are public private partnerships, negotiated development and (to some extent) neo-liberalism (Osborne, 2000; Fischer & Ury, 1983; Shmueli *et al*., 2008; Jessop, 2002). Sometimes the planning authorities themselves are mixed entities that have characteristics that are traditionally associated with the market (making profit) and with the state (promoting public, not private benefits).

Davy (1998: 1) speaks of the trend in negotiated developments or planning by agreements: "Negotiated developments are land uses for which a planning authority grants specific zoning or planning permissions as the result of a negotiated agreement between the municipal government, the developer, and other stakeholders". This strikes us as a good definition of the trend although we should note that the American planning systems are traditionally more oriented towards a strict demarcation between the planning authorities and the developers. TDR systems are often as-of-right (Booth, 2003). Due to the trend in negotiated developments, the use of non-financial compensation schemes may increase, but an non-financial compensation scheme is not necessarily an example of a negotiated development. We hereby take the position of the government as our point of view, since an non-financial compensation scheme that involves a transferable and sometimes even tradable right will generally involve a price-negotiation between market parties.

Davy (1998) raises the question of whether negotiated developments, whether formalized or informal, improve or corrode spatial planning and land use control. A first group of arguments against negotiated development is directed against zoning and spatial planning and questions the legitimacy of negotiable restrictions on land uses. A second group of arguments criticize negotiated developments for more political reasons. Since development negotiations consume substantial resources, the uncertain result of the negotiation process puts into question whether resources are employed wisely. A

final group of arguments against negotiated developments draws upon the traditional outlook of the planning profession. Although 'planning' means different things to different people, the vast majority of professional planners consider themselves defenders of the public good. Planning by agreement is more flexible than planning in the classical way (by detailed legislation); it allows governments to define the goals and purposes of development whereas the market will achieve an optimal distribution of development rights. It thus combines the best of both worlds; it overcomes the social injustices of the market as well as the inefficient rules of the government. This could also provide an explanation for the popularity of non-financial compensation schemes, as they aim to have the best of 'more than one world'. That means that, when planning involves compensation, non-financial compensation schemes are more efficient, more effective and cheaper than traditional planning tools.

Having defined the concept of non-financial compensation we will now have a closer look at the reasons why governments have to compensate (Section 2.3), and sometimes want to compensate (Section 2.4) and why they can recapture values that have increased because of the act of a planning authority (Section 2.5 and 2.6). Conclusions will clarify why the non-financial compensation concept helps to compare non-financial compensation schemes in different planning systems and legal systems. Non-financial compensation is a new term that is not used in any country-specific planning or legal system, and can therefore be used by academics and planning practitioners throughout the world as a neutral concept without a country-specific burden.

2.3 Why governments have to compensate

In this section we elaborate on why governments have to compensate persons who lose one or more rights to property[4]. Sometimes they cannot be compensated in money (because of lack of funds), and therefore have to be compensated in the form of a right. Property rights play a very important role in urban and rural land development. Spatial changes will always have effects on property. Article 1 Protocol No. 1 of the European Convention on Human Rights guarantees:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and

4 We do not use the term *landowners* because the persons that need to be compensated may lease the land or have any other right to it that is taken away from them and therefore requires compensation.

by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The use of land development tools and planning tools therefore will necessarily find a boundary in the protection of the fundamental right to property" (Groetelaers & Ploeger, 2007).

The already mentioned Highline project in New York City ended a battle over an elevated railway that had become obsolete. In the manufacturing district, shop owners underneath the redundant highline had sought ways to have the railway demolished so that they could use the airspace to build new, higher, buildings in one of the last underused areas in Manhattan. They had already reached an agreement with former mayor Giuliani that the railway would be demolished, but things turned out different when mayor Bloomberg promised during his election campaign that he would not tear the railway down. The shop owners under the railway claimed that if the railway stayed, they would lose the opportunity to develop their properties. They demanded compensation, which they received in the form of air rights that they could sell in the district (see www.thehighline.org). This case is interesting for more than one reason, but here we mention it to illustrate the concept of a 'partial or regulatory taking' that was developed in the U.S. where the property is protected in the Fifth Amendment of the Constitution.

The concept of a regulatory taking is related to the concept of a property right. In his work *Contracting for property rights* Gary Libecap (1989: 1-4) defines property rights as: "(…) the social institutions that define or delimit the range of privileges granted to individuals to specific assets, such as parcels of land or water. Private ownership of these assets may involve a variety of rights, including the right to exclude non-owners from access, the right to appropriate the streams of rents from use of and investments in the resource, and the right to sell or otherwise transfer the resource to others".

He continues by stating where these rights stem from: "Property rights institutions range from formal arrangements, including constitutional provisions, statutes, and judicial rulings, to informal conventions and customs regarding the allocations and use of property. Such institutions critically affect decision-making regarding use and, hence, affect economic behavior and performance. By allocating decision-making authority, they also determine who are the economic actors in a system and define the distribution of wealth in a society. (…) Because certain property rights arrangements can reduce transaction costs in exchange and production and encourage investment in order to promote overall economic growth, they have public goods aspects".

The definition points the finger at an important aspect of property rights,

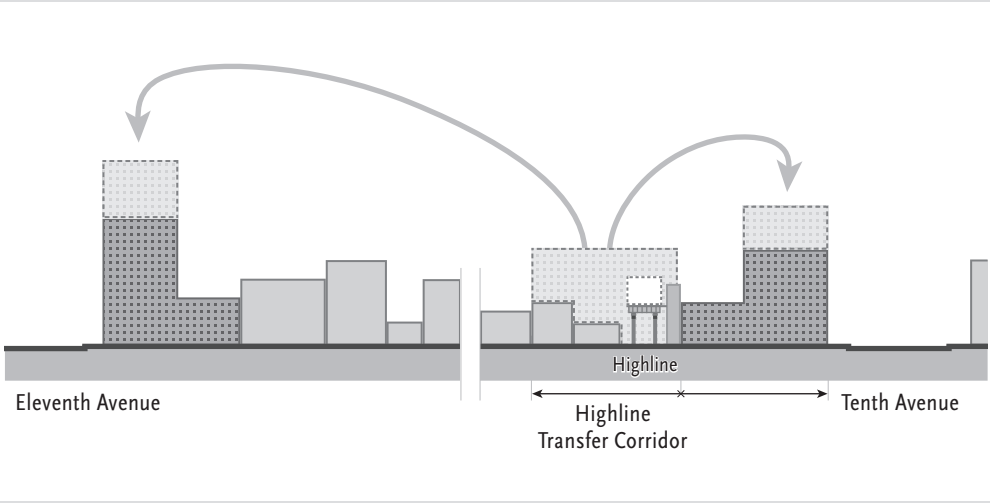
namely that they do not necessarily refer to the term ownership. Property rights involve much more than the rights of the legal owner; they involve the rights of tenants and other users as well and to a further extent than in civil law countries. Secondly, the final quotation points the finger at another important aspect of property rights: they have a public goods aspect. We believe this to be a very important aspect for two reasons. In the first place, it refers to the public meaning of property rights: they function within a society that (depending on the country and the specific rights) protects them to a greater or lesser extent and even defines property rights that do not as such exist in other countries.

As the importance and the amounts of property rights grow, the loss of such rights provides grounds for compensation. It makes sense that governments look for ways that prevent them from having to compensate at a 'fair market value' but rather create new property rights to compensate the owners.

The concept of a partial or regulatory taking has gained importance in European countries. The European Court of Justice seems to use a concept of taking that is analogous to the American concept (Groetelaers & Ploeger, 2007). In the James-case (*James and others v the United Kingdom* (21 February 1986) the European Court of Justice mentioned the term 'property right', when it stated that: (…) "the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the 'public interest', even if they involve the compulsory transfer of property from one individual to another." The line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not yet been systematically articulated. However, a close examination of the relevant jurisprudence reveals that, in broad terms, there are some criteria that tribunals have to use to distinguish these concepts: (1) the degree of interference with the property right, (2) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and (3) the interference of the measure with reasonable and investment-backed expectations (OECD, 2004).

When a landowner loses an opportunity to use his property profitably, this is considered a partial taking. The theoretical background is that ownership in common law countries is not thought of as one undividable right, but rather as a bundle of sticks. Those sticks represent rights and interests in the property. Some of the sticks (the right to make binding rules, the right to take land for public use) are reserved for the legislator/sovereign whereas others are for the private parties. If the government takes away a stick – in the Highline case the opportunity to develop the space above the shops – it leaves the owner with fewer rights to the land than it previously had. The government must then compensate the owner for this loss.

Figure 2.1 New York City, Highline Project



Source: www.nyc.gov

Governments however do not always have financial resources to compensate the landowners for their loss. Therefore they sometimes compensate the landowners by giving them the right to sell a development right on the market to a different landowner for a location where there is no such restriction. This is what happened in the Highline case. In that case compensation was even more complicated because the land was rezoned so that the development rights could be sold but could also be used on site. In that case the building had to be constructed over the highline (see Figure 2.1).

A regulatory taking is a taking that does not expropriate the landowner but takes away a property right of an individual right that is of economic value. Here the difference between the police power and eminent domain are of importance since the first does not require any compensation, whereas the latter demands full compensation for damages that occurred as a result of the regulatory actions by the governmental agency with regard to plots nearby.

The following factors are determinative of a (regulatory) taking: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" (edit. Bruce, 1998: 336).[5] With regard to the taking itself it is not clear whether the whole property is taken into account, or only the stick. But TDRs are said to be in line with the constitution, albeit that the Supreme Court has not yet dealt with them directly. TDRs provide a way to compensate an owner for the loss of one of his sticks by giving him a development right to use on one of his other parcels or to sell.

Three other cases serve to illustrate what American law considers a taking situation and how it deals with it. The first deals with the constitutional

5 The quotation here has been used in a number of cases.

requirement of a state that owners of shopping centers allow individuals to exercise their free speech and petition rights. The retail owners said that this policy involved a taking. The court ruled that the right to property includes the right to exclude others, but the right to exclude others was said to have no economic importance in a shopping mall. Therefore the policy did not involve a taking. When a governmental agency once used the trade secrets of a company, this was considered as a taking. Trade secrets give a company an advantage in the markets and using it was therefore depriving the company of a stick that had economic value. Finally, in New York, the physical invasion resulting from a cable installed on an apartment owner's roof (authorized by New York law) constituted a taking of the apartment's owner property without just compensation. Here the governmental action was said to involve a taking 'per se'.[6]

2.4 Why governments want to compensate

Sometimes governments want to compensate developers by providing them with a property right for their endeavors or sufferings. The reason may include political reasons (property rights movements), but here we focus mostly on situations where the market solves inefficiencies that are due to the nature of planning. In other words, governments want to compensate developers for their endeavors because the market can sometimes solve inefficiencies or reach results that are out of the reach of planning authorities. A compensation scheme in this respect will have the character of an incentive scheme. Governments may add value to rights that had not been worth anything. This however is not enough for a non-financial compensation scheme, which also needs a compensation element. A market where rights are sold is not in itself an example of non-financial compensation. Suppose that the government, to protect the environment, limits the quantity of energy that may be used per square meter of office building. Suppose that it allows owners who stay below that limit to sell whatever they have left of it to those who need more. The government wants to compensate those who use less energy for their endeavors (and probably investments in energy-saving building materials and installations) by granting them a right that they can sell. It may have been hard for the government to reach this result (promoting sustainable development without losing economic vitality) by regulation.

Micelli (2002) puts it this way: "The weak efficiency of urban planning can

6 Pruneyard Shopping Center v. Robbins, 444 U.S. 164 (1979), Ruckelshaus v. Monsanto Company, 104 S. Ct. 2862 (1984), Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982). All cited in edit. Bruce (1998): 332-334.

be attributed – at least in part – to the authoritative nature of the tools for implementing and managing plans. As a result, there is great interest in creating innovative planning tools – in particular through real estate taxation and the creation of new markets – that do not replace the market (as command-and-control tools do), but are limited to intervening to correct its failures" (Lanotte & Rossi, 1995; Stellin & Stanghellini, 1997, both in Micelli, 2002).

Coase (1960) states that the establishment of a property rights market can replace direct forms of public intervention in order to solve the economic inefficiencies due to market failures. This may thus help to solve the increasing ineffectiveness in the management of urban plans. Many trends and developments have intensified the need for effective and expedient spatial planning instruments and schemes, linked to adequate financial constructions. Creative financial constructions in particular are needed for the realization of green and blue zones in urbanized areas, which usually have economically weak functions (De Jong & Spaans, 2006). This type of non-financial compensation scheme further elaborates the utilization of betterment or planning gain in land value accrued from a change in land use to an economically more profitable one (European Communities, 1997).

Before dealing in more detail with this planning gain issue, it is important to note that there is such a thing as 'government failure' or 'public failure' (Coase, 1960; Downs, 1957; Tiebout, 1956; Buchanan & Tullock, 1962). Government failure is the public sector analogy to market failure and occurs when a government does not efficiently allocate goods and/or resources to persons. A government failure is not a failure of the government to bring about a particular solution, but is rather a systemic problem that prevents an efficient government solution to a problem. Some economists believe that even with good intentions governments seldom get their policy application correct. They can tax, control and regulate but the eventual outcome will be a deepening of the market failure or, even worse, creation of a new failure. Public value failure occurs when: mechanisms for values articulation and aggregation have broken down; 'imperfect monopolies' occur; benefit hoarding occurs (i.e. public domain benefits and public goods have been captured by groups, limiting distribution to the population); there is a scarcity of providers of public value; a short time horizon threatens public value; there is a focus on the substitutability of assets that threatens conservation of public resources; social and market transactions threaten fundamental human subsistence (Bozeman, 2002). In planning practice, for example, a very common phenomenon is the constantly adjusted zoning regulations to accommodate 'market forces'. Municipalities compete with their neighbors for the settlement of new businesses. In this respect, Coase (1960) shows that not only public intervention is needed for securing collective action, but that also voluntary market agreements are possible. Although individuals may, in principle, be willing to pay a certain amount to secure a certain quality of public open space, semi-public

open space, regulative control over building quality or over bad-neighbor uses, or of future land use information, none is likely to be able to afford any quantity of such goods on their own and collective action strategies are required to elicit the goods (Webster, 1998: 62-63). An non-financial compensation-like instrument could be used as an incentive to strengthen the collective action initiatives.

Regulative development control planning is traditionally concerned with the production of policy goods that in the end are designed to reduce the level of present and future externalities in a city (Webster, 1998: 55). The regulatory system is also increasingly being employed to lever the private production of tangible (as opposed to policy) public goods. With impact fees, planning charges, linkage exactions, planning consent application and cost-raising conditions on planning approvals an attempt has been made to reduce the consumption of certain built environmental goods (Webster, 1998: 55). The sustainability rationale is one of urban planning's most important rationales. It rests on externality and public goods arguments. Planning engages in negotiation with developers to exact privately financed public goods, rationalized either as a compensation payment for negative externalities or as a repayment of unearned[7] betterment value (Webster, 1998: 55). Both forms should result in maximizing total gain (ibid. 62).

Higher quality of space

Another reason why government is keen to use non-financial compensation schemes in spatial planning is that it enables a higher quality of space[8] with-

7 Land rent is often referred to as 'unearned' income, in the sense that it is not the result of an individual action of forbearance. It is useful to keep in mind that there is no logical connection between 'unearned' and 'undeserved' (Fischel, 1985: 12-13). Other words for this are betterment (U.K.), unearned increment, plus value, windfalls (U.S.). Partly related concepts are planning obligations, planning gain, developer obligations, plus value capture.

8 Quality of space is a broad and often contested concept. The Roman architect Vitruvius was one of the first to write about the issue. In his handbook on architecture he started from basic physical and esthetical values, writing that quality of space should be 'realistic, beautiful and solid'. Nowadays the concept of quality of space is approached in a much broader sense. Place, time, scale level, social conditions and cultural scope determine how quality of space is perceived. The task of spatial interventions is to avoid spatial conflicts, and to encourage the mutual reinforcement of forms and uses by combining these in space and time. The surplus value in doing this is often identified as quality of space. Quality of space may, for example, be described as smart growth, preventing uncontrolled urbanisation, but also as the architectural quality of the public space in a neighbourhood. In this article we use quality of space in its broader meaning, considering it from a regional perspective and including both public and private space. At the same time we realise that quality of space in this broader meaning becomes vague and less operational. Whereas quality of space is considered to depend on a number of factors, these principles may vary between countries. Large suburbanisation land-use patterns may be considered undesirable in one country, whereas in another country they may be approached positively (De Jong & Spaans, 2009).

out necessarily using public funds for its realization. For several years the ambition to improve the quality of space has run into the problem of diminishing state funding and inadequate regional resources. This situation created a need for new methods that would guarantee a better quality of space and the means to fund it. An important source of inspiration came from the American concept of the Transfer of Development Rights (TDR). In the U.S. TDR was related to the Smart Growth Theory, which focuses on a long-term development perspective that accepts economic growth, but advocates that steps be taken to ascertain how – with the revenues originating from this growth – the negative consequences of growth can be absorbed rather than ignored or passed on to the next region (Janssen-Jansen, 2004). However, Smart Growth is largely associated with the fight against urban sprawl, whereas many non-financial compensation schemes have a broader scope and are designed first and foremost to improve the quality of space in urban, rural and mixed-use areas. The prevention or containment of urbanization is simply one of the purposes that co-exists with the realization of improvements to natural or landscape values. These schemes also utilize the planning gain that may accrue from the acceptance of a certain urbanization in designated areas (De Jong & Spaans, 2009). Be that as it may, the theory and practice of Smart Growth can teach us useful lessons in how to develop these methods for spatial interventions at the regional level further and, more importantly, how to flesh out the non-financial compensation scheme (Geoghegan, 2002).

The idea of using planning gain for related or wider development goals is not accepted everywhere. It is contested as much from an economic point of view as from a legal perspective. From an economic perspective it is argued that the obligations are essentially a specific, indirect taxation of betterment. It might be more effective, efficient and fair to developers and other stakeholders to tax the betterment directly and earmark the revenues for special purposes (Crook & Whitehead, 2002). Several countries have such a taxation scheme, be it on the local or state level. The problem is that such taxation schemes seldom result in a program with direct revenues (subsidies and grant) for local governments confronted with the external costs of development and accepted community needs. From a legal perspective there is the requirement of a necessary statutory basis of planning obligations and agreements, the procedural equity between developers and the required relation between the planning or development purpose and the agreed obligations. Do planning obligations have to reasonably and fairly relate to the planning purpose or is a wider relation acceptable? Some argue that with acceptance of the latter the system allows developers to buy permission for profitable developments (Healey *et al*., 1995). In the Dutch planning system utilization of planning gain in most cases requires a formal legal basis and apart from that a reasonable relation between planning goal and obligation (Tweede Kamer, 2001; 2005) (De Jong & Spaans, 2009).

2.5 Why governments can recapture added value

When is it legitimate for government to intervene in private real estate markets? Cho (2007) proposes that the traditional argument regarding land use and urban development justifies regulatory planning intervention based on the concept of market failure – a concept where the pursuit of private interest does not lead to an efficient use of society's resources on the one hand and equity on the other. The market failure view posits that the sources of market failure – public goods, externalities, natural monopolies and information symmetries – impede the allocative efficiency of the market system and that public intervention in land use and urban development is therefore required. On the other hand, the equity argument contends that markets achieve a high degree of efficiency at the expense of equity and that consequently regulations are necessary to achieve an appropriate degree of redistribution (Richardson & Gordon, 1993).

Under the influence of the market failure view, urban development is in large part driven by a variety of government regulations, which comprise not only traditional land use controls such as zoning and subdivision regulations, but also growth management techniques such as concurrency requirements, growth phasing programs, urban growth boundaries, rate-of-growth programs and restricted development zones. Despite the extensive use of such regulatory tools, however, the evidence suggests that regulation efforts often fail to bring about efficient and fair outcomes in development decisions. For example, restrictive urban containment policies have produced various negative consequences, such as the outward expansion of urban areas, the rising prices of housing, a highly dispersed leapfrogging pattern of development, longer commuting distances and the decline of central cities. Thus, the idea of restrictive regulation watching out for the correction of market failure and also distributional justice is, in many cases, not creditable. Given the persistence of adverse consequences of regulatory intervention, the view that only through the enhanced government regulation public purposes can be attained is open to question.

Furthermore, the argument of market failure in support of regulatory intervention into private real estate markets, as grounded in the correction of inefficiency and the unsatisfactory distribution of land resources, must be viewed as only a partial explanation of the appropriate government role. The sufficient forms of public intervention should not cause consequences that would inflict greater social costs than social benefits. Accordingly, identification of the costs of government intervention needs an understanding of the ways collective action can fail, which can be facilitated by the perspective that includes government failure as well as market failure (Weimer & Vining, 1992).

Theoretical underpinnings of government failure are primarily drawn from

public choice theory, which presents an attempt to apply economic models of reasoning to the analysis of collective choice and democratic decision-making. Public choice theory examines the role of economic incentives within the political market of planning intervention and, by exploring the institutional structures of liberal democracy, challenges the merits of government regulation (Olson, 1965; Tullock, 1977; Buchanan, 1986). Challenging the market failure rationale for government planning, it argues that the identification of market failures is not enough to justify government intervention. More specifically, if the economic case for planning is to be made, then planners can obtain the necessary information to correct market failures and furthermore, they have sufficient personal incentives to act on the basis of that information (Buchanan, 1986; Anderson & Leal, 1991). If these conditions cannot be met, it is misplaced to suggest that the alternative to imperfect markets is government intervention immune from similar, if not more serious, institutional failings (Demsetz, 1969; Pennington, 2000). This perspective emphasizes the inadequacy of government as a mechanism for allocating resources, contending that markets may not be perfect as an institution of resource allocation but that they still offer important advantages over governments. Then, the argument of government failure obviously leans toward anti-planning, pro-market sentiment in support of market approaches to urban development.

In recognition of the inadequacy of public regulation for urban development, the pro-market argument posits that market forces can be harnessed to encourage more efficient and equitable development patterns that ensure the maximum satisfaction of the preferences and desires of individuals. Thus, market-oriented thinking espouses the premise that the public interest is best served by market institutions that can process and meet the needs and preferences of all individuals within the community rather than prescribing outcomes that represent the vision or desires of regulators and narrow special interests (Staley & Scarlett, 1997; Pennington, 2000).[9]

2.6 Recapturing added value of land

This leaves the question of why a government has the right to recapture the added value of land. Added value of land can be caused by the rules of the market, by private improvements, by government intervention or public improvements. The extent to which the government may tax or otherwise recapture the added value differs per country. We now take a closer look at the situation where the added value is the result of a 'planning decision'.

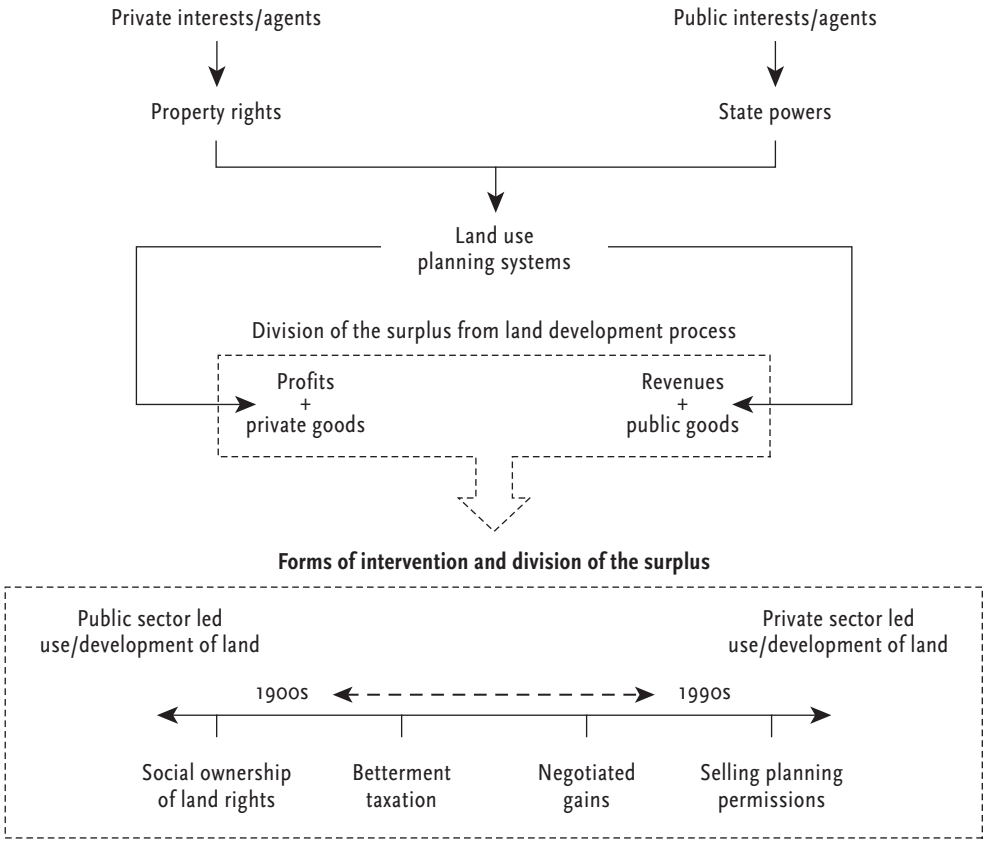
9 For the first part of this section we greatly appreciate the input of Cheol-Joo Cho (2007).

Added value of land (or lost value) is described by terms such as 'windfall' and 'wipeouts' or 'worsenments'. "Windfalls and wipeouts – called betterments and worsenments by the British – are often attributed to governmental projects and regulations. But windfalls and wipeouts can exist independent of government. Activities of neighbors can cause a windfall or a wipeout. Consequently, windfalls and wipeouts are increases or decreases in the value of land or real estate that also are community caused – i.e., caused by someone other than the landowner, whether that someone be government or a private party in the community" (Hagman & Misczynski, 1978: xxix).

The question if and to what extent a government can recapture the added value of land for public use is often debated. In the U.S. the discussion is related to the property rights-movement. "Some may regard windfall recapture as un-American. Many Americans consider it right that increases in value publicly conferred (through rezoning or from nearby public projects) belong to the private property owners" (Hagman & Misczynski, 1978: executive summary, xxxi). Most governments, however, claim to have the right to recapture added value. In England the legal explanation of the right to recapture value is found in the Town and Planning Act of 1947 that nationalized all development rights. A landowner only owns the existing uses of his land, if he wants to develop it differently, he has to acquire that right from the government who owns the right to develop the land. A complex process of negotiation then starts whereby the planning authority demands the creation of public goods and payments for its right (Booth, 2003; Cullingworth & Nadin, 2006). The discretionary power, based on the ownership of the development rights, is vested in the local government who can agree the so-called planning obligations with developers by formulating a development plan (Healey *et al.*, 1995). These obligations mostly enable the provision of infrastructure and services directly related to the development. More recently contributions to the wider community needs like the provision of affordable housing (on or offsite), the creation of mixed communities and the redevelopment of brownfields can also be seen as the results of planning obligations (Crook & Whitehead, 2002).

In many countries the idea of recouping this surplus value of planning decisions is growing in importance, the theory being that more value that results from a planning decision (such as the change of a land use plan) should be recaptured by society. The underlying concept in many countries is that no individual property owner or resident has a legal right to a particular zoning ordinance. Thus, zoning is not a personal property right; it is a community property right (Fischel, 1985: 36). Recapturing would result in more distributive justice (as the gain is unearned), reduce the temptation to misuse planning decisions to enrich individuals, might reduce land speculation by reducing its gains; might increase trust in governmental planning decisions, might reduce growing public objections to new development. Micelli (2002:

Figure 2.2 Simplified framework of the political economy of land use planning



Source: Whatmore, 1994

141) argues that in the debate of urban economists and planners about the possibility of using innovative methods and tools in managing urban plans in order to increase their effectiveness, "a major step would lie in shifting from the use of authoritative tools towards those that employ market levers to implement public policies and, as economists say, to restore conditions of efficient resource allocation". This kind of levy is preferable above alternative fiscal sources. There is money to compensate, because the market will only develop if this is profitable (Alterman, 2005). Linked to the recapturing value discussion in the Netherlands is the question of to what extent a community can require new developments to finance municipal services. Only directly apportioned costs can be attributed to new developments according to existing Dutch law. New laws seem to have broadened the grounds for cost recovery. Non-financial compensation schemes might be a manner to recoup extra value. An important presumption is the belief that transaction costs can be changed into transaction changes (Van der Heijden & Slob, 2006).

In Figure 2.2, Whatmore (1994) sketches a simplified political economy of the flows of economic value between different parties in the land development process. Within this framework, planning gain can be understood as one of the several possible mechanisms for regulating the burden of development costs and benefits between individual and communal interests.

Hagman & Misczynski (1978) indicate that they know of no other country which used the U.S. legal explanation to recapture added value. Although it is based on the common law view of ownership as a bundle of sticks, the U.S. have never stated that they would own development rights to land, the right to recapture a windfall is based on general explanations of fairness and not all states agree that such a right exists. An example in a European country is Spain where 10% of the land on a development site is designated for affordable housing purposes – apart from the public spaces and infrastructure. Many countries require the land to be conveyed to the local government for public spaces and facilities. Since the seventies the comparable construction of the development impact fee has emerged in the U.S.. Many local governments, confronted with rapid growth in their community, have adopted it as an alternative to an increase in property taxes (Evans-Cowley & Lawhon, 2003; Jeong, 2006; Nicholas & Conrad, 2003). In all these constructions the trade-offs basically refer to the specific development plan, or local level, and the obligations are more or less closely related to the development goals (proximity principle) (De Jong & Spaans, 2009).

2.7 Conclusions

In this chapter we have introduced the concept of non-financial compensation as a concept that allows us to compare different planning schemes in which government does not financially subsidize or compensate landowners and/or developers for their losses or endeavors. We introduced the distinction between single-purpose and multi-purpose non-financial compensation schemes. Whereas the single-purpose non-financial compensation scheme only aims to compensate for loss of economic value, the multi-purpose non-financial compensation scheme serves more goals and provides not only a way to compensate but also to promote planning goals (such as a more efficient allocation of development rights or prevention of urban sprawl). The division between single and multi-purpose non-financial compensation schemes relates to the reasons why governments have to compensate and why they want to. We saw that the concept of a taking of interference with a property right gains in importance leaving governments with more cases in which they are obliged to compensate for their actions while, at the same time, governments have less financial resources.

Non-financial compensation offers a way to have the market pay for the

losses of property owners. The government can compensate those owners by granting them a new property right instead of paying them. The reasons why governments want to compensate (using non-financial compensation schemes) are related to modern insights into the relationship between the private and the public sectors. Sometimes, when governments set the conditions, the market will solve inefficiencies that cannot be solved by public action. We also paid some attention to the question of why governments are allowed to let the market compensate for the losses of property owners. In the end an non-financial compensation scheme is about recapturing (or redistributing) added value. We saw that although (to our knowledge) every government recaptures value, there is no clear principle as to why they are allowed to do so. It is better to say that different countries use different, if any, legitimations. It seems, however, to be generally accepted that windfalls that are caused by government (public) action should at least partly be recaptured for the benefit of society.

We conclude that the non-financial compensation concept is a useful contribution to academic discussion because it is not used as such in any legal system. It is therefore neutral and can be developed, whereas a term such as TDR will evoke many connotations by academics (and planners) used to working with that concept. The non-financial compensation concept allows us to discuss practices on a more abstract level, to move one step away from the terms of our own systems, and look at them from a different perspective. The non-financial compensation concept also urges us to rethink the grounds of justification for governments that interfere with property rights and helps us compare the differences between planning systems and in the end, as is our belief, to improve them.

References

Alterman, R. (2005), **SUA-lecture: Should the 'plus value' of planning decisions be reaped for the public purse, and how? A cross-national view**, Delft: TU Delft.

Anderson, T. & D. Leal (1991), **Free Market Environmentalism**, San Francisco: Pacific Research Institute for Public Policy.

Booth, Ph. (2003), **Planning by Consent: The Search for Public Interest in the Control of Urban Development, Planning, History, and the Environment Series**, London: Routledge.

Bozeman, B. (2002), Public Value Failure: "When Efficient Markets May Not Do", in: **Public Administration Review** (62).

Bruce, J.W. (1998), **A Land Use Anthology**, Cincinnati: Anderson Publishing.

Buchanan, J.M. (1986), **Liberty, Market and State**, Brighton: Harvester Press.

Buchanan, J.M. & G. Tullock (1962), **The Calculus of Consent**, Ann Arbor: University of Michigan Press.

Cho, C.-J. (2007), **The Space-for-space Non-financial Compensation Program in Korea: The Case of the District Unit Planning Process**, paper presented at the AESOP Conference on Planning, Law and Property Rights, February 7-9, Amsterdam.

Chorus, P. (2007), **Non-financial Compensation Instruments in Japan; The case of Tokyo**, paper presented at the AESOP Conference on Planning, Law and Property Rights, February 7-9, Amsterdam.

Coase, R.H. (1960), The problem of social cost, in: **Journal of Law and Economics** (3), pp. 1-44.

Crook, A.D.H. & Ch.M.E. Whitehead (2002), Social housing and planning gain: is this an appropriate way of providing affordable housing?, in: **Environment and Planning A** (34), pp. 1259-1279.

Cullingworth, B. & V. Nadin (2006), **Town and Country Planning in the UK**, London: Routledge.

Davy, B. (1998), **Planning for sale! How efficient and equitable are negotiated developments?**, paper presented at the AESOP conference, Aveiro, July 22-25.

De Jong, J. & M. Spaans (2009), Trade-offs at a regional level in spatial planning: two Dutch case studies as a source of inspiration, in: **Land Use Policy**, doi: 10.1016/j.landusepol.2008.04.005.

Demsetz, H. (1969), Information and efficiency: another viewpoint, in: **Journal of Law and Economics** (12), pp. 1-22.

Downs, A. (1957), **An Economic Theory of Democracy**. New York: Harper & Row.

European Convention on Human Rights (ECHR), **article 1 protocol 1** (available at http://conventions.coe.int).

European Commission (1979), **Habitats Directive**, No. 79/409, Brussels.

European Commission (1992), **Birds Directive**, No. 92/43, Brussels.

European Communities (1997), **The EU compendium of spatial planning systems and policies, Regional development studies**, Luxembourg: Office for Official Publications of the European Communities.

Evans-Cowley, J.S. & L.L. Lawhon (2003), The effects of impact fees on the price of housing and land: A literature review, in: **Journal of Planning Literature** (17), pp. 351-359.

Fischel, W.A. (1985), **The economics of zoning law, a property rights approach to American Land Use controls**, Baltimore/London: The Johns Hopkins University Press.

Fisher, R. & W. Ury (1983), **Getting to Yes: Negotiating Agreement Without Giving In**, New York: Penguin Books.

Geoghegan, J. (2002), The value of open spaces in residential land use, in: **Land Use Policy** (19), pp. 91-98.

Groetelaers, D.A., & H.D. Ploeger (2007), The importance of the fundamental right to property for the practice of planning: an introduction to the case law of the European Court of Human Rights on article 1, protocol 1, in: **European Planning Studies** (15), pp. 1423-1438.

Hagman, D.G., & D.J. Misczynski (Eds.) (1978), **Windfalls for wipeouts; Land value capture and compensation**, Chicago: American Society of Planning Officials.

Healey, P., M. Purdue & F. Ennis (1995), **Negotiating development; Rationales and practice for development obligations and planning gain**, London: E&FN Spon.

Janssen-Jansen, L.B. (2004), **Regio's Uitgedaagd, 'Growth Management' ter inspiratie voor nieuwe paden van pro-actieve ruimtelijke planning**, Assen: Van Gorcum.

Jeong, M.G. (2006), Local choices for development impact fees, in: **Urban Affairs Review** (41), pp. 338-357.

Jessop, B. (2002), Liberalism, Neoliberalism, and Urban Governance: A State-Theoretical Perspective, in: **Antipode** (34), pp. 452-472.

Lanotte, H. & D. Rossi (1995), Négocier les droits sur le sol, in: **Etudes Foncières** (68), pp. 19-26.

Libecab, G. (1989), **Contracting for property rights**, New York: Cambridge University Press.

Micelli, E. (2002), Development Rights Markets to Manage Urban Plans in Italy, **Urban Studies** (39), pp. 141-154.

Nicholas, J.C. & J. Conrad (2003), Market based approaches to environmental preservation: To environmental mitigation fees and beyond, in: **Natural Resources Journal** (43), pp. 837-863.

OECD (2004), **Working papers on international investment**, number 2004/04: "indirect expropriation" and the "right to regulate" in international law.

Olson, M. (1965), **The Logic of Collective Action**, Cambridge (Mass.): Harvard University Press.

Osborne S.P. (Ed.) (2000), **Public Private Partnerships: Theory and Practice in International Perspective**, London: Routledge.

Pennington, M. (2000), **Planning and the Political Market: Public Choice and the Politics of Government Failure**, London: The Athlone Press.

Pruetz, R. (2003), **Beyond Takings and Givings, Saving Natural Areas, Farmland and Historic Landmarks with Transfer of Development Rights and Density Transfer Charges**, Burbank: Arje Press.

Richardson, H.W. & P. Gordon (1993), Market planning: Oxymoron or common sense? **Journal of the American Planning Association** (59), pp. 347-352.

Shmueli, D.F., S. Kaufman & C. Ozawa (2008), Mining Negotiation Theory for Planning Insights, in: **Journal of Planning Education and Research** (27), pp. 359-364.

Staley, S.R. & L. Scalett (1997), Market Oriented-Planning: Principles and Tools, in: **Policy Study** 236, Reason: Public Policy Institute.

Stellin, G. & S. Stanghellini (1997), **Politique di riqualificazione delle aree metropolitane: domande di valutazione e contributo delle discipline economico-estimative**, Genio Rurale, 7/8, pp. 47-55.

Tiebout, C., (1956), A Pure Theory of Local Expenditures, in: **The Journal of Political Economy** (64), pp. 416-424.

Tullock, G. (1977), **The Vote Motive**, London: Institute of Economic Affairs.

Tweede Kamer [Parliament] (2001), **Op grond van nieuw beleid – Nota Grondbeleid**, Tweede Kamer, 2000-2001, 27.581, nr. 2, Den Haag: Sdu Uitgevers.

Tweede Kamer [Parliament] (2005), **Nieuwe regels omtrent de ruimtelijke ordening** (Wet ruimtelijke ordening), Tweede Kamer, vergaderjaar 2004-2005, 28.916, nr. 15, Den Haag: Sdu Uitgevers.

Van der Heijden, G.M.A. & A.F.L. Slob (2006), **Meervoudig ruimtegebruik. Enkelvoudig recht**, Delft: Eburon.

Webster, C.J. (1998), Public Choice, Pigovian and Coasian, in: **Planning Theory, Urban Studies** (35), pp. 53-75.

Weimer, D.L. & A.R. Vining (1992), **Policy Analysis: Concepts and Practice**, Englewood Cliffs: Prentice Hall.

Whatmore, S. (1994), Betterment revisited – issues in contemporary land use planning, in: **Land Use Policy** (11), pp. 163-167.

3 Japan: using developing rights as driver for development

Paul Chorus

3.1 Introduction

People that are used to neatly planned cities might be shocked when going to Japan. Virtually everything seems to be possible in Japanese cities resulting in a, for the outsider, rather chaotic and contrastive landscape. For example, it is quite common to find skyscrapers next to low-rise wooden houses or remnants of farmland in the middle of the Central Business District (see Figure 3.1). This makes one wonder if there actually is such a thing as a planning system in Japan. To be reassuring, yes there is, but it is a very loosely regulated one. Furthermore, landownership in Japan is highly fragmented. When a development is taken on it is quite common to see hundreds of different landowners get involved. This calls, particularly in metropolitan areas, for long negotiations since each landowner has to be convinced separately in order to acquire the land necessary for a development. Although the government is authorized to use eminent domain[10], it rarely applies this right, making planning in Japan a rather time-consuming task.

3.2 City planning

Planning in Japan is carried out at three levels; the national, regional and local level. At the national level Comprehensive National Development Plans are prepared. Since 1962 five such plans have been established. The current plan, however, approved in 1998 with 2010-2015 as its target year, is likely to be the last one of its kind as the Ministry of Land, Infrastructure and Transport is currently revising its national as well as the regional planning system. On the national level the Comprehensive National Development Plan is going to be replaced by the New National Land Sustainability Plan. This plan has to meet "the needs of the new era", referring to the challenges Japan is facing such as a declining population and an expected decrease in its share in the world economy. The new plan is expected to come into effect by the middle of 2007 (Ministry of Land, Infrastructure and Transport, 2006b). Besides national plans, the Ministry of Land, Infrastructure and Transport is also responsible for formulating the regional plans. In contrast to many other countries Japan does not have a separate layer of regional government. Tokyo belongs, with seven surrounding prefectures, to the National Capital Region for which the

10 Due to bad experiences in the past such as the development of Narita International Airport in Tokyo, there is virtually a ban on using eminent domain.

Figure 3.1 Contrastive land uses: remnants of farmland in the middle of Tokyo's CBD

National Capital Regional Basic Plan has been formulated. The changes proposed on the regional level mainly involve a simplification of the plan figures. On the local level planning is carried out at two levels; by the prefectures and by the municipalities within each prefecture. Prefectures serve the wider areas while the municipalities provide the local services. The prefecture of Tokyo occupies a special position as its central and most populated part is divided into 23 self-governing municipalities, referred to as the 23 wards. Regarding city planning the Wards are responsible for 'local affairs' such as the construction of local roads, the maintenance of local parks and small-scale urban developments. The prefectural governments are responsible for the large-scale projects and for the planning of urban facilities such as roads, airports, parks and sewerage facilities. City plans such as district plans, urban development projects (land readjustment and urban redevelopment projects), land use zoning plans and plans for urban facilities are made on the local level. Either the prefecture, in the case of Tokyo the Tokyo Metropolitan Government, or the wards carry out such plans, which basically depends on the size and importance of a project.

The foundations for city planning were laid in 1968 when, after being entirely revised, the new City Planning Law was promulgated. The City Planning Law defines the basic provisions for the planned development of urban areas in Japan. These include (1) the types and standards of city planning, (2) planning procedure, (3) planning control and (4) urban development projects. Details of regulations are specified in separate legislation such as the Building Standards Law, which regulates building activities in accordance with the zoning plan (Isocarp, 1997: 14).

City planning in Japan begins by defining the City Planning Area. This is the area where the City Planning Law is applied and land use is under the control of the government. The City Planning Area demarcates two areas: the Urbanization Promotion Area (UPA) and the Urbanization Control Area (UCA). In an UCA the urbanization is to be restricted. However, in some exceptional cases large-scale developments are allowed to take place. The UPA includes the built-up areas and areas which will be developed in the coming ten years. In an UPA land use is controlled by twelve land use districts while in an UCA land use is controlled by plans from the agricultural side. Besides the 12 land use districts additional zonings exist that make either tighter or looser regulation of the land possible. Such zonings partly cover existing land use districts and are designated by municipal ordinance in specified areas (Ministry of Land, Infrastructure and Transport, 1996b). The most detailed control of land use takes place on the district level and is laid down in so-called district plans.

3.3 Loose planning regulations

The flexibility of the Japanese planning system is perfectly illustrated by the land use zoning districts. In Japan there are 12 standard land use categories, which can be roughly divided into three groups: residential districts, commercial districts and industrial districts (see Table 3.1). No less than seven zones belong to the residential districts. Although the name supposes differently none of these zones is exclusively reserved for residential use. Even in the most strictly zoned residential district, the Category 1 Exclusive low-rise residential district, non-residential use such as a small shop or office is allowed. Also Industrial districts are not the exclusive territory of factories. For example in an 'Industrial' and 'Quasi industrial district' houses and shops can be built. The most loosely zoned districts are the 'Commercial districts'. Here virtually every kind of function combination is possible and directions related to the usage of buildings and lands are minimal. Usually the areas zoned as 'Commercial districts' can be found along the major roads, around stations and in the traditional shopping and business districts.

In addition, the areas that are most loosely zoned are also the areas where the controls on building activities are the weakest. 'Commercial districts' do not only facilitate the largest variety in land uses, they also allow for the highest densities and tallest buildings to be realized. This is most clearly demonstrated by the volume controls such as the Building Coverage Ratio (BCR) and the Floor Area Ratio (FAR). The BCR determines to what extent a site can be built upon, while the FAR regulates the scale of a building with respect to its surroundings. The height of both volume controls varies depending on the land use district. The highest values are to be found in the Commercial districts since these are the areas where land prices are the highest and inten-

Table 3.1 Standard land use districts in Japan

Examples	1	2	3	4	5	6	7	8	9	10	11	12
Residences, residences in combination with small-scale functions (store, office etc.)												
Kindergarden, schools												
Shrine, temple, church, clinic												
Hospital, university												
Store/restaurant, max. 150 m² on the 1st or 2nd floor												
Store/restaurant, max. 500 m² on the 1st or 2nd floor												
Store/restaurant												
Office, store												
Hotel												
Karaoke box												
Independent garage												
Warehouse												
Theater, cinema												
Auto repair shop												
Factory with some possibility of danger or environmental degradation												
Factory with strong possibility of danger or environmental degradation												

Legend

1 Category 1 – Exclusively low-rise residential districts
2 Category 2 – Exclusively low-rise residential districts
3 Category 1 – Exclusively mid-rise residential districts
4 Category 2 – Exclusively mid-rise residential districts
5 Category 1 – Residential districts
6 Category 2 – Residential districts
7 Quasi residential districts
8 Neighborhood commercial districts
9 Commercial districts
10 Quasi-industrial districts
11 Industrial districts
12 Exclusively industrial districts

Can be built Usually cannot be built Can be built under some conditions

Source: Adapted from the Ministry of Land, Infrastructure and Transport, 2001

sive land use is most often requested. By placing fewer restrictions on volume controls, resulting in high FAR and BCR ratios, such a demand can be met. In a Commercial district the BCR is 80% while the FAR can go up to as much as 1,300% (see Table 3.2). This means that 80% of a building lot can be used for the construction of a building that is allowed to have a floor space equalling thirteen times the size of the lot. Therefore, traditionally the highest densi-

Table 3.2 Allowable total Floor Area Ratios and Building Coverage Ratios

Land use district	FAR Values (in %)	BCR Values (in %)
Category 1 and 2 Exclusive low-rise residential districts	50, 60, 80, 100, 150, 200	30, 40, 50, 60
Category 1 and 2 Exclusive mid-rise residential districts	100, 150, 200, 300, 400, 500	30, 40, 50, 60
Category 1 and 2 Residential districts	100, 150, 200, 300, 400, 500	50, 60, 80
Quasi residential districts	100, 150, 200, 300, 400, 500	50, 60, 80
Neighborhood commercial districts	100, 150, 200, 300, 400, 500	60, 80
Commercial districts	200, 300, 400, 500, 600, 700, 800, 900, 1000, 1100, 1200, 1300	80
Industrial districts	100, 150, 200, 300, 400	50, 60
Quasi industrial districts	100, 150, 200, 300, 400, 500	50, 60, 80
Exclusive industrial districts	100, 150, 200, 300, 400	30, 40, 50, 60

Source: The Building Center of Japan, 2004

ties and the most high-rise buildings are to be found in the Commercial districts. Most strictly regulated are the Exclusive residential zones, resulting in low values regarding the FAR and the BCR. For example, in some areas zoned as Exclusive low-rise residential districts only a BCR of 30% and a FAR of 50% is permitted. In these areas aspects such as sunlight, ventilation and lighting play an important role in the quality of the living environment. Therefore, it is not preferable to have a high density here, which is why FAR values are among the lowest in these zones. The FAR Controls were introduced in 1970 to replace the former Building Height Controls. Previously, the total floor area of buildings was regulated by controls such as the building height. In Residential districts the height of a building was not allowed to exceed 20 meters while in other districts the maximum height was set at 31 meters. With the adoption of the FAR controls these height controls have been abolished except for the Category 1 and 2 Exclusive low-rise residential districts where a height control of 10 to 12 meters still exists.

Although specified by law the designated FARs are not fixed. Several systems exist that allow for a relaxation of existing FAR values. In general, exemptions to existing floor areas are given when a developer includes the preservation of historical sites, the creation of public facilities or the guarantee of a certain percentage of open space in a development. Depending upon the proportion a developer contributes the so-called FAR bonus is given, which is an additional FAR. For example, in the Central Business District of Tokyo such relaxing measures have resulted in FAR values of 1,700% while officially only 1,300% was allowed. This is typical for the planning style conducted in Japan nowadays[11]. Although the law regulates many things, nothing seems to

11 After the collapse of the Bubble at the beginning of the 1990s the government introduced many relaxing measures in order to increase private sector development as it was believed that this would increase economic growth.

be fixed and everything is negotiable, basically paving the way for all developments to happen. That this does not always lead to good results is clear from the evident contrasting land uses.

3.4 Fragmented landownership

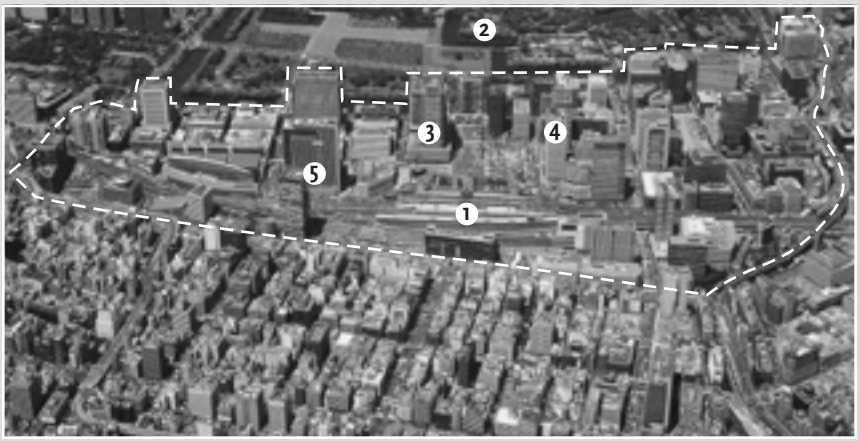
Whereas one would expect a flexible planning system to be accompanied by efficient planning procedures allowing for prompt developments, this is not the case in Japan. Due to the highly fragmented ownership of land, it is often more than ten years before a development is actually carried out, making urban planning in Japan a rather time-consuming process. Most of the land is owned by the private sector and of this privately-owned land individuals hold the largest share. However, the amount of land that each individual owns is rather small. In Tokyo, for example the average plot size is around 209 m^2 (Chorus, 2002). It is quite common therefore that a large number of landowners get involved in any development. Each of them needs to be dealt with separately in order to acquire the land necessary for the development. Since the voluntary movement of the landowner is usually relied upon, one can imagine that this can lead to long negotiations.

An individual landowner enjoys an almost untouchable position in Japan. Landownership is highly respected since strong emotional values are attached to it. A piece of land is often the only remaining connection to one's ancestors and individuals are therefore often very reluctant to sell it. This 'never sell' mentality was reinforced by the soaring land prices. For a long time land was believed to be a reliable asset to invest in as its value could only increase and, even though land prices did start to decrease at the beginning of the 1990s, values are still high. For example, residential land in an area outside the Central Business District of Tokyo still sells for €4,000/m^2. Due to negative experiences in the past the government rarely uses the instrument of eminent domain anymore, so the chances that a landowner will be forced to relocate are very small. The voluntary cooperation of the landowner is rather relied on, which is understandable since eminent domain contradicts with Japan's consensus-oriented society. It is against this background one should consider the case studies provided in the next section.

3.5 Case on conservation and redevelopment in the Marunouchi District

Right in the heart of Tokyo, situated in between the Imperial Palace and Tokyo Station, the most important area of Japan is to be found: the Marunouchi District (see Figures 3.2 and 3.3). Over 4,000 companies, among them many na-

Figure 3.2 Tokyo, aerial view of the Marunouchi District



Legend

Marunouchi district

1 Tokyo Station
2 Imperial Palace
3 Marunouchi Building
4 Industry Club of Japan Building (in the picture hidden behind another building)
5 Tokyo Building

Source: Otemachi Marunouchi Yurakucho Redevelopment Project Council, 2005b

tional and international head offices, are located in this area, contributing to approximately 20% of Japan's Gross Domestic Product. Besides having a workforce of over 240,000 people, the area attracts more than 700,000 visitors per day. Including the buildings under construction, 105 major office buildings are located in an area of 120 hectares with a total floor space of approximately 6.4 million m^2 (Okada, 2006). To underline the economic importance of the Marunouchi area the Tokyo Metropolitan Government has designated this district with the highest allowable FARs to be found in the country, namely 1,300%. In this way private developers like Mitsubishi, the most important landowner in the area, are encouraged to use their land in the most efficient way.

3.5.1 Development history

The foundations of the Marunouchi district were laid in the Meiji period (1868-1912). It was in 1890 that Mitsubishi purchased the Marunouchi site, a 36-hectare site formerly owned by the headquarters of the Imperial army. Four years later, in 1894, they completed their first office building: the Mitsubishi No. 1 Building. This building was the first office building and marked the development of Marunouchi as Japan's first Central Business District. Striking for the Marunouchi Area was that, unlike other Central Business Districts in the world, its first appearance was that of a low-rise area due to the strict height regulations that existed in Japan at that time. The Building Standards Law did not allow buildings to be taller than 31 meters in Japan, which is also referred to as the 100-feet setback rule. By the time this rule was abolished and replaced by the FAR system most of the Central Business District had

Figure 3.3 Tokyo, location of the Marunouchi District

Legend

1 Imperial Palace
2 Tokyo Station
Subcenters (apart from Tokyo Station)
Circular loop line (Yamanote line)

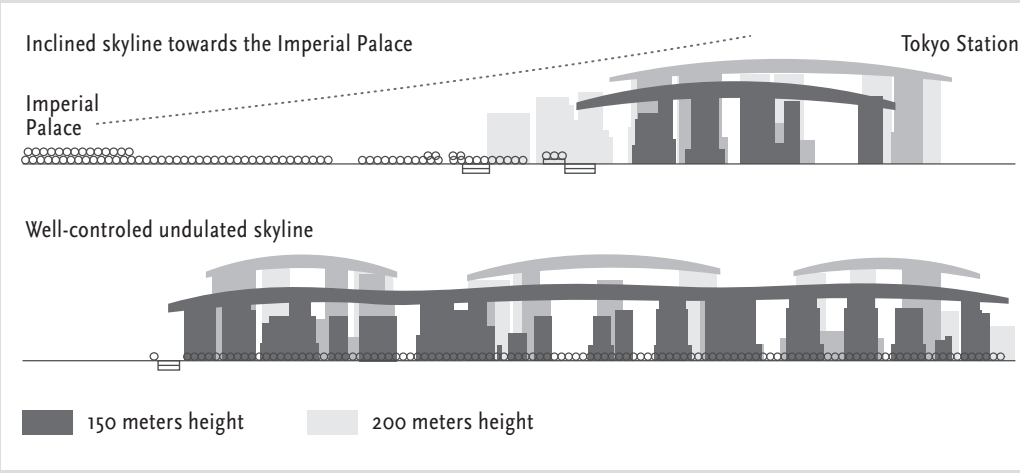
Source: Ibaraki Prefectural Government, 2005

already been developed. Since many of the buildings are now more than 40 years old, the need to upgrade them is becoming an issue. The FAR system provides the developer with a tool to do this in a much more efficient way. For this reason all the projects in the current redevelopment phase share the same approach: the conversion of low-rise buildings into high-rise complexes.

3.5.2 Planning the redevelopment of Marunouchi

In 1988, 69 landowners and leaseholders in the Marunouchi district formed the Redevelopment Project Council headed by Mitsubishi Estate. With the establishment of this Council the planning of the renewal of Marunouchi offi-

Figure 3.4 Idea of the skyline according to the city planning guidelines of Tokyo



Source: adapted from Otemachi Marunouchi Yurakucho Redevelopment Project Council, 2005a

cially started. Their task was to coordinate and promote plans for a comprehensive redevelopment of the area. In 1996 the Advisory Committee on Area Development was established as a public private partnership consisting of representatives of the Tokyo Metropolitan Government, Chiyoda ward (the ward Marunouchi District is situated in), East Japan Railways Company and the Redevelopment Project Council. It was their role to create a future vision for the area and to set up a basic framework of rules for its implementation. This resulted in the establishment in 2000 of the city planning guidelines for the Marunouchi District. In this planning document it was agreed that the traditional business center would be transformed into a city center with multiple functions, also referred to as an 'Amenities Business Core'. For this functions that were at that time underrepresented, such as cultural facilities, hotels, meeting places, shops and restaurants, had to be drawn into the area. Furthermore the idea of creating an inclined skyline towards the Imperial Palace was launched (see Figure 3.4). For this the Marunouchi district had to be roughly divided into three building height zones. In the area bordering the Imperial Palace a height of 100 meters was allowed respecting the view from the Palace, while in the center of the Marunouchi district buildings up to 150 meters could be built, with the possibility of 200 meters in the area around Tokyo Station.

It was also decided to retain the 100-feet setback rule as a general design principle for the area. In this way, something of the unique landscape caused by the 31-meter height restriction could be preserved for the future.

3.5.3 The first results

The first redevelopment phase (1998-2007), in which six buildings have been renovated, has just come to an end. All the buildings have been redeveloped according to the same principle – by converting a former low-rise building in-

to a high-rise structure. However, the instruments used to achieve this differ, as will be illustrated by the three cases below.

The Marunouchi Building

The original Marunouchi Building was completed in 1923 and was one of the first high-rise office buildings in the Marunouchi District. Due to the earthquake in Kobe in 1995 serious questions were raised about the earthquake resistance of old buildings in Tokyo. Therefore in 1998 Mitsubishi, as owner of the building, decided to demolish it and replace it with a 37-story high-rise building, which opened its doors by 2002. This seems like a sad story, but in fact the opposite is true. Although the old building was demolished, it was then rebuilt to resemble the original style. However, this did not mean that an old low-rise building was simply replaced by a new one. That would have been a missed opportunity, since the floor area regulations allowed Mitsubishi to use their land much more intensively. By building an additional high-rise on top of the low-rise building they were able to fully utilize their unused floor area rights. This development model allowed Mitsubishi to adopt the 100-foot setback rule as was required by the city planning guidelines by using the low-rise structure as a podium for the high-rise building.

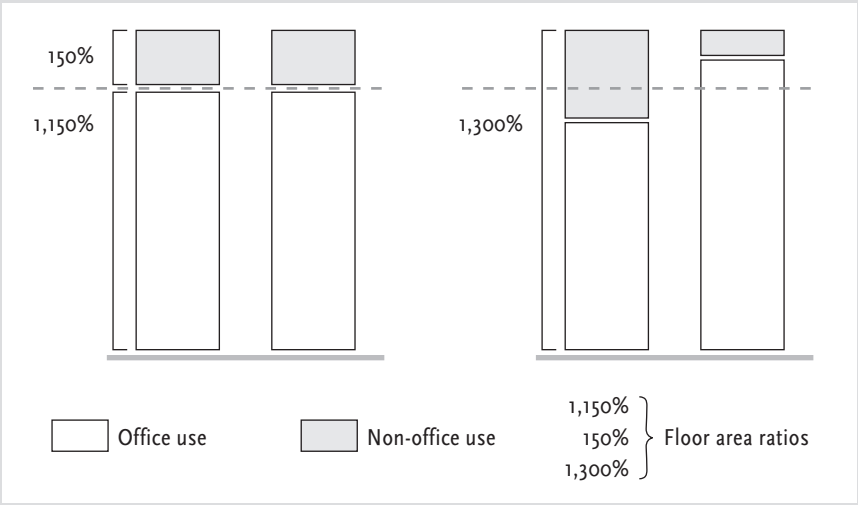
What is typical of many developments in Tokyo is that the FAR actually used turns out to be much higher then the officially designated one. This applies to the Marunouchi building, which was allowed to utilize a FAR of 1,000% (after 2002 this was increased to 1,300%), but instead used a building volume of approximately 1,437%, resulting in a height of 180 meters.

As mentioned before, if a private developer includes the preservation of historical sites or public facilities in his development, or secures open space, he receives the FAR bonus, a proportionate additional FAR. In the case of the Marunouchi Building a bonus of 300% was received for adding cultural facilities to its building, providing open space and constructing a passageway. A further 137% was received from an adjacent building's unused development rights, resulting in a total additional FAR of 437%.

The Industry Club of Japan Building

Another historical building that has been recently redeveloped is the Industry Club of Japan Building. The building itself was completed in 1920, but for the same reasons as the Marunouchi Building, it had to be renewed. However, unlike the Marunouchi Building, the original building was not demolished as it was registered as a Tangible Cultural Property. The developer was therefore required to preserve the outer façade of the building and was only allowed to carry out minor changes to the inside interior. However, in return for this, the developer received tax exemptions and financial support from the national government. The low-rise building also served in this case as a podium for the construction of a high-rise building totalling 143 meters. However, such

Figure 3.5 Use substitution applied in Marunouchi, Tokyo



Source: Adapted from Otemachi Marunouchi Yurakucho Redevelopment Project Council, 2005a

an increase in building volume was only allowed as the adjacent building, the Mitsubishi UFJ Trust and Banking Building, was included in the redevelopment. Therefore, Mitsubishi, as developer of the site, could use the development rights of that adjacent property to construct the high-rise building. Instead of receiving an additional floor area due to some kind of investment, as was the case for Marunouchi, an increase was simply made possible here by utilizing unused development rights.

Tokyo Building

In 2005 the redevelopment of the Tokyo Building was completed, adding a building of 33 stories with a height of 164 meters to the Marunouchi District. Unlike the other redeveloped buildings in the area, the Tokyo Building is much more an office building. Although on the ground level and in the basement there are commercial functions, their contribution is rather small compared to other redeveloped buildings in the area. It is interesting that such a development was possible, despite city planning guidelines established in 2005 to stop such primarily office-led developments. It is interesting that the same instrument that was introduced for realizing multifunctionality also made this rather monofunctional land use possible. Once again, this proves how flexible the Japanese planning system is.

The city planning guidelines established an instrument called 'Use substitution' in order to introduce non-office functions in Marunouchi. This instrument prescribes that when constructing a building with a FAR of more than 1,150%, the additional capacity needs to be devoted to non-office uses. Since in the Marunouchi district a FAR of 1,300% is allowed (see Figure 3.5), this means that 150% has to be devoted to other usages to fully utilize this floor area allowance. However, this non-office part does not need to be realized in the same building, as Use substitution instrument allows for an exchange of

usages between different buildings in the district. This means that non-office functions can be traded against office functions, thus enabling a developer to devote more than 1,150% to office use.

This is what happened in the case of the Tokyo Building. The total FAR for the Tokyo Building was approximately 1,720% which meant that, according to Use substitution instrument, 570% needed to be devoted to non-office uses. Instead of realizing this non-office part in the Tokyo Building, this 570% was transferred to two other buildings within the district – the Hibiya Peninsula Hotel (another redevelopment project in the Marunouchi Area) and the Tokyo-Mitsubishi Bank Building. In return, the Tokyo Building received a similar volume of office space from these two buildings[12]. This allowed the Tokyo Building to remain mainly an office building and the Peninsula Building to become an exclusive hotel (see Figure 3.6).

The Tokyo Building was ultimately able to increase its allowable FAR to 1.720% as it received air rights from Tokyo Station and used the unused air rights of the adjacent Tokyo-Mitsubishi Bank Building.

3.5.4 A look into the future

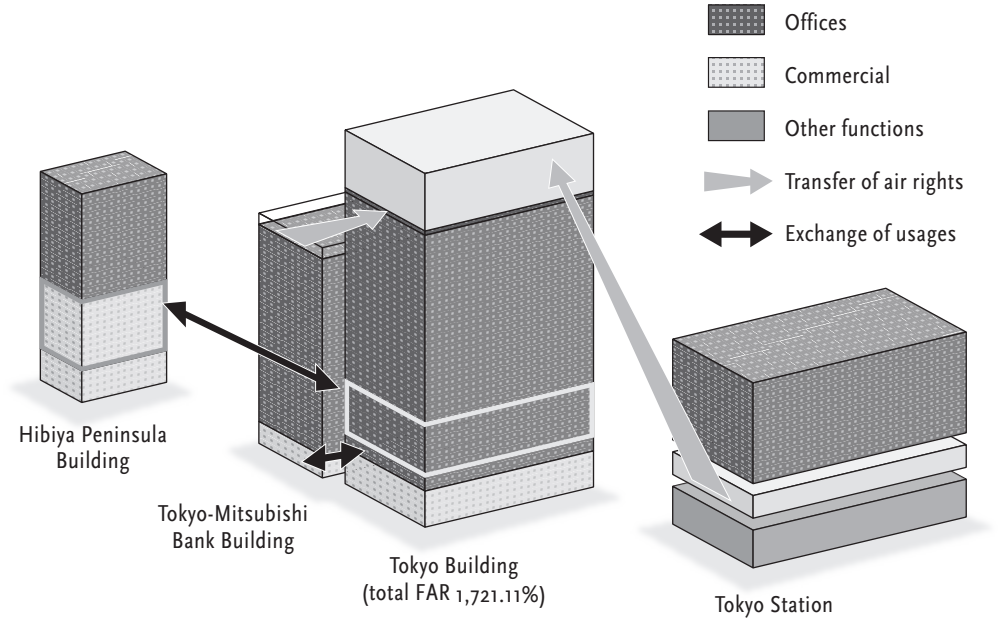
The second phase of the Marunouchi redevelopment starts in 2008 and another 7 or 8 buildings will be renewed. It is most likely that the guidelines for the area will be further deregulated. One of the clear signals for this is that the Marunouchi Area has been designated as a Priority Development Area for Urban Renaissance, based upon the Urban Renaissance Law. Such a designation allows for financial support and tax exemptions and a shortening of city planning procedures. The most drastic measure is, however, that within such an area special zones for urban renaissance can be established in which all the existing land use regulations are lifted and a new set of rules is imposed which takes the private sectors opinions into account. This means that a private developer will be able to draft a plan without the interference of local government, giving a developer even more freedom in using their site in the most efficient way.

3.6 Case on conversion in Tokyo: towards safer and more efficient land use

In many Japanese cities there are still plenty of them; the so-called low-rise high-density areas. Typical of these areas is that many of the houses consist of wood and are built so close to each other that they hardly leave room for

12 As Mitsubishi Estate owns both buildings the exchange of usages was fairly easy.

Figure 3.6 Use substitution applied to the Tokyo Building



Source: adapted from Kajima Corporation, 2005

infrastructure or greenery. Most of them were built at a time when there were hardly any detailed city planning regulations. After the enactment of the City Planning Law in 1968 this changed, but planning controls remained weak. For example, in most cases in Tokyo a landowner does not need planning permission for a building lot development when the size of the plot does not exceed 500 m^2. Since most of the land owned by individuals is smaller, on average 209 m^2, no control on their land use exists (Chorus, 2002). This means that basically any land use is allowed and explains why in many areas the land is utilized in a rather inefficient way. The many low-rise houses that are present in the Commercial districts as well as the remnants of farmland one can find in the Central Business District make this perfectly clear.

Besides inefficient land use, many sites are also characterized by a rather inefficient spatial layout. Especially in the low-rise high-density areas this is a pressing problem. Infrastructure is often so poorly developed that it is not even possible for cars to enter the area. Furthermore, because the areas are so densely built up, there is hardly any space left for greenery. This makes these areas extremely vulnerable to damage from fire or earthquakes which are, due to its location on a fault line, a very common phenomenon in Japan. These crammed areas need to be replanned to make them safer. Additional greenery is required to serve as a refugee base whilst a wider infrastructure is essential to make the areas accessible to the emergency services. In 1995 a heavy earthquake struck Kobe and most of the damage occurred in the areas

with densely packed wooden houses. In the light of this lesson and due to the fact that a big earthquake directly under Tokyo is expected in the near future, the Tokyo Metropolitan Government recognises the urgency of redeveloping these areas.

3.6.1 Two methods for rearranging the land

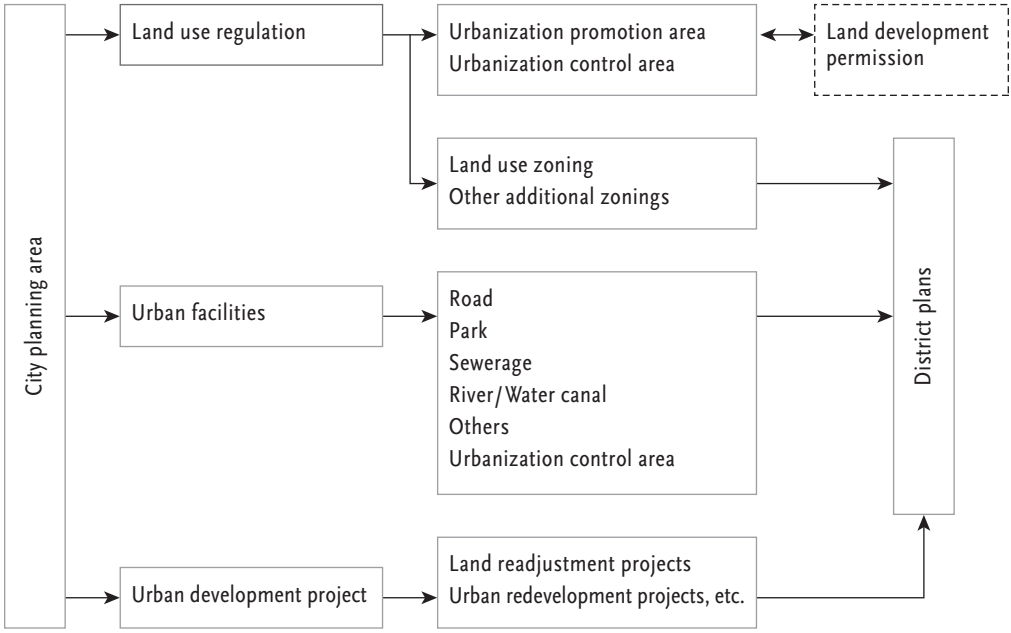
The Tokyo Metropolitan Government has a wide range of instruments available for rearranging the land. Many of these instruments aim to utilize the individual sites efficiently. However, this case study focuses upon the rearrangement of larger areas, for which two methods are employed: Land Readjustment and Urban Redevelopment. Both of them fall under the so-called Urban Development Projects that make, together with the land use plans and the urban facility plans, the basic framework of city planning in Japan. Urban Development Projects implement land use and urban facility plans and the combination of all three makes the planning system in Japan comprehensive (see Figure 3.7). Other private land development activities are regulated by the land development permission, which is legalized in the City Planning Law (Ministry of Land, Infrastructure and Transport, 1996c).

Land readjustment

Land readjustment was originally used as a measure for consolidating agricultural land. Before World War II it was broadly applied to areas that were struck by disasters. Since World War II land readjustment has been used as a measure to provide housing lots for a rapidly urbanizing Japan. The legal basis for carrying out a land readjustment project is provided by the Land Readjustment Law (1954).

Land readjustment is a measure based upon the exchange of rights from one land to another. This is also referred to as replotting. Both landowners and leaseholders contribute an equal portion of their land in a land readjustment project. Part of this land is used for the development of public facilities while another part is used for financing the project costs. The land used to defray a part of the project costs, is referred to as 'reserve land'. After the land readjustment the landowners and leaseholders receive their replots (the rearranged lands after land readjustment) back, albeit smaller in size. By using this system public facilities can be improved and lands can be reorganized integrally. Land readjustment projects are broadly applied to areas such as existing built-up areas, areas where urban sprawl is in progress and new towns. Projects vary in size from 10 to 1,000 hectares. By 2002 more than 385,000 hectares had been developed using the Land readjustment method. Land readjustment projects are carried out by both the public sector and the private sector. In the public sector most land readjustment projects are carried out by the prefectural and municipal governments, followed by the Urban Renais-

Figure 3.7 Structure of city planning system in Japan



Source: adapted from the Ministry of Land, Infrastructure and Transport, 1996c

sance Agency, whereas in the private sector most projects are carried out by land readjustment cooperatives consisting of at least seven or more landowners or leaseholders. It is also possible to carry out a land readjustment project as an individual.

Urban redevelopment

Urban redevelopment projects are executed under the Urban Redevelopment Law (1969). This law was the result of a merger of two other laws; the Fire Prevention Building Districts Expansion Law (1961) which aimed to turn wooden structures into fire resistant ones, and the Urban Reformation Law making it possible to transfer rights from land to a building for the purpose of providing public facilities.

Urban redevelopment is based upon the exchange of rights from land to a building floor. This is also referred to as right conversion. Land and building owners who are willing to participate in an urban redevelopment project give up their lands and buildings. Under the urban redevelopment system new buildings are constructed and previous land titles are transferred to the building site and the floor space in the new buildings. That is, landowners and also lease owners obtain a certain portion of floor space in the newly constructed building. Excess floors are reserved in order to defray part of the project costs. This system enables a comprehensive renewal of public facilities and build-

ings and is mainly applied to existing central urban areas. The project size is generally around 1 to 3 hectares with a maximum of 10 hectares. By 2002 more than 860 hectares had been developed through urban redevelopment projects. Executors of urban redevelopment projects are public bodies such as local governments and the Urban Renaissance Agency as well as private bodies such as a redevelopment corporation consisting of several landowners and or leaseholders.

In the following section two cases will be described that show in practice how land readjustment and urban redevelopment work. Although there are many examples available within Tokyo itself we have consciously chosen projects located more on the urban fringe to illustrate that developments are also taking place outside Tokyo. The first project is the Tsukuba Express, which is a commuter line that connects Tsukuba, a suburb to the northeast of Tokyo, with the center of Tokyo. The second involves several urban redevelopment projects in Saitama.

3.6.2 Land readjustment applied along the Tsukuba line

The Tsukuba line started its services in August 2005, twenty years after the first plan was launched. The 58.3 km railway line consists of 20 stations and links Tokyo with Saitama, Chiba and Ibaraki prefecture (see Figure 3.8). The Tsukuba Express, also referred to as TX, is most likely the last new commuter line that has been built in the Tokyo metropolis. The new line aims to promote development in areas where there had been no railway services. A special act was enacted in 1989 to enable this, the 'Special law on the housing-land and railroad system development'. This law enabled the TX project to simultaneously promote the acquisition of land for the railroad services and land readjustment. Along the line 20 projects are planned totaling 3,300 hectares with a planned population of 100,000 people. Here the Katsuragi project, conducted by the Urban Renaissance Agency, is described.

The Katsuragi project

The Katsuragi project is located around Kenkyugakuen Station, which is one station before Tsukuba, the final destination of the Tsukuba Express. Its total area comprises 485 hectares and it has a planned population of 25,000 people. The first plans for the area were made in 1991 by designating Katsuragi as a top priority development area under the earlier mentioned 'Special law on the housing-land and railroad system development'. In 1994 the three parties involved (representatives of landowners, the governor of Ibaraki prefecture and the Tsukuba city mayor) agreed the basic frame of the project. In 1999 the boundary of the project area and the location of the main roads and railways were fixed by the city planning. People started moving into the area in 2005. The project is expected to be completed in 2019.

Figure 3.8 Tokyo, location and route of the Tsukuba Express line

Source: Ibaraki Prefectural Government, 2005

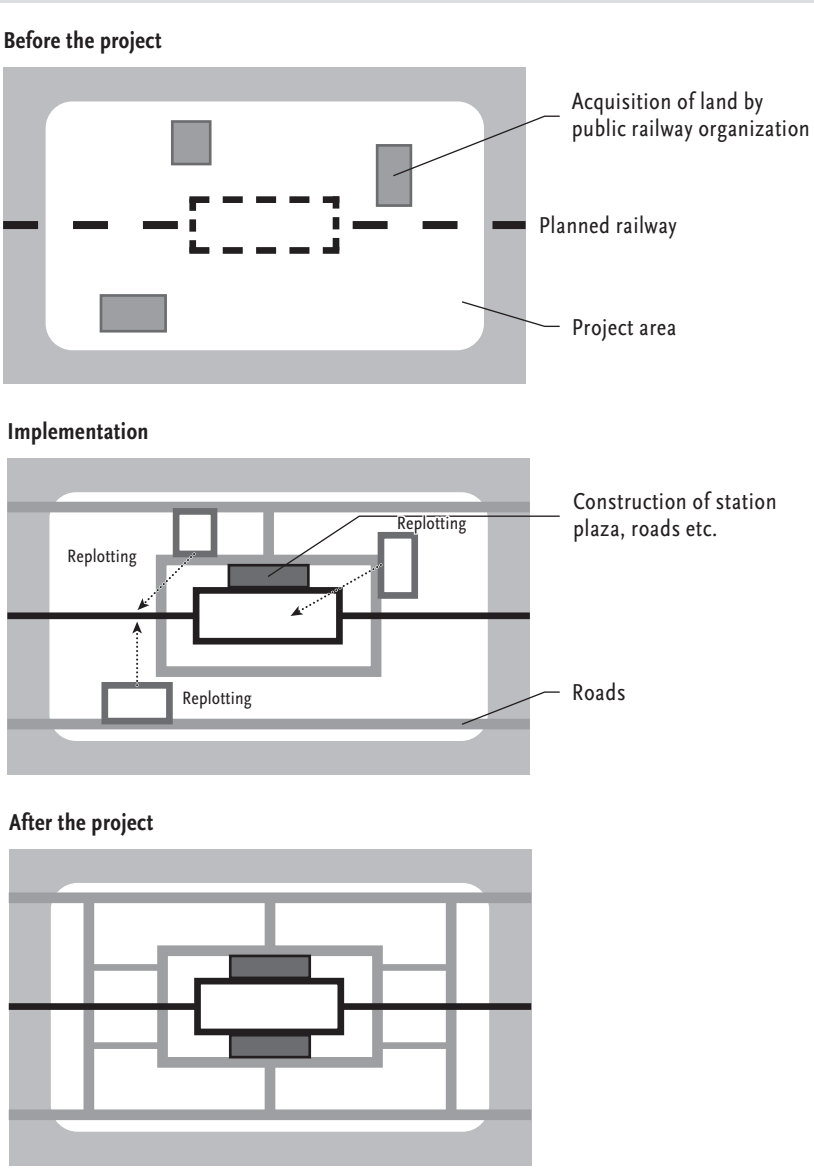
Land readjustment in progress

In the case of the Katsuragi project 846 different landowners were involved. Prior to the start of the replotting of the land a majority of them needed to approve the plan. One can imagine that this must have been rather time-consuming, particularly as it is common to rely on the voluntary contribution of land in Japan. However, only after the consent of the landowners can the land be rearranged. Regarding the Katsuragi Project the average rate of land contribution was 40% which was used for the construction of roads and parks and partly sold as reserve land to private developers to defray part of the project costs.

The Katsuragi project is different from other ordinary land readjustment projects as it uses two special types of land readjustment;. the 'Specifically designated land readjustment project method' as well as the 'Integrated land readjustment project method'. The first method is used for designating both consolidated farmland and common housing areas. Landowners that want to be located in either the consolidated farmland area or the common housing area can swap their lands. As for the Katsuragi project, landowners could swap their lands into a common housing area, but no farmland area was set up.

The integrated land readjustment project is based upon the Special Law for Housing and the housing-land and railroad system development. It is implemented in areas where new railroad facilities are planned. Under this system land is acquired in advance for the construction of railways and related rail-

Figure 3.9 Tokyo, land readjustment applied along the Tsukuba Express line



Source: adapted from the Ministry of Construction, 1996c

road facilities such as roads and a station plaza (see Figure 3.9). In the case of the Katsuragi project, Ibaraki prefecture bought 36% of the land readjustment area in advance. This land was swapped for land along the railway line. However, only part of it was actually used for developing railway-related facilities. The remaining land, the usage of which was decided upon before the land swap, was sold as commercial land to private developers. Ibaraki prefecture

bought a large amount of land in advance so that the land exchange would go more smoothly. The conductor of the Katsuragi project is however the Urban Renaissance Agency, a large semi-public housing corporation, who, as project executor, had to develop the public facilities. Part of the land contributed by the landowners to the project was used for this. The remaining land, the reserve land, was sold to private developers. The revenues generated from this were used by the Urban Renaissance Agency to cover the project costs.

The disposition of reserve land is the major source of revenue in a land readjustment project. Furthermore, if a major arterial road is included in the project, as is the case for Katsuragi, a subsidy for the construction or improvement of roads is received from the national government. This can amount to as much as half of the construction costs. The major expenses involved are usually the relocation of buildings and the construction of public facilities.

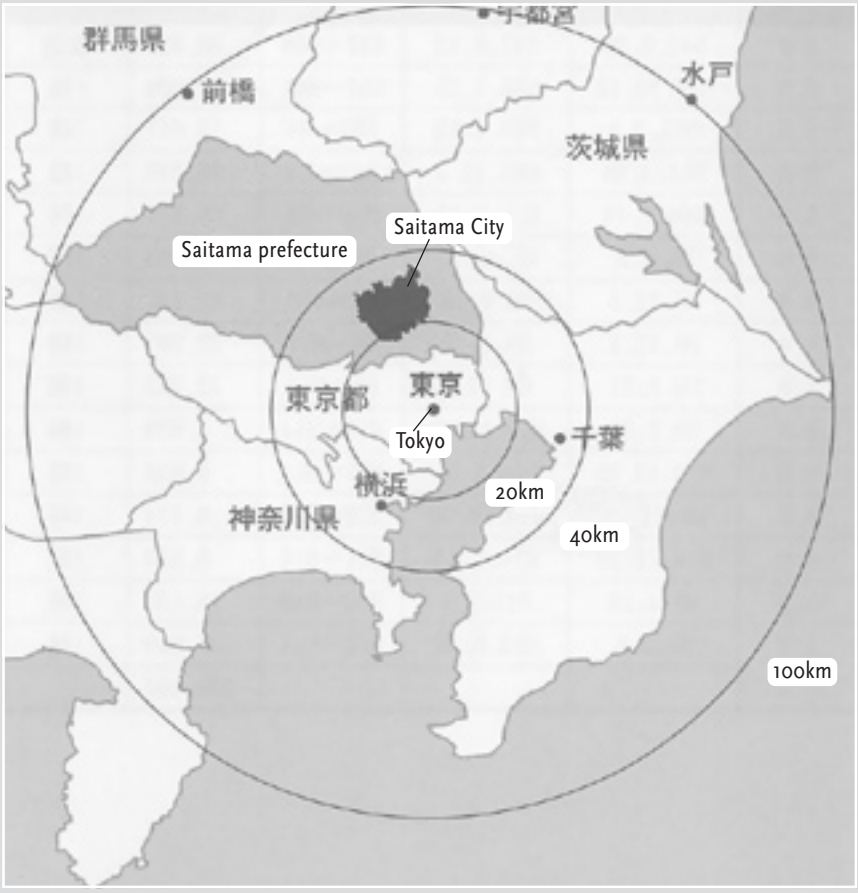
3.6.3 Urban redevelopment projects applied in Saitama City

Saitama City is part of Saitama prefecture and is located 30 kilometers from Tokyo (see Figure 3.10). It has experienced vigorous growth in its population due to the influx of families, the majority of whom work in Tokyo but who prefer to live in Saitama. Due to this increase in the population the construction of condominiums prospers, illustrated by the many high-rise buildings that have been built in recent years. It is interesting to note that most of these high-rises are built along railway lines. An explanation for this is that the areas along railways are usually the oldest parts of the city. Here the typical low-rise high-density wooden areas are to be found which are inefficiently used and at the same time vulnerable to damage from earthquakes. The high-rises are the result of the numerous urban redevelopment projects that have been carried out in these areas aimed at making them more efficient in terms of land use and layout. The workings of urban redevelopment will be illustrated by the Asahi Machi area around Yono Station.

Redevelopment of the Asahi Machi area

On the westside of Yono station several areas have been redeveloped. All of them concern former low-rise high-density areas consisting of numerous landowners, leaseholders and building owners. One of them is called Asahi Machi, an area of 0.6 hectares consisting of 110 different owners (see Figure 3.11). For the redevelopment of the area an association has been established representing the affected owners. In contrast to land readjustment owners had to give up more than just their land for the urban redevelopment as both buildings and lots were to be comprehensively rearranged. However, they were compensated for this by receiving a certain portion of building floors in the renewed building, and, dependent on their previous tenure, shared own-

Figure 3.10 Saitama City, located 30 kilometres from Tokyo

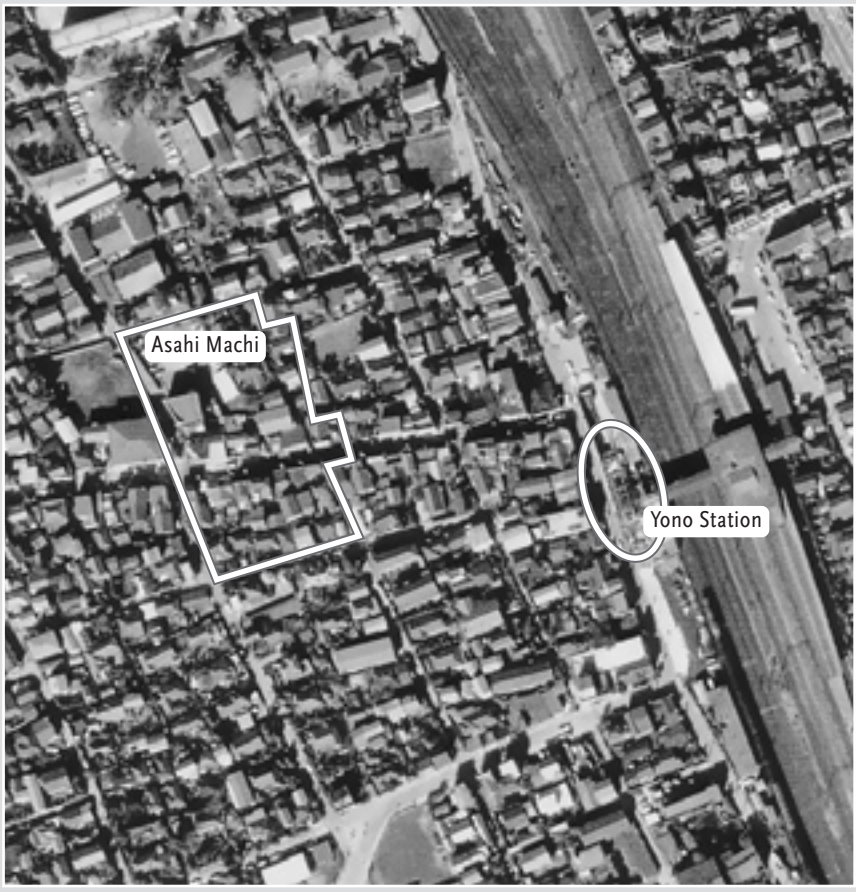


Source: adapted from Saitama City

ership of the land. In case of the Asahi Machi area the application of urban redevelopment resulted in two high-rise buildings of 70 and 72 meters respectively (see Figures 3.12 and 3.13). The land, which was divided into many small pieces before the project implementation, has been integrated into one lot and is shared by the owners. At the same time the landowner owns, together with the leaseholders and the building owners, a certain portion of the high-rise building. Excess floors have been sold to outsiders by the redevelopment association. In this way part of the project costs could be covered. A common outcome of an urban redevelopment project is that low-rise houses are replaced by mid-or high-rise buildings as such buildings enable a far more efficient utilization of the land while at the same time space is created for facilities such as roads and parks. This is perfectly illustrated by the changes in land use after the redevelopment of the Asahi Machi project.

The major source of revenue comes from the disposal of the reserved floors. The national government also provided a subsidy for the dismantling of buildings and the provision of public facilities equal to one-third of the

Figure 3.11 Saitama City, the Asahi Machi area before its redevelopment



Source: Saitama City

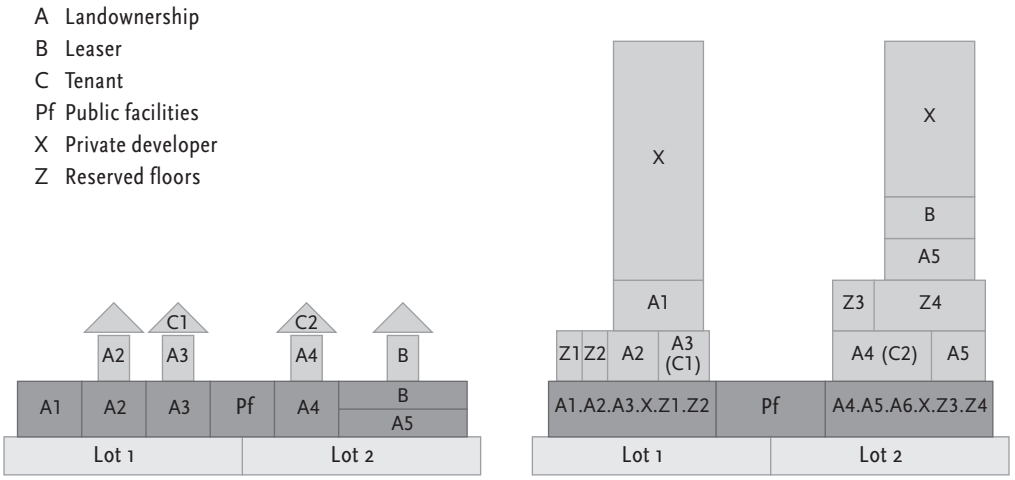
total costs of the development. The major expenses are the removal of old buildings and the construction of the new buildings, roads and parks.

Although both systems, land readjustment and urban redevelopment, enable efficient and safe land use, the time required before the first results are visible is rather long. There are years of negotiations, in the case of the Tsukuba Express line 13 years, before all the land is acquired for a development. One may wonder if Japan has that time considering the continuous threat of a big earthquake hitting a major city. If Japan truly wants to become a safer city this has to change.

3.7 Case on reallocation: compensation for the non-development of Tokyo Station

Located in the middle of the Central Business District one of the few buildings that possesses a high historical value can be found – the Tokyo Station

Figure 3.12 Saitama City, right conversion system applied in the Asahi Machi area



Source: adapted from Saitama City

Figure 3.13 Tokyo, the redeveloped Asahi Machi area

Source: Saitama City

building. Many regard it as the 'entrance to Japan', especially as it fronts onto the 'most important road' of Japan, the Miyuki Dori, which is the road that leads to the Emperor's Palace. Its symbolical value is still reflected by the fact that every new ambassador is transported by coach along the Miyuki Dori to receive official approval for his or her appointment from the Emperor. Renowned office buildings such as the Marunouchi Building and the Shin Marunouchi Building are also located along this road, underlining further its importance. The station building itself was built in 1914 during the Meiji Era (1868-1912), which was when Japan started its modernization, greatly influenced by the 'civilized countries of the West'. The adaptation of ideas and techniques from the West was regarded as the ultimate means of turning Japan into a modern country. Many buildings that were designed during this period reflect this strong orientation to the West. This is most clearly illustrated by the Tokyo Station building itself which clearly resembles the Amsterdam Central Station building. The station building itself has undergone a rather rough history as it was severely damaged by the Great Hanshin Earthquake of 1923 and barely repaired before it was hit again, this time by the air raids during World War II. The station complex is currently being redeveloped. On the Marunouchi side, which is the westside of the station, the surrounding area is being converted into a big plaza extending into a walkway in the direction of the Imperial Palace. Furthermore the roof of the station will be restored to its original state. This part of the redevelopment is scheduled for completion in 2010. On the Yaesu side, the eastside of the station, a large pedestrian promenade is planned with a high-rise building at each end (see Figure 3.14). It was completed in 2007 and is the first result of an instrument introduced by the national government in 2001 – the so-called 'Special FAR applied district'.

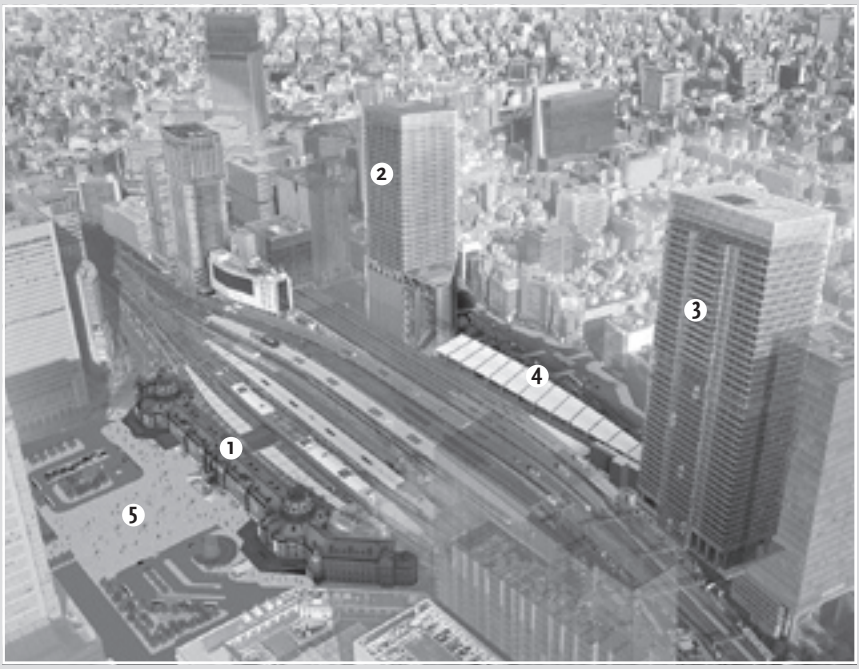
Transferring unused development rights

In 2002 the Tokyo Metropolitan Government designated the Marunouchi Area the first area to become a 'Special FAR applied district'. Such a designation made it possible to utilize unused floor areas by transferring them to multiple sites within a district (see Figure 3.15).

For this the consent of the rightful owners concerned is needed. Prior to this a transfer of the unutilized floor area was already possible, but the transfer was limited to the adjacent plot. The new instrument enabled Japan Railways East (JR East), the owner of the station building, to fully utilize its development rights.

The Tokyo Station building is located in an area zoned as a 'Commercial district' and is allowed a maximum FAR of 900% while the height for the surrounding area is set at 1300%. In the current situation approximately 200% is used for the station complex, which means that 700% remains untouched. Therefore JR East is entitled to use the remaining part. At first a plan was launched to construct two high-rise towers on the Marunouchi side, because

Figure 3.14 Tokyo station and its surroundings in 2011 (projected)



Legend

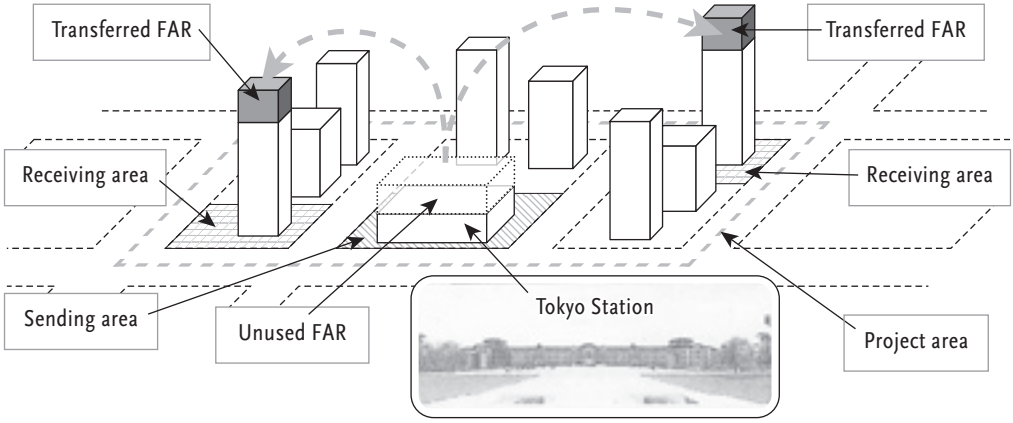
1 Tokyo Station
2 Yaesu North Tower
3 Yaesu South Tower
4 Pedestrian deck
5 Plaza

Source: Japan Railways East (2004)

JR East did not own enough land to develop them on the other side. This plan was met with strong criticism since this would overshadow the historical station building. However, in the light of the ongoing redevelopment in the neighboring Marunouchi area it was a rather logical response of JR East that they wanted to use their land as intensively as possible. Eventually, JR East managed to find the necessary space for its high-rise development by working together with the landowners on the Yaesu side of the station.

Until 2007 the FAR has been distributed to four different plots. For each transfer the Tokyo Metropolitan Government's permission was required. In 2003 99.9% was sold to Mitsubishi and used for the development of the Shin Marunouchi Building. In 2004 98% was transferred to the Tokyo Building, which was a joint development by Mitsubishi and JR East. In the same year JR East was allowed to transfer 360% to the Yaesu towers, a development carried out together with Mitsui Fudosan, another real estate developer. After these three transfers 340.5% remained for the station building. Another part has been recently sold to Mitsubishi for their so-called Marunouchi SF project, which involves the redevelopment of three buildings. The revenues earned by the sale of unused floor areas are used by JR East to cover the redevelopment expenses of the station. The building volume of the renewed station is expected to increase slightly as an additional story will be added to the build-

Figure 3.15 Tokyo, transfer of unused floor area to multiple sites within the Marunouchi District



Source: adapted from Otemachi Marunouchi Yurakucho Redevelopment Project Council, 2005a

ing. The Tokyo Station used to be a 3-story building but after the earthquake became a two-story one.

On the Yaesu side two towers have been built which are 170 meters and 205 meters in height respectively. Their height is largely the result of the transfer of the unused floor area of the station. The sending area is rather large, as the square in front of the station building is also included. The absolute number of square meters that can be transferred to other areas is considerable. This results in high FARs when looking at the sites individually. For example the Yaesu tower of 205 meters has a FAR of approximately 1,650%. This is much higher then the 900% allowed by the land use zoning. However, looking at the whole area, the designated FAR of 900% is not exceeded. Investing in a pedestrian deck also led to the bonus of an additional floor area.

The example of Tokyo Station shows that being a historically valuable building, located in the middle of the most important business area of Japan, does not necessarily have to imply that development opportunities are limited. Still JR East, as owner of the station building, can fully exploit its location by transferring its unused development rights elsewhere. However, without such an institution it would have been much more difficult for the Tokyo Metropolitan Government to convince JR East not to demolish its station complex. It was only in 2001 that JR East decided to preserve the station building, the same year the national government introduced the 'Special FAR applied district'.

3.8 Evaluating Japan's planning style

The term 'negotiation-led planning' would probably characterize the planning style of Japan best. Developments are the result of deals closed between private and public parties, and not so much of regulations set up by the govern-

ment in advance. Regulations provide the basic framework for a development, although one can never guess their final outcome. This is most clearly illustrated by the allowable floor area volumes. The Building Standard Law stipulates that in Commercial districts a maximum FAR of 1,300% is allowed, but as illustrated by the cases of Tokyo Station and the Marunouchi District these values are often much higher. For example, the Tokyo Building has a FAR of approximately 1,720%, which is 420% more then the law officially prescribes, while the Marunouchi Building has a FAR of 1,437%, which was at the time of its completion 437% more then the law allowed. The additional volumes are the result of the incentive systems the government uses for encouraging efficient utilization of the land. Basically, if a private developer meets certain conditions such as investing in public infrastructure and open space he is rewarded for it by receiving additional building volume, also referred to as the 'FAR bonus'. The amount of the bonus depends on the proportion a developer invests. What is interesting about these systems is that in the end both parties gain from it. The government receives public infrastructure it does not have to pay for, whilst a private developer receives in return additional floor area, which enables him to make a greater profit.

In the case of urban redevelopment projects such as the Yono Station project in Saitama these incentive systems work in a similar way, albeit the government's objective is different. The main aim here is not only to encourage efficient land use, but also safe land use by stressing to the developer the importance of buildings that are 100% fireproof and have enough open space to serve as a place to shelter. Regarding land readjustment the incentive is not so much the FAR bonus, but the increase in the value of the land that is expected due to the improved infrastructure. This should convince a landowner to relinquish a piece of their land.

Having said this, the question arises of whether such a planning style would be of any interest to other countries. For countries that are looking for a more market-oriented style of planning the answer would definitely be yes. Planning in Japan is strongly led by the economy. Planning measures are mainly established from an economical point of view; they are supposed to contribute to the growth of the national economy. From this perspective it is logical that in Japan a rather flexible planning system is used, as too detailed rules would frustrate the development of the economy. Even the latest instrument introduced, the so-called 'Special zone for urban renaissance' is strongly focused upon giving the economy a new boost after a decade of economic stagnation. What is new however is that within these special zones all existing land use regulations are lifted and a new set of rules imposed, based upon the proposals received from the private sector (Japan External Trade Organization, 2002). By setting up such a special zone regulations can be established that truly fit the specific local circumstances rather then being applied uniformly to the entire country. By using this instrument the private developer is

gradually taking over the role of the government, which may one day lead to planning being carried out without the involvement of the government.

However, the other side of the coin is that this strong focus on the economy has distracted attention away from the quality of the developments. The fact that high-rises can appear next to low-rise buildings and that there are still many crammed areas of wooden low-rise houses in the cities makes this quite clear. During the long period of economic growth the quality of the design of the buildings did not play a really important role, resulting in many functionally designed square blocks. This is also noticeable when looking at the areas that have been rearranged due to land readjustment and urban redevelopment. Their new development pattern is of course more efficient then before, but on the other hand the land use is rather dull, characterized by dead straight streets and plots.

From this perspective, a lesson for Japan would be to look for ways of incorporating the qualitative aspect into their flexible planning system. By paving the way for any likely development to occur without basically having to offer anything in return, as is the case for the 'Special zone for urban renaissance, it is questionable if the desired quality will ever be met. Therefore, if Tokyo truly wants to become a more attractive city, the government should perhaps remain involved.

Acknowledgements
Many thanks to Christian Dimmer (Tokyo University, Department of Urban Engineering, Laboratory of Urban Design) for his valuable comments.

The author tried every possible way of contacting the persons involved in making the illustrations, but did not succeed in finding them all. The author can always be contacted via email: paul.chorus@gmail.com.

Table 3.3 Summarizing the Japanese cases

	Case 1	Case 2	Case 3
	Conservation and redevelopment in the Marunouchi District	**Towards a safer and more efficient land use: a) Katsuragi b) Asahi Machi**	**Compensation for the non-development of Tokyo Station**
Period in which the case was introduced	Bubble economy period (1986-1991)	a) Bubble economy period (1986-1991) b) 1998 (three years after the big earthquake in Kobe)	Bubble economy period (1986-1991)
General objective of the proposed instrument	FAR bonus instruments: - ensure balance between public infrastructure and buildings - achieve a pleasant urban environment	a) Integrated land readjustment: - coordinated development of railways and their surrounding areas b) Urban redevelopment: - disaster prevention - provision of public facilities - efficient utilisation of land	Special FAR applied district: - efficient utilization of lands in commercial districts
Characteristic factors	Introduction of non-office usages such as retail, conference, restaurants to an office-dominated Central Business District (CBD)	a) After land readjustment Public land: 26% Private land: 74% (of which 35% is commercial land and 34% residential land) b) After urban redevelopment: On 60% of the 0.64 ha project area two high-rise buildings have been constructed. The remaining land is public.	Preservation and restoration of the old station building. - Area in front of station is converted into a plaza (west side) - A large promenade deck is planned with a high-rise building at each end (east side)
Particular economic and social circumstances that have determined the instrument	Rapid growth of the economy resulted in high development pressures on the CBD	a+b) Growth of the economy led to a large influx of people into the urban areas (1950s onward) b) Great fires in urban areas (1960s)	A decade of low growth of the economy (1991-2001) resulted in several deregulation measures that were supposed to help the economy to recover
Fit within planning and legal systems: which relation with spatial plans?	Projects are carried out in accordance with the city planning vision established for the Marunouchi District	a+b) District plan	The project is carried out in accordance with the city planning vision established for the Marunouchi District

Table 3.3 continued

	Case 1	Case 2	Case 3
	Conservation and redevelopment in the Marunouchi District	**Towards a safer and more efficient land use: a) Katsuragi b) Asahi Machi**	**Compensation for the non-development of Tokyo Station**
Were specific laws or regulations drawn up?	Tokyo Building: - Made use of the Special FAR applied district regulation (2001) - Marunouchi Building and Industry Club of Japan Building made use of existing FAR regulations (1961)	a) Special law on the Housing Land and Railroad System Development (1989) b) Urban Redevelopment Law (1969)	Amendment of the City Planning Law and Building Standards Law in 2001
Relevant public actor(s) and role	- Tokyo Metropolitan Government: provides the conditions for the FAR incentives - Chiyoda Ward: involved in the planning of the minor public facilities (local road, local parks)	a+b) National government and local government; provider of subsidization	- National government: provider of subsidization for the renovation of Tokyo Station - Tokyo Metropolitan Government: provides the conditions for the FAR applied district
Public-private sector exchange	The several redevelopment projects are the outcomes of negotiations between private and public parties, and not so much a result of regulations set up by the government in advance	a) The plan was developed by the government after consulting the landowners involved b) The plan was developed by the private landowners themselves with the help of an outsider (private developer)	The redevelopment project is an outcome of negotiations between private and public parties, and not so much a result of regulations set up by the government in advance
Parties which financed the case	Mitsubishi Corporation	a) Urban Renaissance Agency and Ibaraki prefecture b) Urban renewal association and Sumitomo Fudosan (private developer)	National government, JR East and some other private parties
Possibility of public participation	No, only a master plan was made which is seen as a 'gentlemen's agreement' by the parties involved	a+b) Yes, both cases have to undergo the city planning procedure	No, only a master plan was made which is seen as a 'gentlemen's agreement' by the parties involved

References

Building Center of Japan (2004), **The Building Standard Law of Japan**, Tokyo.

Chorus, P. (2002). **Multiple and intensive land use in Tokyo, a good example for the Netherlands?** Master thesis (in Dutch only), University of Amsterdam.

The Daily Yomiuri (2005), **Akihabara – Tsukuba line opens: New TX express train seen promoting development in nearby areas**, Tokyo, August 25.

Ibaraki Prefectural Government (2005), **City Planning along the railway tracks of the Tsukuba Express** (in Japanese only), Mita City, Ibaraki.

Isocarp (1997), **Urban planning in Japan**, Bulletin 33rd congress, Special Issue 2.

Izumi, H. (year unknown), **Urban Renaissance in Japan**, Tokyo, Ministry of Land, Infrastructure and Transport (PowerPoint presentation).

Japan External Trade Organization (2002), **Urban planning; Dawn of an urban renaissance** [Online], available from: www.jetro.go.jp/thailand/e/data/urban-plan.pdf.

Japan International Cooperation Agency (2004), **Comprehensive city planning: Building Standard Law**, Tokyo.

Japan International Cooperation Agency *et al.* (2005), **Urban renewal projects**, Tokyo.

Japan local government center, **An outline of local government in Japan,** available from: http://www.jlgc.org.au/localgovt/AnOutlineofLocalGovernmentinJapan.pdf.

Jijigaho (2006), **2006 February**, available from: http://www.jijigaho.or.jp/app/0602/eng/sp07.html.

Kajima Corporation (2005), **The Site; Tokyo Building, newly built construction** (in Japanese only), available from: http://www.kajima.co.jp/news/digest/mar_2005/site/site.htm.

Metropolitan Intercity Railway Company (year unknown), **Tsukuba Express**, available from: http://www.mir.co.jp/english_guide.pdf.

Minerbi, L. *et al.* (1986), **Land readjustment, the Japanese system**, Boston (Oelgeschlager, Gunn & Hain, in association with the Lincoln Institute of Land Policy).

Ministry of Internal Affairs and Communication, Statistics Bureau & Statistical Training and Research Institute, **Statistical Handbook of Japan; Chapter 17 Government system**, available from: http://www.stat.go.jp/english/data/handbook/c17cont.htm.

Ministry of Land, Infrastructure and Transport (1996a), **Urban planning system in Japan**, Tokyo.

Ministry of Land, Infrastructure and Transport (1996b), **Urban land use planning system in Japan**, Tokyo.

Ministry of Land, Infrastructure and Transport (2001), **Urban land use planning system in Japan**, Tokyo (Powerpoint presentation).

Ministry of Land, Infrastructure and Transport (2005), **Urban Redevelopment Projects** (PowerPoint presentation).

Ministry of Land Infrastructure and Transport (2006a), **White paper on land, infrastructure and transport in Japan 2005**, available from: http://www.mlit.go.jp/english/white-paper/mlit03/p2c3.pdf.

Ministry of Land Infrastructure and Transport (2006b), **New National Land Sustainability Plan**, available from: http://www.mlit.go.jp/english/2006/b_n_and_r_planning_bureau/01_duties/New_NLSP_060515.pdf.

Mitsubishi Estate (2005), **Marunouchi 100-year development and our future vision**, Tokyo (Powerpoint presentation).

Okada, T. (2006), Case study: Efforts in the Otemachi, Marunouchi, and Yurakucho Area. In: **CPIJ News Letter** (25), Tokyo.

Otemachi Marunouchi Yurakucho Redevelopment Project Council (2000), **Otemachi- Marunouchi- Yurakucho City Planning Guidelines** (in Japanese only), Tokyo.

Otemachi Marunouchi Yurakucho Redevelopment Project Council (2005a), **Otemachi- Marunouchi- Yurakucho City Planning Guidelines Revised edition** (in Japanese only), Tokyo.

Otemachi Marunouchi Yurakucho Redevelopment Project Council (2005b), **Information brochure October 2005** (in Japanese only), Tokyo.

Saitama City (year unknown), **Urban redevelopment of Saitama City** (in Japanese only), Tokyo.

Todome, M. (2005), **Urban Redevelopment Projects**, Tokyo, Ministry of Land, Infrastructure and Transport (Powerpoint presentation).

Tokyo Metropolitan Government (2002), **Planning of Tokyo**, Tokyo: Tokyo Metropolitan Government.

Tokyo Metropolitan Government, Bureau of General Affairs, Statistics Division, **Land prices in Tokyo-to**, available from: http://www.toukei.metro.tokyo.jp/tnenkan/2004/tn04qytia1651.xls.

Tokyo Metropolitan Government, Bureau of Urban Development (2005), **Otemachi Marunouchi and Yurakucho Area Development Guidelines 2005**, available from: http://www.metro.tokyo.jp/ENGLISH/TOPICS/2005/ftfas400.htm.

Tsukuba Information Center (year unknown), **Tsukuba Science City; Tsukuba Express Line Project**, available from: http://www.info-tsukuba.org/english/project/index.html.

4 Korea: the case of non-financial compensation in the District Unit Planning process in Seoul

Cheol-Joo Cho

4.1 Introduction

One of the most recent developments in the Korean public sector is a shift from the use of restrictive regulation tools towards those that employ market levers to implement public policies. In tandem with the emerging trend in pro-market regimes, the application of market-oriented devices has rigorously expanded in the area of land use and development control. Motivated by the argument that markets are advantageous for mitigating the various forms of transaction costs that would be high if command-and-control regulation applies, the pro-market position suggests a variety of market-based tools with which practical problems associated with growth – urban sprawl, traffic congestion, loss of open space and farmland, higher infrastructure costs, and environmental degradation – would be effectively addressed.

Of diverse market-oriented mechanisms, the idea of a development rights market has received significant attention from the planning profession. The Korean planning system has not yet established a typical non-financial compensation instrument, even though it has long been argued that the non-financial compensation program is necessary to promote public interests. Two non-coercive programs that would be considered non-financial compensation in their concept have, however, been recently initiated. One is an incentive zoning scheme that has been introduced into two planning-related laws, the Planning and Use of National Territory Act (PUNTA) and the Special Act for Urban Readjustment Promotion (SAURP). The other is a non-financial compensation program in-kind that has recently been incorporated into the SAURP.

Extra bonuses in development density are given under PUNTA as a right to developers who fulfill the prescribed requirements for public purposes set out in the planning ordinances. The legal requirement under this program is strict – development rights should not be transferred across different development tracts and thus the development rights severed from a development site cannot be used in a separate tract. On the other hand, SAURP is closer to the typical non-financial compensation program in the sense that the two separate zones, i.e. sending and receiving districts, can be established to facilitate the transfer of unused development rights between them. Only effective as of October 2006, however, there have as yet been no development cases carried out under this program.

This chapter aims to examine the Korean experience of non-financial compensation with respect to the use of incentive zoning in urban development, presenting the details of its structure and operation. In the next sec-

tion an overview of the Korean planning system is presented. This system can be seen as the envelope of the density transfer program. Then, three development cases are examined, all of which have been implemented with this density transfer program. Next, the pros and cons of the Korean instrument and its potential with regard to planning purposes are discussed. Finally, this chapter ends with some concluding remarks.

4.2 Planning and development system

Korea's planning framework has a top-down structure to establish a vertical consistency between central, provincial and local plans. It provides the necessary order of intergovernmental coordination to address a wide variety of planning issues encompassing national, regional or local interests. Under the stringent top-down planning order, central government has an umbrella authority to guide planning at lower levels of government, with the legal authority to enact enabling legislations that cover the whole country. As the steering function in planning is primarily controlled by the national government, it can be said that most of the scope and characters of planning are centrally determined. This means that the role of local government in planning is limited and the ways by which planning operates are therefore not much different between localities.

On top of Korea's planning hierarchy is the national comprehensive plan, a 10-year nationwide plan, which dictates the spatial allocation of population, employment, public facilities and the like on the national level. It provides a blueprint with strong spatial components, such as urban development, industrial location, resource conservation, environmental protection and infrastructure investments. The legal status of the national comprehensive plan is authorized by the Planning Framework of National Territory Act (PFNTA), the planning law that regulates the scope of various levels of planning and the relationships between them. The law states that no public bodies can enact any by-law or undertake any planning that does not conform to the approved national comprehensive plan.

The next tier of Korea's planning comprises provincial plans which are legally bound to enumerate the planning guidelines spelled out in the national comprehensive plan. Provincial governments in Korea are hierarchically related to central government. Accordingly, much of the provincial policy efforts are devoted to implementing the policies and programs which are delegated from central government. Lacking a higher degree of autonomous steering power, provincial governments merely develop policies in their own right within the framework outlined by national legislations and plans.

Provincial and metropolitan city governments constitute the upper-tier of Korea's two-tier local government system, while localities, i.e. the municipal

and county governments for the provincial government and district governments for the metropolitan city government, form the lower-tier. Although the provincial government forms the parental authority for local jurisdictions, the master-servant relationship is not so strong between them. Unlike the state government in the American federal system, provincial governments in Korea have no power to legislate enabling acts through which local governments can enact their own ordinances. To the extent that the scope of local codes is defined by national government's legislation, provinces are not considered the architect of local government.

Although the political and administrative controls that provincial governments exercise are limited in scope, the provinces have a relatively strong stake as far as local government planning is concerned. The provincial plan is a stand-alone planning guide in the sense that it customizes the objectives and policies of the national plan into appropriate provincial policies. However, the legal mandate that local plans should conform to the outlines defined by the provincial plans calls for provincial governments to supervise over local planning. The provincial plan, positioned in between the national and the local plan, plays the role of a middleman bridging the plans at both ends, defining the policy framework within which the objectives and policy prescriptions of local government plans should be compatible.

Local government planning in Korea is largely regulated by the 2002 PUNTA, the result of merging two formerly separated planning laws – the City Planning Law and the Use and Management of National Territory Act. The PUNTA spells out detailed regulations for local plans and development processes, including the types of zoning districts, regulations of land uses, lot coverage and density, infrastructure provisions, urban design, development permits, planning processes, and so on. As long as the legal provisions confined by the PUNTA are fulfilled and consistency with the provincial plan is maintained, local governments can formulate their own plans. With the limited amount of discretion that the legal framework delegates to local governments, local planning in Korea is hardly a local matter. It is largely handled by central government control and, in consequence, there is no great variety in the ways that local planning is carried out throughout the country.

PUNTA enables joint cross-government planning efforts to be organized to deal with extra-local issues such as, for example, the spatial allocation of infrastructure and public facilities. An area-wide plan covers multiple local jurisdictions if it is formulated within a province, or ranges over a metropolitan city government and adjacent localities if it transcends the political boundaries of the metropolitan city. The current institutional framework does not allow separate regional bodies to be created that are responsible for handling area-wide planning. Accordingly, provincial governments are authorized to govern the extra-local plan that covers multiple localities, whereas provinces and metropolitan city governments are jointly responsible for preparing and

implementing the area-wide plan that transcends the boundaries of metropolitan cities and provinces.

In addition to the various levels of plans examined above, the PFNTA defines another level, i.e., regional plans, which are also established within the framework of the national comprehensive plan. Regional planning is conducted by central government for the parts of the national territory where special policy prescriptions are needed. In general, regions that are economically distressed or lagging far behind the rest of the national territory are targeted for special investments and customized promotional treatments. Initiated by national government, regional plans generally transcend the political boundaries of a locality, covering multiple provinces and/or local jurisdictions as their planning areas.

The capital region surrounding Seoul, however, is treated by a separate legal framework beyond the reach of the PFNTA. Specifically, all the planning and development issues at the macro level of the capital region are addressed by the Capital Region Readjustment Planning Act (CRRPA), a centrally enacted law. For the capital region, the CRRPA occupies the top statutory status to which other legislations are subordinate.

As industrial and population growth has become excessively concentrated in the capital region, planning for this region has largely been about reducing the unbridled development pressures and simultaneously relocating the industrial and public facilities to the outside regions. Accordingly, the key planning issues for the region, most of which are addressed by the CRRPA, include the Capital Region Readjustment Plan, macro regional zoning by which the region is split into multiple use districts,[13] development constraints imposed on the amount of annual industrial growth, and various development exactions designed to discourage excess growth in the capital region. Planning and development in the capital region are therefore determined centrally, in the sense that the capital region's guiding principles are regulated by area-specific statutes enacted by central government.

The central role of the national government in enacting planning-related legislation, coupled with direct intervention in the planning and development at lower levels of government, has served to portray Korea's planning as typical of a top-down system. Under the extremely centralized planning system new innovation in planning is barely feasible unless the national government initiates a law by which the innovative devices can be utilized.

Within the legal framework of Korea's planning and development, various policy instruments have been established to address the adverse consequences associated with urban development, such as urban sprawl, environmental degradation, infrastructure shortage, traffic congestion, and financial stress.

---

13 The capital region is divided into three macro zones with varying degrees of development regulation: congestion relief zone, natural conservation zone, and growth management zone.

Examples of prominent planning tools include the development-restricted zone (more frequently referred to as the greenbelt), a development impact fee, incentive zoning, the development permit process, congestion charges and an aggregate development ceiling system.

Of the various planning instruments in Korea's planning system, incentive zoning is the most recent, and is considered a non-coercive, market-oriented device close to the non-financial compensation mechanism in its concept. Designed primarily to encourage urban design purposes and/or adequate public facilities, Korea's incentive zoning scheme is operated with the District Unit Planning (DUP) process, which is initiated under the legal authority of the PUNTA.

DUP is classified into two types: Type I DUP and Type II DUP. The former is established in urban areas to achieve public purposes, whereas the latter provides adequate infrastructure in non-urban areas. Under Type I DUP bonuses in development density are provided to developers who meet the requirements for public amenity set out in the DUP plan. The developers within the Type I DUP area donate part of their site for public purposes in exchange for a density bonus that can be used in the rest of the site. The development rights severed from one section of the site are transferred to the building which is thereby able to increase its development density, so the developer obtains compensation for the donation of land for public amenities.

On the other hand, Type II DUP is introduced to redress the problem of urban expansion with sprawled development. As urban areas rapidly expand outwards, fragmented patchwork development with infrastructure shortages, free-riding on the existing public facilities, has become a common landscape in newly-developed areas. These circumstances pushed the government to encourage plan-guided development with adequate infrastructure, needed to serve new developments in non-urban areas. Once an area is defined as Type II DUP, developers within the area are authorized to take advantage of the extra premium in density and lot coverage. Instead, they have to submit the development plan that demonstrates the adequacy of various planning features, including public infrastructure.

Of the two types of DUP, Type I DUP could be regarded as a TDR type non-financial compensation technique, where the development rights are transferred within a single site rather than across the separate zones as in the typical non-financial compensation scheme.[14] Ideally under the Type I DUP

14 Under the typical TDR, owners of property in development-restricted areas called sending districts are granted the ability to sever the development rights from their property and to sell those rights to property owners in specified receiving districts. Property owners who purchase development rights are then able to increase the development density that can be built on the receiving site above the as-of-right limits on development (Nelson & Duncan, 1995). The non-financial compensation technique can be used to save historic structures from demolition, prevent conversion of farmland to urban uses, and preserve unique environmental areas and vistas.

process, both developer and local government end up ahead. The developer ends up enhancing the value of the development project by more than the cost of the donated property. On the other hand, the local government secures the permanent provision of public space that has high amenity, public or open space value at no direct cost. Thus, Type I DUP offers a way for communities to achieve their urban development goals without having to collect public money for acquisition. Type I DUP therefore is a Case 3 (re-allocation) non-financial compensation tool.

Admittedly, on the other hand, Type II DUP must constitute a kind of non-financial compensation mechanism with a something-for-nothing appeal. But it does not fall into the category of a non-financial compensation technique, because the extra development rights granted to the developer are not offered in return for the provision of public space. Rather, the density bonuses that permit additional development are presented in exchange for the developer's compliance with the planned layout scheme. Accordingly, given the lack of attributes of the technique of space exchange, Type II DUP is hereafter excluded from further consideration.

So far, an overview of Korea's planning system has been outlined, locating the position and attributes of the DUP process within it. Next the structure and operation of Type I DUP are examined for three cases of application, all of which have been implemented in Seoul.

4.3 Re-allocation: three cases of density transfer in Seoul

4.3.1 Legal foundations

As mentioned earlier, Type I DUP is a new emerging land use control technique designed primarily to overcome the shortcomings of zoning at no expense to general taxpayers. Zoning regulations are applied to individual zoning lots, each of which constitutes the basic unit of development control. For individual zoning lots, zoning controls the use of the lot and imposes bulk, height, lot coverage and setback limits on the structures erected on the parcel of land. Bulk and height requirements, among others, are combined to determine the intensity of land use, generating a flexible formula, i.e. the Floor Area Ratio (FAR), which constrains a building's total floor area as a certain multiple of the lot size, without necessarily specifying coverage.

Under the zoning system, development approval is granted as long as the development proposal complies with the zoning requirements specified in the planning-related statutes, such as the PUNTA, the Building Regulation Act, and local government's building codes. Executed on a lot-by-lot basis, zoning's fit-and-go permit procedure is therefore not effective in promoting qual-

ity environments in highly complex urban areas. For a tract of development in urban areas, the public interest can be much better achieved if public facilities, roads, open space, dwellings, commercial buildings and land use are planned as a unit. Zoning's lot-by-lot regulations lack the authority to encourage cooperative efforts between different developers, however, which means that it fails to produce desirable public features, such as the interconnection of buildings, pedestrian pathways protected from vehicles, open-air concourses, urban plazas, the mixture of complementary land uses, and so on.

Most local governments are facing increased demands for public spaces, however, along with fiscal constraints on their revenue capacity to afford the necessary public facilities. The revenue limit provides localities with lasting incentives to find novel ways to raise more financial resources. Cost recovery devices are rigorously looked at on the part of local governments to prevent the imposition of new development costs on the existing tax base.

To overcome the limits of the conventional zoning system in an era of fiscal shortage, central government has extended the Type I DUP process into the PUNTA. Article 51 of the PUNTA defines candidate areas where Type I DUP districts are designated, stating that "(…) part or whole of the following areas can be designated as a Type I DUP(…) including zoning districts, infrastructure-fee payment districts, urban development districts, housing rehabilitation districts, residential development districts, industrial estate development, tourism development districts, districts released from development restriction, etc.". As such, Type I DUP is a technique that can be used in new areas where development can be started with a clean slate and an undisturbed landscape, or already developed areas. When the Type I DUP process is applied to existing built-up areas in particular, anticipating the timing of development for individual zoning lots is almost impossible. Since property owners tend to make development decisions on an individual basis, development occurs over a long period of time. Property owners choose the date of conversion of a specific site such that the present value of net income is maximized under the market forces and economic circumstances at that time.

On the other hand, Article 52 of the same statute specifies the planning components that should be specified in the Type I DUP plan as follows: "(…) among others, the Type I DUP plan shall address the switch of zoning use districts, the allotment of public facilities, block-unit development planning, lower- and upper-limits on building heights, lot coverage and FAR, building's usage, the layouts, shapes and colors of buildings, environmental and landscape planning, transportation circulation planning, etc.". In addition to these planning components, the same article contains the provision by which the zoning restrictions imposed on building heights, lot coverage and FAR could be mitigated if some planning and design requirements are fulfilled.

On the other hand, the specific conditions for the development restrictions to be eased are spelled out in Article 46 of the Enforcement Decree of

the PUNTA, another key planning law accompanying the PUNTA. In addition, the same article articulates the quantitative formula with which the amounts of relief that would be granted to the developer are calculated. Then, it is just by these statutory provisions that the developer can take advantage of density incentives or bonuses offered in exchange for the developer's donation of public spaces.

Within the guidelines outlined by the relevant articles of the DUP enabling acts, local governments are authorized to enact their own ordinances to regulate density incentives, in which the list of planning requirements and the magnitude of density bonuses offered in exchange for fulfilling each requirement are specified. In general, most local ordinances specify various planning features as prerequisites for awarding density bonuses, such as plazas, pedestrian-circulation improvements, open-air concourses, arcades, and the widening of sidewalks. By increasing pedestrian space, creating streamlined linkages, and improving the level of amenities, these planning features enhance the quality of the urban environment. As mentioned earlier, the preset planning features are not attainable if the development process depends exclusively on conventional zoning regulations. Furthermore, constraints on the financial capacity do not allow local governments to purchase all the spaces required to provide public amenities.

Under the Type I DUP procedure, the local government is required to make a blueprint DUP plan for the whole district based on the assumption that the individual property owners would entertain the maximum extent of legally provided incentives, instead suiting all the preset design and amenity requirements defined by the DUP relevant laws and local ordinances. But the effective bonuses that individual property owners obtain are determined by the number of prescribed requirements with which the property owners choose to comply, and for each requirement fulfilled, the magnitudes of density bonuses to be granted are *a priori* specified in accordance with the legal restrictions. Accordingly, the verbal prescriptions and pictorial images contained in the DUP plan do not represent the end product realized when the development of all the properties is complete. In this sense, the DUP plan, once approved, becomes a regulation envelope within which individual property owners are allowed to make development decisions based on negotiations with the city's government.

4.3.2 Operations of Type I DUP

Korea's DUP seems similar to the Planned Unit Development (PUD) used in the U.S., in the sense that both devices apply to a site larger than a zoning lot. However, they are quite different in terms of the geographical scopes of the transfer of density. In PUD, transfers of density are permissible across different lots within the PUD track such that the overall density is not changed

(Barnet, 1982; Cook, 1980). Unlike the U.S. PUD, however, cross-lot transfer of density is not allowed in Type I DUP, where unused or foregone development rights within a lot are transferable to the remainder of the area within the same lot in the form of density incentives.

Four kinds of density as expressed in FAR are distinguished in the operation of Type I DUP: standard density, permitted density, upper-limit density, and the legal density ceiling. Under the Korean zoning system, an allowable upper bound of density below which local governments can choose the appropriate levels of density that are applied in their jurisdictions is specified by the key zoning legislations.[15] The maximum density defined by the key legislations constitutes the legal ceiling on density. When managing zoning and development, therefore, none of the local governments issue a density permit up to the legal ceiling, but rather, in most cases, set the permissible densities below the legal density ceiling.

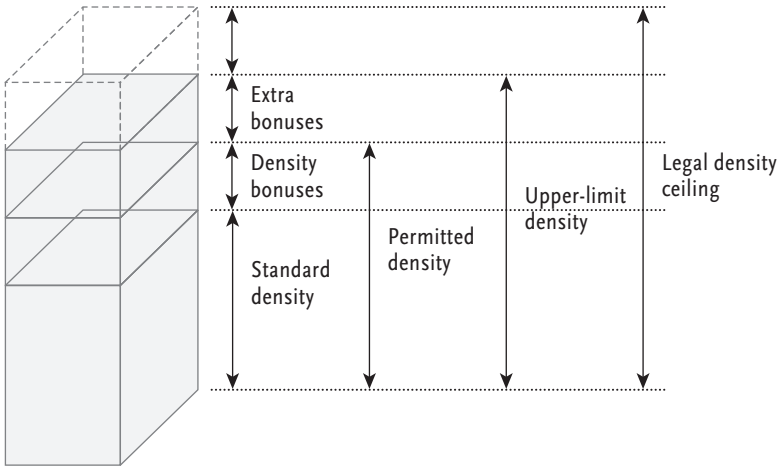
In the operation of Type I DUP, the standard density forms a base-line FAR to which the density bonuses that a developer receives in return for providing public facilities are added to determine the permitted density. The permitted density is then determined by summing up the preset standard density and the density bonuses that the developer receives as a reward for building-prescribed public amenities. In general, the determination of permitted density depends on the negotiation between the developer and the city. Once the permitted density is determined, the developer is entitled to develop his property exceeding the prevailing standard density.

On the other hand, if the developer decides to dedicate part of his property to the city without just compensation, extra densities are awarded.[16] If the developer makes a property donation to the city, but refuses to comply entirely with the preset list of design features, the developer can only take advantage of the extra density bonuses. In this case, the allowable FAR at which the developer can develop his property equals the standard density plus the extra density bonuses. On the other hand, if the developer agrees to build something for public use and simultaneously to donate a segment of his property, he will be offered an extra density bonus above the permitted density. Then, the total density granted to the developer is equal to the sum of the permitted density and the extra bonus. In both circumstances, the allowable density,

15 Article 78 of the PUNTA stipulates that in urban areas, the legal maximum floors in FAR are set at 500% for the district zoned for residential uses, 1,500% for the commercial district, 400% for the industrial district, and 100% for the green district, respectively.

16 When the property owner donates part of his property to the city, the ownership of the donated area of the site is transferred to the city. In contrast, zoning incentives obtained in exchange for providing desirable features that meet the qualifications spelled out in the ordinances do not accompany the transformation of the title of the site on which public uses are constructed. Consequently, the responsibility for building and maintaining the public facilities remains in the hands of the property owner.

Figure 4.1 Definitions of development densities in Korea



which is determined with the extra bonus awarded in return for property donation to the city, is tantamount to the upper-limit density. Figure 4.1 illustrates the concepts of the four different kinds of density associated with the Type I DUP process.

Local governments have exclusive authority for preparing the Type I DUP plan for the entire areas designated as Type I DUP districts, and managing the DUP process. The Type I DUP plan contains verbal prescriptions and graphic sketches that detail land uses, the layouts of streets, the provision of public facilities, and architectural plans for individual structures. The development features suggested in the plan represent the end state if all the property owners in the DUP district decided to meet all the preset requirements.

To get a development permit issued, the property owner has to submit a development application to the city government, which evaluates the compatibility of the application with the predetermined DUP plan. To facilitate the complicated DUP process, the city usually prepares bonus-award guides in accordance with the relevant legal restrictions. The incentive guides contain the detailed features required of the prescribed public uses in order to qualify for a density bonus and the corresponding amounts of incentive to be granted. Table 4.1 shows an example of incentive-award standards currently adopted by the City of Seoul.

Referring to the bonus-award manual as shown in Table 4.1, the property owner embarks on rounds of negotiation with the city, through which he chooses, among the prescribed requirements, the specific planning features that he is willing and able to fulfill. Thus, as for the DUP process, the final development plan that will be used as a development guide is generated through the negotiation-based bargaining process. It is contended, therefore, that the specific forms and profiles of a Type I DUP development are not determined until the city-developer bargaining process is completed.

To reflect changing environments and circumstances surrounding the DUP district over time, the DUP plan is periodically updated every 5 or 10 years. The properties that have remained undeveloped during the previous planning period, if any, are subject to the updated regulations spelled out in the revised plan.

4.3.3 Cases of Type I DUP application

The Jeonong-dong case

In 1997, the City of Seoul decided to make a sector of the Jeonong-dong area a Type I DUP district.[17] According to Seoul's zoning map, Jeonong-dong's DUP district is a zoned neighborhood commercial district, superimposed by an aesthetic district. The case analyzed here is a development application from early 2006. The development tract in question is split into 20 separated lots, each with different ownership, with a total acreage of 2,970 m^2.

Applying for development approval, the property owners agreed to construct a mixed-use building accommodating offices and residential apartments in the upper floors and convenient commercial activities in the lower stories. The architectural plan for the property's development proposed a section of the tract (269.15 m^2) be dedicated for public uses, which would include green space (66.67 m^2), public open space (43.97 m^2) and pedestrian roads (158.61 m^2). The net acreage of the building site on which the proposed structure would be constructed, would then be 2,700.85 m^2.

According to the Type I DUP regulation, the ownership of the dedicated section was conveyed to the city government. In return for the voluntary dedication of land, the property owners obtained an extra density bonus, which amounted to 62.184% as measured in FAR. The DUP plan for this Type I DUP district allocates a standard FAR density of 300% to the development site.

Besides the voluntary dedication of their space, the property owners decided to fulfill the pre-established requirements for which additional density incentives are offered. Without releasing further space for public use, they consented to accept several non-spatial design features: constructing the building jointly across 20 separate lots; accommodating the recommended use in the lower floors; and conforming to the recommended building setback requirement. In return for the non-space compliance with the requirements, an additional 180% of density incentive was awarded.

The negotiation process between the property owners and the city govern-

17 The *dong* constitutes a lower level of administrative unit in the hierarchy of government. In the Korean government system, a municipal government is divided into several dongs, to which no authority of local autonomy is delegated. The City of Seoul is composed of 25 district governments, which are equivalent to the status of local government. In turn, the 25 local governments of Seoul are further split into 522 dongs.

Table 4.1 Standards for density bonus award, the City of Seoul

Requirement for bonus award		Mitigation standard	
Lot development plan	Joint development within a single unit	SD x 0.1 ~ 0.4	
	Cross-lots joint development	SD x 0.05 ~ 0.15	
	Trade of lots	SD x 0.2	
Building plan	Cross-lots joint construction of buildings	SD x 0.5 x A	2 lots: A=0.1 3~4 lots: A=0.15 Above 5 lots: A=0.2
	Shared wall	SD x 0.1 ~ 0.15	
Recommended use of building	Compliance for entire floors	SD x (recommended area – total floor area except parking area) x 0.2	Compliance area should exceed 20% of total floor area
	Partial compliance	SD x (recommended area – area of the relevant floor) x 0.1	Compliance area should exceed 30-50% of area of the relevant floor
Open space within development site	Compliance with recommended location	SD x 0.1	
	Compliance with recommended form and size	SD x [(donated area – mandatory requirement)/lot size] x B	Piloti form: B=0.5 Open form: B=1.0~1.2
Plaza within development site	Compliance with recommended location	SD x 0.1	
	Compliance with form and size	SD x (donated area/lot size) x C	Piloti form: C=0.5 Bed form: C=0.8~1.0 Open: C=1.0~1.2
Open space in front of building line	Entire area from curb to building line	SD x (donated area/lot size) x D	Piloti form: D=0.5 Open form: D=1.0~1.2

ment therefore yielded a 480% permitted density, composed of the standard density, 300%, and the bonus award for non-space compliance, 180%. The upper-limit density as applied to this development site amounts therefore to 542.184%, calculated by adding the bonus incentive awarded in return for the space dedication, 62.184%, to the permitted density, 480%.

Unlike the classical TDR program, the Jeonong-dong case represents a transfer of development rights within a single site. By allowing the shift of unused development rights to the remainder part of the development tract, the local government secures 269.15 m^2 of public space without spending the city's financial revenue. No compensation to the property owners is made for safeguarding the public space.

In this example the non-financial compensation technique was used for re-allocation purposes, where part of the developer's property dedicated for public purposes is converted into extra development rights that can be used to increase the floor areas of the development project. Even though the public space is not parcels of land that are separate from the development site, this case may fit the re-allocation category (Case 3) in the sense that government finance is not used to achieve the prime purpose of guarding the public zone.

Finally, it is noted that, in this case, the role of the transfer of density is

Table 4.1 continued

Requirement for bonus award		Mitigation standard	
Pedestrian path within development site	Walkway on surface	SD x (donated area/lot size) x E	Piloti form: E=0.5 Open form: E=1.0 Underground walkway connected with subway station, underground plaza and underground pathway
	Underground or elevated walkway	SD x (donated area/lot size) x E	
	Mixed-use for pedestrian and vehicle path	SD x (donated area/lot size) x E	
Form and appearance of building	Joint installment of outdoor signboard	SD x 0.05	
	Connection with subway station	SD x 0.1 ~ 0.15	Connection point within building or lot
Environment-friendly construction	Conservation of ground soil	SD x (conserved area/lot size) x 0.1 ~ 0.2	
	Planting on building's rooftop	SD x (planting area/lot size) x 0.3	
	Recirculation of wastewater or use of rainwater	SD x 0.05 ~ 0.1	
	Parking lots with pervious surface	SD x 0.05	
Vehicle circulation	Cross-lots joint entry and exit lane or ramp to parking lot	SD x 0.1 ~ 0.2	
	Cross-lots joint parking space	SD x 0.1 ~ 0.2	
Opening part of indoor space to the public		SD x 0.2 ~ 0.3	

Note: SD = standard density.

Source: City of Seoul, 2004

not overstated, as its contribution to the property's development is not higher compared to that of the non-space compliance. The lower role of transferable density is demonstrated by the fact that a majority of the total extra density obtained above the standard density, say, 242.284%, comes from the developer's compliance with the non-spatial requirements rather than the voluntary dedication of space to the city government.

The Sinseol-dong case

Seoul's zoning map shows that the Sinseol-dong DUP district is located within a semi-residential district, overlaid with an aesthetic district, where office buildings can be developed. The development site selected for analysis was a vacant property filed for development approval in early 2006. The development tract with a total acreage of 1,501.6 m^2 comprised three separate building lots owned by Daihan Life Insurance. The insurance company applied for a development permit to construct the company's branch office on that site.

In order to receive development approval, the developer proposed meeting two pre-determined planning features, for which density bonuses are provided: the establishment of a small-sized rectangular plaza in the corner of the site and setting the building back by an additional 3 m. The size of the plaza

and the acreage of the extra open space created by the extended building setback are 95.33 m^2 and 69 m^2, respectively. The further expanded setback space was reserved for pedestrian walkways. In addition, besides the two forms of space-related dedication, the developer suggested complying with one non-dedication of space requirement. Specifically, the developer chose to landscape the proposed building's roof with planting, for which an extra density bonus is offered of up to 30%.

The total FAR obtained as density bonuses amounted to 60.07%, of which 5.26% was an award provided in return for the public plaza, 24.81% in exchange for the expanded pedestrian space, and 30.0% for the roof planting, respectively. In this case, the dedication of a segment of the development site to the public does not include a transfer of the title to the city and therefore the construction as well as subsequent maintenance of the plaza and pedestrian walk remains the responsibility of the developer.

The permitted density of this application was therefore 360.7%, which is the sum of the standard density, 300%, and the extra density bonus, 60.7%. The upper-limit density is therefore identical to the permitted density. Since the developer did not propose the dedication of property without compensation, no extra bonus is awarded additionally above the level of permitted density.

As with the Jeonong-dong case, this application represents non-financial compensation, where extra densities are offered in return for space donation as well as non-space compliance. Yet the title of the space dedicated for public use is not conveyed to the city government, but held by the property owner. Due to the lack of transfer of ownership, further development rights are not granted above the permitted density.

This case also uses the transferable density tool to preserve the square footage for public purpose which could otherwise be built, resulting in the development of the property at a much higher density. Obviously, neither conservation nor conversion purposes are aimed at in this case. Therefore, this case can be classified as an application of the Case 3 re-allocation tool.

On the other hand, the contribution of the transferable density technique to the feature of the development is balanced with that of non-space compliance. That is, half of the density bonuses offered are attributed to the compliance with non-spatial requirements, and the remaining half is awarded in return for the dedication of public spaces.

The Isoo development tract case

The Isoo development tract, located adjacent to Isoo station on Line 7 of Seoul's subway network, is the special planning district defined inside the boundaries of the Bangbae-dong DUP district. A special planning district is established in subareas of a DUP district. If a development tract is occupied by multiple owners the development of a large-scale project is not appropri-

ate. By discouraging voluntary cooperation and agreement on development among multiple owners, the fragmented ownership of a development tract forms a significant barrier to the large development project. The primary purpose of the special planning district therefore is to facilitate large scale projects in tracts where developments in a single unit are desirable. The key process of the special planning district is the transfer of individual ownership to the development company chosen by the property owners to carry out the development on their behalf. As the project is completed, the property clearing step is processed. Specifically, the development company redistributes part of the new development to individual property owners, the remainder being used by the development company to compensate the hard as well as soft costs incurred in the development process.

In 1996, the Bangbae-dong DUP district area, encompassing the Isoo development tract, was re-zoned up from a general-purpose residential district to a general-purpose commercial district. As an orderly and quality urban environment is increasingly demanded, the area was designated a DUP district by the City of Seoul in 2002, setting up the Isoo tract as a special planning district at the same time.

The Isoo development site, which is 3,882 m^2, was a built-up area occupied by obsolete residential dwellings with divided ownership and unplanned, irregular roads. The residents in the tract agreed to cooperate to redevelop their properties in a single project and selected Delco Design as the development company, who were contracted to manage the whole complicated process of development as well as the development costs.

Once agreement on the features of the development project had been obtained, the property owners of the Isoo development tract conveyed the titles of their properties to the development company. Thus, as the existing structures on the tract were demolished, a number of individual lots were assembled into a single development site. The property owners and Delco Design agreed to construct three 25-story buildings with 7-story underground basements, with a total floor area of 40,514.26 m^2. Of the three high-rise buildings, one was to accommodate offices, whereas the other two buildings were for apartments. On the lower floors of all three buildings, specifically from basement one to the sixth floor, commercial facilities were to be accommodated, while the remainder of the basements were set aside for parking spaces.

To take advantage of increased FAR awards, the development plan for the Isoo special planning district proposed two kinds of public amenities, amounting to 633 m^2, which would account for about 15.5% of the total area of the development tract. The donated public spaces included 248 m^2 of pedestrian roads and a small-scale public plaza of 255 m^2. The pedestrian roads were proposed to provide streamlined access to the users of Isoo subway station who have to cross over the development site. On the other hand, the public plaza was constructed on the northeastern corner of the site, which was

open to the general public.

To the satisfaction of the existing residents, Delco Design launched into negotiations with the city to determine the amount of FAR bonuses. The city and the company agreed to provide a 330% of extra FAR, added to the standard density, set at 300%, giving a permitted density of 630% as measured in FAR. In addition, as the development company agreed to transfer the titles of the constructed public roads and plaza to the city, further bonuses amounting to 145% in FAR, were granted to the project. As a result, the upper-limit density as applied to this development project increased to 775%. The total amount of FAR granted in return for the donation of public spaces is therefore equal to the sum of the two individual incentives, i.e. 475%.

Unlike the previous two cases, the Isoo special planning district represents a case where the property owners of the development site hand over land rights to the development company, which, in turn, carries out the planning and development of the site on behalf of the indigenous owners. From the standpoint of the development company and the property owners, the case represents a case heavily laden with transaction costs. The development process is complicated and costly, coordinating the different interests of the multiple owners on the one hand and negotiating with the city to reach an agreement on the public features to comply with and the corresponding level of density incentives to be awarded on the other.

Like the previous two cases, this case employs the non-compensation technique for the re-allocation purpose, under which the spaces dedicated for public use are compensated for in the form of extra density bonuses. Thus, the government achieves the purpose of establishing public amenities without depending on public finance.

4.4 Discussion of Korea's DUP process

Although Korea's DUP process is a non-financial compensation tool evolving from pro-market thinking, its operation relies on the combination of market-based and command-and-control approaches. In the DUP process, the creation of transferable density does not replace the traditional planning approach, but rather integrates the former to make the latter more efficient. Intense and articulated administrative controls are utilized to convert the foregone development rights for dedicated public space into a density incentive. Many steps are invoked to facilitate the DUP process: the ex-ante preparation of elaborate DUP plans, the evaluation of the conformity of development applications to the preset requirements, the articulation of recommended design features, and the inducement of development applications fitted to the proposed DUP planning features. These procedures all demand a higher degree of frequent and complicated transactions.

Development decisions in the DUP process are accomplished through the time-consuming and inter-locked rounds of negotiation between the developer and the city government. The DUP review board, which is responsible for mediating the conflicts occurring in the process of development, is often hit by snares. A break in mediation can be particularly critical when a development track for which joint development is highly desirable is shared by separate owners. In order to achieve agreement for a joint development from a multiplicity of property owners their diverse preferences and interests need to be satisfactorily fulfilled. Negotiations around the distribution of development benefits among the multiple agents tends to be complicated and tedious however, and as the number of property owners increases the costs of negotiation becomes a substantial problem.

As Coase (1960) indicates, when it becomes very costly to operate the market mechanism, it may be preferable to impose special regulations. The effectiveness of market-based tools is not completely ensured and therefore the recourse to command-and-control mechanisms remains a possible solution. The operation of Type I DUP may fit in this case. In practice, planning intervention significantly conditions the operation of the DUP process. Specifically, local government designates the area to which Type I DUP is applied, prepares detailed plans designed to guide property development within the DUP district, manages the interactive negotiations to reach agreement between the relevant stakeholders, and monitors the developer's compliance with the negotiated agreements.

On the other hand, the maximum satisfaction of differentiated interests is not easily safeguarded when the DUP decisions are made based solely on the legally bounded standards, which include the requirements of complying and the formulae by which the amounts of extra density are determined. Under the current DUP process, the discretion of the DUP review board is confined within the limits of the prescribed standards. Given this limited flexibility, the DUP process is costly because, by engaging in it, developers are shut off from other profitable options they could otherwise have pursued. If property owners are not pleased with the pre-determined standards, therefore, it is not easy to prevent separate, stand-alone developments occurring, even if joint development is highly recommended.

In general, market conditions pertaining to real-estate development are dynamic over time. The conditions under which the developer's interests are maximized are not constant. Furthermore, even in the same city, market conditions are segmented into several geographical sub-areas. Given the turbulent and idiosyncratic attributes of real-estate markets, then, the relatively rigid standards set up for the DUP process are not necessarily conducive to promoting collaboration between multiple agents with conflicting interests, including, for example, property owners, city governments, citizen groups, etc.

The efficiency of the DUP process varies with the attributes and preferenc-

es of individual developments on which a maximum attainment of development benefit depends. If the preset DUP standards do not match a developer's preferences, the DUP process can become an inefficient tool for facilitating the developer's participation, failing to minimize transaction costs unless agreements can be negotiated in a short time. To encourage the developer's transaction cost economizing behavior, more flexibility needs to be embedded into the DUP process by, for example, authorizing the DUP review board to exercise more discretion, thereby liberating the stringent restriction of the qualifying conditions for incentive award and its magnitude.

On the other hand, Type I DUP can contribute to solving the policy problems with which the city is commonly faced in the implementation of urban development. First, the DUP process mitigates the resistance of property owners to the compulsory exactions of public infrastructure. The private provision of resources to serve public infrastructure, usually mandated by the zoning regulation, significantly reduces the value of their holdings. If developers are required to construct, at their own expense, and then dedicate all public improvements within a development project to the city the property owner would strongly object to the obligatory dedications. The density incentive awarded to make up for the loss of confiscated properties therefore relieves the property owner's opposition to the proposed DUP plan.

Second, the DUP process provides an alternative source of capital financing for new facilities needed to serve public purposes. Local governments usually suffer a shortage of financial resources, and general tax revenues are generally inadequate to finance the public services and infrastructure needed. In this situation, Type I DUP, which is a kind of something-for-nothing approach, provides a promising non-financial compensation technique to facilitate financing. By offering a density incentive to the developer, the city's government is able to establish the required public facilities without spending general tax revenues.

Although Korea's DUP has some creditable features from the point of view of urban development, it is unfavorably compared with TDR in terms of preserving valuable physical and natural resources. The cornerstone of the TDR concept is the recognition that the possibility of developing property is a fungible commodity distinct from the property itself (Nelson & Duncan, 1995). Under the typical TDR program, property owners in sending districts sell the unused development rights to developers in specified receiving districts. The TDR's potential for facilitating the preservation of precious resources stems from the separation of the sending site from the receiver site, thereby allowing development rights to be transferred between different sites. As far as the property owner who possesses historic structures or natural areas worthy of preservation agrees to participate in the TDR program, the privately owned assets in question can therefore be protected from demolition or conversion. Unlike TDR, however, DUP does not permit the transfer of developments

Table 4.2 Overview of Korean cases in catchwords

	Conservation	Conversion	Re-allocation
Period in which the case was introduced	–	–	Since 2003
General objectives of the proposed instrument	–	–	Re-allocation (provision of public amenities without public finance)
Characteristic factors	–	–	Implemented on the basis of a single developer
Particular economic and social circumstances that have determined the instrument	–	–	Shortage of public finance to meet the demanding public spaces The burgeoning trend of market-oriented approaches to planning
Fit with the planning and legal system: What relation with spatial plans?	–	–	Compatibility with the relevant urban planning required
Were specific laws and regulations drawn up?	–	–	Yes: - PUNTA at the national level - City ordinance for specific regulation
Spatial level at which the case is tackled	–	–	National and local levels combined
Relevant public actors and role	–	–	Local government (the City of Seoul) The role of formulating the DUP plans and issuing the development permit after negotiation
Balance between private and public exchange	–	–	Resolved by rounds of negotiation between the city and the developer (in the third example, between city and property owners, mediated by the development company)
Parties which financed the case	–	–	Example 1+2: Individual property owner (developer) Example 3: The development company and the future residents to be housed in the developed property
Possibility for public participation	–	–	Not legally required

rights across separate sites. Given that the cross-zonal transfer of development rights is prohibited, the DUP process fails to safeguard the preservation of a specific site or the structure on the site. In practice, the three cases reviewed in the previous section indicate that development rights transferable within a single site cannot be used to serve two other purposes of the non-financial compensation techniques: the conservation purpose (Case 1) and the conversion purpose (Case 2). They show that the Transferable Development Rights (TDRs), if operated within a single site, can facilitate only the Case 3 re-allocation purpose. In Table 4.2 the cases are summarized.

Recognizing the DUP's inadequate role in preservation, the Korean central government has recently enacted two pieces of legislation to overcome the

current institutional limitations. One is the SAURP and the other is the Enforcement Decree of the SAURP, by which the cross-zonal transfer of development rights can be initiated. These twin enabling laws, the primary objective of which is to promote the urban renewal of blighted areas, allow multiple districts separated from each other to be designated as a single development area. In addition, the enabling acts permit the creation of development rights in one district and the transfer of the created development rights to another district. SAURP and its Enforcement Decree have, however, only been effective since May and October 2006, respectively and thus are very recent newcomers. Accordingly, no cases of TDR application have been executed for the purposes of conservation and/or conversion. As Cullingworth (1997) admits, the TDR process is quite simple in concept but complex in operation. To put the TDR technique into practice in Korea, detailed standards and procedures first need to be elaborated.

4.5 Concluding remarks

Urban development in Korea has been heavily dependent upon the traditional command-and-control regime. It is only recently that non-coercive pro-market tools have been introduced into Korea's planning system. The technique of density bonus, which is a variant of incentive zoning, is representative of Korea's new innovative planning tools. The density award scheme is implemented through the Type I DUP process. The complicated and frequent negotiations required to operate the DUP process can incur high levels of transaction costs. To encourage the relevant actors to economize transaction costs, therefore, intensive planning intervention is coupled with the DUP process. Type I DUP appears to fit the device of realizing the prescribed planning features on the limited scale of a single track well. It also makes a substantial contribution to mitigating the financial stress on the government to provide public infrastructure. However, the DUP process fails to provide an adequate instrument to preserve community heritages of historic significance and environmental resources. Under Type I DUP, the transfer of unused development rights between separate sites is not permissible. Given the sizable acreage of resource lands seemingly transcending the boundaries of a single lot, small scales of development density, with intra-zonal transfer only allowed, may not serve conservation and/or conversion purposes.

The legal foundation enabling the use of a more innovative tool close to the typical non-financial compensation has been recently initiated into Korea's planning system. To facilitate the non-financial compensation process, elaborated guides and standards need to be established *a priori*. As Korea's non-financial compensation is still emerging, it is too early to be able to find and in particular evaluate cases of the non-financial compensation process.

References

Barnet, J. (1982), **An Introduction to Urban Design**, New York: Harper & Raw, Publisher.

Coase, R. (1960), The problem of social cost, in: **Journal of Law and Economics** (3), pp. 1-44.

Cook, Jr., R.S. (1980), **Zoning for Downtown Urban Design**, Lexington: Lexington Books.

Cullingworth, B. (1997), **Planning in the USA: Policies, Issues and Processes**, New York: Routledge.

Nelson, A.C. & J.B. Duncan (1995), **Growth Management Principles and Practices**, Washington, D.C.: Planners Press.

The City of Seoul (2004), **Standards for Type I DUP planning** (in Korean only), Seoul: Planning Department, the City of Seoul.

5 Spain: non-financial compensation instruments and the Valencia model

Francisco Blanc

5.1 Introduction

Non-financial compensation techniques are frequently used by Spanish public bodies in the management of a city's development. In fact the opposite techniques (compulsory purchase of land and the public funding of basic urban infrastructures) have become the exception in recent years. Despite the fact that land readjustment was already established by ancient legislation (1956), it has only become a major tool in planning practice since the legal reforms fostered by the regional powers at the turn of the century. This chapter presents three significant cases of application of such techniques. The Almería case (Section 5.4) explains how the transfer of development rights was introduced with the support of the Courts of Justice without changes in the statutory law. This case focuses on the recovery of the urban architectural heritage. Avenida de Francia (Francia Avenue) in Valencia (Section 5.5) is a pioneer case which inspired the more relevant and recent changes in Spanish law headed by the Valencian Region Law; it focuses on the transformation of an industrial area with residential purposes. The Orriols case (Valencia) (Section 5.6) focuses on the techniques of land readjustment on a large scale, managed by a developer chosen through public contest.

5.2 Institutional framework and legal principles[18]

In Spain, the public powers regarding land use planning are structured at three levels of decision-making:

1. National powers – Acts of National Parliament regulate basic property rights such as legal rules regarding compulsory government purchase, the litigation procedures established to deal with claims against public powers, and planning actions and decisions.
2. Regional powers – Regions have their own respective Parliaments with full capacity to produce their own legislation. Theoretically (according to the Constitution), Regional Parliaments are the only ones empowered to rule on land use planning. Such power is, practically speaking, limited due to

18 The institutional framework as described in the text was mainly established by Judgment 61/1997, granted by the Constitutional Court.

national regulations which determine the guidelines of regional legislation, especially when relevant economic issues are at stake (Parejo-Alfonso & Blanc-Clavero, 1998). Additionally, national powers include the administrative power to control the actions of local powers, to grant the final approval of major planning structural provisions, and to devise policies to do with the use of land when more than one local boundary district is affected.

3. Local powers – Local powers play an important role. They grant prior approval to most of the planning schemes, or Partial Plans, and grant final approval when no regional issues are involved. They also grant building permits.

Legal principles are binding plans, compensation cases and compulsory purchase.

Binding Plans

Zoning regulations included in town and country plans not only forecast the future use of the land but also have legally binding effects for the later authorization of most private and public construction and urbanization projects. Planning schemes drafted with respect to a particular area inside the municipality have to be consistent with the so-called General Plan drafted for the whole municipal constituency. Nevertheless, the hierarchical design of the planning sequence has been softened by legislation during the last decade. An important difference between Spanish and other European laws is that in most countries the equivalent of the Spanish General Plan does not have such binding effect on the development rights of individual properties.

Compensation Cases

As a general rule, landowners do not have the right to be compensated for restrictions imposed by planning provisions when developing, building on, or using their land. Nevertheless, in three limited cases the right of compensation for these policy power decisions arises:

1. Landowners have the right to maintain, exploit, and enjoy existing uses on their land. This right includes the prerogative to obtain new permits for the maintenance of existing buildings in their basic former physical condition or for economic purposes. Planning provisions that foresee the suppression of existing uses will only be enforced if full compensation has been granted following due process.
2. When a landowner or any other developer with relevant interest in the land has properly initiated an authorized development, new planning provisions will not deter the development in progress without proper compensation which would include the reimbursement of the expenses that the developer has already incurred, and to some extent the loss of potential

benefits.[19]

3. When limitations and the potential uses of land affect the various properties included in the same area with inequitable economic effects on the different properties, landowners who suffer a less profitable treatment have the right to be compensated for this discrimination. To be more precise, all the landowners whose properties are in the same area have equal rights to share the windfall benefits (betterment) derived from planning provisions (García de Enterría & Parejo-Alfonso, 1981). In order to enjoy this equitable share of the benefits, they have to contribute equally to the necessary investments to provide the area with the public facilities that the new buildings would demand around them, such as public spaces, roads, or streets. If it is not possible to enforce a non-financial compensation technique – such as land readjustment – to redistribute equal benefits and costs amongst the landowners, the public budget will pay compensation to those who do not obtain profitability equivalent to the average.[20]

Compulsory purchase

In the case of compulsory purchase or eminent domain proceedings for a public purpose, the land has to be appraised at market value and compensation must be paid. Until the recent reform of 2007, the market value included the amount of potential benefit loss for not being allowed private development at an average level for the area where the condemned property is located. For this reason, since the late 1980s until the present, compulsory purchase has become a progressively obsolete technique, giving way to non-financial compensation techniques such as land readjustment and the Transfer of Development Rights.

5.3 Techniques

The above-mentioned principle (fair redistribution of benefits and encumbrances imposed by the planning provisions) was introduced into the Spanish legal system in 1956. The purpose of this principle was to provide the necessary funding to provide the public infrastructure for new development. The increase in land value was made possible by the development potential granted by the planning provisions. Additionally, it is intended to grant an equal economic effect on all the properties affected by the planning provisions, in spite

19 Recent legal changes approved by Act no. 8 of 2007 have extended a similar regime to the case of development which is going to be initiated even though it has not yet begun. (art. 24).

20 This rule was stipulated in art. 3 of Act of 12 of May 1956, art. 3 of Act 1346/1976, art. 3 of Act 1/1992 and art. 5 of Act 6/1998. Please note that art. 8 of the recent Act 8/2007 marks a turning point limiting such a principle.

of the different physical treatment that must necessarily apply to each individual property. In its original form, the rule of fair redistribution was limited as a means of dealing with the urbanization within planning pools (polygons). The original scope of such a redistribution could hardly be applied to managing redevelopment in downtowns, nor could it be involved in large spaces reserved for major public infrastructure projects. The legal reforms of 1976 and 1992 attempted to extend and broaden the scope of application of such redistribution. Recent legal reforms enacted on July 1, 2007 marked a turning point limiting the relevance of this principle in future public projects.

Land readjustment is the technique for redistribution applied when the affected land is a continuous space of several properties subject to a common process of new development. The TDR technique – in its special Spanish manner – is applied when the affected land in a downtown area is subject to redevelopment, or when large spaces are targeted as major public facilities that will provide common services to different parts of the city.

In spite of its well-established position in the Spanish legal tradition, the practical experience of land readjustment was unsatisfactory practical up until the mid-1990s. Landowners were frequently unable to manage such a complex process on their own. It became clear that associations of landowners were an impractical tool in managing land readjustment. Full cost recovery was a brilliant legal theoretical principle, but not a practical concept that could be applied. Such impractical procedures were circumvented by means of rezoning contracts between developers and municipalities.

The Valencia Regional Planning Law of 1994 (no. 6) provided a turning point to this scenario. A developer agent was assigned to manage responsibilities of land readjustment over an area that could exceed his own property. The quick success of this formula prompted its adoption by the rest of the regional legislations throughout Spain. Two variants are combined in each regional system. One is the original Valencia formula in which the developer agent in charge is chosen in a public contest open to non-landowners, but in which the owners have some say. Another variant is the 50%-claim-the-title system in which the owner or owners of more than half of the total surface of the pool have the exclusive rights to manage the land readjustment, if they claim that right, and undertake the financial commitments within a stated period after the approval of the General Plan.

5.4 Conservation case: TDRs applied to listed buildings in Almería 1984-1988

5.4.1 Transferable Development Rights

During the 1980s, Spanish cities had a serious deficit of public spaces in the

overbuilt downtown areas. With the change to a democratic form of government, new planning provisions were drafted to fill the void but municipalities could not afford to purchase the necessary urban land. Non-financial compensation tools were drafted to resolve the problem. On many occasions, the planned public facility was assigned to a plot where a historically-designated building existed, even one in poor condition.

TDRs were sometimes used in Spain during the 1980s in order to preserve designated historic buildings. This technique was introduced in Spain for the first time in the small town of Elda-Petrer (Valencia) in 1978 and it was later applied to mid-sized cities such as Getafe (Madrid), Jerez and Almería (Andalucía). In spite of the fact that the relevant law (Act 1346/1976) did not include detailed provisions for this technique, it was backed by two judgments of the Supreme Court in 1982[21]. The Spanish planner, J. García-Bellido, originally promoted the idea, which was officially accepted by the Courts after a notorious legal battle. The legal grounds of this acceptance was based on considering this technique as a valid simplification of the land readjustment proceedings (García-Bellido, 1979). These proceedings are legally binding when the affected landowners in densely-built neighborhoods are willing participants.

The technique worked as follows: The General Plan (Plan) of the city established a so-called Standard Development Right (*Aprovechamiento Tipo*) for each homogeneous zone of the inner town. This Standard Development Right was an equitable Floor Area Ratio (FAR), which included an equal development right for all the properties inside the particular zone. This development right was only a legal reference, not necessarily coinciding with the material building possibilities that could be authorized with regard to each particular site. Those private properties designated for public facilities (such as green public areas) had allotted the same development right but it could not be utilized on that location. Instead it could be transferred to a plot capable of being developed. Most of the sites capable of private development could eventually be built up with a density that exceeded the Standard Development Right, but this surplus of development rights had to be transferred from properties with an equivalent deficit. Properties that their owners cede to the municipality for public uses are considered in deficit by definition. Owners therefore ceded land for public purposes to the municipality and obtained in exchange the potential to develop other receiving plots. The physical density was therefore ultimately above the level of the Standard Development Right. This process was implemented via a mutual agreement between the owner of a plot that could be developed and the owner of a site assigned by the Plan for public facilities which had only theoretical developing rights without actual-physical

21 Judgments delivered on 6/22/1981 and 5/4/1982. Art. 78.3 of the Decree 3288/1978 was used as legal back-up of this technique.

possibility to be built up. A maximum FAR above the Standard Development Right was foreseen by the Plan for each site and TDRs were not allowed to be used to surpass this maximum.

Landowners of sites available for development therefore have two options: to develop only the Standard Development Right FAR, or to reach an agreement with the owner of a plot assigned by the Plan for public facilities to cede it to the municipality, use Transferable Development Rights (TDRs), and share the benefits of the plot to be developed between both owners. Landowners of land not capable of development which has been assigned for public facilities by the Plan have two options as well: to enter into an agreement, as mentioned above, or to sell their land to the municipality. In this last case, the municipality would re-sell the development rights of the purchased land, subrogating itself to the landowner in future TDR transactions.

5.4.2 Almerías historic buildings[22]

Between 1950-1980, without legal restrictions, 90% of Almerías buildings constructed before 1900 were demolished. In 1979, however, the new city council, (the first one elected in many years by democratic means), was interested in preserving the remaining historic buildings (Fernández, 1994). The buildings included small palaces or other large structures such as the old Liceo theatre. New regulations forbade the demolition of buildings and obliged owners to preserve their internal structures.

At that time, neither the original owners nor private developers were interested in restorations. The General Plan of Almería in 1986 (146,000 inhabitants) allowed the use of TDRs from any property designated for restoration which had been ceded to the municipality to be restored as a public facility. Normally, a professional developer would buy the building with the single purpose of ceding it to the municipality in order to transfer the development rights to other plots in different locations. These donations of property, in spite of their lack of financial compensation, were absolutely voluntary. If the building owner was not willing to use TDRs, he had the alternative of restoring or maintaining the property himself, and had the option to use it for private purposes.

The municipality incurred no costs in obtaining the properties as they had to be ceded as a prerequisite for obtaining TDRs. Public funds were only employed for restoration projects and for necessary improvements to rehabilitate the buildings as public facilities.

The first TDR that produced the transfer of the property to public hands

22 The information about this case including copies of several official files was provided by Justice Mr. Silvestre Martinez, Judge of the Administrative Courts.

Table 5.1 Hypothetical basic case in which a property with a listed building is transferred to the public administration

Concepts	Developable plots	Historic buildings
Standard development right (Zone)	1 m² floor area/m² land area (FAR 100%)	2 m² floor area/m² land area (FAR 150%)
Surface	1,000 m² land area	833.33 m² land area
Existing construction bonus	.+ 0%	.+ 50%
Development rights (DR)	(100% x 1,000) = 1,000 m² floor area	(200% x 150% x 833.33) = 2,500 m² floor area
Zone value	€ 1,000/m² floor area	€ 800/m² floor area
Land value	(1,000 m² floor area x € 1,000/m² floor area) = € 1 million	(€ 800 x 2,500 m² floor area) = € 2 million
FAR (Plot)	300% = (3 m² floor area/m² land area)	Existing building
Potential building allowed	(300% x 1,000 m² floor area) = 3,000 m² floor area	Restoration
Surplus/Deficit DR	(3,000 m² floor area – 1,000 m² floor area) = +2,000 m² floor area	(0 m² floor area – 2,500 m² floor area) = –2,500 m² floor area
Surplus/Deficit Value	(2,000 m² floor area x € 1,000/m² floor area) = **+ € 2 million**	€ 0 – € 2 million = **– € 2 million**

was not sufficient to make use of all the development rights, so developers held onto the remainder of the development rights for the future. To some extent there was a free market of development rights and the municipality played a relevant role in this as broker or TDR bank.

Different zones had different Standards of Development Rights, ranging in FAR density from between 0.8 and 2. The TDR could be transferred between different zones after taking into account the different values. The rule was that in the case of the TDR, the land where the development rights came from had to be ceded to public hands, but obviously if the ceding consisted of a property already developed, its value was greater than if it were undeveloped land. Because of this, the TDR had a bonus when the ceding included a designated historic building. The bonus consisted of the allocation of additional TDRs.

Table 5.1 explains a hypothetical basic case in which a property with a listed building is transferred to public administration. The TDR requires a balance between two equal values: the value of the development rights which are transferred (deficit) and the value of the surplus of FAR over the Standard Development Right, which is going to be developed. The first one depends on the area ceded to the municipality, on its Standard Development Right, on its positional value, and it includes a bonus (150%) in exchange for the ceding of the constructed building. The second depends on its land area, on its respective Standard Development Right, and on its positional value.

This technique has a dual purpose (García-Bellido & De Salamanca, 1979). On the one hand, it enables different landowners to be treated equitably, in spite of the different provisions that the zoning regulation has provided for their respective plots. It strives to acknowledge equal development rights for

those landowners who can build or rebuild their plots, and those others who can only make restoration with presumably few financial benefits (García-Bellido, 1985). On the other hand, it allows the municipality to obtain public spaces without the financial costs that would otherwise have to be charged to the taxpayers. This has the effect of shifting the burden from the taxpayers to the developers who prefer new development over restoration. The reports say that in Almería, in the long term, the technique became obsolete when private developers began to be not only interested in new development or redevelopment, but also in restoration. There were a total of 146 TDRs purchased between 1984 and 1988 which involved the development of more than 1,800 new dwellings. In the initial years, the municipality gained a ratio of 0.63 m^2 for every 100 m^2 of floor area developed by the private sector without incurring any financial costs. This ratio diminished after the mid 1980s to 0.28 when the municipality became more interested in obtaining historic buildings than open land to develop new public facilities.

5.5 Conversion case: Francia Avenue in Valencia, 1991-1996

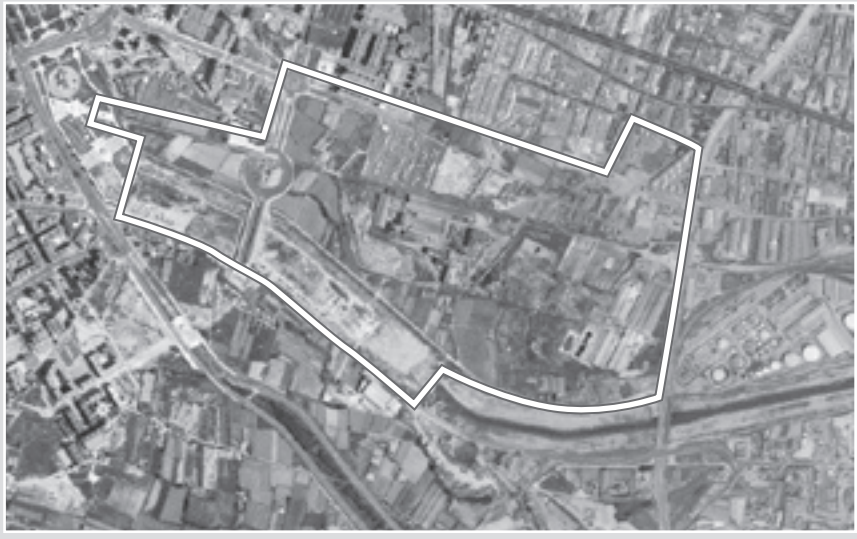
Land readjustment is a technique[23] primarily devised to transform rural land into urban land. It is applied to a continuous area usually outlined in the previous planning provisions which also define the future development potential and necessary public facilities and infrastructure. In land readjustment, the original rural properties are exchanged for the new developable plots included in the same outlined area. In this way, the landowners affected receive a developable site in exchange for their original rural property. The exchange is managed on an equitable basis, granting to each landowner a development right proportional to the surface area of his or her original property. Land reserved for public facilities is transferred to the Public Administration which also receives a minor part of the developable site to support its public housing policies. Most of the new urban sites are distributed among the original landowners who can individually build up the plots they obtain. The expenses generated by the required public works to be developed are distributed among landowners proportional to the development rights of the plots that each one obtains. This includes the costs of construction of the sewage system, roads, streets, gardens, and other public facilities. It is a rule that the final balance derived from the benefits and costs has to produce a net benefit for all the landowners affected and not only compensation for the value of their original

23 Guidelines of land readjustment in Spain are regulated by the National Act 1346/1976 (arts. 94-102) and by the Royal Decree 1079/1997, but there are relevant peculiarities in each particular Regional Regulation.

Figure 5.1 Valencia, Francia Avenue: original property structure

Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

Figure 5.2 Valencia, Francia Avenue before redevelopment



Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

properties. Landowners who are not satisfied with the proposed terms of the land readjustment have the right to sell their original property and receive financial compensation. The public administration or, on its behalf, the developer Agent selected in a public contest, are obliged to pay the compensation if so requested by the landowner.

Existing buildings

Inside the area affected by land readjustment there may be existing uses such as buildings, farms, or plantations which have to be destroyed as a consequence of the joint development. The owner, or any person with the relevant rights over these existing assets, has to be compensated with an amount of money equivalent to their market value, discounting the value of the land (which will be compensated with development rights). The total amount of these compensations also has to be redistributed on an equitable basis amongst all the landowners according to their respective development rights. Therefore, there has to be an account drawn up in which each particular landowner has a double entry as debtor and creditor against the pool. This technique has obvious limitations: the new planning provisions have to significantly increase the value of the whole property inside the pool over the value of the set of pre-existing uses. For this reason, this technique has not been applied to operations to decrease residential density but in the substitution of industrial uses for residential and commercial uses. The point to note here is the extent to which the broadness and quality of the renewal, and not its density, can be the tool for producing added values to finance the redevelopment. Such was the case in the Francia Avenue Sector in Valencia.

Social background

Francia Avenue sector has been the most relevant redevelopment project performed in the City of Valencia in the last decade. It is an entire neighborhood located between the city centre and the port, formerly occupied by industrial facilities. New planning provisions in the late 1980s outlined the need to substitute the pre-existing industrial area by a new residential and commercial area. The proper connection between the city centre and the seafront required supporting the redevelopment with necessary public infrastructure and public works. The Plan established that the area had to be developed as a whole, that the active industries had to be stopped, demolished, and that the ground had to be cleaned. Additionally, the development had to include a bridge connecting it with the city center. It had to accomplish the following: convert a former river bed into a park, landscape additional gardens, construct a new web of avenues, streets, plazas (with a sewage system, traffic lights, and related infrastructure) and provide several plots for public buildings and public social housing. The developers had to pay a substantial contribution to bury the railway track.

Figure 5.3 Valencia, Francia Avenue planning scheme

Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

History of Francia Avenue

There were 170 different properties[24] located in an area of 65 hectares (see Figure 5.1). Many of the properties included factories, some of which were obsolete, but others were still active (see Figure 5.2). Landowners had the option of setting up an association to cope with the land readjustment and the development of common works, but they were not interested in doing this. Costs were high, possible benefits were too speculative, and it was difficult to coordinate the actions of so many affected people in a task which involved managing major civil works.

The municipality chose to perform compulsory purchase of all properties, but as there were no public funds to finance the program, a public contest was held to select a developer prepared to buy the properties (on a compulsory basis if necessary) and to perform all the works. Some landowners protested because they were interested in participating in the development. Because of this it was stipulated that the developer had to meet in association with those landowners that were interested in participating in the development. It was also stipulated that any interested landowner could choose between making a financial investment, only contributing with their property in exchange for development rights, or simply selling their property and receiving cash.

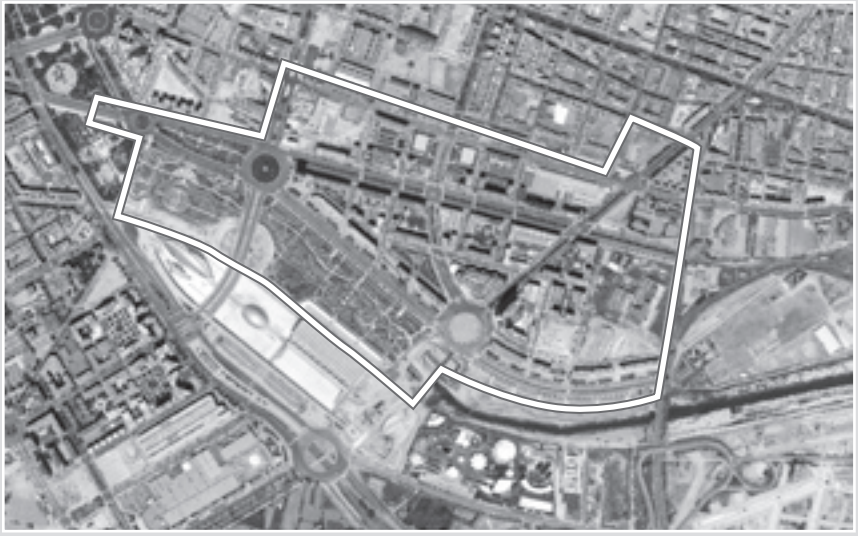
The selected developer agent was the joint venture of a bank and a major contractor who had previously bought a couple of large properties inside the area. Unexpectedly, in the end, all the landowners chose to be part of an asso-

24 Valuable information has been provided by Prof. José Cardona of the University C.E.U.S. Pablo of Valencia.

Figure 5.4 Valencia, Francia Avenue final properties allotted by land readjustment

Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

Figure 5.5 Valencia, Francia Avenue after redevelopment



Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

ciation with the developer agent, all signing several standard financial agreements. Land readjustment was the result (see Figure 5.3). This does not mean that the specific details of the land readjustment were willingly accepted by all the affected people. Obviously there was a broad consensus about those details (reached through negotiations with the developer agent, landowners, and the municipality), but there were also specific disputes about particular

decisions that were initially resolved by the municipality which enforced its own decisions. These decisions were either confirmed afterwards, or modified through judicial review, depending on each particular case.

Results and consequences

The land readjustment and the development of the infrastructure were performed between 1991 and 1996. Today the area – almost completely developed – is a downtown hotspot for the commercial and residential real estate markets (see Figures 5.4 and 5.5). 80% of the area is assigned to public uses and the footprint of the 130 private buildings is 8.5% of its total surface area.

This experience inspired the Valencia legal reform of 1994 and further inspired regional legal reforms all around Spain. Finally, the recent national law enacted in July 2007 established this operating model as a basic pattern all around the country.

5.6 Re-allocation case: Orriols sector as part of the General Plan of Valencia, 1988-2001[25]

5.6.1 The extent of land readjustment and TDRs

Since 1994, land readjustment has been applied all around the Valencia Region – and in other Spanish Regions – in hundreds of cases which involve thousands of hectares. The General Plan of Valencia and the development of the Orriols sector provide a good example to explain its mechanics. Almost all of the major real estate development in Spain is performed by means of land readjustment. It is also important to note that sometimes land readjustment techniques are combined with TDR techniques.

The Orriols sector was envisaged in the General Plan of 1988. The area for land readjustment covered 541,000 m^2 in the northern outskirts of the city surrounded by developed neighborhoods to the south, east and west. It stretched over farmlands with many scattered small buildings, dumps, a few trees, one historic listed building, a professional league soccer stadium, as well as blighted areas.

5.6.2 Transferable Development Rights

In Spain, TDRs require the donation to a municipality of those areas from which the development rights are transferred. The General Plan of Valencia

25 The information about this case has been obtained from the official files of the City of Valencia Municipality. Useful information has been also provided by the planner Mr. A. Escribano Beltrán.

was approved in 1988. It divided the city's outskirts into 15 planning sectors of land that could be developed (*suelo urbanizable programado*). The size of the sectors ranged from 11 to 59 hectares with a total area of 310 hectares. The number of new dwellings foreseen for them was around 20,000. The General Plan delineated the boundaries of each sector and assigned to them a specific use for future urban development, the number of dwellings to be developed, and a precise area of floor that could be built, distinguishing between residential, industrial, or tertiary use.

Provisions of the General Plan had to be completed along with the more detailed ones of specific Partial Plans (*Plan Parcial*) drafted for each sector, and each Partial Plan had to be developed by means of land readjustment. The Partial Plans consisted mainly of a draft of the respective sector streets, public parks, and plots allotted for public facilities. The major spatial reserves for large public facilities were allocated directly in the General Plan. The development of 15 sectors had to be linked with the parallel development of major public facilities (i.e. the new Public University) which occupied approximately 200 additional hectares.

The General Plan established a particular Average Development Right (*aprovechamiento medio*) for all the properties included in any sector or assigned for any public major uses. The same FAR for any single square meter was established with the exclusive purpose of determining equitable rights for all properties. The Average Development Right was calculated by dividing the total amount of development potential assigned by the General Plan by the total area occupied by the sectors and by the major reserves for public spaces. As each particular sector was assigned a different FAR in terms of physical building limits, it was necessary to implement TDRs in order to equalize the differences between the physical FAR of each property and the Average Development Right established for all the land involved in these new developments. There were several sectors in which the physical FAR coincided with the Average Development Right, but no sector with a physical FAR under this average. The TDRs had to transfer development rights from the land reserved for major public facilities to the sectors or, to be more precise, to each land readjustment process with actual building potential. We have already mentioned that in Spain TDRs require the donation to a municipality of those areas from which the development rights are transferred. The mechanics of the TDRs in this case were so flexible that in the land readjustment a portion of land was included located in another part of the city that would be ceded to the municipality for public uses.

For example, the Orriols sector has an inner area of 38 hectares but it needed to include in its land readjustment an external area of 16 hectares assigned to a public park and large avenues. For the Orriols, this external area was located adjacent to the sector, but in other cases it was located far away. As land prices vary according to location, the General Plan established value

Table 5.2 Simplified example of how TDRs operate in land readjustment cases

	Sector A (with private uses)	Sector B (with private uses)	Sector C
Concepts	(with private uses)	(with private uses)	(only allowed public uses)
Equalized average development right (i)	0.8 r.d.u. (ii)/m² of land	0.8 r.d.u./m² l (iv)	0.8 r.d.u./m² l
Positional value (iii)	€ 10/m² f	€ 20/m² f (v)	–
Coefficient*	[1]	[0.5]	–
Operative average development right	**0.8 m² f/m² l**	**0.4 m² f/m² l**	–
Total developable floor area inside the sector	9,000 m² f	3,450 m² f	0 m² f
Land area's sector	10,000 m² l	8,000 m² l	1,875 m² l
Development rights without TDR	(0.8 r.d.u./m² l*1*10,000 m² l) = 8,000 m² f	(0.8 r.d.u./m² l*0.5*8,000 m² l) = 3,200 m² f	(0.8 r.d.u/m² l*1,875 m² l) = **+1,500 r.d.u**
Deficit/Surplus of development rights in the sector	(8,000 – 9,000 m² f) = –1,000 m² f; (–1,000 m² f : [1])= **–1,000 r.d.u.**	(3,200 – 4,450 m² f) = –250 m² f; (–250 m² f : [–0.5]) = **–500 r.d.u.**	+1,500 r.d.u = 1,000 r.d.u to S1 (66,66%)+ 500 r.d.u. to S2 (33,33%)
Developable floor reserved for the TDR	–1,000 r.d.u *[1] = –1,000 m² f; [–1,000 m² f] : [–1,250 m² l] = **0,8 m² f/m² l**	–500 r.d.u. *[0.5] = –250 m² f; [–250 m² f] **:** [–6,625 m² l] = **0.4 m² f/m² l**	From 1,875 m² l: 1,250 (66.66%) TDR to S1 625 (33,33%) TDR to S2

(i) Established by the General Plan according to the ratio of positional values among the different sectors.
(ii) Right development units (r.d.u.) is used to measure the development rights transferred between different sectors.
(iii) Determined by means of a market study of prices realised at the time when the General Plan was approved.
(iv) 'l' stands for 'land area' or surface area.
(v) 'f' stands for 'floor area' or developable area.

coefficients to calculate the land needed for TDRs according to the location of the non-continuous areas included in the same land readjustment.

Table 5.2 shows a simplified example of how TDRs operate in land readjustment. As a consequence of the correction determined by the coefficient, the Average Development Right is not the same FAR for all the sectors. Nevertheless, all the landowners obtained the same land value. In the example: (0.4 m² floor area/m² land area * €20) = €8 = (0.8 m² floor area/m² land area * €10).

The system discussed above is an implementation of compulsory rules stipulated in National Law (art. 84, Act 1346/1976[26]) that have been applied in most of the large and mid-sized cities in Spain during the last two decades. It is noteworthy that for Valencia in 1998 (as in others, such as Madrid in 1985) the value coefficients were calculated based on a serious market study. The intended final result was that all the landowners affected by the new development in the outskirts of the city could obtain an equal benefit as a result of the implementation of the General Plan.

With regard to the Almería conservation case previously discussed, it must be noted that TDRs in that case are not necessarily founded on mutual agree-

26 The detailed regulation comes from arts. 30-34 of Royal Decree 2159/1978.

ments between the affected landowners, but instead on compulsory decisions enforced by the municipality and subject to later judicial review.

The proceedings

A public contest to choose a developer agent took place in 1995. There were three contending companies, all of which were joint ventures (more than 20 companies participated in the process). All of the competitors presented a technical proposal and a bid with their respective economic conditions. The whole process of selection lasted 11 months. During this period, competitors started an aggressive campaign in the media to gain the favor of public opinion and the municipality. This increased public interest more than the official proceedings and prompted debates about the proposals.

Each competing proposal comprised a complete design of the planning provisions, fully delineating the building plots including public spaces, the drafting of the micro-zoning of the use of land, the number of floors, footprint conditions, height of the buildings, uses, and the economic activities allowed. Land readjustment could not modify these provisions afterwards. Nevertheless, the planning provisions (*Plan Parcial*) only regulated the general conditions of the minimal surface and shape to be respected in the design of the plots – the boundary limits of these plots. The precise shape of the individual plots was allotted later in the land readjustment – taking into consideration the conveniences of the distribution of rights among landowners. The total number of dwellings was established beforehand in the Plan; the land readjustment distributed them amongst the sites, establishing a limited number of dwellings for each one. The proposals were also accompanied by a basic project of public works (a description of the landscaping and urban design qualities, provisions to construct the streets, as well as water, gas, electric, traffic light and sewage systems). Such documents had to be consistent with the General Plan strategy; no major changes were allowed with regard to the General Plan (the pre-established Average Development Right).

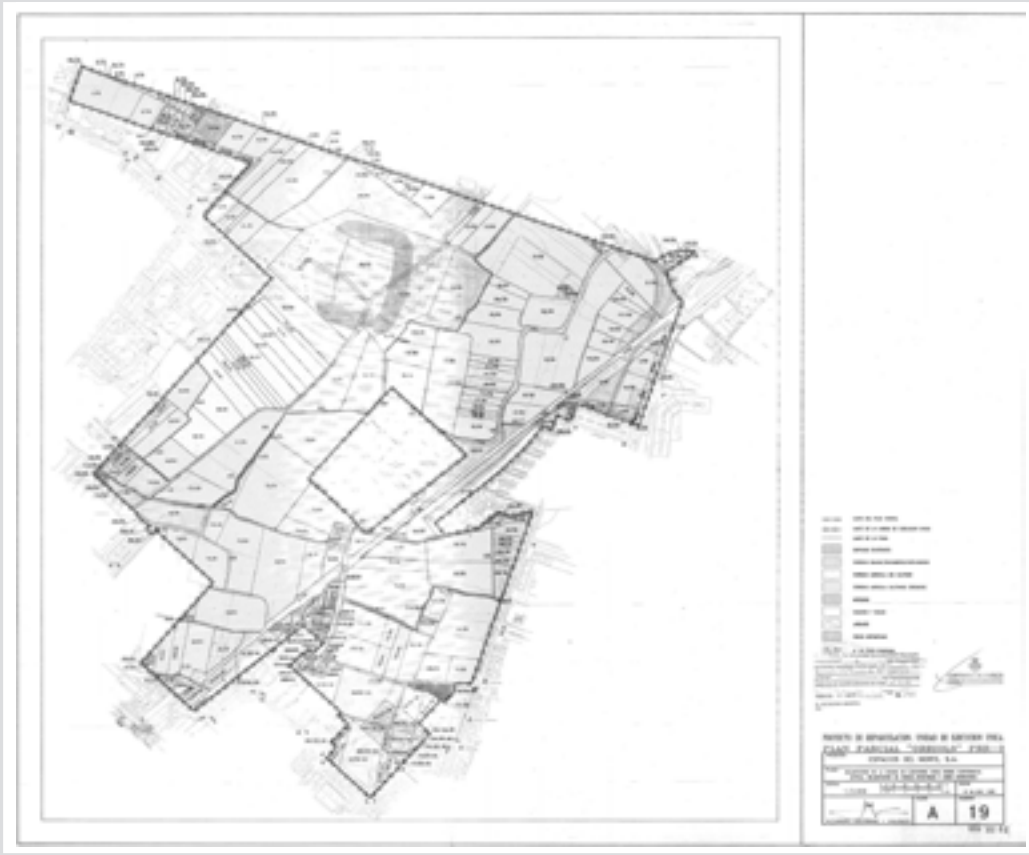
The bids contained a schedule to perform the land readjustment and the development of the public spaces, and economic conditions offered to the landowners.

After a developer agent was selected as promoter by the Municipal Assembly, the process of land readjustment began.

5.6.3 Ownership structure

The original land was divided into 300 separate farming properties. In the beginning, more than 90% of the surface was in private hands (see Figures 5.6 and 5.7). Neither of the companies in the contest had significant ownership of the properties. During the official period of representations, landowners had an active role supporting one company or the other because of agreements

Figure 5.6 Valencia, Orriols original property structure

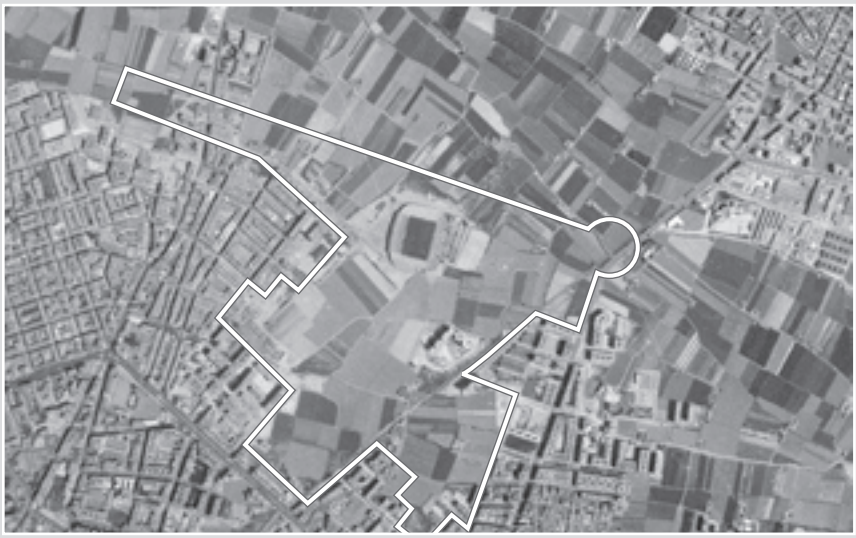


Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

that had been negotiated. Several landowners argued against particular features of the development, but virtually none were opposed to developing the area.

During the contest and the land readjustment process, relevant changes in property took place, reducing the number of landowners. There was a clear difference between the Valencia model which included developer agents chosen in open contests and other scenarios. In the Valencia model, movements in the real estate market evolved at the same time as the administrative procedures (Blanc-Clavero, 1997; Modrego-Caballero, 1997; Fernández, 1998). By the time land readjustment was to be approved in 1999, half of the original land surface was in the hands of ten owners. The total number of landowners was still high, but many of them were not the original owners but rather private and company investors. In the open market, the developer agent bought 12% of the surface land and 18% of the development rights. Of particular note in this case was that 21 of the plots were assigned in joint property shared by several associated owners.

Figure 5.7 Valencia, Orriols before redevelopment



Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

5.6.4 The landowner's role in land readjustment

Landowners were notified of the approval of the selected developer agent granting them the choice to make a financial investment in the development works of common interest or to only contribute with the original land. The first choice obviously implied more development rights. The economic conditions of both options were fixed in advance according to the winning bid in the previous contest. In the case of cash investment, the landowner had to present a bank guarantee or other kind of payment guarantee. The developer agent had to present bank guarantees covering the value of the development rights gained in exchange for its investments and increase the total cost of the public works by 7%.

The Average Development Right for an owner who made a financial investment in the urbanization works was 0.64 m^2 floor area per m^2 of the original property, but only 0.3328 if the owner only contributed the original land without cash payment. The required investment if there was a cash contribution was €39/m^2 of the original property. Owners representing 22% of the total area affected declined to contribute a cash investment, and the developer agent had to cover this lack of investment, and acquired in exchange equivalent development rights.

Landowners can decline to participate in land readjustments. They have the prerogative to claim a cash compensation for the original land in its entirety, but this is very unusual. Nevertheless, landowners, in some cases, cannot participate in land readjustment because their rights are so limited that it is impossible to compensate them with an entire building plot or with a minimal share in a plot over the legal minimum (50% of the smaller plot planned).

Figure 5.8 Valencia, Orriols planning scheme

Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

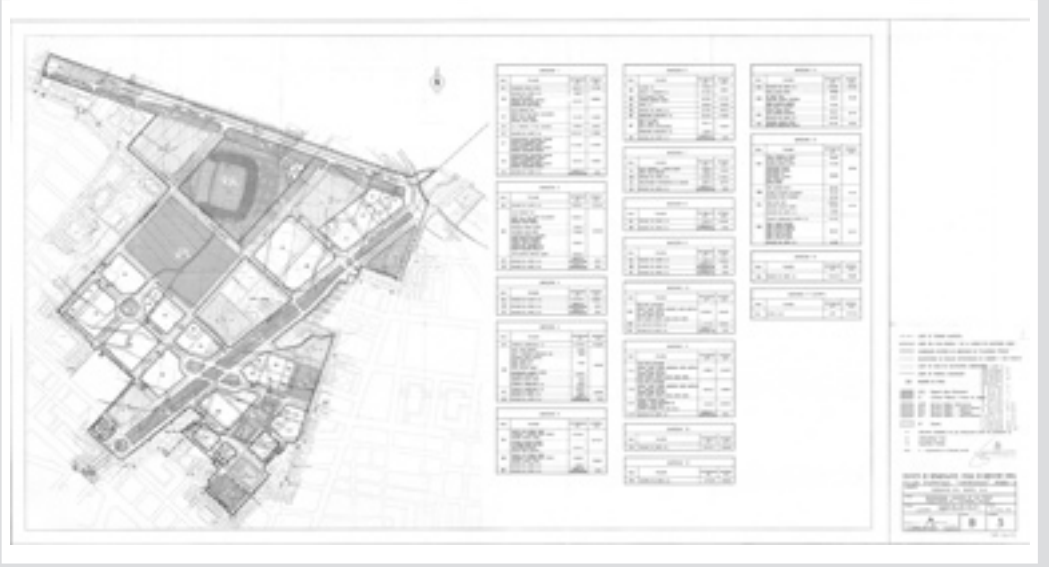
The developer agent has the duty to make these payments and the right to acquire the equivalent development rights. In the case of the Orriols sector, the properties amounted to 6.9% of the total development rights.

5.6.5 Allocation rules

Finally, the building plots were distributed among the holders of development rights in such a way that the physical building potential of each plot equalized the development rights of the relevant parties involved. In order to decide the location of each assignment, several criteria had to be used. First of all, most of the affected people had to obtain an assignment of land. Secondly, the assignment in full property had to be preferred over the assignment of shares for the same property. Thirdly, it was mandatory that when other equal conditions allowed, each owner had to obtain the new site in the same location as the original property or as close to it as possible. It was also mandatory to calculate the different values of the different uses of land (commercial or residential) to correct the assignment of plots when necessary (as in the case of a soccer club). All the preceding rules could be avoided as long as there was a willing agreement between the parties involved.

Such a complex set of rules would be impossible to manage if the developer agent did not have the ability to negotiate and patiently forge a broadened consensus among the majority of the affected owners. This is one of the major roles of the developer agent and the key to the success of land readjustment. This role is easy to carry out when the property is acquired by different developer companies or when the developer agent is familiar with the local culture of the farm land ownership. Conversely, in particular areas of

Figure 5.9 Valencia, Orriols final properties allotted by land readjustment



Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

the coast where many properties are family investments by foreign landowners, conflicts have been frequent.

5.6.6 Land readjustment procedures

The project of redistribution was subject to two periods of representations advertised with wide-spread publicity. The project not only comprised a description of the initial and final properties, but an appraisal of them as well, distinguishing land values from the appraisal of other assets. The project was registered in the Land Registry[27] after obtaining the official endorsement of the municipality.

The respective landowner also needed to be compensated for existing uses of the land that could not be preserved (warehouses, trees). Tenants and holders of rights over the properties (distinct to those of ownership) also had to be compensated. The total amount of these compensations had to be proportionally distributed among the relevant parties who would benefit from the development rights. Cash compensations had to be paid before property could be taken. Future investments had to be guaranteed by the responsible party by means of a mortgage on the assigned plot or a bank guarantee (Parejo-Alfonso & Blanc-Clavero, 1998).

27 The enforcement of Royal Decree 1079/10997 was a landmark in the regulation coordinating planning decisions and the Land Registry in Spain.

Figure 5.10 Valencia, Orriols after redevelopment

Source: Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana (Valencia City Council)

5.6.7 Development

The number of plots after land readjustment dropped considerably (see Figures 5.8 and 5.9) In the Orriols sector, 75.5% of the area was assigned for public use; 19.7% for gardens; 12.4% for municipal plots for public services; 8.6% for a tram transport system; and the remaining 34% for roads, streets, bicycle lanes, and public squares. The developable land for private purposes was 24.5% (1% private gardens). The total number of final plots assigned for private purposes were 56; 3 for private facilities and 53 for blocks of apartments and semi-detached houses. Furthermore, 90% of the area set aside for development was for residential purposes and 10% for commercial purposes. Urbanization was fully accomplished in a few months. Among the works included was the restoration of an historic building, a new track trajectory for the tram service, a public sports facility with a swimming pool, and a park for the pre-existing neighborhood. Most of the area is now developed (see Figure 5.10). This same system has been enforced in all but two of the sectors foreseen in the Valencia General Plan of 1988.

5.7 Conclusions

Since the mid 1990s, investment in public urban infrastructure has been important across Spain. It is important to recognize, however, the extent of the private contribution to this investment. Spanish public opinion deems it normal that developers have to finance the cost of the basic public facilities that new development will demand. It is generally assumed that the public bud-

get would not be burdened with the acquisition costs of the land required for public purposes, or for the basic facilities of its urbanization. A tax increase to finance the creation of new urban infrastructure, whose main effect would be to re-appraise the surrounding land, would be unpopular. Land readjustment and other techniques of non-financial compensation are therefore seen as the normal rule. Developers have accepted the principle because it allows them to boost their investment initiatives without depending upon bureaucratic public expenditure decisions. Local landowners have become familiar with these techniques, and a majority of them are strong supporters of new urban development. This is particularly true in areas where small landowners abound. This tendency towards development was forged by the economic decline of traditional farming and by very low interest rates which stimulated the mortgage market.

Large benefits and unexpected problems have arisen from this new scenario. Public finances are healthy, and budgets, released from the burden of traditional expenses, can be re-allocated in new directions. Nevertheless, critics point out the risk that the public sector could lose the ability to direct urban development because it does not manage the financial leverage. It may be symptomatic that until recently Spanish development was still being directed by wide-scale public planning drafted during the 1980s. In some regions, it has not been replaced by the comparable effort to create structural planning during the 1990s. Supporters of the new trend argue that public authorities are more demanding and rigorous when they exert the planning control over private investment than when they have to finance public infrastructure with public funds.

Another problem has come in the form of a conflict of cultures. In very specific coastal areas of southern Valencia, a wave of protest against planning law has arisen amongst the foreign European landowners of small properties (these number in the thousands). They cannot understand land readjustment and deem it to be an expropriation without fair compensation. The majority of locals have a very different point of view. This clash of opposing perceptions has a multi-tiered explanation. Mechanisms like land readjustment, when applied to a very fragmented property structure, demand that the affected people are familiar with the political process and the legal environment that nourishes community life. Nevertheless, there is not only a conflict of cultures but of divergent interests in these debates, and this introduces an interesting point.

It is not a coincidence that these conflicts are geographically focused in areas where sprawl has been the pattern of development for decades. Land readjustment and TDRs are meaningless if there is no expectation of economic benefit for the affected people. It functions when landowners regard their property as a capital asset that can be invested through a joint development process, but not if they consider it to be an urban site that they can develop

individually. It is also important to point out that the increase in land value ('windfall benefits') that public planning decisions produce does not derive from the vicinity of a particular public facility to a particular property, but instead from the potential to override the legal restrictions to develop such property. In sprawl areas where rural property has been extremely fragmented and where there has traditionally been tolerance towards allowing the irregular construction of so-called 'farm houses' by everybody everywhere, new planning provisions with more public space and public infrastructure is not popular with many landowners (Fernández, 2005). There will only be an increase in the previous value of small properties in the short term if public infrastructure is generously paid for from public budgets[28].

Things are decidedly different in the rural vicinity of a major city which has had strict restrictions against scattered development. In this second scenario landowners consider land readjustment as leverage that overrides the limits to development and as a tool that transforms rural land into urban land, re-appraising it. The problem in this last context will be to convince landowners that development on the land surrounding the cities has to have limits. New experiences with TDRs have been explored through recent legal changes[29] to preserve rural spaces, but it is too early to evaluate them[30].

Acknowledgement
All the images used in this chapter are the property of *Ajuntament de Valencia, Concejalía de Urbanismo, Vivienda y Calidad Urbana* (Valencia City Council).

28 A new regulation has been enacted to deal with such conflicts in Valencia Regional Act 6/2005 arts. 27-29.

29 Valencia Regional Act 14/2004.

30 Harsh criticism has been made by García-Bellido (2007).

Table 5.3 Summarizing the Spanish cases

	Conservation (Almería General Plan)	Conversion (Francia Avenue Program (Valencia))	Re-allocation (land readjustment Orriols (Valencia))
Period in which case was introduced	1984-1988. Our case study finished in 1988 but the experience that started in 1984 lasted several more years	First public decision (official announcement of a public contest) in 1991 Public works of urbanization finished in 1986 Building process finished in 2006	The bases were established in the General Plan of Valencia in 1988 Orriols operation started in 1995 (public contest) and finished in 2001 (completion of the public facilities and land readjustment)
General objective of proposed instrument	General objective was to boost the restoration of historic buildings in derelict condition and to reuse them as public equipment to assist the cultural and social needs of the city center of Almería	Redevelopment of a very large industrial area between the city center of Valencia and its seafront	Development of a new neighborhood in green land Land readjustment among 300 properties connected with 12 other land readjustments around different parts of the city
Characteristic factors	All the techniques involved were applied on a free-will basis between private and public actors	Relevant public infrastructure works developed or afforded by the private sector Global impact in the life of a major city Pioneer experience of public contest to choose a developer in charge of an area that exceeds its own property	The case combines the techniques of land readjustment with TDRs, and public contest to select the developer in charge. The number of landowners affected was unusually large
Particular economic and social circumstances that have determined the instrument	Public reaction against a previous historic process of development which neglected the preservation of heritage Financial difficulties for the public sector	Financial requirements that exceed the possibilities of the public budget Large number of landowners affected (170) with passive attitudes and the need to find leading actors to promote the private involvement in the public targets	Typical development in the Valencia Region during the mid-1990s. The premise was that all the landowners of green land affected by development around the city had to have equal development rights gauged in terms of financial value
Fit within planning and legal system: which relation with spatial plans?	Regulatory framework established by ordinance contained in the General Plan (master planning instrument) of the municipality. Special physical provisions drafted in the planning	Private project selected in public contest inside the guidelines prior established in the General (Master) Plan drafted by the municipality	Spatial planning of 1988 established all the relevant physical and social parameters which rule the development

Table 5.3 continued

	Conservation (Almería General Plan)	Conversion (Francia Avenue Program (Valencia))	Re-allocation (land readjustment Orriols (Valencia))
Were specific laws and regulations drawn up?	Only at the local level	No, only at the regulatory local level. Procedure legally foreseen but never before applied. Relevant practical discovery (possibility of a third actor between landownership and public administrations). The experience inspired major legal changes at the regional and national levels	No, only the details of the land use regulation were drawn up for the case, but it was based on parameters previously established. It was also necessary to establish the economic details related to landowners' participation, but they were strictly fixed applying the general legal rules and also the result of bids offered during the public contest
Spatial level at which case is tackled	Local (municipality)	Local (municipality)	Local (municipality)
Relevant public actor(s) and role	City council of Almería established the policy and the rules and it controls its enforcement. Developers and building owners are the economic actors by means of free agreements amongst them. 146 TDRs achieved	City council of Valencia directed the process. 170 property owners contributed in different ways to the development. Professional developers managed and financed the process	City council of Valencia directed the process. 300 property owners contributed in different ways to the development. Professional developers managed and financed the process
Balance between private and public exchange	Building owners and developers not interested in restoration battled with the municipality in exchange for development rights that could be allocated in other areas. Historic buildings were transferred to the municipality which restores and reuses them as public facilities	Public targets performed by the private sector. The city gains a new neighborhood in a former industrial area in an obsolete position as it also obtains many properties and major infrastructures. No cost to the public sector. Profitable results for the numerous private actors affected	Development rights equally redistributed among landowners proportionally to their respective original area. Participation of external properties assigned for public uses in order to compensate the greater development possibilities in the area
Parties which financed the case	Properties are contributed by the private sector. Public sector finances the restoration works	Private developers. Landowners contribute with properties	Developers and landowners
Possibility for public participation	Each one of the deals, which performs a TDR, is subject to a period of public participation to allow possible representations and suggestions of third private parties	Through the formal public participation in the local land-use plan	Through the formal public participation in the local land-use plan. The experience proved that public contest stimulates public participation

References

Blanc-Clavero, F. (1997), Los efectos de la LRAU sobre la actividad urbanizadora: causas y consecuencias de un transformación, **Ciudad y Territorio, no. 112**, pp. 257-294.

Fernández, G.R. (1994), **Del desarrollismo al urbanismo de la democracia: 20 años de planeamiento en Almería, 1970-1990**, Instituto de Estudios Almerienses.

Fernández, G.R. (1998), **Elnuevomodeloenlagestiónurbanística: la experiencia de la legislación valenciana**, Revista de derecho Urbanístico y Medio Ambiente, no. 166, pp. 89-112.

Fernández, G.R. (2005), Mitos y realidades del agente urbanizador, **Ciudad y Territorio, no. 143**, pp. 125-144.

García-Bellido, J. (1979), Transferencias de aprovechamiento urbanístico. Una nueva técnica para la obtención gratuita de los equipamientos en Suelo Urbano, **Ciudad y Territorio no. III**, pp. 29-43.

García-Bellido, J. (1985), Nuevos enfoques sobre el deber de conservación y la ruina urbanística **Revista de Derecho Urbanístico no. 65**, pp. 53-125.

García-Bellido, J. (2007), Por una liberalización del paradigma urbanístico español (iii): El Tsunami urbanizador que arrasará el territorio, **Ciudad y Territorio nº XXXVII, no. 144**, pp. 273-286.

García-Bellido, J. & L.E. de Salamanca (1979), **Transferencias de aprovechamiento urbanístico: Fundamentos Jurídicos de una nueva técnica de gestión**, RDU 65, pp. 39-87.

García de Enterría, E. & L. Parejo-Alfonso (1981), **Lecciones de Derecho Urbanístico**, Cívitas: Madrid.

Modrego Caballero, F. (1997), La liberalización del urbanismo: la experiencia valenciana, **Ciudad y Territorio, no. 112**, pp. 251-254.

Parejo-Alfonso, L. & F. Blanc-Clavero (1998), **Derecho Urbanistico Valenciano**, Ed. Tirant lo Blanch.

6 Italy: experiments with non-financial compensation instruments to preserve, conserve and re-allocate buildings

Giancarlo Leoni

6.1 Introduction

It is important to make some preliminary remarks about the Italian national framework before looking at specific cases,. In Italy, townplanning regulations are delegated to regions which, according to the principles stated in the national directive, have the opportunity to define in detail the rules concerning territorial organization. Over the last fifteen years this prerogative has spawned many regional laws, some of which have provided innovative results in the area of Transferable Development Rights (TDRs). Each region was free to follow its distinctive philosophy, and this has resulted in a multitude of different approaches. Italian townplanning legislation has therefore become one of the most complex of its kind in the whole of Europe, caused by numerous management issues. Nevertheless, many of these different experiences have contributed to the delineation of better procedures in the management of urban developments. The fundamental rules for the governing of the regions, provinces and municipalities, are identified in a 1990 law[31] and in the constitution (see Table 6.1).

6.2 Planning framework

The new national regulations have identified the province as the intermediate body (between the municipality and the region) for spatial planning. The Territory Coordination Provincial Plan (TCPP) is the master plan, on which territorial and environmental policies with a supra-municipal vision are based.

31 Law no. 142, June 8, 1990, *Regulation of Local Autonomies*, with respect to articles 117 and 118 of the Constitution.

Table 6.1 Planning instruments

Territorial level	Institutional role	Instruments
State/National (Federal)	Production of general laws (main criteria, references and standards) and National Law of Local Administration Reform (planning capacities of public authorities)	- National Infrastructure Plan - National Law of Cultural and Historical Heritages and Landscape Estates
Region	Production of territorial governance laws and definition of more detailed criteria and standards	- Regional Infrastructure and Transport Plan - Regional Industrial, Services and Supra-Local Settlement Programs - Regional Territorial Plans - Regional Landscape Plan - Regional Park Territorial Plan Sector Plans
Province	Control of coherence between the municipal plan and provincial plan	- Provincial Territorial Plan - Sector Plans (Quarries, Energy, Transport and Traffic)
Municipality	- Urban plan management - Executive plans - Negotiation	- Local Land Use Plan (former General Town Plan (GTP)), now in Lombardy Territorial Government Plan - Town Traffic Plan - Executive Plans: for example the IIP (Intervention Integrated Plan)
Municipality Province, Region	Institutional negotiation based on general laws	Negotiated Agreement Instruments (Program Agreement/Territorial Development Framework Agreement)
Private investors	Public-private negotiations	Executive private plan proposals

Many regions transferred urban planning competence to the provinces[32] in line with the national directive, although most planning is executed at the municipal level. At this level of scale major changes and challenges can be distinguished over the years, like the introduction of new comprehensive plan figures (for example the IIP – Intervention Integrated Plan). Challenges include the problem of organizing instruments to mediate between public and private interests. In some cases, the conflicts create stalls due to legal disputes, or due to scarce public financial resources. In many other cases, corruption or lack of clarity in planning choices has led to the mediation of interests with satisfactory results for private development, but with few benefits for public interests. In cases with more positive outcomes, such negotiations were only partially governed by the available urban instruments (executive plans and contracts – see the conservation case further on). Nevertheless, most nego-

32 Based on the above-mentioned regulation, the TCPP is intended to:

- coordinate the identification of general objectives relating to the shaping and the protection of the landscape and the environment of the provincial territory;
- determine the resultant policies, measures, and actions falling under provincial competence;
- define the strategic direction for territorial shaping at the supra-municipal level, as well as the direction for infrastructure, landscape preservation and environmental protection, water, hydro-geological and hydraulic-forestry framework; and, upon agreement with the competent authorities (regional and basin authorities), public services; and
- promote and provide added value to local proposals.

tiation experiences conducted by public administrators have created the Contracted Townplanning movement, emphasizing the role of the urban project rather than the planning of the project. Since the 1990s, these negotiations, which included vast sectors of private representatives together with public administrators, resulted in the development of public-private planning strategies in IIPs, guaranteeing clarity and public control.

Another challenge that municipalities have met in the management of cities has been the reduction of expropriation powers since the 1980s. Furthermore, some judgments by the Constitutional Court have introduced the mandatory principle that public institutions acknowledge land value at its fair market value rather than at the agricultural price, thus significantly increasing expropriation costs. The Constitutional Court has, in this way, acknowledged the possibility of collecting the differential value that the development of a town and its collective infrastructures on agricultural land would create for private parties. As a result, municipalities are financially unable to plan the acquisition of vast areas to be earmarked for public activities.

This has forced municipalities to choose between the following actions:

- acquisition of the areas by utilizing their own funds, if available (improbable due to the policy of reducing the Italian public financial deficit);
- renewal of the restriction of certain uses through a variation of the General Town Plan (GTP) for an additional period of five years;
- renegotiation of the earmarked uses, and the consequent change of the GTP through an agreement with the private sector.

Since the 1980s, much discussion has centered on creating new instruments to allow municipalities without financial resources to acquire public areas and to compensate private individuals with permission to develop in other areas. This has motivated the creation of instruments and managerial practices based on bargaining between public and private interests. These experiments with innovative townplanning instruments, led to the introduction of new modalities by the regions for the management of public-private conflict. These regulations included most notably equalization instruments that enabled public goals to be achieved, and improved transparency and citizen involvement.

6.3 The Intervention Integrated Plan (IIP)

The IIP, mentioned in Section 6.2, a device for implementing public decisions, and not just to execute them, has some distinctive features. According to the General Arrangement Document (which serves as a framework for IIP), private parties may propose a project to the administration. Negotiations then follow concerning the organizational scheme and the characteristics of the proj-

ect; after an agreement between the two sides has been reached, the Town Council has the last word in ratifying the decision. At the same time, possible modifications of the IIP project may be proposed, such as the inclusion of additional partners, the need for public and private funds, or the requalification of areas assigned to public services.

The General Framework Document approved by the municipality (preliminary to the IIPs) requires the combination of the separate intervention programs solicited by the private sectors in order to obtain an overall view. This view is important for public administrators in formulating proper objectives and in the selection of the intervention proposals. For private parties it influences the presentation of their intervention proposals, as these should be coherent with the public administration strategies and the municipal Territorial Government Plan.

The municipalities within the potential sphere of the planning document promote the organization of the IIP in order to re-structure townplanning and the developmental and environmental needs within the boundaries – downtown and peripheral areas – including the redevelopment of former industrial areas (see the conversion case in section 6.4).[33] It is characterized by the presence of at least two of the following elements:

- the forecasting of multiple destinations and functions, including those inherent to the infrastructure of public interest, and the environmental, natural and landscaping renovation;
- a mix of public and private actions and integrated intervention modalities, including reference to the realization and development of primary and secondary urbanization projects; and
- territorial relevance as applied to the reorganization of urban problems.

The IIP is to be implemented in areas that may not be contiguous and may be either wholly or partially developed, or earmarked for new development, including those that are locked or related by lapsed expropriating ties. When the IIP is implemented the parties involved enter into a contract with the municipality which provides for the reciprocal rights and obligations of the various public and private parties, as well as the timing (in any case not over ten years) for the completion of the interventions proposed in the IIP. Within the same contract, or within a separate specific deed, the types of management of public equipment are established as well as those of public or general interest realized and managed by private subjects. Provisions are included regarding the following: obligations for the manager, appropriate sanctions, transfer methods to third parties, conditions for the possible acquisition of goods by the municipality, and the proper guarantee forms in favor of the municipal-

33 Article no. 87 Lombardy Region Law no. 12 2005.

ity. This last provision is innovative because it enables a private subject the possibility to be assigned the management, for a given number of years, of some public service that is realized in the IIP, such as public gardens or sport facilities. This reduces the town's management costs. In any case, the public is guaranteed access to the services and control over the tariff system. Public interests, in terms of minimum public standards, are provided for by the Municipal Town Plan and the many compensations are defined with the various owners.

Sections 6.4, 6.5 and 6.6 examine some significant cases of the application of these new and innovative Italian townplanning instruments oriented on non-financial compensation.

6.4 Conservation: the case of Schio (Veneto)

6.4.1 Objectives

The conservation of green areas and facilities of public interest such as urban parks and district gardens, including broader ex-urban areas, has been adopted since the second half of the 1980s. Although the planning statute of 1942 provides the basis for a Municipal General Town Plan (MGTP)[34], the development of innovative planning tools which include non-financial compensation without government takings was not commonplace before the 1980s.

The Schio municipality in the Venetian Region, provides a pertinent example of the above[35]. It extended the traditional Executive Plan by earmarking areas for services and increasing densities. A uniform development potential was awarded across the targeted area to get the same property values per plot. The plots earmarked for public use were transferred to the municipality at agricultural land value, and development took place in the private areas. With an non-financial compensation mechanism, the public administration obtained the proposed urbanization of the zone.[36]

34 National Townplanning Law (no. 1150) of 1942.

35 In the 1980 Schio case, the areas earmarked for public services are equal to 1/3 of the entire compartment of transformation. In the first year, 2003, the areas earmarked for public services were equal to l50% (up to 75% if falling within the landscaping tie) of the equalization. The landowners were not previously consulted regarding the consequential large-scale operative uncertainties (Piazza & Lucato, 2005).

36 During the first experiences of Schio, in the 1980s, public areas were acquired according to 33 m^2/inhabitant, whereas the GTP increased the percentage by up to 50%, and for the areas with landscape ties it was 75%.

6.4.2 Case circumstances

The Executive Plan (both for residential development and for manufacturing activities) provides the municipalities with the option to negotiate a series of private sector duties. This includes duties of payment and supplying primary and secondary infrastructure. Such an agreement is formalized through a contract that may include the transfer of development rights. This transfer takes place within the same parcel and sometimes in other areas.[37]

In general, the contract[38] is subject to obtaining building permits and must provide for the release of development rights within pre-established time constraints. It must also provide for the areas necessary for essential urbanization projects and areas with public facilities and of public or general interest – as provided for by the government plan for the territory.

If the acquisition of such areas is not possible or is considered not applicable by the municipality due to their size, layout or location, or relation to the municipal intervention programs, then the contract can alternatively provide either a total or a partial release of development rights. Upon drafting, the parties subject to the contract must pay the municipality an amount equal to the economic value of the released development rights, which cannot be lower than the value of other comparable areas. The revenue from the release of development rights must be used for the realization of services provided in the plan. These services include the acquisition of other areas earmarked for public use. As an alternative to payment, private parties were able to use this opportunity to exchange green or agricultural areas in the town's other zones.

The contract must also provide compensation to the owners of primary and secondary urbanization projects necessary to connect the area to public services. These provisions must be exactly defined; where realization of the works entails lesser onuses than those distinctly provided by the primary and secondary urbanizations, then the difference must be paid back to the private

37 The first model is the classic one, referring to the institute of the compartment in terms of article 23 of urban law. It is limited to particular zones in which the right, being the object distributed amongst the owners, coincides with the building attributed by the plan; the criterion of the partial or subsequent equalization, is part of the model being examined. In this case the rights matured within the compartment cannot be externally transferred. A variant of this model states that providing for the building attributed also to areas external to the compartment (even if not contiguous) which can contribute to the transformation of the said model itself. In this case, the conventional building attributed to the external areas for which conservation is called for, is shifted inside the compartment, leading to an added building capacity, while the equalization of the onuses is subdivided among all the areas external or internal thereto; this is the case of the General Townplanning scheme of Reggio Emilia to which the famous sentence no. 22/9833 of the Regional Administrative Court of Law refers.

38 Urban Law no. 12 2005 Lombardy Region, Article 46 (Convention on Actuation Plans).

Table 6.2 Transfer of development rights to other non-contiguous areas

	Size	Comments
Total sq m of urban executive plan (C2+F)	13,248 m²	On this land it is possible to build 13,248 m³, but part of this area must be ceded to the municipality
C2 Zone: urban plan category for development	9,416 m²	
F Zone: urban plan category for public infrastructure and activity	3,832 m²	The potential development building volume of this area is transferred to a C2 area and private space (F) is ceded to the municipality for green (3,265) and public services (e.g. parking 567)

contributors;[39] completion dates by private developers can vary and can extend to a maximum period of ten years. As such, in many cases the possibility to negotiate within the contract exists, so that a private investor might contribute to the costs of a park or a public garden or sports facility for public use, including the maintenance or management costs for the years preceding delivery to the municipality. In the past, this approach was motivated by mutual interests – the private developer increased the desirability of the property due to the public infrastructure, and the municipality provided a public service without any maintenance and management costs for at least ten years.

6.4.3 Compartment number 3

The case of Compartment number 3, Cappuccini, in the Schio municipality (see Figures 6.1 and 6.2) provides an example of 'volume equalization', whereby urban zoning made it possible to pursue the objective of distributive justice towards the owners of non-contiguous parcels of different urban zoning classifications. The Executive Plan (*Piano Particolareggiato*) was used to transform a portion of the area classified as suitable for development into a zone earmarked for public use (see Table 6.2).

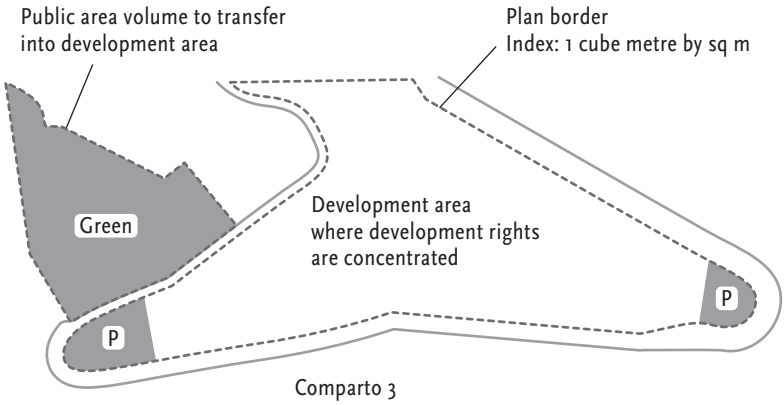
This has led the owners of areas which were previously suitable for development and are now earmarked for public use by the Executive Plan, to claim the previous development rights. The owners stated that before the actuating plan, the GTP allowed them to build on an area with a higher landscape value than that attributed in the new plan. The municipality consequently proposed the possibility of transferring the development rights to other non-contiguous areas scattered over the territory to private developers.

The owners of *Comparto 3* have realized only the primary urbanization infrastructures (such as roads, energy net) that are strictly functional for the intervention area and whose cost, €66,500.00, has been deducted from the primary urbanization obligation. All the surfaces with standard green areas (green and parking) have been deducted from the secondary urbanization ob-

39 Instead of the direct realization of the works, the municipality has the possibility of requesting the payment of an amount equal to the effective costs of the urbanization works inherent to the actuating plan, including to the entity and to the characteristics of the settlement and not lower than the obligations as provided for by the municipal relative resolution. Regional law also provides that the convention could contain other agreements between the contracting parties according to the criteria approved by the municipalities for the realization of the interventions.

Figure 6.1 Schio, Cappuccini area in recent General Town Plan after executive plan

Figure 6.2 Schio, Compartment number 3: Cappuccini Executive Plan



ligations at a cost of €7.50 per m^2. In liquidating the compensation operation of the urbanization costs and the value of areas for primary and secondary standards, the linear obligations of primary and secondary urbanization have been essentially equivalent. Due to this practice, the town administration managed to grant the district a larger green zone, thus pushing it to a higher level of qualification, without resorting to expensive expropriations.

The same operative philosophy has also made it possible to fulfill the ob-

jective of preserving intact the social, townplanning and architectural features distinctive of many Italian historical urban sites. In many instances, in fact, restoration of the historical hearts of Italian cities has been executed according to the principle of a constant dialogue between public administrators and private owners. This has often resulted in a peaceful and agreed appropriation not only of green areas, but also of portions of residential sites owned by private citizens.

6.5 Conversion: the case of Cremona (Lombardy)

6.5.1 Objectives

In the town of Cremona[40] (71,000 inhabitants), a large, abandoned industrial area was re-zoned. The area, Park Ex Feltrinelli, consisted of warehouses and deposits of reinforced concrete (see Figures 6.3 and 6.4). The Intervention Integrated Plan (IIP) Park Ex Feltrinelli intended to create a new part of town by promoting a so-called new 'urban door'. The first objective was to re-organize the existing viable areas by paying particular attention to environmental issues. The second objective was to promote more and better services by reconfiguring the urban plan, paying particular attention to a higher residential quality (Lombardy Region, 2005a). The area owned by the private applicant occupies 202,000 m^2, for the most part corresponding to the area occupied by the unused industrial complex. The remaining part of the IIP intervention includes approximately 80,000 m^2 of roads owned by the Cremona municipality.

6.5.2 The Cremona conversion process

The Cremona case shows that the IIP gives the public entity authority[41] to offer flexible solutions, resulting in the awarding of public services and private development rights. This legislation is used, in diverse ways, in many regions (Lombardy Region, 2005b). In the Cremona case vacant industrial buildings will be demolished. Subsequently a multifunctional settlement will be developed which includes a business center integrated with recreational facilities, three residential complexes, an arts and crafts facility, a public building for collective services and sports activities, a school complex earmarked for high-

40 Territory Management Department of the Cremona municipality.

41 More precisely, the IIP is the executive plan based on authorities that are attributed in various regional and municipal regulations.

Figure 6.3 Cremona, the area of Park Ex Feltrinelli

er education, a public square, green areas with public areas and underground parking facilities.

The ability of the new compartment to communicate with the center and nearby suburban areas was a major goal of the project. The major structural elements that were a concern were the traffic directives, in particular Paullese Road and Via Sesto that surround the project area. Residences and a school complex would be situated along the Via Sesto, separated from the road by a green belt with three rows of trees (within which there would be cycle and pedestrian pathways) and a future parking area. The receiving and dispatching areas of the commercial center and craft pavilions would be along the SS 415 and the urban bypass. These areas would also be protected against the negative traffic effects through mitigating green areas (a tree-lined belt approximately 20 meters wide along Paullese Road). The area earmarked for a municipal-wide urban park (approximately 20,000 m^2) would be located between the southeast side of the commercial center and the urban bypass. The park is flanked by pathways for cycles and pedestrians. Over a total territory of 283,440 m^2, the private owner owns 202,000 m^2 of this surface; after implementation of the project, however, a portion amounting to 106,972 m^2 (92,862 + 14,110) would be given to the municipality.

The buildings are placed in some of the sections of the area, and their internal space will be employed for public uses. The private developer would build 21,520 m^2 of Gross Floor Area (GFA) for residential use, 31,500 m^2 of GFA for commercial uses, 6,000 m^2 of GFA for manufacturing activities and 4,000 m^2 meters of GFA for sporting activities.

The goals already attained by the project are the following:

- The developer has benefited from a slight increase in the volume of the building area due to the movement of development rights from the areas now owned by the municipality to new, privately-owned areas.
- The administration has acquired spaces and infrastructure suitable for

Figure 6.4 Cremona, recent General Town Plan of the Feltrinelli Area Project, with new buildings

Source: Associated Study Ori e Ariente (designer)

public uses, paid and realized by private subjects following a process of negotiation which has received wide resonance and public visibility.
- The city and the citizens now benefit from newly-created green areas and from services that have significantly improved the quality of life.

Thus, the IIP of Cremona provides a promising example of a conversion-case that includes some examples of non-financial compensation whereby building volumes are increased in exchange for land for public uses.

6.6 Re-allocation: the case of Rome (Lazio)

6.6.1 Objectives

The most innovative procedure that has recently been introduced in some regions concerns the Urban Development Rights Equalization Principles that allow the transfer of building rights. In the previous cases, the issue of transferring development rights from one subject to another was mainly handled through the definition of fragmented executive plans. This approach has demonstrated its effectiveness since the 1990s. Lacking clear and definite national legislation on this matter, many regions have decided to employ this strategy and many town administrators have resorted to equalizing procedures.

The case presented here does not concern a single building project but a general strategy with which the municipal district of Rome faced the general

matter of the transfer of development rights. The same line of conduct has also been practiced by other municipalities, sometimes in different ways, and this allows us to discuss these matters in a concrete way, with an experimental basis rather than a merely theoretical one.

A significant case that has recently developed is the General Townplanning Scheme (GTPS), provided by the Townplanning Scheme variant for Rome (Rome Municipal Council, 2003) which has actuated (in Plan art.13) the criteria to be used to apply townplanning equalization and the transfer of building rights. This article states in particular that the executive plans define the overall building capability, the destination for use, as well as the ties and the characters necessary in forming the actuating instruments. It also allocates the building expectations amongst areas and subjects according to equity and uniformity principles, taking into account the existing town development discipline, the existing building set-up and its legitimacy and the pursuit of objectives of public and general interest.

6.6.2 Circumstances

It is interesting to note that the debate and the experimentation of equalization has developed even in the absence of a structured normative picture, as shown by the intense elaborations in nearby local areas. Experiences can be clarified by focusing on the three main approaches and strategies aimed at guaranteeing the TDR to acquire public utility areas either at agricultural prices or gratuitously to the municipality. The first strategy enables townplanning equalization to become the main instrument in the regulation of the use of the grounds by the administration in terms of managing the changes in the area, and in urban and agricultural land uses by intervening on the entire municipal area. The second enables the equalization instrument to only be applied to a quota earmarked for townplanning transformation and in the presence of executive Plans. There is also a third equalizing model which tends to attribute a general application mechanism to the equalization, extended to only a part of an expanding or transforming area but not to the whole municipal territory.

In such a case, conventional building parameters are awarded for categories that are normally low and uniform, based on the actual state of the buildings or the rights. Rights are classified with preventive criteria with respect to choices of the plan and are not correlated to the urban load defined by the said plan. The complexity of the volumes acknowledges uniformity for all the properties of the same class but does not coincide with the effective townplanning included as an objective of the plan. In this case, the equalizing mechanism allows additional density. Part of this additional right is gratuitously reserved for the municipality, and coincides with the need for other public works. The other part remains within the user's prerogative. According

to Stanghellini (2005), the practical variants of the experience also include the following aspects:

- a choice to include the equalizing ceiling (the building index or the territorial utilization conceived in an equalizing way) of the building rights relative to public residential housing and to other public works that the municipality reserves for itself;
- a degree of acknowledgement, in the case of ground either fully or partially built – the possibility of re-using the existing building capacity (over and above that deriving from the equalizing ceiling) and the criteria for its quantification;
- the adoption of the indexes on the report on building rights, when these refer to a townplanning destination whose property value is highly differentiated;
- the possibility that some properties transfer building rights to non-contiguous properties, and as such, the provision in favor of the buyers tends to favor this transfer.

Under the methodological profile, attribution to the equalizing ceiling grounds, and of the consequent building rights, depends on a consolidated application procedure from the methodological point of view, at least as far as the main passages are concerned:

- identification of areas earmarked for townplanning transformation either the whole territory or only some actuating areas;
- analysis and evaluation of the townplanning characteristics (destination and quality) and legal analysis of the property in order to create an equalizing basis upon which to assign the third phase index;
- attribution to the classes identified in the relative building index;
- identification of the actuating and building compartments, inside which the areas earmarked for services and public structures to be assigned to the municipality are measured.

The heart of the matter is that if the equalizing ceiling produces a land value higher than that incorporated in the grounds, the property is likely to realize the transformation even if the municipality 'gratuitously' gave additional value to the private property. If the ceilings are too low, there is the risk that the owner's will not be interested in the townplanning transformation.

In the early 1980s, a few planners, in particular Stefano Pompei (1998), realized that the problem could be approached and solved by means of urban planning tools, hence shunting eminent domain procedures. The methodical Equalization of Urban Development Rights emerged as the most suitable tool to attack the problem. The main principle of these rights has been described as: "Urban land development rights must be defined regardless of zoning uses, yet they must depend on status of fact and law that the land

is in at the moment the master plan is produced". The equalization's main principle's first corollary states that "Any development planned in excess of the equalized rights extent is reserved for municipal administration to utilize for community improvement and social interest programs". The second corollary states that "The development rights within a Planned Unit can be utilized by landowners only according to their transfer to a minor portion of such unit (usually 12 to 24%), leaving to municipal domain its major portion" (Pompei, 1998). Some of this major portion is handed over without cost according to per-inhabitant law standards. The rest is compensated at agrarian value now that the urban surplus value has been fully exploited within the minor portion.[42]

6.6.3 A new institutional framework for re-allocation processes

Together with some other experiments like in Casalecchio di Reno (Bologna), the Rome experiences have resulted in the regions introducing their own laws that compensate, equalize and incentivize townplanning instruments with strong innovative characters compared to the previous norms. In the case of the Lombardy Region (2005b), the municipalities, on the basis of criteria defined in the planning document, the executive plans and the negotiated programming deeds with territorial value (for example the IIP), can allocate the building rights amongst all the owners of the properties interested in the interventions. Furthermore, they can allocate the onuses derived from the allocation of areas for urbanization works through the attribution of the same territorial building index. For the purpose of realizing the overall volume derived from the attributed building index, the above-mentioned programming

42 Pompei applied this experimentation to the Town Plan of Casalecchio di Reno (Bologna), adopted in 1989 and approved in 1992, which represents one of the first and best known examples of a town plan actuating the equalization principle. The Town Plan classified the land into four categories: consolidated urban territory, marginal urban territory, suburban territory, and open territory. The townplanning equalization is applied to the second and third classes, whereas building is not allowed in the other two classes. In the first step towards the concrete actuation, the equalizing plan is constituted, after the attribution of the building index to the areas object of the townplanning transformation, to the identification of the compartments, which consist of two types. The first can be constituted by areas under the same ownership, or made up of areas belonging to diverse owners, some of whom are in a position to exploit their building rights. In Casalecchio di Reno, the municipal administration, in order to eliminate the problem concerning actuation of the compartments, has reduced to the minimum the number of owners involved in the said compartment and it has associated those for whom reaching an agreement was deemed possible at the beginning. In order to set the Land Development Right values, incorporated land is divided according to four main classes. The first class is Consolidated Urban Land. It consists of fully-existing or partially-developed subdivisions, urban streets, and public open spaces.

plans and deeds identify the potential buildings, the areas where building activity is concentrated, and the areas to be gratuitously ceded to the municipality or to be subjugated for the realization of services and infrastructure, as well as townplanning compensations in exchange for areas of public utility.

On the basis of such criteria, rights can be transferred according to the municipal Regulation Plan to all the areas of the municipal territory, with the exception of the areas earmarked for agriculture, those subjected to townplanning transformation or those with an identical territorial building index. This is done by designating the ratio with the cubic area of the existing buildings, in relation to the various projected intervention types. When availing oneself of these transfer rights, the regulated gratuitous transfer to the municipality of areas earmarked within the plan itself for the realization of townplanning work needs to take place, as set out in the regulation plan. This townplanning work includes services and structures of either public or general interest to be carried out upon the utilization of the building rights, determined upon application of the equalization criteria.

The areas earmarked for the realization of either public or general interest that are not controlled by programming plans or deeds can be granted to the municipality in exchange for transferable building rights to areas provided by the GTP deeds, even if they are not subjected to an actuating plan. As an alternative to such a transfer of building rights, on the basis of the provisions of the service plan, the owner could directly realize the interventions of public or general interest, via a contract with the municipality for the handling of the service. Regional law also establishes that TDRs are freely marketable.

The planning document includes, besides the relevant public benefits added in respect to those due and related to the fixed objectives, an incentive discipline of not more than 15% of the cubic area allowed for the interventions included in the actuating plans aimed at urban re-qualification. This consists of the transfer of differentiated indexes determined by the objectives. An analogous incentive plan can also be foreseen for the purpose of promoting the green building industry and for energy conservation.

The Italian regional legislation had already granted the authority to municipalities to determine the principles governing the matter of equalization in their local planning activity, in order to give the issue of transferring development rights a general framework and to more effectively handle urban growth. The specific case of Rome, moreover, introduces further elements into the discussion, elements that we can summarize with a single expression: 'marketing of Transferable Development Rights.'

6.6.4 The Rome re-allocation process

First of all, it is necessary to take an in-depth look at how the General Framework of the Plan of the district of Rome handles the concept of distributing

TDRs in areas that have yet to be realized and in those already existing areas of the city linked to them. In the latter case the owners, after approval of the executive townplanning instrument, cede, either to the municipality, or to third parties identified by that municipality, the land surface corresponding to the building expectations reserved for the municipality. In this way the GTPS guarantees the allocation (to the owners interested in the executive townplanning instruments) and the fair distribution of the building expectations, independent of the specific destinations assigned to the single areas and proportionally to the quota of the surface owned. Independent of the criteria and modalities of attributing the building rights, the GTPS guarantees the allocation of the onuses to be taken on towards the Administration in proportion to the building expectations assigned.

In the areas earmarked for the expansion, the building expectations can be transferred between the areas belonging to homogeneous territorial contests, without constituting a variant of the GTPS. This is on condition that the interested urban areas are the object of only one actuating instrument, in the form of an integrated Program aimed at better insertion or overall coordination of the interventions in the settling, infrastructural and environmental systems.

These regulations also allow private investors to move the building rights that were originally linked to those areas (that have been later acquired by the municipality for services of public utility and works of urbanization) into new areas. Furthermore, the possibility to transfer development rights to other areas stated inside the plan stimulates the birth and growth of a new market for TDRs, fueled by the offer of surplus development rights owned by subjects that either do not intend to or are not able to exploit them on-site, and the parallel demand of them from subjects who are willing to expand the volume of their activities beyond the share originally assigned by the Plan.

These opportunities have not only been controlled by the city in expansion but also by the consolidated city and in the city to be reused and the city to be restructured, where the building expectations can be transferred to different areas falling within the same area for integrated programs. In the case of demolition and reconstruction, the building expectations can also be transferred from other areas of the consolidated city to planned areas, as well as from public service areas to other areas in the city to be restructured or reused.

The transfer of building rights in areas with ecological-environmental issues does not take place directly between landowners but between landowners and the City of Rome. An exception states that the landowners in areas within wider extra-urban areas which include an area of ecological-environmental value in conflict with the commercial value derived from the ownership of a building right in the same area, can obtain a volume of equal value from the municipality that will be created in the planned area of expansion of the city, which could include area that already belongs to the municipality or that will be acquired by it in the future.

6.7 Conclusions

The cases presented are significant in the debate within the European community regarding the procedures needed to render the documents and decisions regarding the public-private ratio in town transformation management more transparent and visible to the citizens.

A second theme of particular interest, strongly tied to the previous one, concerns the problem of the owners' equal treatment in the face of the opportunities – ties to the urbanization of the town. Often in fact, the distorted use of negotiations between institutions and private citizens creates differences in treatment and discretionary power that may jeopardize citizens' elementary rights. As maintained by Stanghellini (2005), "between the negotiable townplanning scheme experiences and equalizing ones, there are some basic objectives, or some results, that are common, nevertheless the two methodologies are significantly different; not only as far as the municipal role as an Administration negotiator is concerned (and, therefore, of discretionary risk), but also for the non application of the equality and equal treatment principle. The equity approach inborn in the equality system of the grounds does not refer only to the owners of the grounds, but also to the community in its complexity and to the owners of the urban re-qualification". Consequently, the problem of guaranteeing equal treatment to the investment opportunities for property owners provides a better stimulus with respect to planning competition and, in the meantime, affirms the principle of competition among investors.

Finally, the experiences highlighted offer a third theme that has often interested the European townplanning debate: the ratio between the strategic planning of general plans and executive-management planning over a short period of time (MILU, 2007). As already described above, townplanning instrumentation management has always evolved by finding high degrees of flexibility with respect to the GTPS or to the strategic master plan. This approach has allowed, on the one hand, a quicker response from the municipalities regarding the town changing pressures, and, on the other hand, it has created the problem of the loss of the strategic vision of public actions in favor of sporadic private pressures. Therefore, the need exists to re-think the role of strategic plans, or of master plans, in their function as government instruments.

Table 6.3 Summarizing the Italian cases

Characteristic factors	Conservation: Schio	Conversion: Cremona	Re-allocation: Rome
Period in which case was introduced	From 1960	From 1995	2005
General objectives of the proposed instrument	Actuating management on the municipal General Town Plan (GTP) choice	Actuating management of the modification requirements-integration of the GTP by the private parties	Introduction upon drawing up the GTP of the management and transfer rules of the building rights
Characteristic factors	- Little urban vision - Public/private negotiation is very informal	- Urban vision is requested - Public/private negotiation is public	- Urban vision is necessary - Public/private negotiation is planned and organised
Particular economic and social circumstances that have determined the instrument	Need for public control of the expansion of large urban areas	Creating flexibility of the public instrument to face the requirements of the private landowners	Lack of public resources to expropriate and equity of treatment of owners in a preventive way and not in retrospect
Fit within planning and legal system: which relation with spatial plans?	This instrument is used in a few parts of the municipal General Regulation Plan	This instrument is used with a strategic vision document related to municipal General Regulation Plan	The instrument is an important part of the new municipal GRP
Were specific laws and regulations drawn up?	General national and regional legislation	Specific national and regional legislation	Regional legislation
Spatial level at which case is tackled	Only in the areas for the actuating plans	In new areas not provided for by the actuating plans	Both in the actuating plan and all over the municipality territory
Relevant public actor(s) and role	Municipality	Municipality	Municipality
Balance between private and public exchange	More public interest than private	Good balance	Equalization between private interests
Parties which financed the case	Private	Private and public	Private
Possibility for public participation	Low	Medium	High

References

Lombardy Region (2005a), **Governing Territory With Negotiated Programs**, Bollettino Ufficiale Regione Lombardia no. 12 ed. spec. March 22.

Lombardy Region (2005b), **Regional law no. 12**.

MILU (2007), **Multifunctional Intensive Land Use-net Interreg IIIC EU Project**, Gouda: Habiforum.

Piazza, F. & F. Lucato (2005), The confronting experiences, in: **Venetian experiences of urban equalization, townplanning dossier no. 76,** supplement to no. 202 of Urban Information, National Institute of Townplanning.

Pompei S. (1998), **Il piano regolatore perequativo**, Milano: HOEPLI.

Rome Municipal Council (2003), **decision no. 33**, March 19-20.

Stanghellini S. (2005), **Perequazione in Veneto: background and future vision, into urbanistica,** dossier no. 7, June 6, INU editor, National Institute of Townplanning.

7 U.S.: some best practices of Transferable Development Rights

Bianca Putters

7.1 Introduction: national framework

Although planning and land use regulation in the U.S. are for the most part accomplished at the municipal level of government, municipalities have obtained power that has been passed down through a series of government levels beginning at the very top with the Federal Constitution (Constitution). The Constitution delineates the powers of the federal government, referred to as 'enumerated powers,' because if the power is not specifically included in the Constitution, the federal government does not possess it. The power to enact land use and planning laws is not listed as one of the federal government powers, but it falls within the auspices of the Constitution's Tenth Amendment which grants to the individual states all powers not specifically granted to the federal government. These powers passed down to the states are referred to broadly as the 'police powers' and grant to the states the power to pass laws for the "health, safety, morals or general welfare" of their citizens. Land use and planning laws belong precisely to this category of laws. The fifty states in turn pass these powers down to lower levels of government, namely the counties, cities, townships, villages and such within their borders, through an enabling act which enables or allows this transfer of power. The ASU Department of Commerce drafted a standard zoning enabling act in the 1920s which provided a model for most states. Alternatively, cities can be granted home-rule authority through the individual states' constitutions. This authority is generally broader and allows cities to adopt laws governing land use and other affairs.[43]

This being said, laws passed by federal and state legislatures are interpreted by the courts. Among the powers allocated to the federal courts are the responsibility to interpret federal laws and the Federal Constitution (Jacobstein, Mersky & Dunn, 1998). The highest level federal court is the U.S. Supreme Court, and its decisions are binding on all jurisdictions across the country when the decision involves questions of federal law or the interpretation of the Federal Constitution.

In 1926, the U.S. Supreme Court decided the case of *Euclid v. Amber Realty*[44] and ruled that zoning was constitutional. Zoning is a land use device which superimposes a grid on land, dividing the different zones into categories, gen-

43 City of New Orleans v. Board of Commissioners of the Orleans Levee District, 640 So.2d 237, 242 (La. 1994). If the state constitution does not include any provisions regarding the transfer of municipal authority, "local governments have no independent power of initiation or immunity; they possess only those powers granted them by the state legislature". This is known as Dillon's rule.

44 Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

erally including types of use, area requirements, and height allowances. After *Euclid* was decided, zoning, the most common form of land use regulation in the U.S., was referred to as 'Euclidean' zoning. In addition, cities throughout the country then began to pass zoning laws – dividing cities into areas separating commercial and industrial property from residential, and further separating single family residences from denser residential building types such as apartment buildings. Zoning has been widely upheld by the courts; it is considered constitutional within the very broad parameters of the states' Tenth Amendment police powers. However, zoning is subject to the Federal Constitution's fairness (due process) requirements which are categorized into procedural due process and substantive due process.

In order to avoid offending both state and federal constitutional provisions such as the due process, or fairness requirements, methods exist to provide some flexibility to zoning laws. These tools include exceptions and special exceptions or variances to zoning ordinances, amendments to zoning ordinances, provisions for non-conforming uses and conditional use permits. Each of these provides some measure of accommodation to the landowner who would suffer disproportionately under local zoning laws. The exceptions and special exceptions are uses that are expressly listed in zoning ordinances, and therefore are different from variances which are not expressly permitted uses.

The second most widely used form of land use regulation in the U.S. is the comprehensive plan, also known as a master plan or general plan. The comprehensive plan sets forth, in broader terms than the zoning ordinance, the policy that a city has adopted regarding the future use of land within its boundaries. It is therefore not as specific and detailed as zoning. The Housing Act of 1954 required local governments to enact comprehensive plans in order to qualify for federal grant monies. States began to require their cities to prepare comprehensive plans, and in later years the courts decided that cities' zoning laws should conform to the policies set forth in those comprehensive plans.

7.2 Transferable Development Rights

Transferable Development Rights (TDRs) are one of several creative land use planning devices which assist in resolving inequities resulting from land use regulations[45] and which also function to protect the environment. Basically, in American property law, the theory holds that ownership of land entitles

45 Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 865 (Cal. 1998).

the owner to a certain 'bundle of rights.' [46] Among these rights are the right to possess the land, the right to exclude others, and the right to develop the property. Under the TDR model, one of these rights, the right to develop, is severed from the property in question, referred to as the sending or donor property, and transferred to another property, referred to as the receiving or donee property. More broadly, the sending property is said to be located in a sending area and the receiving property is said to be located in a receiving area. The result is that the sending property is restricted from developing to the same extent as surrounding properties, and the owner of the property in the sending area gets compensated monetarily for this restriction while the owner of the property in the receiving area pays for permission for additional development beyond that which he would otherwise have been permitted. Both of the owners benefit, society benefits, and private rather than public funds are used to compensate the owner of the restricted property.

One of the first examples of the use of TDRs in the U.S. took place in New York City. New York City's zoning laws include TDR provisions to minimize the impact of the Landmark Preservation Laws on individual landowners. In *Penn Central v. New York City*[47] the U.S. Supreme Court decided issues revolving around a key provision of the U.S. Constitution within the Fifth Amendment, the Takings Clause.

The Takings Clause prohibits the government from taking "private property" for "public use" without "just compensation."[48] This provision was part of one of the first ten Amendments to the Constitution, known as the Bill of Rights, ratified in 1791, and included in order to protect Americans from abuses when governments simply appropriated property, leaving citizens with no recourse under the law (Mandelker, 2004). Bodies of law have developed over time which define the terms 'property,' 'public use' and 'just compensation.' In this chapter, we focus on the effects that TDRs have had on the requirement for 'just compensation.'

In general, when the government takes a landowner's property, under the doctrine of eminent domain (Kanter, 2006), the landowner should receive the fair market value for the taking. However, government regulations were eventually seen as capable of being classified as 'takings', and a body of law known as 'regulatory takings' developed. As such, when a landowner was prevented from doing something with his land due to the restrictions of a particular regulation, the courts began to rule that this could be the equivalent of a physical taking, and the landowner might be entitled to "just (or fair) compensation."

46 Estate of Gibbs v. U.S., 161 F.3d 242, 247 (3d Cir. 1998); Loretto v. Teleprompter Manhattan CATC Corp., 458 U.S. 419, 435 (1982).

47 Penn Central Transportation Co. *et al*. v. City of New York, *et al*., 438 U.S. 104 (1978).

48 U.S. Constitution, amendment V.

Takings law, and more specifically, eminent domain, is often the subject of heated debates among landowners and municipalities and can be illustrated by the 1995 U.S. Supreme Court decision, *Kelo v. City of New London*.[49] Here the Court determined that the City of New London, Connecticut, could use its powers of eminent domain to take property for private development in order to strengthen the tax base of the city. This power of eminent domain in which the government can take private property for public use had previously been restricted to situations where blight or extreme degradation existed. The decision sent waves of outrage throughout the states, mobilizing groups to enact anti-*Kelo* legislation.

In *Penn Central*, the owners of New York's Grand Central Terminal applied for permission to build a fifty-five story tower atop the eight-story train terminal in order to increase revenue. The terminal, located in the prime commercial area of midtown Manhattan, had been designated a landmark under New York City's Landmarks Preservation Law. The city denied the application arguing that the proposed plans would dramatically alter the historic appearance of the beautiful 1916 Beaux Arts terminal. As a result, the owners of the terminal sued the city, alleging that the city was taking their property in violation of the Constitution's Fifth Amendment. The case made its way through the hierarchy of New York's courts before reaching the U.S. Supreme Court which decided that the New York Landmarks Preservation Law was constitutional and the owners of the terminal had not experienced a taking requiring compensation.

Of relevance to the decision were the determinations that the law did not interfere with the Terminal's present uses, that the owners of the Terminal were able to obtain a reasonable return on their investments, and that the pre-existing air rights were transferable and valuable.

The New York City TDR provisions originally provided that owners of real property could transfer development rights to parcels they owned which were contiguous to (bordering) their parcels and on the same block. Later, the TDR provisions were expanded to include the transfer to parcels under the same ownership and across a street or intersection. Still later, the provisions were further expanded (apparently to assist the owners of the Grand Central Terminal) to include transfers to parcels adjacent to parcels which were across a street or intersection provided that all parcels were under the same ownership. A further expansion allowed all development rights to be transferred to the same parcel.[50] This proves to be an example of how TDR provisions can change over time to accommodate the requirements of the jurisdiction to which they apply.

---

49 Kelo v. City of New London, 545 U.S. 469 (2005).

50 Penn Central Transportation Co., *et al*. v. City of New York, *et al*., 438 U.S. 104 (1978).

Recently, religious institutions have used TDRs to supplement their funds in order to expand their services and fulfill their religious missions. These institutions are selling the air rights above the churches to owners of properties eligible to receive additional density, and in this manner, they are receiving needed funds, and communities are benefiting from the preservation of these magnificent historic structures.

Other similar tools have developed throughout cities in the U.S. that have many similarities to TDRs. Examples of these include Transferable Development Credits (TDCs),[51] Purchase of Development Rights (PDRs) (Feitshans, 2002), Marketable Credits (Littlewood, 1998), and Residential Development Rights (RDRs). Furthermore, credit exchanges for waste reduction (Tripp & Dudek, 1989) are the equivalent of TDRs in the context of pollution control (Stewart & Wiener, 1992). Differences among these different land use tools include the level of coerciveness that is mandated, the difficulty in setting up the programs, and the expenses required to operate and administer the programs (Feitshans, 2002).

Several factors have been identified as being determinative of a strong TDR program. Among these are marketability, sufficiency of receiving area, acceptance by the public and efficiency in administration (Tripp & Dudek, 1989; Biber, 1999). The three case studies that follow present different examples of TDR programs that have assisted cities in resolving issues pertinent to their particular locale and citizenry.

7.3 Conversion case: the Hudson Yards Project

7.3.1 Objectives

Over eight million people now live in New York City,[52] the most densely populated city in the U.S. It is projected that in the next 20 years, New York City will need 111 million ft^2 (10.3 million m^2) of office space to accommodate almost one half million new workers. Manhattan is one of New York City's 5 boroughs. Midtown Manhattan will need to absorb 45 million ft^2 (4.18 million m^2) of this office space, and it currently has the capacity to expand only 20 million ft^2 (1.86 million m^2).[53] The last area of land that is not developed in Manhattan is the Hudson Yards area which is on the western edge of Manhattan bounded approximately north/south by West 43rd and West 30th Streets

51 To be discussed below under Conservation case.

52 2000 Census: U.S. Census Bureau at www.census.gov/population.

53 New York City Department of Planning: www.nyc.gov/.

and east/west by Seventh Avenue and the Hudson River.[54] The area mainly includes transportation infrastructure, commercial and industrial uses, parking lots, garages, a convention center and residential uses.[55] In short, it is not a friendly pedestrian area, and instead can be described as having a "gritty industrial character"[56] which lacks public transportation and recreational facilities.

The construction of a deck over the Hudson rail yards will provide land upon which to construct the necessary office and residential buildings, convention facilities, parks and related infrastructure for the coming decades. The under-utilized Hudson rail yards area (roughly 360 acres or 144 hectares) will be converted into developable land, and this improvement will help to defer additional development in outlying suburbs which would contribute to sprawl and its negative impacts.

TDRs, together with other financing tools, will make the conversion of this last frontier a reality. One of the owners of the property, the Metropolitan Transit Authority (MTA),[57] will sell some of its air rights which will eventually be used to allow developers to reach target densities. Public financing will provide for the initial developments: the deck, a convention corridor, parks and subway service. The private sector will contribute to the longer term developments: office and residential buildings.

7.3.2 The Hudson Yards Project

Thirty-three acres of Hudson Yards is "below grade railroad tracks".[58] The plan includes covering this area with a deck which will provide the land for commercial and residential buildings, an improved convention center and parks.[59] Similarly, in the early 1900s, New York City's Park Avenue was built on a deck covering unsightly railroad tracks which ran from East 42nd to East 56th Streets between Madison and Lexington Avenues. As we know, Park Avenue became the successful, thriving center of New York City's Central Business

---

54 The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info.

55 Http://home2.nyc.gov: Hudson Yards, the Area.

56 Http://home2.nyc.gov: Hudson Yards, the Area.

57 The MTA is a public benefit corporation responsible for transportation in New York State. The MTA is responsible for the development and implementation of a unified mass transportation policy for the New York metropolitan area which includes New York City and certain suburban counties. The MTA owns the Eastern Rail Yard and the Western Rail Yard.

58 New York City Department of Planning: www.nyc.gov: the rail yards consist of the Western Rail Yard and the Eastern Rail Yard. The Western Rail Yard is the portion between 11th Avenue and the Hudson River. The Eastern Rail Yard is the portion between 10th and 11th Avenues.

59 Completion of the redevelopment of the Project will take 30 to 40 years. The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info.

District. Among the buildings on the deck is the beautiful beaux art Grand Central Terminal. The Hudson Yards Project (hereafter called the Project) includes plans to construct a Hudson Boulevard with bordering parks running the length of the Project.

The Project includes the extension of an existing subway line,[60] making a subway station accessible within a 10 minute walk from anywhere in the Project. It also includes over 20 acres of open space and a public square. The Project includes plans for affordable housing – approximately 28% of the 13,000 planned units will be affordable to low and middle income families.[61]

Originally, the plan was to build a football stadium for the New York Jets over the Western Rail Yards. However, opposition to the plan led to its demise[62] which in turn allowed for the birth of new ideas for the area.

The Project includes plans for extensive underground parking facilities which have incited public opposition and led to the filing of a lawsuit against the Mayor, the planning director, the MTA and the New York Department of Environmental Conservation.[63] The crux of the plaintiffs' arguments centers on alleged violations of environmental control laws. As such, the Project has included a healthy share of debate and controversy among political factions and the public.

7.3.3 Municipal zoning

New York City enacted the country's first comprehensive Zoning Resolution in 1916. The Zoning Resolution consists of zoning text which establishes zoning districts (and their regulations) and zoning maps which delineate the zoning districts. The City has three basic zoning districts: residential, commercial and manufacturing, and each of these includes low, medium and high density variations.

In 1961, the Zoning Resolution classified the Hudson Yards area as manufacturing, and few changes have been made to this initial classification.[64] In order to revitalize the area and create the combination of uses to make the area successful and vibrant, rezoning with respect to densities and uses was necessary. In 2005, the bulk of the area was rezoned – except for the Western

60 Completion of the subway line is scheduled for late 2012. The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info.

61 Press Release dated September 27, 2006: www.nyc.gov/portal/site/nycgov/menuitem.

62 www.manhattancb4.org: "West Side Railyards/Hudson Yards Rezoning" What is the Hudson Yards Plan?" Last Updated May 25, 2007.

63 New York League of Conservation Voters, "HKNA Enviro Lawsuit v. Bloomberg Moves to Court," May 4, 2007.

64 Http://home2.nyc.gov: Hudson Yards, the Area.

Rail Yard.[65] The City also approved changes to the city map and it acquired property necessary to extend a subway line to service the Project.[66] Therefore, the framework has been laid for the construction of infrastructure to be followed by development of commercial, retail and residential buildings.

7.3.4 Financing of the Hudson Yards Project

The Project will draw monies from the City's general fund, but in addition, Payments in Lieu of Taxes (PILOTS)[67] and property taxes will help to pay for infrastructure improvements.[68] Property within the Project will be exempt from real property taxes and instead owners will pay a PILOT as set forth in the PILOT calculation tables.[69] The Project's financing has been divided into two phases: the first phase includes construction of the deck, the subway extension with one stop, Hudson Boulevard and a park; the second phase includes a second subway stop and an extension of the boulevard.[70] This phasing was imposed to make the Project financially feasible.

The Hudson Yards Infrastructure Corporation (HYIC) and the Hudson Yards Development Corporation (HYDC) were formed in 2004 and 2005, respectively, to finance and manage the improvements and construction. The MTA and the City entered into an agreement which outlined their respective duties and assignments with respect to the Project. The MTA would sell some of its Floor Area Ratio (FAR) in the form of TDRs to the HYIC for $200 million (€126 million) and the HYIC would market the TDRs[71] and recover its $200 million and the capital costs, the remainder being transferred to the MTA.[72] The initial $200 million was raised through the sale of bonds.

The railyard TDRs cannot be used in the Eastern Rail Yards where they originated, but instead can be sold to developers of land located to the north

---

65 The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info. City Council Resolution 760. The area was rezoned for increased commercial and residential density. The City of New York, Zoning Resolution, Article IX, Chapter 3 at www.nyc.gov/planning.

66 Rail Yards Agreement among the MTA parties dated September 28, 2006.

67 PILOT payments will help service the bonds that will pay for the infrastructure improvements; The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info.

68 The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info.

69 Second Amended and Restated Uniform Tax Exemption Policy of the New York City Industrial Development Agency, as approved on December 12, 2006 by the Board of Directors of the New York City Industrial Development Agency, Appendix E, Tax Exemption Policy for the Hudson Yards UTEP Area.

70 New York City Independent Budget Office Fiscal Brief dated August 2004.

71 The TDRs will be marketed to developers of property located 8 blocks north of the Eastern Rail Yards and will allow those developers to build more densely on those sites. The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info.

72 Rail Yards Agreement among the MTA parties dated September 28, 2006.

Figure 7.1 New York City, special Hudson Yards District

Special Hudson Yards District
Subdistricts
Subareas within subdistricts
Phase 1 Hudson Blvd. and Park
Phase 2 Hudson Blvd and Park

Large-scale plan subdistrict A
Eastern Rail Yard subareas A1
Four Courners subaerea A2
Subareas A3 through A5

Farley Corridor subdistrict B
Western Bloks subarea B1
Central Blocks subarea B2
Farley Post Office subarea B3
Pennsylvania Station subarea B4

34th Street Corridor subdistrict C

Hell's Kitchen subdistrict D
Subareas D1 through D5

South of Port Authority subdistrict E

Source: Map of the Special Hudson Yards District used by courtesy of the New York City Department of City Planning

of the Eastern Rail Yards. FAR there can be increased from a total of 13 to a maximum of 18 via the use of TDRs.[73] The railyard TDRs can only be used for constructions above 13 FAR and are thus strategically designed to promote high densities.

In Phase 2 of the development of Hudson Boulevard and the park area, TDRs will be transferrable to separate receiving sites in 4 different districts.[74]

In addition to TDRs, density bonuses would be available to developers following a contribution to the Hudson Yards District Improvement Fund. The contribution was set at a particular dollar amount per square foot of floor ar-

73 The City of New York, Zoning Resolution, Article IX, Chapter 3, 93-21at www.nyc.gov/planning.

74 The City of New York, Zoning Resolution, Article IX, Chapter 3, 93-32 at www.nyc.gov/planning.

ea, and the amount is annually adjusted on July 1st.[75] The density bonuses must be employed prior to the use of TDRs.

Approximately $3 billion of long-term bonds should have been issued by the HYIC by the fall of 2006 to be serviced from revenues generated by the Project.[76]

7.3.5 Tax exemptions

Financial incentives are necessary to promote development of the Project due to the lower rate of rentals in this more remote area of Manhattan. The Uniform Tax Exemption Policy (UTEP) controls tax exemptions in New York City. On August 8, 2006 the UTEP was amended to include three components: PILOTS, Payments in Lieu of Mortgage Recording Tax (PILOMRT) and Payments in Lieu of Sales Taxes on construction materials (PILOST). A project must be at least 1 million zoning ft^2 (93,000 m^2) and 75% of the usable space must be class A office space or otherwise approved commercial space. The City will receive all PILOTS generated by the development of the Project.[77] These incentives will be available for 19 years and will graduate depending on proximity to Midtown Manhattan and proximity to inception of the Project.

Since the Project is still in its early stages, its success may be determined by a variety of factors including the timeliness of the construction of the infrastructure such as the deck over the Eastern Rail Yard and the subway extension, the strength of the economy, and the response of developers and the public.

7.4 Conservation case: the City of Malibu

7.4.1 Objectives

The City of Malibu has provisions for a Transferable Development Credits (TDC) program that was established to ensure that no net increase in density would occur within environmentally sensitive areas as a result of land divisions and/or multi-family residential development. Because the purpose of the TDC program is to protect the environment, it provides a good example of the application of non-financial incentives for conservation. The TDC provisions are written into Chapter 7 of the City of Malibu LCP Local Implementation Plan. Recently, TDCs were purchased by a landowner of two parcels of

75 The City of New York, Zoning Resolution, Article IX, Chapter 3, 93-31 at www.nyc.gov/planning.

76 The Council, Report of the Finance Division, October 10, 2006: webdocs.nycouncil.info; Rail Yards Agreement among the MTA parties dated September 28, 2006; New York City Independent Budget Office Fiscal Brief dated August 2004.

77 www.nyc.gov/portal/site/nycgove/menuitem: September 27, 2006 release.

Figure 7.2 City of Malibu, zoning map of project location

Source: courtesy of the California Coastal Commission

property within the City of Malibu, and they were used to subdivide each parcel into two parcels.

A description of the uniqueness of the land of the City of Malibu and the recent successful application of the TDC program related to the subdivision follows.

7.4.2 Topography and history of Malibu

The City of Malibu is located in Northwest Los Angeles County along a twenty-one mile (34 kilometers) stretch of the Pacific Ocean. Its width varies from one to eight miles (1.6 to 12.9 kilometers). Thirteen (21 km) of the twenty-one miles of coastline has residential development directly on the beach. This development blocks most views and access to the beach by the public.

Malibu has a varied mix of climates due to terrain that varies from beaches to canyons, mesas, and rugged mountains. It includes a Mediterranean ecosystem that is unique. In addition, it is the most unstable area per square mile in the world due to geological faults and predisposition to landslides. The combination of its topography, soil conditions and resultant instability create conditions incompatible with density. In fact, as a result of the widespread development along the beaches of Malibu, erosion has been greatly accelerated, the beaches are not as wide as they once were, and there is less land available for public use (Duncan, 2004).

Figure 7.3 Malibu Coastline

Source: courtesy of Chris Hlad

The City of Malibu was incorporated in 1991 because its residents were fearful that a Los Angeles County proposal to install a sewer system would be the beginning of massive subdivisions that would have converted Malibu into another part of Los Angeles. Residents of Malibu continue to attempt to preserve its rural atmosphere. Another example of environmental challenges involves water contamination. The City of Malibu has recently been pressured into correcting the sources of contamination of its creeks, its lagoon and the Santa Monica Bay. The city has purchased a stretch of property for $25,000,000 (€16,000,000[78]) and plans to install a $5,000,000 (€3,200,000) storm water treatment center there in order to correct the problem.

The City of Malibu has a history of fierce legal battles to maintain exclusivity and control over passageways across its beaches and inland territory. Today, although trains travel along many miles of the California coastline, a southbound train just north of Malibu turns sharply inland, away from the coastline and away from Malibu. A prominent landowner in the city was able to prevent the Southern Pacific Railroad from linking the train tracks which stopped both north and south of Malibu. The same landowner vigorously fought the construction of public, county and state roads through Malibu, and this time was unsuccessful – a road through Malibu exists today, a state highway known today as the Pacific Coast Highway, and when it was completed in 1929, it ended Malibu's isolation.

More recently, legal battles have been viciously fought over the public's right to beach access along the coastline which some argue is overdeveloped with celebrity mansions. Easements for public use have been pursued by both

78 The author calculated euros from dollars based on the exchange rate at the time of writing this particular chapter.

the California Coastal Commission[79] and a program created to focus on the processing of the easements, the Coastal Access Program.

Despite the yearly fires, floods, landslides and political battles, Malibu remains one of the country's most prestigious, expensive, and sought-after properties – known for its celebrities and status as well as its excellent climate and conditions for surfing.

7.4.3 The planning and legal system and fit within a spatial level

Coastal development

The U.S. enacted the Coastal Zone Management Act in 1972 in order to encourage states with coastal borders to enact their own set of laws regarding the development of land along their coastlines. Following this, the voters of California passed the California Coastal Zone Conservation Act of 1972 which created the California Coastal Commission (Commission) and six regional boards. One of the Commission's duties was to help local governments adopt their own coastal plans (Breemer, 2004).

The Commission has the authority to approve development projects in the coastal zone (Duncan, 2004; Lycett, 2000) and the power to control development in a way that should balance the unique environmental needs along the coast with the desires of private property owners (Breemer, 2004). The coastal zone is defined as land that is 1,000 yards (914 meters) from the mean high tide line of the sea, but where significant coastal areas exist, the zone can extend to the lesser of the first major ridgeline parall to the sea or five miles (8 kilometers) from the mean high tide line (Breemer, 2004). The entire City of Malibu is located within the coastal zone.[80] Any new development in the coastal zone requires a Coastal Development Permit. The Commission retains the authority to approve these development permits until a county approves a Local Coastal Program (Lycett, 2000).

The Commission submitted a comprehensive coastal development plan to the state legislature which became the California Coastal Act of 1976 (Coastal Act). The Coastal Act encouraged the creation of local coastal programs and a transfer of the power to approve development permits to local coastal governments (Breemer, 2004). However, the Commission retains jurisdiction to hear the appeals of decisions of the local government authorities. The basic goals of the Coastal Act are the preservation of the ecological balance of nature and the public's right to access the coast. A TDR program was enacted in 1979, to be administered by the California Coastal Conservancy, a government agency

79 Created by the California Coastal Zone Conservation Act of 1972.

80 Malibu General Plan, Land Use Element at 1.1.4.

established by the state of California to protect the coastline.[81] The Mountain Restoration Trust was formed in 1981 to assist in locating transferable development credits (TDCs).[82, 83]

Coastal development in the City of Malibu

The City of Malibu Local Coastal Program (LCP) consists basically of a Land Use Plan, zoning ordinances, and zoning district maps.[84] The Local Implementation Plan (LIP) carries out the policies of the Land Use Plan. It contains specific policies and regulations applicable to each and every project which requires a coastal development permit. It was adopted by the Commission in 2002.

The Commission was concerned that development from Los Angeles would spread into the Malibu mountains before sufficient infrastructure was available (Merriam, 2001). Provisions for a Transferable Development Credits program are included in Chapter 7 of Malibu's Local Coastal Program/Local Implementation Plan. Its stated purpose is to ensure that no net increase in density would occur within the environmentally sensitive areas of the city as a result of land division and/or multi-family residential development in two zoning districts: the Multiple Family (MF) district and the Multi-Family Beachfront (MFBF) district. This is accomplished by retiring rights to develop on certain other parcels in the Santa Monica Mountains Area coastal zone from private property owners.[85]

The fact that the area where the donor lots are located does not correlate completely with the area where the land divisions take place may place the benefits of the TDC program outside Malibu's city borders. However, one can argue that natural habitat as well as the built environment, such as roads, do not follow political boundaries, and a general improvement of the environment does benefit the cities in close proximity to the preserved areas.

The TDC program is supposed to mitigate the negative effects of develop-

---

81 http://www.coastalconservancy.ca.gov/About/about.htm.

82 Telephone interview with Steven Harris, Director of the Mountain Restoration Trust (October 19, 2006).

83 http://creec.edgateway.net/cs/creecp/view/creec_org/1378. The Mountains Restoration Trust is a California Public Nonprofit Organization committed to preserving and protecting the resources of the Santa Monica Mountains, and it accomplishes this by acquiring land, doing restoration work and providing educational programs. More broadly, land trusts are local, state, regional or national level charitable organizations "created under federal tax laws" in order to "conserve land for its 'natural, recreational, scenic, historical and productive values. Land trusts can purchase land for permanent protection (...) accept donations of land or the funds to purchase land (...)'" (Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 University of Colorado Law Review 283, fn. 2, Spring 2006).

84 Commission Agenda Report, May 17, 2005; Malibu General Plan, Land Use Element at 1.1.4.

85 City of Malibu LCP Local Implementation Plan, Chapter 7 – Transfer of Development Credits at 7.4(B) Objectives of the Transfer of Development Credit Regulations.

ment in the Santa Monica Mountains area[86] coastal zone, an area with limitations created by its topography. The Santa Monica Mountains area was selected as the donor or sending area in order to transfer development from lots located far from necessary infrastructure to lots that are closer to major roads and other vital support. The rationale consistently provided is related to the health, safety, and welfare of the residents and specifically fire protection, reach of emergency vehicles, and the limitations of septic or sewer systems.[87]

The coastal zone is considered an environmentally sensitive area[88] which requires intervention to protect the natural resources – the mountain areas and the beaches. Some problems inherent in the location are dangers of increased flooding due to paved surfaces, increased risk of fire as a result of increased development and the resultant increase in erosion which then exacerbates floods and landslides.

The provisions of this TDR chapter do not apply to affordable housing units, but they do apply to new land divisions and new multi-family unit development in the City of Malibu. As such, new land divisions, including the development of multi-family units, "will not be approved unless Transfer of Development Credits are purchased to retire development rights on existing donor lots in the Santa Monica Mountains area."[89] As a result of the transfer of these credits, the donor lot is forever restricted from development via the recording of a "permanent open space easement."[90] As a result, future development on the donor lots is completely prohibited into perpetuity.

For each newly created lot, sufficient donor lots must be retired to provide one TDC credit. The landowner wishing to develop must show proof of the purchase of the TDCs and proof that the donor site has been permanently restricted by an easement dedicated to the City of Malibu and that it has been officially recorded.

Application of TDCs

An application to subdivide two properties in the City of Malibu was recent-

86 City of Malibu LCP Local Implementation Plan, Chapter 7 – Transfer of Development Credits at 7.3 Definitions: "Santa Monica Mountains Area" means the Santa Monica Mountains within the coastal zones of the City of Malibu and the County of Los Angeles.

87 Telephone interview with Steven Harris, Director of the Mountain Restoration Trust (October 19, 2006).

88 City of Malibu LCP Local Implementation Plan, Chapter 7 – Transfer of Development Credits at 7.3 Definitions: " 'Environmentally sensitive habitat area' means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

89 City of Malibu LCP Local Implementation Plan, Chapter 7 – Transfer of Development Credits at 7.1, Purpose and Intent.

90 City of Malibu LCP Local Implementation Plan, Chapter 7 – Transfer of Development Credits at 7.1, Purpose and Intent.

ly granted with the purchase of two TDCs. The two properties that are being subdivided were the subject of an application to subdivide in 1989 in order to divide each of the two lots into three lots.[91] At that time, the County of Los Angeles (Malibu was not incorporated until 1991) initially approved the application, and in 1993 the City of Malibu approved a lot-line adjustment to change the lot lines of the Los Angeles County approved map. Thereafter, the Commission approved the revised six-lot subdivision.[92] However, the approvals for the subdivision expired without any construction on the lots.

On March 3, 2003, the owner of the two lots submitted an application to the city for permission to subdivide each of the two lots into two lots – for a total of 4 lots, and it was approved by the Planning Commission in 2004. In December 2004, the owner filed an application for a Coastal Development Permit which was followed by the required publication of a Notice of Application in a local newspaper and a mailing of a Notice of Public Hearing to all property owners and occupants within a 500-foot (152 meter) radius of the properties. These requirements are in place in order to provide the security and validity necessary for the TDC program to function effectively.

Each of the two original lots is located in a Single-Family Low-Density Residential zone district[93] and has a house under construction at the time of writing. The owner's plans include the construction of two additional houses, one on each of the newly created lots, following the subdivision and permit approvals. As such, each of the four lots will include one main house within its borders.

The landowner entered into a purchase agreement with the owner of two parcels located in an area defined as an Environmentally Sensitive Habitat Area. The parcels were to be located within 200 feet (61 meter) of a park – however, they were not. A solution was reached to annex the surrounding properties, owned by the County of Los Angeles, to the park, and thus bring the donor lots to within the 200-foot requirement.

The owner of the two lots to be subdivided complied with the requirements of the General Plan, the Municipal Code and the Local Coastal Program. In addition, the project complied with the requirements of the California Environmental Quality Act (CEQA)[94] in that it was found that the project did not have a significant effect on the environment and was thus exempt from the requirements of CEQA.

Since the donor lots are not located within the City of Malibu, it appears that the city itself does not benefit from the retirement requirements of the

---

91 City of Malibu, Commission Agenda Report dated May 17, 2005: After the subdivision, the four lots will have the following areas: Lot 1: 1.17 acres, Lot 2: .51 acres, Lot 3: .53 acres, and Lot 4: .99 acres.

92 City of Malibu, Commission Agenda Report, May 17, 2005.

93 This designation allows for the creation of up to two lots per acres with a minimum size for each lot of acre.

94 City of Malibu, Negative Declaration No. 03-07 Dated December 18, 2003.

TDC program. However, it can be argued that the city will benefit in general with the reduction in development in the Santa Monica Mountain area coastal zone which borders the city. After all, if the surrounding mountain area is less developed as a result of the TDC program, less impervious surfaces will exist to affect the City of Malibu; animal and plant life will be less affected which will assist in the maintenance of native species, and all the innumerable advantages of a smaller footprint on the earth will benefit the city and the area. Furthermore, the city holds the easements acquired through the retirement of donor lots. Legislative amendments to force the retirement of property within Malibu's city limits may be needed should it be determined that increased development, including subdivisions and the construction of multi-family dwellings, is harming the city.

The Malibu TDC program is based on goals protecting both the Santa Monica Mountain Coastal area and the City of Malibu from damaging development in these environmentally- sensitive areas. The burden is on the Malibu landowner who wants to subdivide to find landowners in the sending site area willing to sell TDCs, and this is often difficult. Therefore, this program does not appear to be as accessible as the Portland programs. The program may function well for the goals of the region, but should it be determined that the sending area needs more protection than is being provided by the current program, changes to the program may be necessary to allow it to be more accessible to the private developer.

7.5 Re-allocation potential: Portland, Oregon

7.5.1 Objectives

The state of Oregon is looked upon by the rest of the nation as providing an example of the positive outcomes that can be achieved with intelligent and diligent land use planning. Specifically, Portland is an example of a metropolitan area with vibrant streets shared by pedestrians, cyclists, buses and other mass transit together with the automobile. An urban growth boundary (UGB) surrounds Portland and has served to contain sprawl and to provide infill development and attention to the necessities of a healthy urban environment. At the same time, the UGB has preserved the environment and allowed forest land and farmland to be preserved outside the boundary.

The Pleasant Valley District encompasses an area that was part of the 1998 expansion of the UGB. This district has a TDR provision within its zoning code whose purpose is to allow for the development of new housing and at the same time to protect environmentally sensitive areas within the watershed area of Portland. This district presents us, therefore, with an excellent example of the use of TDRs for the re-allocation of resources to protect the envi-

ronment by compensating for non-development in the watershed area while at the same time allowing the development of housing where it has been determined it should be built and would be less harmful.[95]

The Central City Plan District has provisions for TDRs with respect to single-room occupancy (SRO) housing in order to provide incentives to owners of this type of housing to preserve it. SRO buildings typically have single room rental units that are occupied by one person. Again, this provides a good example of compensation for non-development and compensation to support necessary low-income housing. The Sally McCracken Building, an SRO building, provides an example of the use TDRs to avoid the loss of low-income housing in a city where property values have been increasing at a tremendous rate.

7.5.2 The planning and legal system and fit within a spatial level

Before 1906, (in 1906, the state of Oregon adopted home rule amendments) cities within the state had no independent legislative power.[96] Even today the grant of authority to home rule cities in Oregon is a limited grant, and not plenary.[97] According to the Oregon Constitution, "legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon" (Aoki, Briscoe & Hovland, 2005).

In 1973, Oregon passed Senate Bill 100 which provided a comprehensive plan that preserved open spaces, helped to develop lively and healthy cities, and in essence, curbed sprawl (Aoki, Briscoe & Hovland, 2005). In Oregon, each city must have an UGB which separates urban land from rural land.[98] An UGB prevents infrastructure from spreading further and further out from metropolitan areas, creating a sprawl frenzy which not only destroys farmland and forest areas but urban environments as well. In Oregon, UGBs are required to have a twenty-year supply of housing and development potential within their boundaries, and a report to review the remaining supply must be prepared every five years. The UGB must be expanded if it appears there is a housing shortage.

Oregon's state legislature has enacted requirements at the regional level of government. The regional level was given the responsibility to coordinate regional and local comprehensive plans in order to adopt a regional UGB, to impose consistency between local comprehensive plans and state and regional planning goals, and to plan for regional level requirements like transportation,

---

95 At the time of writing, a project with the use of TDRs in the Pleasant Valley District has not been approved. Telephone conference with Jay Sugnet, Planner, City of Portland (November 1, 2006).

96 City of Sandy v. Metro, 200 Or. App. 481, 499, (Or. Ct. App. 2005).

97 City of Sandy v. Metro, 200 Or. App. 481, 495, (Or. Ct. App. 2005).

98 www.metro-region.org.

water and air quality, and solid waste. The Portland metropolitan region includes a growth management policy, the 2040 Growth Concept, which defines regional growth and development for the region.

Metro, an agency created in 1979, is responsible for managing the Portland metropolitan region's UGB which came into effect in 1979.[99] Throughout the years, many small increments have been made to this region's area. Larger increments started in 1998 when 3,500 acres (1,400 hectares)[100] were added to provide housing and jobs. Following this, in 1999, 380 acres (152 hectares) were added to balance the number of residences with the number of jobs. In 2002, 18,867 acres (7,547 hectares) were added, again for residential and employment needs. Most recently, in 2004 and 2005, the UGB was expanded by a total of 2,301 acres (920 hectares) in order to provide for industrial needs. The current UGB encompasses about 256,360 acres (102,544 hectares). The UGB is often recognized as the primary reason for the successful rehabilitation of Portland's downtown center.

Nevertheless, Oregon has been recently embroiled in controversy with the passage of two measures supporting property rights' advocates. The measures have the potential to dangerously weaken the very land use regulations that have provided the state with exemplary land use successes. As a normal result of regulations, landowners who are impacted will voice opposition to the regulations in the name of injustice and inequities, citing constitutional violations, both state and federal. Even though there was opposition by property rights advocacy groups to the regulations imposed by the comprehensive plan in the early 1970s, the passage of Measure 7 in 2000 came as a surprise to many. Measure 7 was designed to either compensate landowners for any loss in value of their properties due to any land use regulation or to allow landowners experiencing a loss in value a waiver of those same land use regulations. Even though it was a major victory for property rights activists, Measure 7 was short lived since it was ruled unconstitutional by the Oregon courts because it violated the 'separate vote' requirement of the Oregon Constitution.[101]

99 www.metro-region.org.

100 An acre is .40 hectares or approximately 4046.86 m^2.

101 League of Oregon Cities, *et al*. v. State of Oregon, 334 Or. 645, 664 (2002). The Oregon Constitution provides that "When two or more amendments shall be submitted...to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately." Measure 7 was found to amend the takings clause of the Oregon Constitution and the freedom of expression clause as well. The freedom of expression clause was found to be amended due to the following exception written into Measure 7: "Nothing in this 2000 Amendment shall require compensation due to a government regulation prohibiting the use of a property for the purpose of selling pornography, performing nude dancing, selling alcoholic beverages or other controlled substances, or operating a casino or gaming parlor." Since pornography is considered a form of speech, writing or printing, it is protected under the Oregon Constitution's freedom of expression clause.

However, property rights advocates persevered and, in 2004, Measure 37 was passed by Oregon voters, and it included essentially the same provisions as had been included in Measure 7. After its passage, the lower Oregon court ruled that Measure 37 was unconstitutional, and the case went on to appeal in the Oregon Supreme Court where the lower court decision was overturned in February 2006. The Supreme Court of Oregon found no constitutional violations, and thus supported the decision of Oregon's voters. Other states are currently faced with similar initiatives, and it will take some time to find out how the passage of these laws will affect the ability of cities to apply land use regulations – some of which are necessary to protect resources and allow for development that is beneficial to the health of urban areas.

Due to the political turmoil that Oregon and the rest of the nation is involved in these last few years, the timing may be right for TDRs to play a more important role in resolving the different mind sets of both property rights advocates and those who have helped to create environments that the rest of the nation envies.

7.5.3 The plan districts

Areas that have unique characteristics or resources can form a district, and as such have separate zoning regulations applicable to them in addition to base zone regulations. The Pleasant Valley Plan District – located in southeast Portland, is one such area. In 1998, the Pleasant Valley Plan District formed part of what was added to Portland's Urban Growth Boundary. The total area of this district encompasses 1.32 acres (5,300 m^2), and therefore, the developable area is small. The plan for this district is to create an urban community complete with transportation and natural resource areas and room for a population of 12,000 together with the creation of about 5,000 jobs.

Overlay zones provide additional land use regulations to specific areas and may include controls regarding the preservation of historic areas or the protection of environmentally sensitive areas. The Pleasant Valley Plan District includes some of these additional land use controls in the form of the Pleasant Valley Natural Resources Overlay Zone (designated as a 'v' zone) which applies to areas protecting natural resources and providing for appropriate development in the District, and the Environmental Protection Overlay Zone (designated as a 'p' zone) which provides the highest degree of protection to areas which include vital resources. Development is rarely approved in areas within a 'p' zone. The purpose of the Pleasant Valley Plan District is to integrate the natural resources of the area with the newly developing urban area in Pleasant Valley. Some of Pleasant Valley's land area is within the City of Portland and some is within the City of Gresham.

The provisions for TDRs are included in Chapter 33.564 of the zoning code which is the code for the Pleasant Valley Plan District. The development rights

are defined as "the number of potential dwelling units that are allowed on the site." Sending sites are restricted to "sites where at least 50 percent of the site is within the Pleasant Valley Natural Resources overlay zone." Receiving sites can include sites within the Pleasant Valley Plan District or the Johnson Creek Basin Plan District (with limitations) except where the receiving site is within the 100-year flood plain or within the Pleasant Valley Natural Resources overlay zone. Additional regulations restrict the additional density to 150 percent of the normal allowable density. The area is limited to twenty-acre (8 hectare) development parcels, but can be subdivided with the purchase of TDRs to a maximum of one building per acre. To date, no TDRs have been sold or purchased to enable subdivisions within the Pleasant Valley Plan District. Although one application had been received and was in process in March 2006, the matter was not finalized due to the lack of infrastructure, in particular sewer systems, in the Pleasant Valley Plan District at this time. The sewer system is scheduled for expansion to this area in 2008, and it is expected that land subdivision applications will follow after that time.[102]

TDR provisions are also included in the Northwest Hills Plan District which allows transfers from the Environmental Protection overlay zone to the residential farming (RF) zone within the UGB and not within an environmental zone. The resulting density may not exceed 1 unit per acre (0.4 hectares). Likewise, the Johnson Creek Basin Plan District includes TDR provisions to allow "for new housing and to reduce development pressure on environmentally sensitive areas."[103] Therefore, similar TDR provisions appear within several parts of the Portland zoning code.

7.5.4 Historic resource protection overlay zone

The Portland Zoning Code includes an overlay zone specifically constructed to protect historic resources in the region. Within this code are located provisions regarding historic preservation incentives – TDRs specifically catering to the preservation of historic resources. The stated purpose of these provisions is to increase the potential for the protection, renovation and preservation of these resources through flexibility and economic opportunities.[104] Density and FAR may be transferred from Conservation Landmarks and Historic Landmarks. Density may be transferred from a landmark to another location in multi-dwelling, commercial and employment zones. Furthermore, landmarks in single-dwelling zones may be used as multi-dwelling structures without an increase in parking requirements. The potential exists to expand the floor

102 Telephone interview with Jay Sugnet, Planner, City of Portland (November 1, 2006).

103 Portland Zoning Code, Title 33, Planning and Zoning, at 33.537.110, 9/3/04.

104 Portland Zoning Code, Title 33, Chapter 33.445, 1/7/05.

area of the landmark. Additional provisions provide that structures located in multi-dwelling zones may be used as multi-dwelling structures with no maximum density, and that daycare is an allowed use in residential zones. Several additional provisions provide attractive flexibility which will motivate the reuse of historic resources.[105]

7.5.5 Base zones

TDR provisions are included in zoning ordinances for two separate base zones, Employment and Industrial Zones (Chapter 33.130) and Commercial Zones (Chapter 33.140). The employment and industrial zones consist of areas that have industrial uses or a "mix of uses with a strong industrial orientation."[106] Density in the form of FAR can be transferred from certain employment zones containing a Landmark to sites that are within a certain distance from the Landmark. However, the increase in FAR cannot exceed 3 to 1, and this increase includes any other transfers of density. Therefore, stringent limitations exist regarding the particular receiving sites.

Portland has categorized its commercial zones into eight different types, from zones that support surrounding residential areas to zones that have a community or regional market. Once again, FAR can be transferred from a site which includes a Landmark to a receiving site that is within a certain distance from the Landmark. Similarly, the increase in FAR cannot exceed 3 to 1, inclusive of other density increases.

As previously stated, these provisions located within the base zone codes have as a primary effect the preservation of historic resources – as opposed to the preservation of the sensitive environmental habitat which is the main focus of TDR provisions within the Plan District codes.

7.5.6 The Sally McCracken Building

The Central City Plan District includes provisions for TDRs for the encouragement of the development of new low-income housing in the form of single-room occupancy buildings or hotels (SROs) and for the preservation of existing SROs.[107] The owners of qualifying sites may transfer unused floor area to any location in the Central City Plan District. This provision provides the flexibility necessary to make the TDR provisions user friendly. The money that can be obtained by an owner of an SRO property can be used to make improve-

105 Portland Zoning Code, Title 33, Planning and Zoning, Chapter 33.445, Historic Resource Protection Overlay Zone, 33.445.610.

106 Portland Zoning Code, Title 33, Chapter 33.140.010.

107 Portland Zoning Code, Title 33, 33.510.200 (E), 4/22/06.

Figure 7.4 Portland, the Sally McCracken Building

Source: courtesy of Central City Concern

ments to the property, especially if it is currently vacant and unused. The SRO may not be "demolished or converted to other uses unless the number of SRO units will be replaced."[108]

An example of a successful application of TDRs in the Central City Plan District is provided by the Sally McCracken Building, formerly known as the Athens Hotel.

The hotel had fallen into disrepair and was being used as a "shooting gallery for drugs."[109] Central City Concern, a non-profit organization that owns and manages several SROs in Portland, bought the building and began renovations, at a total cost of $4,000,000 (€2,525,000). In the early 1990s, 50,000 ft^2 (4,645 m^2) of floor area were transferred from the hotel to adjacent properties owned by Kalberer's Hotel Supply Company, Inc.[110]

The Athens Hotel was using 40,000 ft^2 (3,716 m^2) of an allowable 90,000 ft^2 (8,361 m^2) of permitted development. A typical block in Portland has a 40,000 ft^2 area of development, and as such, the 50,000 ft^2 of area that was transferred was significant.

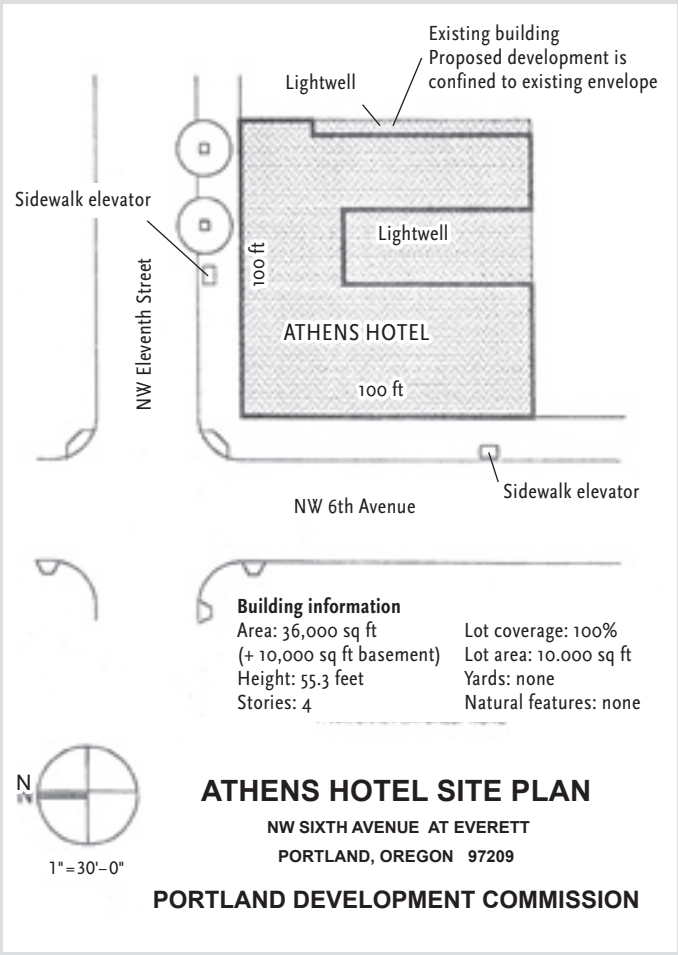
The Sally McCracken Building currently has ninety-five single rooms and is

108 Portland Zoning Code, Title 33, 33.510.200 (E), 4/22/06.

109 The Enterprise Foundation, Federal Policies Illustrated, June 1995 at 222.enterprisefoundation.org/policy/monographs/pubpol3.asp.

110 Interview with Barbara Sack, City Planner II, City of Portland, Portland, Oregon (March 20, 2006); telephone interview with Barbara Sack, City Planner II, City of Portland (November 3, 2006).

Figure 7.5 Portland, Athens Hotel site plan



Source: courtesy of the City of Portland Bureau of Planning's files

home to formerly homeless and recovering drug and alcohol addicts who can remain at the building as long as they are in a recovery program.[111] This case provides an example of a successful application of TDRs in the context of low-income housing for special needs' residents. These TDR provisions in the Central City Plan District were drafted to motivate owners of special low-income housing to support the maintenance of this housing in the City of Portland, and the provisions compensate these owners for refraining from developing their land to its maximum potential. In this manner, development is re-allocated to other sites that do not include SROs, and the city benefits by providing for a segment of the population which might otherwise be homeless.

111 The Enterprise Foundation, Federal Policies Illustrated, June 1995 at 222.enterprisefoundation.org/policy/monographs/pubpol3.asp.

The various TDR provisions available in the Portland region and outlined above are evidence of the flexibility of TDRs to assist in the protection of many societal needs: low-income housing; the protection of environmentally sensitive land areas, open space and farmland as well as the preservation of historic resources, to name a few. In addition, these provisions are evidence that once a particular TDR program is incorporated in the legal framework, it facilitates additional programs which together can form an available network of flexibility in addition to traditional financing of the past. Furthermore, the inclusion of a TDR program is unlike other land use determinations where an unwise decision can have unwanted and harmful, widespread consequences.

7.6 Conclusion and evaluation

A review of the many TDR programs available in several cities of various states reveals that although a city may have several TDR provisions that resemble each other in its zoning ordinance, outside of this context no two TDR provisions are exactly the same, and in fact, they can be very different from each other. This is because the needs of different areas are different because no two areas of land are the same, and no two areas of land have been historically developed the same way.

TDRs are used in many ways to protect both the natural environment and the built environment. In New York City, TDRs are used for historic preservation and to convert underutilized land into a much needed new residential and commercial neighborhood. In Malibu, TDRs are used to protect the environmentally sensitive area known as the Santa Monica Coastal Mountain area. In Oregon, talented leadership instigated land use controls that allowed for the healthy development of cities and the preservation of farmland and forest land, and eventually this resulted in the inclusion of various TDR provisions in Portland's zoning and planning code.

However, it is perhaps most useful to the international audience to focus on the similarities that can be found and how the various provisions are inherently similar in substance in terms of achieving the same goal: resources in the natural or built environment that are in need of protection are identified. This protection may not be available through the current legal structure or certain owners cannot for legal reasons be forced to bear the burden of the necessary protection. These resources can form the equivalent of the 'sending' area in a TDR program. Next, a 'receiving' area is identified, consisting of an area that may be ripe for development and that, due to market conditions, can economically absorb added costs. The specific legal structure of the region or municipality is analyzed to determine how TDR provisions can be incorporated. In order for the TDR program to function effectively, the receiving area should not have options available outside of the employment of TDRs. Ideally,

a form of TDR bank should be created in order to facilitate the trading of TDRs and to provide the necessary market reliability and stability. To ensure a successful program, provisions that dictate clearly how the transfer is to be made and recorded are essential.

It is useful to study TDR programs that are actively being employed, as well as those that are not. A review of the American Planning Association's Model TDR ordinance[112] may provide a starting point for governments outside of the U.S. who have yet to draft TDR provisions. With an initial focus on separate needs, or the needs of separate areas, and the selection of one to contribute to the 'subsidy' of the other, what remains is an analysis of a country's political and legal structure in order to construct a 'tool' to make the transfer of funds a reality.

Looking forward, TDRs are one tool that will assist in resolving the current national controversy in the U.S. that exists between property rights activists and concerned citizens regarding the right of government to regulate land use for the common good. The U.S. Supreme Court's decision in *Kelo* and the passage of Measure 37 in Oregon have spurred initiatives throughout the country. Elections will give an indication of the national support for a laissez-faire mentality towards land use controls, and the subsequent years will determine the solutions that will be employed to curtail the damage that lurks for our cities and the natural environment.

The New York City TDR program provides an example of how TDR provisions can be changed over time to accommodate the changing needs of the jurisdiction to which they apply. Originally, the New York City TDR program required that the receiving site had to be right next to the sending site. Later, in order to assist the owners of the Grand Central Terminal, the receiving site could be located across the street from the sending site, and still later, the receiving site could be even a bit more distanced from the sending site. At this time, TDRs are one tool that will be used to finance the Hudson Yards Project – ultimately providing developers the opportunity to construct denser buildings than otherwise allowed, and at the same time providing the funding for the construction of a deck over an otherwise underutilized rail yard area.

The various provisions available to the areas of the Portland Metropolitan Region evidence the interest generated by TDRs and the needs of municipalities and regions to resolve land use concerns, but the fact that they are not employed more often is indicative of the need for changes to the provisions. Planners indicate that there are no provisions for a TDR bank to facilitate the exchanges between parties.[113] Therefore, the planning for a TDR bank, at the initial stages of setting up a TDR program, will likely help ensure a successful

---

112 Model TDR Ordinance at http://www.planning.org/smartgrowthcodes/phase1.htm.

113 Interview with Portland City Planners, Portland, Oregon (March 20, 2006).

program because of the confidence and ease that the TDR bank will engender in communities.

In the discussion of the conservation case in Malibu, where the sending parcels needed to be located within 200 feet of a park and were not, the solution to annex the surrounding Los Angeles County properties to the park, and thus bring the donor lots to within the 200-foot requirement, demonstrated necessary flexibility. This flexibility is a necessary component that can make the difference between a TDR program that exists nicely in print in a code of law and one that is actively used for conservation, compensation or the reallocation of resources.

Table 7.1 Summarizing the U.S. cases

	Case 1: Conservation – Malibu, California	Case 2: Conversion – Hudson Yards Project	Case 3: Re-allocation – Portland, The Sally McCracken Building
Period in which case was introduced	2005	2003	Early 1990s
General objective of proposed instrument	No increase in development in environmentally-sensitive areas	- To make use of an underutilized section of the City (part of Manhattan borough) where land is scarce and valuable - To provide office space - to defer sprawl	To encourage development of new low-income housing, specifically SROs (singe-room occupancy buildings)
Characteristic factors	Sending area is the Santa Monica Mountains Area coastal zone; Receiving areas are only 2 districts in the City of Malibu – MF (Multiple Family) and MFBF (Multi-Family Beachfront)	Sending areas are: Eastern Rail Yard (ERY) and Phase II Hudson Blvd & Park. Receiving areas for ERY are located to the north of ERY; for Phase II districts C2-8, C6-2, C6-4, and M1-5	Owners of qualifying sites can transfer unused floor area to any location in the Central City Plan District
Particular economic and social circumstances that have determined the instrument	The California Coastal Commission was afraid that development from LA would spread to Malibu; large number of undeveloped parcels with limited infrastructure	- TDRs will help finance the deck over the Eastern Rail Yards - TDRs will allow the density levels appropriate and necessary for NYC	Loss of low income housing due to gentrification
Fit within planning and legal system: which relation with spatial plans?	Special coastal regulation, but basically TDCs are within the city zoning code that conforms to the city Land Use Plan	TDR provisions are in municipal zoning resolution	TDR provisions for this case appear within one of the plan districts (Central City Plan District). Areas that have unique characteristics or resources can form a District.

Table 7.1 continued

	Case 1: Conservation – Malibu, California	Case 2: Conversion – Hudson Yards Project	Case 3: Re-allocation – Portland, The Sally McCracken Building
Were specific laws and regulations drawn up?	Not for this particular case	Hudson Yards area was rezoned in 2005	Not for this particular case
Spatial level at which case is tackled	Because of sending area being outside of the City of Malibu, this is regional-like	Municipal	District level
Relevant public actor(s) and role	The City of Malibu approves the transfer of TDCs	- New York City - Metropolitan Transportation Authority - Two corporations formed to manage the finance and construction (HYIC and HYDC)	City of Portland approves the transfer
Balance between private and public exchange	Negotiations take place between owners of sending lots and owners of receiving lots. The Planning Director calculates TDCs and maintains the records of transfer.	- Control of financing and management is in public hands - Private developers will pay for density bonuses and TDRs - Tax exemptions will be available to private parties	Private companies owned sending and receiving properties
Parties which financed the case	The landowner who subdivided the 2 lots paid for the TDCs	- New York City (general fund) & private developers - Sale of long-term bonds to be financed by revenues from the improvements	- Sending area was building owned by a non-profit organization - Owners of adjacent receiving lots were owned by another company
Possibility for public participation	Public notice and review took place	- Public notice and review took place - Public forums in November 2002 and February 2003	Public notice and review took place

References

Aoki, K., K. Briscoe & B. Hovland (2005), Trading Spaces: Measure 37, Macpherson v. Department of Administrative Services, and Transferable Development Rights as a Path Out of Deadlock, in: **Journal of Environmental Law and Litigation** (20), pp. 273-328.

Biber, E. (1999), Exploring Regulatory Options for controlling the Introduction of Non-Indigenous Species to the U.S., in: **Virginia Environmental Law Journal** (18), pp. 375-465.

Breemer, J.D. (2004), What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thought on the Underlying Causes, in: **UCLA Journal of Environmental Law and Policy** (22), pp. 247-300.

Duncan, J. (2004), Coastal Justice: The Case for Public Access, in: **Hastings West-Northwest Journal of Environmental Law and Policy** (11), pp. 55-80.

Feitshans, T. (2002), PDRs and TDRs: Land Preservation Tools in a Universe of Voluntary and Compulsory Land Use Planning Tools, in: **Drake Journal of Agricultural Law** (7), pp. 305-340.

Jacobstein, J.M., R.M. Mersky & D.J. Dunn (1998), **Fundamentals of Legal Research**, Seventh Edition, New York: Foundation Press.

Kanter, S. (2006), The Griswald Diagrams: Toward a Unified Theory of Constitutional Rights, in: **Cardozo Law Review** (28), pp. 623-713.

Littlewood, W. (1998), Transferable Development Rights, TRPA, and Takings, the Role of TDRs in the Constitutional Takings Analysis, in: **McGeorge Law Review** (30), pp. 201-233.

Lycett, J. (2002), Landgate, Inc. v. California Coastal Commission: Why Temporary Takings Law is "Screwed Up", in: **Hastings West-Northwest Journal of Environmental Law and Policy** (7), pp. 55-68.

Mandelker, D. (2004), Zoning and Planning: What is Their Future?, in: **Land Use Institute,** pp. 869-895.

Merriam, D. (2001), Reengineering Regulation to Avoid Takings, in: **Urban Lawyer** (33), pp. 1-43.

Stewart, R.B. & J.B. Wiener (1992), Models for Environmental Regulation: Central Planning Versus Market-Based Approaches, in: **Boston College Environmental Affairs Law Review** (19), pp. 547-563.

Tripp, J. & J. Dudek (1989), Institutional Guidelines for Designing Successful Transferable Rights Programs, in: **Yale Journal on Regulation** (6), pp. 369-391.

8 The Netherlands: experiments with non-financial compensation instruments in planning practice

Leonie Janssen-Jansen, Marjolein Spaans & Menno van der Veen

8.1 Introduction

The Netherlands is one of the world's most densely populated countries. The population numbers approximately 16.5 million inhabitants. With an area of 41,526 km^2 (16,033 mi^2; including 18.41% water), land is scarce and economic and population growth keep the Netherlands in a constant state of reconstruction. It is becoming increasingly difficult to meet all these needs without damaging the overall quality of the rural and urban countryside. The Netherlands has traditionally tolerated and accepted greater levels of public intervention in the land market than neighboring countries like Belgium and the U.K. However, over recent years, the call for more market-oriented instruments has been increasing.

8.2 Planning framework

The Spatial Planning Act (WRO) has formed the legal basis for Dutch planning since 1962. It established a framework within which spatial policy could be formulated. Each of the three government levels – national, provincial and municipal – has its own planning authority and growth is controlled by regulations and policies at each of these levels. Although the planning system has a clear hierarchy, with each planning level monitored for consistency with the goals at a higher level, only the local land use plan is legally binding (Evers, 2004: 212). The national policy is persuasive. There is no national plan as such, but national legislation obliges national government to publish its planning strategies periodically. The prevailing Dutch spatial policy is presented in the recently published National Spatial Strategy (*Nota Ruimte*, Ministerie van VROM *et al*., 2004). At the provincial level, regional plans are drawn up that implement goals articulated in the national reports, and which coordinate the various local land use plans within the provinces. The regional plan is regulatory. The local level is the most important: the local land use plans indicate where development is allowed and what uses are permitted. If a building application conforms to the requirements of a local land use plan and additional requirements, the local authority should issue a permit. Although this system of zoning may appear quite rigid, flexibility has been built into the system by an exemption procedure (Article 19 of the WRO), which allows local authori-

ties to move away from the provisions of an existing local land use plan. This planning by exception is used quite frequently (Evers, 2004: 213). Some argue (Evaluatiecommissie WRO/Bro, 1994; Sommer, 2003) that the famous Dutch planning doctrine, with its urban containment strategies and compact new towns, is therefore not as successful as planners in other countries usually think.

In response to the societal demand for new and more decentralized planning policies and area-oriented and location-specific policies, the Dutch growth-control policy seems to have been abandoned in the latest report on spatial planning (2004). Adaptive planning and spatial development, performed by local and regional players in strategic alliances, with less national governmental steering, makes up the new Dutch planning style. With this shift, the Dutch government followed the international trend toward more regionally-focused planning (Peirce *et al*., 1993; Orfield, 1997; Katz, 2000; Esselbrugge & Van der Heijden, 2004; Johnson & Peirce, 2004; WRR, 1999). After this change in planning philosophy, market-oriented developments have been receiving a lot of attention.

8.3 Towards more market-oriented planning instruments?

In the near future several new planning laws will become effective. The new Spatial Planning Act has become effective in mid-2008 (www.minvrom.nl). This revision is quite fundamental in Dutch terms and will provide a less complex Act: the two main planning documents will be a strategic plan and a legally binding plan. The distinction between policy statements and legally binding statements will be made clearer. Non-binding structure visions will reflect the strategic and indicative policies together with general descriptions provided by the provinces and national government (Spaans & De Wolff, 2005). However, in the new Act not only local governments will be able to provide for legally binding land use plans, but this competence will also be assigned to both national and provincial governments, which will then be able to draw up binding national and provincial land use plans. This will enable them to establish elements of spatial planning that are of national or provincial importance. Furthermore, measures will be taken to keep the land use plans up-to-date (Spaans & De Wolff, 2005). Land policy is given a more regional dimension when the 2008 Land Development Act (*Grondexploitatiewet*) came into effect. However, this Act is limited to the redistribution of land within one planning area. Although it offers some possibilities to redistribute between developments at different locations, this remains very problematic.

With these new laws, opportunities for more operational strategies are sought to enable more development-oriented spatial planning. This new fo-

cus in planning is about interactive development and implementation aimed at developing value-added comprehensive plans for an area, in cooperation with all regional stakeholders. The ultimate goal is to improve spatial quality by coupling spatial investments, protecting natural resources and revitalizing communities in the Netherlands by means of comprehensive, area-oriented approaches. Furthermore, emphasis is placed on a more direct influence of private interests on planning. For the Dutch steering philosophy this represents a considerable change.

During the last decade, the price of land and the functioning of the land market through the specific Dutch land policy have often been discussed. For example, the classical governance concept of land use (the zoning of land) and the possibilities of a more market-oriented approach (impact fees, open space fees, imposing taxes on windfall profits) are currently being discussed. In Dutch planning practice, the possibilities of an area-oriented approach with so-called project envelopes in which profitable projects are coupled to non-profitable projects via scope optimalization, in order to integrate red (urban) and green (rural/nature) forms of land use receive attention. In this way surplus profits of projects can be invested in the quality of an area (De Wolff *et al*., 2004). For example, the realization of the *Tweede Maasvlakte* (an extension of the Rotterdam harbor area into the sea) also requires the realization of new countryside.

Public-private partnerships, such as development companies (i.e. special purpose companies that consist of both public and private parties whose goal is to develop one specific area or project), may facilitate the implementation, for example via benefit-sharing agreements. This implies that the profits of public as well as private actors above a previously agreed level of reasonable profit find their way back into the project budget. Most of these projects are local in nature; conversion at a regional level rarely exists. However, in addition to these local, experimental and often voluntary arrangements, pleas have been made for regional funds by the Council for Rural Areas (RLG, 2002) and the VROM-Council (2002), for example for the comprehensive development of the rural countryside to prevent the fragmentation of policies. These concepts are close to the idea of non-financial compensation. The trend for area-oriented development planning thus shows an increasing popularity in the Netherlands for such pay-as-you-grow principles (confer concurrency), aimed at the realization of greater spatial quality (WRR, 1999; Spit, 2003) by redistributing between profitable and non-profitable developments.

There are some clear differences between Dutch planning practice and planning practice in many other countries. In the Netherlands there is no property rights shares, as for example in the U.S. (bundle of rights) (see also the Chapter 7 on the U.S.). Development rights cannot be separated from the land. Furthermore, the starting point of land use differs (Needham, 2006). Non-financial compensation schemes are, in essence, legally possible in the

Netherlands if the goal of the program is explicitly related to the goal for spatial quality improvement in the area (the causation requirement) (Tweede Kamer, 2004). At this moment, only one example exists in practice: the Space for Space concept (see Section 4.3 on the conversion case). Furthermore, the idea of recouping the 'surplus value' of planning decisions is becoming more important in the Netherlands.[114] The surplus value, as a result of a zoning change, should be recaptured for the benefit of society. A financial planning compensation mechanism (*planschade* – article 49 Dutch Spatial Planning Law) has been in place for several decades, and now the discussion is about how to 'milk the cow of land value growth'. The idea behind it is that no individual property owner or resident has a legal right to a particular zoning ordinance. Thus, zoning is increasingly seen as a community property right, instead of a personal property right (Fischel, 1985: 36). Recapturing would result in more distributive justice (the gain is unearned), would reduce the temptation to misuse planning decisions for individual interests, might reduce land speculation by reducing its gains, might increase trust in governmental planning decisions, and might reduce growing public objections to new development. This kind of levy is a sort of alternative fiscal source: there is money for compensation because the market only develops if it is profitable (Alterman, 2005). As a result of these ideas, a new system of cost recovery (*Grondexploitatiewet*) in the forthcoming new Land Development Act has recently been introduced and accepted (Ministerie van VROM, 2007). Related to this idea is the discussion about the question of the extent to which a community can require new developments to finance local public services. Only directly apportioned costs can be attributed to new developments according to existing law. The new law seems to broaden the grounds for cost recovery. At this moment there is also attention focused on non-financial compensation instruments as a manner to recoup surplus value. What kind of permutations of the classic non-financial compensation would be interesting for the Netherlands? An important assumption is the belief that transaction costs can be changed into transaction opportunities. Via so-called 'recombination', different interests can be connected (Van der Heijden & Slob, 2006). Recombination is about the innovative cooperation between sometimes differing interests. Two of the examples in this chapter, the conservation example in the province of Limburg and the re-allocation example in Amsterdam (described in Sections 4.2 and 4.4) reflect other ideas for the use of non-financial compensation in planning in the Netherlands.

114 However, also a counter movement exists, for example in Rotterdam. In this municipality the land lease system has recently been abandoned due to the political reasoning that this type of recouping of value was an outdated system.

8.4 Conservation case: the Limburg experiment

8.4.1 Introduction

Recently, the pay-as-you-grow concept received attention in the province of Limburg in the south of the Netherlands in reaction to the decision by the national government to economize on the development of the countryside (2003). The policy to buy land for natural development was changed into a nature conservation policy. The province of Limburg had to differentiate between the national ecological infrastructure and the provincial ecological ambitions. The latter could not be realized or conserved anymore with national financial help, and so the provincial government searched for other – non-financial – mechanisms to improve the quality of the Limburg landscape. The two priorities were new initiatives for partnerships to improve the spatial quality of the province as well as system innovations for agricultural nature maintenance (Verhoeven, 2005: 280). The idea of TDRs was adopted (Bruil *et al.*, 2004) as a way of using the market for area development. The Ministry of Spatial Planning, Housing and the Environment was interested in the Limburg experiment (Ministerie van VROM, 2005) and in 2005 the concept of VORm was born. VORm (*Verhandelbare ontwikkelingsrechten methode*) can be translated as the *TDR method*.[115] VORm is part of the *Contourenbeleid* (Growth Boundary policy) of the Province of Limburg, which has been in force since June 2005. This policy emphasizes the separation between rural and urban land. Around each urban area a growth boundary has been implemented. Development within the boundary is possible; but outside the boundary, development is only possible under strict conditions: there have to be accompanying improvements to the overall quality of the rural countryside, the development site and the province as a whole.

8.4.2 VORm in Limburg: red for green policy

The concept of VORm is about recouping windfall profits from land that are the result of public decision-making for public goals. Desirable developments are encouraged, but public compensation is required through investment in the provincial program on nature development (*POG – Provinciale Ontwikkelingsruimte Groene waarden*)[116]. The province uses three models to decide on the amount of compensation due. The first model is used for the development of

115 However, this name might be a bit misleading. The concept runs down to a form of planning obligations in the Dutch planning system. Furthermore, in Dutch the word transfarable is translated as tradable.

116 This is true for all development in Southern Limburg; housing developments in Northern and Middle Limburg will have to contribute to Limburg's Space for Space program (www.limburg.nl).

one or a small number of additional[117] development sites for expensive housing, without complicating factors such as soil and sanitation. The second model is used for the extension of an existing industry or farm. The last model is used for larger and more complex housing projects. An example of the VORm policy is the red for green policy for new country estates (*nieuwe landgoederen*). This policy encourages the development of a country estate outside the growth boundaries. Each new development has to include sufficient new countryside, for example in a ratio of 1 hectare red to 10 hectares green land usage. Such an initiative should be laid down in the local land use plan, the red as well as the green components. A civil law contract binds the developers to realizing the green part (Provincie Limburg, 2006: 14).

8.4.3 Evaluation

Limburg's VORm and the red for green policy concerning new country estates are new. No actual cases have been implemented yet, although it is already possible to apply for such development. Some project developers have looked into the program, but have decided not to develop because the conditions were too strict and they thought the share of the profit that would be redirected was too large. It is to be expected that most of the VORm development – if it happens – will take place at the local level, paid for by private parties (civilians). The project fits within the Dutch framework, as the VORm project is part of Limburg's regional plan. However, it is questionable whether this form of non-financial compensation that in fact deals with planning gain in a more open and calculated way than what was used to be the case in land servicing plans, will hold up in court.

8.5 Conversion case: Noord-Brabant's Space for Space program

8.5.1 Objective and background

An interesting conversion project in the Netherlands is the Space for Space program (*Ruimte voor Ruimte*) in the province of Noord-Brabant, in the south of the Netherlands. This Space for Space program is one of the most extensive red for green projects in the Netherlands. The aim of the project is to achieve a qualitatively better arrangement between urban and rural areas by means of a system of conversion whereby expensive houses on large parcels finance

117 In addition to the agreements between the Province and the local authorities.

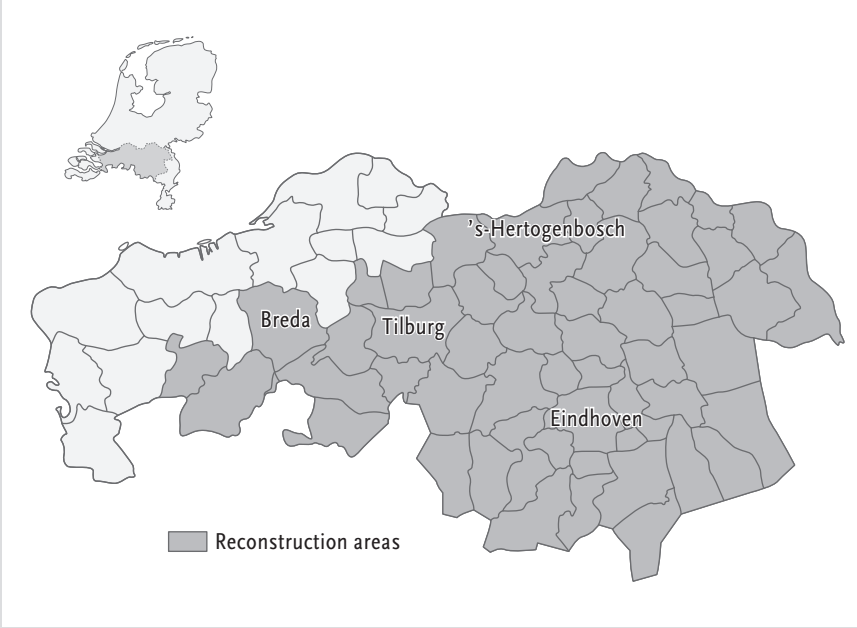
Figure 8.1 Reconstruction areas in the Netherlands

Source: GIS Centrum FMG Amsterdam

the demolition of stables[118] (see Figure 8.1). The project came from the EU's new nitrate guidelines, which stated that phosphate and nitrate emissions had to be reduced. The Dutch national government focused on reducing the intensive livestock production of pigs by encouraging farmers to stop their business activities by buying their emission rights. Many farmers participated in this reconstruction program of intensive livestock farming laid down in a statute (*Reconstructie concentratiegebieden Zandgronden:* Tweede Kamer, 1999). It was not the location of the livestock industries that was of interest, but the amount of manure, reflecting the sectoral nature of the regulation. No attention was paid to the stables that might become vacant. Furthermore, no differentiation was made between the locations of closed business activities, even though, from a spatial point of view, it would have been preferable to terminate intensive livestock farming in environmentally vulnerable areas rather

118 Additional financing is created through the municipal and provincial allowance of additional expensive housing. In exchange for paying demolition costs to a farmer, one can get such additional building rights and search for land to develop, which will be sold for a fixed price by the municipalities. Due to the risks in almost all cases, a public-private company functions as an intermediary. Surplus profits are paid into the fund, which pays for additional quality improvement to give the municipalities something in return.

Figure 8.2 The Netherlands, Province of Noord-Brabant



Source: GIS Centrum FMG Amsterdam

than in agricultural development zones. However, farmers in both zones were allowed to participate in the regulation. The five reconstruction provinces in the Netherlands decided to implement the Space for Space program.

8.5.2 Space for Space

This program aimed to demolish derelict stables on intensive livestock farms and also added a spatial dimension to the agricultural reconstruction. With this program it was possible to give an additional financial incentive above and beyond the cease and desist regulation to farmers terminating business activities. At the same time, the quality of the countryside was improved by clearing the landscape of vacant stables which were perceived as ugly. In doing so, rural areas were cleared of buildings. The demolition of the stables prevented a situation arising in which the former stables are used for undesirable activities such as those associated with car dealerships and caravan parking areas. This area-oriented approach has been laid down in the *Brakkestein Pact* (Ministerie van LNV, 2000). National government approved the proposal whereby the provincial authorities allowed some additional expensive housing on large parcels (with a maximum of 6,500 units) in order to finance the demolition of the stables. The villas had to fit in with their surroundings. At the moment, the demolition process is in full swing, and plans are being developed for the new housing plots. The project started in 2002 and will be finished around 2010. The project has a strong regional focus, especially in the province of Noord-Brabant. Each province has its own elaboration of the Space for Space program.

8.5.3 Organization

The regional conversion process in the province of Noord-Brabant is collaboratively organized in a development bank which was founded in 2001. This TDR bank is a public-private partnership called *Ontwikkelingsmaatschappij Ruimte voor Ruimte* (ORR; Space for Space Development Company) (Janssen-Jansen, 2004). Within this company five private actors, developers (Heijmans, IBC and Grontmij) and financial institutions (NIB Capital Bank and the Bank Dutch Municipalities (BNG)) work together with the province. The private parties each have a 16% share in the investments; the province leading the Space for Space process has a share of 20%. Thus, the parties in the consortium jointly look after the revolving fund for the demolition compensation, and in return receive permission to construct a large housing project. A farmer can also demolish his own stable and receive a building permit in return. That permit however, can only be used in a receiving area, not on the plot of his stable. These receiving areas are not explicitly designated. General conditions, for example that the villas can only be constructed within or adjacent to existing villages and cities, indicate which parcels are allowed as receiving areas. The development company enables a regional redistribution between sending areas and receiving areas. The whole countryside of Noord-Brabant is designated as a sending area. No priority provisions were made between, for example, agricultural development zones and vulnerable nature areas. This is because zoning followed the actual reconstruction. The negative carrots ('sticks') (fines imposed by the EU) have reversed the process. Most of the sites on which the stables are being demolished are unfit for new commercial activities. In this example, the conversion principle is coupled to a sort of containment because green boundaries define where building is not permitted, for example in the ecologically important zones. This presents the possibility of realizing Space for Space parcels on more spatially desirable lots located within or near the border of already urbanized areas rather than in vulnerable or valuable areas. Because only the requirements of the receiving areas are given, and not those of the locations themselves, this can be characterized as a form of 'loose zoning'. Establishing suitable locations is difficult because the local circumstances differ. The ORR is responsible for the localized fitting. The municipalities have to agree on the locations because they have to be included in their local land use plans.

8.5.4 Results: demolition of stables and realization of large parcels

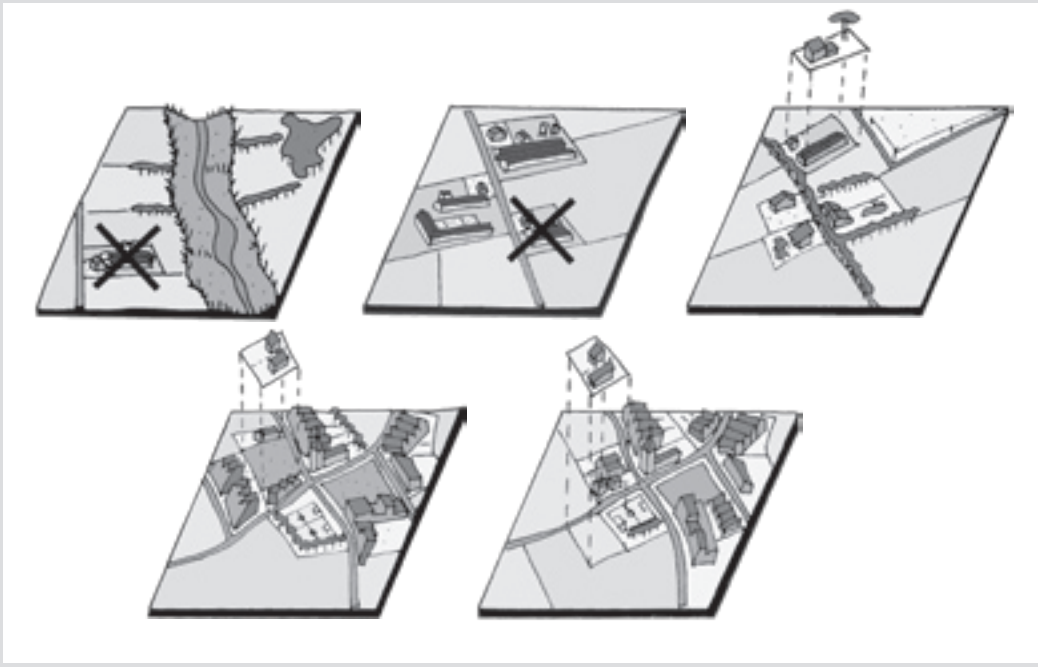
Four types of demolition locations can be distinguished within the Noord-Brabant Space for Space program: (1) a demolition location in an area where the livestock industry has been harmful for the environment; (2) a demolition

location on the border of a village or city; (3) a demolition location in an agricultural development area; and (4) a demolition location that can also be used as a building location. This last type has to fulfill the receiving area requirements. This location type is uncommon in Noord-Brabant. Furthermore, there are a lot of farmers who sell their environmental rights, but do not continue with the demolition process. High residual values are the main reason for this. The increase of the overall quality of the rural land is greatest if stables are demolished in vulnerable locations. However, the nature of the Regulation ending the holding of livestock (RBV – *Regeling Beëindiging Veehouderijtakken*) is agricultural in nature and was not intended to have a spatial dimension. It is to be assumed that such locational differentiation was politically not possible because of the resulting social inequity for farmers. Furthermore, participation in the RBV was voluntary. In addition, the timetable was too strict. Coupling a spatial goal to the environmental goal implied that both limitation on animal manure production (*mestquotum*) and the demolition of the stables had to be carried out in 2003 in order to meet the EU nitrate guideline. An opportunity seems to have been lost in that no sending areas were defined.

The other side of the Space for Space coin consists of the building/receiving sites. Parcels can be realized at three types of locations in Noord-Brabant: (1) within existing urbanized areas; (2) on the border of a village or (3) within an urban cluster in the countryside. No precise location is designated for the sending areas, there is only rather vague zoning. Local tailor-made solutions were preferred for each of these locations for which municipal and private initiatives are the point of departure. Research has shown that the realization of expensive housing on these three types of locations contributes to an increase in overall quality of the area, for example if an unsightly urban fringe is complemented with housing on large parcels. Formerly denied proposals should not be resubmitted. What is needed is added value, and the province has a dual responsibility in this process. According to its governmental role, it must guarantee spatial quality and this might result in the rejection of proposed locations. According to its civil law role, as a partner in the ORR, it benefits most from the expedient realization of as many parcels as possible. Sometimes this causes conflicts. The municipalities are responsible for the final quality gain at the level of the individual building, as they have to agree to the final building permits. The level of quality gain differs between the location types. Housing development in existing urban areas benefits most from the careful use of space as referred to in the Noord-Brabant regional plan (Provincie Noord-Brabant, 2002).

Locally, no urgent need is felt for regional red for green. The urbanized areas in particular have little interest in realizing large housing parcels. They are able to build enough housing and find it financially more attractive to develop housing themselves. The realization of the Space for Space parcels has been slowed down by this lack of interest. Participation by the munici-

Figure 8.3 The Netherlands, Space for Space Concept



Source: Mulders, 2003

palities was supposed to be on a voluntary basis, but at the start of the program it was decided that all the Noord-Brabant municipalities should benefit from the additional profits as these have to be invested in the open space of Noord-Brabant (via a reconstruction fund). This extra green cost carrier is not acknowledged. On the contrary, the rural municipalities, which have limited building possibilities, are willing to participate. However, the national government recently relaxed the restrictions on building opportunities in the countryside. In addition, in its Administrative Arrangement of 2003 (*Bestuursakkoord 2003*) the province of Noord-Brabant abandoned its strict building policy. Opponents of this change in policy, like the provincial governor of Noord-Brabant, point out that it interfers with the Space for Space policy (Provincie Noord-Brabant, 2003). The relaxation referred to will result in an increasing supply of expensive housing in the countryside and a decreasing willingness of municipalities to participate in the Space for Space program. The condition that these rural municipalities are only allowed to build to cater to their own population increases will do little to change this situation. The policymakers assume that municipalities will only realize small houses for young people or the elderly and no large villas and thus do not see the relaxation as a threat to the Space for Space program.

To recapitulate, the quality of the parcels is not a problem at this stage of the process, but the same cannot be said for the number of potential parcels. Due to the economic recession in the first years of the program, it has been difficult to sell suitable parcels at desirable prices for a sustained period of

time and the prices have dropped because of increased competition. As the demolition subsidies have already been paid, these distributional difficulties appear to result in a financial deficit for the ORR (and thus for the province). The provincial and national governments abandoning the scarcity policy will undoubtedly have consequences for relations within the ORR. In the public-private partnership contracts, the provincial authorities had covered this uncertainty financially, and this turned out to be a significant risk. However, as the economic situation has improved over the last year, the parcels are selling more easily today.

8.5.5 Evaluation

The Space for Space program offers the opportunity to improve the overall spatial quality of the area, in this case Noord-Brabant, by demolishing empty stables and realizing expensive villas via a unique system of non-financial compensation. Although the Space for Space program has not yet been completed, the overall conclusion is that it is successful. However, some planning lawyers disagree with this method of spatial exchange. They view the recapturing of windfalls not as a sort of compensation to society for granting building permits but as payment for the permits together with neglect for quality improvements. This is not possible according to Dutch law, although none of them have appealed to this program to test the legal framework.

8.6 Re-allocation case

8.6.1 Introduction

Instruments for re-allocation, as in the Valencia case discussed in the chapter on Spain (Chapter 5), do not exist in the Netherlands. However, in the last century, land re-adjustment was a common instrument in the agricultural sector. Land re-adjustment results in the exchange of agricultural areas within a designated area in order to contribute to a more efficient use of space. More recently, the Dutch have created common land exploitation companies wherein some spatial exchange has taken place. These are called Joint Land Exploitation Companies *(Gemeenschappelijke Exploitatie Maatschappij (GEM)*) and were intended to deal with the building activities in the so-called VINEX areas. National government stated in the Fourth Report on Spatial Planning Extra (VINEX) (Ministerie van VROM, 1990), that new, mostly greenfield development was necessary on a large scale. To prevent urban sprawl, well-indicated areas were designated for the development of housing, the so-called VINEX areas (see further Subsection 8.6.2). Also, in the new CBD of Amsterdam, the South Axis, functions will be re-allocated (see further Subsection 8.6.3).

8.6.2 GEM in VINEX (Vleuterweide)

Since the VINEX report, plans for new urban expansions have been drawn up for many locations in the Netherlands. In the overall housing program about 1.1 million dwellings were involved, to be built on both greenfield and brownfield areas. The program is a policy rather than a plan, and consists of contracts with local and regional authorities, allocated quotas and selected sites. The largest VINEX operation, Leidsche Rijn, is planned in the middle of the Netherlands, near Utrecht. Leidsche Rijn involves constructing 30,000 new homes (for 80,000 people) by the year 2015. The ambitious objectives of this project have required complex organization: 14 public players (national ministries, the province of Utrecht and the municipalities of Utrecht and Vleuten-De Meern) reached an agreement to start the VINEX Leidsche Rijn operation in 1995. To begin with, the design was awarded to a private consultancy firm that produced a master plan in a single year by bringing together 50 professional urban planners. In 2000, the City of Vleuten-De Meern merged into the City of Utrecht.

Vleuterweide is one of the sub-centers of Leidsche Rijn. By 2010, about 6,000 dwellings will be created in an area of 240 hectares. The City of Vleuten-De Meern owned one third of the land in the area, and four project developers (Amvest, AMWonen, Ballast Nedam and Fortis) owned most of the remaining two thirds. Local government and private developers reached an agreement on establishing a joint venture in which both partners would have a 50% share. The name of this joint venture was GEM Vleuterweide (Joint Land Exploitation Company). This company, established in 2000, is responsible for obtaining the remaining land, preparing the site for building, selling land to the project developers that are the private shareholders in the joint venture and arranging the public area. Within this process, the plots of all owners have been re-allocated in order to obtain the optimal overall quality of the area. In this process, public as well as private partners have been involved. In the initial contracts, each owner has been allocated a share of buildable land in relation to its contribution. A so-called claim accounting (*claimboekhouding*) has been agreed upon to translate the distribution of development rights amongst the partners into numbers and types of houses. The risks for the government were reduced by sharing them on a fifty-fifty basis with the private partners (Glaser, 2005).

8.6.3 Sports in the South Axis

The Amsterdam Zuidas (South Axis) covers a linear area of 30 hectares on either side of the Amsterdam ring road, between the center of Amsterdam and Schiphol, the main airport of the Netherlands. The project aims to give Amsterdam a Central Business District (CBD) in a lively, prestigious, mixed-

Figure 8.4 Amsterdam, AFC Sports Park in 2005

Source: Salet & Majoor, 2005, p. 56

use neighborhood combining international headquarters with residential facilities, galleries, museums, theatres, shops, restaurants and sports facilities. As an international neighborhood, the aim is that the South Axis will compete with major European cities. Its main railway station, Amsterdam Zuid WTC, will probably be connected to the high-speed train (under construction) to Paris (Salet & Majoor, 2005).

In 2005, a new partnership was established in order to enable the construction of an underground 'dock model' in the central area (Salet & Majoor, 2005: 40). By placing motorways and rail tracks underground, approximately 1,000,000 m^2 of additional surface area can be made available for development. This will also greatly reduce air and noise pollution and enable greater variation in the urban development. Currently, large residential developments are forbidden due to environmental laws regarding noise and pollution associated with the infrastructural corridor that cuts right through the area.

Many public actors are financially involved in the project. In 2006, the City of Amsterdam, the regional organ of Amsterdam (ROA), the province of Noord-Holland and the Dutch national government signed a contract in which they worked out the financial contributions, the (public) goals of the project and most notably the procedures that would be used to attract investors willing to buy shares in the South Axis enterprise (*Zuidasonderneming*). The corporation will be formed in 2008 when all the shares will have been sold. The City of Amsterdam will own 20% of the shares of the corporation, and the national government will also own 20%. Private parties (mostly banks and pension funds) will also own some shares. It is a unique case for Amsterdam that the public parties will only own a minority interest in the enterprise.

The national government will, therefore, have a say in the enterprise but

Figure 8.5 Amsterdam, AFC Sports Park in 2030 on top of the South Axis Dock

Source: Salet & Majoor, 2005, p. 56

all specific public regulations will be made by the City of Amsterdam.

One of the landowners in the South Axis area is the Amsterdam Football Club (AFC). On the existing playing fields, high-rise offices will appear over the next decade. However, the amateur club will not leave the area; the sports fields will be realized above the existing train tracks and highway, on the roof of the dock, occupying more than 40,000 m^2 of the most expensive land in the Netherlands. The dock will cost about €2 billion. Although the final decision about its construction has not yet been made, the actors involved do not doubt its future realization. The sports fields will form the central park of the South Axis (although football will be played on artificial and not real grass).

From an outsider's viewpoint, it is difficult to understand how amateur football club members are able to occupy such expensive land. In the past, the municipality has had many problems when attempting to relocate sport clubs. From a political point of view, it is not desirable to begin such a process. Furthermore, famous sports figures like Ruud Gullit and Marco van Basten and some Dutch television personalities often play at AFC after their active football careers; the pressure to remain in the location is tremendous. The executive committee of the football club began communications with the City of Amsterdam after the South Axis development was decided upon. The committee proposed giving AFC a plot within this new development according to the principle of multiple and intensive use of space (Haan & Rengers, 2005). In this example, the sport fields will be reallocated in the development area; the original sports park will be used for offices and the revenues from this development will finance the dock and the new sports fields on the dock.

8.7 Evaluation and debate

The most elaborate non-financial compensation initiative in the Netherlands is the Space for Space program. In addition, the GEM example is now seen as common practice. The other examples discussed above are still in their infancy. The success of the Space for Space programs resulted in other ideas for pay-as-you-grow arrangements and increased attention for sustainable landscape development, such as in the Limburg initiative. In addition, the South Axis sports park reallocation is seen as an interesting experiment, although some argue that after seven years of debate, this reallocation has become a project in itself instead of a way to keep all of the involved participants satisfied (Majoor, in: Haan & Rengers, 2005).

In all the Dutch variants exchange is noticeable. However, none of the variants utilizes a classic TDR system. Recapturing windfalls, however, can be seen as a kind of compensation to society for granting building permits (see the Limburg example). All of these TDR-like options seem to have pitfalls. One major pitfall is that in all options the right to develop will be made dependent upon a non-spatial requirement. In doing this, major legal obstacles exist. Principally, planning requirements must have a causal relation with the development. Recently, however, a system of cost recovery in a broad, regional sense has been introduced in the new Land Development Act (*Grondexploitatiewet*). On a voluntary basis, developers in a region can contribute to the spatial quality of the region. In the draft of the implementation of the law, development of the countryside, for example, is mentioned; but the idea of demolishing old development might also fall within the scope of the law. Exchanging developments seems to be more likely to take place under this new law. Furthermore, this new law might be the first official step to legalizing non-spatial conditions for developments. The space for space system has been silently approved, after all (Janssen-Jansen & Van der Veen, 2006).

Pay-as-you-grow planning principles can be included as interesting additional instruments in Dutch planning. In this paper we have discussed the paradigm shift towards a more development-oriented planning. This paradigm shift should mean that the complexity of urban society is better addressed. With developmental planning policies, the command-and-control role of government changes into a more active role creating sustainable developments. The steering role of the government in a developmental planning system is no less involved than in a more permissive planning system, in fact it is more involved. Market players, as long as they accept the public interest of sustainable development, will secure a more prominent position in a development-oriented planning system, and that also puts emphasis on recouping surplus values for society by redistributing the profits of profitable land uses (offices, commercial housing) to loss-inducing projects (parks) on a regional scale. The intent is not that development-oriented planning as such will be

more profitable, but that this kind of planning will result in more initiatives and thus strengthen the creativity and innovative solutions – resulting in improved sustainability. The focus is on transaction opportunities rather than transaction costs. Insights are needed about the positive and negative costs of this kind of (voluntary) cooperation. In addition, fiscal incentives can be used to encourage changes in the behavior of individuals and organizations.

In the Netherlands, redistribution between land uses is becoming more institutionalized. Red for green principles, sometimes with a TDR-like conversion, are becoming more and more common. The successful Space for Space program in Noord-Brabant has been approved. Voluntary exchange is slowly penetrating the minds of developers; this increases the opportunities for non-voluntary exchange. Public intervention in the land market has been quite common in the Netherlands, after all. Government is often seen as the actor that is responsible for the creation of public value, for example via the development of new instruments. Conditional planning and setting standards for development are also common. Zoning can be seen as a collectively-held entitlement and thus as a collective property right. It would not be surprising if the approach to private property rights shifts slightly. The planning system will increasingly frame developments focusing on conditions to frame the collective action space. For now, Dutch planners seem to be moving toward a planning system where market players occupy a different position; if they cooperate in realizing more sustainable development, by developing under the pre-set governmental conditions and reinvesting the 'market money' in the quality of the development as a whole, they will be able to contribute to their own goals as well as to the goals of society.

Table 8.1 Summarizing the Dutch cases

	Conservation	Conversion	Reallocation	
	Limburg experiment VORm	**Brabant's Space for Space program**	**GEM Vleuterweide (City of Utrecht)**	**Zuidas enterprise in South Axis (City of Amsterdam)**
Period in which case was introduced	Still in set-up phase, first experiments since 2006	2001	Contract signed in 2000	Proposal was signed in 2005 by partnership
General objective of proposed instrument	Reinvesting windfall profits of a few additional development sites in provincial countryside development program	Financing demolition of stables of intensive livestock industries (and thus reducing emissions) by using profits from additional housing sites	Comprehensive development of new housing area with 6000 houses via reallocation of developments rights	Relocation of landowner AFC within the project
Characteristic factors	Use of profits from urban land uses for provincial policy on countryside development	Embedding non-spatial policy aims in a spatial plan	Reallocation of plots in order to get the most optimal overall quality of the area	Relocation of sports fields of a powerful football club within a major internationally competing business district
Particular economic and social circumstances that have determined the instrument	Decision of national government to economise on countryside development	Need to meet the EU objectives on the reduction of phosphate and nitrate emissions and thus need to create a financial fund to facilitate the demolition of stables of intensive livestock farms	VINEX goals to develop 30,000 houses in Leidsche Rijn (and 6,000 in Vleuterweide) – divided ownership of land in the area	Powerful landowner with land to be redeveloped in the project which caused problems in the relocation of land within the project
Fit within planning and legal system: which relation with spatial plans?	Initiatives have to be laid down in the local land use plans	Doubts about legally sound elaboration: relation between demolition of stables and recouping of windfalls of a land use with no relation to the stables. Link has to be included in the local land use plan	Proposed development has been laid down in a local land use plan	Deal between original landowners and public-private partnership participants. Ultimately inclusion of the relocation in land use plan

Table 8.1 continued

	Conservation	Conversion	Reallocation	
Were specific laws and regulations drawn up?	No	Yes: the regulation on the ending of livestock branches and the Brakkestein Pact (2000)	No	No
Spatial level at which case is tackled	Provincial level	Provincial level	Project and local level	Project and local level, with also national interference
Relevant public actor(s) and role	Province of Limburg (initiative and coordination) and local authorities (implementation of additional sites)	Province of Noord-Brabant (initiative and coordination) and local authorities (implementation of additional sites)	Former City of Vleuten-De Meern (contracts have been adopted by the City of Utrecht)	Local authority of Amsterdam (public actor in public-prive partnership and responsible for land assembly)
Balance between private and public exchange	Mainly a contract between province and local authority. Local authority passes on the recouping of profits of the additional site to private developers	Strong coordinating role of public sector (province and local authorities). Individual farmers ending their business and developers also benefit	Joint venture on 50-50 basis (risks, influence etc.)	Hardly. Deal between landowner and public-prive partnership about relocation of land use
Parties which financed the case	Ultimately the private developers (and thus the end users) pay for the countryside development	Revolving fund of Space for Space Development Company includes 5 private developers and financial institutions (each 16% share) and province (20% share)	Developers and municipality	Public private partnership responsible for the overall financing of the project (banks, national government etc.)
Possibility for public participation	Through the formal public participation in the local land use plan, as the linking of additional development site and countryside development has to be laid down in this plan	Through the formal public participation in the local land use plan	Through the formal public participation in the local land use plan	Through the formal public participation in the local land use plan, but in the specific deal on relocation

References

Alterman, R. (2005), **SUA-lecture: Should the 'plus value' of planning decisions be reaped for the public purse, and how? A cross-national view**, Delft: TU Delft.

Bruil, D.W., G.B.C. Backus, M.A.H.J. van Bavel & C.P.C.M. van der Hamsvoort (2004), **Verhandelbare Ontwikkelingsrechten in Limburg, Rechten voor kwaliteit, kwaliteit voor rechten**, Den Haag: Landbouw Economisch Instituut.

De Wolff, H., J. de Greef, W. Korthals Altes & M. Spaans (2004), **Financiering van regionale ontwikkelingen uit de grondexploitatie, kostenverhaal en verevening op gemeentegrensoverschrijdende locaties of op bovenplans schaalniveau**, Delft: OTB.

Esselbrugge, M. & J. van der Heijden (2004), Regiovisie Groningen-Assen: poging tot integratie, in: De Bruijn, H. (ed.), **Meervoudig ruimtegebruik en het management van meerstemmige processen**, Utrecht: Lemma, pp. 271-290.

Evaluatiecommissie WRO/Bro (1994), **Van plannen, projecten en de praktijk. Advies van de Evaluatiecommissie WRO/Bro**, Den Haag: Ministerie van VROM.

Evers, D.V.H. (2004), **Building for Consumption; an institutional analysis of Peripheral Shopping Center Development in Northwest Europe**, Amsterdam: Universiteit van Amsterdam.

Fischel, W.A. (1985), **The economics of zoning law, a property rights approach to American Land Use controls**, Baltimore/London: The Johns Hopkins University Press.

Glaser, M.B. (2005), **PPP and Brownfield revitalization sites in Northwest Europe**, Utrecht: Deloitte Consultancy b.v.

Haan, F. & M. Rengers (2005), Duurste veld ter wereld, **De Volkskrant**, 21-12-2005.

Janssen-Jansen, L.B. (2004), **Regio's Uitgedaagd, 'Growth Management' ter inspiratie voor nieuwe paden van pro-actieve ruimtelijke planning,** Assen: Van Gorcum.

Janssen-Jansen, L.B. & M. van der Veen (2006), **Money from the market? Possibilities for TDR-like instruments in the Dutch planning system**, Paper presented at the second World Congress of Planning Schools, Mexico City, Mexico, July 11-16.

Johnson, C. & N. Peirce (2004), **Regionalism Today, Risks, Rewards and Unresolved,** The John D. and Catharine T. MacArthur Foundation.

Katz, B.J. (2000), **Reflections on Regionalism**, Washington D.C.: The Brookings Institution Press.

Ministerie van LNV (Landbouw, Natuurbeheer en Visserij), [Ministry of Agriculture, Nature Conservation and Fishery] (2000), **Bestuurlijk afsprakenkader LNV, VROM, provincies Gelderland, Overijssel, Utrecht, Noord-Brabant en Limburg en de VNG, 'Pact van Brakkestein'**, Den Haag: Ministerie van LNV.

Ministerie van VROM (Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer), [Ministry of Housing, Spatial Planning and the Environment] (1990), **Vierde Nota over de Ruimtelijke Ordening Extra,** Den Haag: SDU Uitgeverij.

Ministerie van VROM (Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer), [Ministry of Housing, Spatial Planning and the Environment] *et al*. (2004), **Nota Ruimte: Ruimte voor Ontwikkeling,** Den Haag: Ministerie van VROM.

Ministerie van VROM (Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer), [Ministry of Housing, Spatial Planning and the Environment] (2005), **Brief voor het AO grondbeleid op 1 februari n.a.v. vragen over instrumenten voor provincies in het debat over de Nota Ruimte op 17 januari jl.,** M19, Den Haag: Ministerie van VROM.

Ministerie van VROM (Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer), [Ministry of Housing, Spatial Planning and the Environment] (2007), **Grondexploitatiewet aangenomen**, Press release 22-05-2007, Den Haag: Ministerie van VROM.

Mulders, M. (2003), **Roze voor Groen, onderzoek naar de verbetering van de ruimtelijke kwaliteit in Brabant door de Ruimte voor Ruimte regeling**, doctoraalscriptie, Den Bosch, Provincie Noord-Brabant.

Needham, B. (2006), **Planning, Law And Economics: The Rules We Make for Using Land,** London: Routledge.

Orfield, M. (1997), **Metropolitics: A Regional Agenda for Community and Stability,** Washington D.C.: Brookings Institution Press.

Peirce, N., C. Johnson & J.S. Hall (1993), **Citistates: How Urban America Can Prosper in a Competitive World,** Washington D.C.: Seven Locks Press.

Provincie Noord-Brabant [Province of North-Brabant] (2002), **Brabant in Balans, streekplan Noord-Brabant 2002 & Ontwikkelingsprogramma Ruimtelijke Ordening,** Den Bosch: Provincie Noord-Brabant.

Provincie Noord-Brabant [Province of North-Brabant] (2003), **Bestuursakkoord 2003-2007 'Samen werken aan uitvoering',** Den Bosch: Provincie Noord-Brabant.

Provincie Limburg [Province of Limburg] (2006), **Limburg in VORm: Ruimtelijke ontwikkelingen in balans, Ruimte voor Limburg,** Maastricht: Provincie Limburg.

Raad voor het Landelijk Gebied (RLG) [Council for the Rural Area] (2002), **Meer regio, minder regels, meer resultaat,** Advies over het Tweede Structuurschema Groene Ruimte, deel 1, Amersfoort: RLG.

Salet, W. & S. Majoor (2005), **Amsterdam Zuidas, European Space,** Rotterdam, 010 Publishers (ISBN 978 90 6450 5836).

Sommer, M. (2003), Nederland heeft geen zelfvertrouwen, **De Volkskrant**, 5-4-2003.

Spaans, M. & H. De Wolff (2005), **Changing spatial planning systems and the role of the regional government level; comparing the Netherlands, Flanders and England**. Paper presented at the ERSA conference in Amsterdam, August 23-27.

Spit, T.J.M. (2003), **Ontwikkelingsplanologie als beleidsopgave** [inaugural speech], Utrecht: Universiteit Utrecht.

Tweede Kamer [Parliament] (1999), **Reconstructie concentratiegebieden Zandgronden**, Vergaderjaar 1999-2000, p. 5.

Tweede Kamer [Parliament] (2004), **Brief van de minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer aan de Tweede Kamer der Staten Generaal inzake Grondbeleid,** Vergaderjaar 2004-2005, nr. 27 581/20.

Van der Heijden, G.M.A & A.F.L. Slob (2006), **Meervoudig ruimtegebruik. Enkelvoudig recht,** Delft: Eburon.

Verhoeven, M. (2005), Limburg in VORm, **Rooilijn** (38), pp. 280-283.

VROM-Raad [VROM-Council] (2002), **Impuls voor ruimtelijke ontwikkelingspolitiek**, advies naar aanleiding van de (ICES) investeringsimpuls 2002, Den Haag: VROM-Raad.

Wetenschappelijke Raad voor het Regeringsbeleid (WRR) [Netherlands Scientific Council for Government Policy] (1999), **Spatial Development Policy; Summary of the 53rd report,** Den Haag: Sdu Uitgeverij.

9 Non-financial compensation from an economic perspective

Vincent Renard

9.1 Introduction

The use of planning instruments has, over a long period of time, raised legal, political, and economic concerns due to inequities inherent in zoning and other regulations. The value of a parcel of land depends crucially on the regulations that apply to it. This is especially true in urban and suburban areas where development rights assigned to a piece of land are a central element in price setting. Property law varies widely from one country to another, particularly in the case of development law, the prime demand, and therefore, cost determinant for land.

In many countries, including those in Western Europe, planning and zoning laws were traditionally applied without granting compensation to landowners whose land use was restricted. In some countries, however, such as the U.S., compensation has increasingly been demanded by property owners whose property values have been affected by regulations under the Fifth Amendment's 'takings' jurisprudence. Other countries have also progressively been including various devices to compensate, in one way or another, for the impact of restrictions on land values. A good overview of such cases is analyzed in *Windfalls for Wipeouts* by Hagman and Myszinski (1978).

Two points should be emphasized. First, the wide variety of tools required to take into account the legal-historical attitude towards property which is very different from one country to another. Even within Western Europe large discrepancies exist in the attitude and legal framework regarding property and compensation. A second point refers to the economic reasoning behind such mechanisms. The basic principle behind such mechanisms is a principle of distributive justice; if the value of an owner's property has been reduced by some regulation, he must then be compensated. This statement is easy to understand because it is a basic principle of economic equity. But it also includes a series of difficult issues, mainly the issue regarding evaluation of the 'loss,' which is in fact a potential loss on the one side, and the issues regarding the sources of money used to compensate, such as public authorities or property owners who received some undue capital gains. There is no single answer, and the wide variety of solutions illustrates that there cannot be one single equitable and efficient solution to the questions that are being raised.

We are focusing here on non-financial compensation devices, especially market-oriented devices that are used to compensate for land use restrictions. The various chapters of the book display the wide variety of such non-financial devices, especially those using the notion of the market for development rights, or 'Transferable Development Rights' (TDRs), and we focus here on the economic interpretation that can be provided.

Before going into the details of actual examples of tradable permits, the relationships between property law, urban development regulations and tradable permits will be examined, with particular attention to the differences between the legal systems found in North America and those common in Western Europe. Following this, a description will be given of how the non-financial compensation systems – which may still be deemed experimental since the practice is not yet widespread even in the U.S. – operate in various countries, with special attention to the situation in France. After considering these experimental schemes, a number of conclusions will be drawn as to the value of the system, its economic effectiveness in reaching its goals and the conditions required for it to operate satisfactorily.

9.2 Non-financial compensation in planning and land use

9.2.1 The origin: market tools for the protection of the environment

Tradable rights have come to the fore as a topic in recent years, particularly in the general context of climate change, the greenhouse effect and air pollution. An important threshold was crossed in late 1997 with the Protocol adopted in December by the Kyoto Conference which envisaged trading in quotas or emission credits. A primary conceptual difference should first be noted between a tradable permit attached to land and a tradable emission quota.

With respect to pollution, the object of the trade is an entitlement to emit an ongoing level of a pollutant, measured, for example, in tons of nitrogen dioxide discharged into the air per year. A continuing processis involved so that the relevant quotas themselves may continue to be bought or sold *ad infinitum*. The idea behind tradable land rights is quite different since the right concerned is sold outright or for a very long period of time. Admittedly, it is only saleable in part, or may be bought back at a later date, but the purpose of the transaction is in no way to engage in an ongoing process. This obviously has a major impact on the way the instrument is employed with respect to allotting rights and the conditions for buying them back. The concept, therefore, concerns property law as applied to geographical space, and reveals a major difference between the legal systems originating in Roman law, based on the indivisibility and absolute nature of land ownership, and the different view of the main variants of Anglo-Saxon law, in particular North American law, which considers land ownership to consist of a 'bundle of rights.' Some components of this bundle can be separated, such as development rights, air rights or mineral rights.

These differences in legal structure and in case law go a long way to explain-

ing the difficulty which countries of Western Europe or Japan have in understanding the concepts or techniques that are widespread in North America. It is particularly evident in the long-standing American practice of tradable environmental rights (easements), a concept which appears nowhere in French law, for example, with its need to determine dominant tenement and servient tenement (*fonds dominant* and *fonds servant*) in order to establish such a relation.

A distinction also exists between tradable rights and transferable rights, the latter being the right which is attached to a particular piece of land, and then transferred to another plot. The mechanism under scrutiny here concerns transferable rights, but the transfer is not on a plot to plot basis but rather can be on a zone to zone basis. As such, any development right on the emitting zone can be transferred to any plot in the receiving area, possibly through the intermediation of an ad hoc body, a development rights bank which can take place via the municipality itself.

9.2.2 The rationale behind non-financial compensation: creating a market or compensating restricted landowners?

Central to the creation of a market in development rights is the issue of the financial and fiscal implications of land use regulations. In urban and peri-urban areas, the value of a parcel of land lies in the rights attached to it which is conditioned by zoning and other environmental regulations. Whenever regulations are introduced by public authorities, the price of land can be strongly affected. Since any change in the regulations moves the price of land up or down, this raises the issue as to what corrective measures ought to be taken by the public authorities.

As far as urban and peri-urban areas are concerned (the problem being most acute in the latter), the response differs from country to country. Roughly speaking, most countries in Western Europe have adopted the principle that constraints on urban development are not subject to compensation. As expressed in the French Urban Code for example, this principle applies "to any constraint affecting the road system or prompted by health, aesthetic or any other considerations and concerned with such matters as land use, heights of buildings (…) or prohibition of development in given zones" (article 160-5 of the Urban Development Code). A constraint on the right to make use of a given parcel of land is not considered grounds for compensation unless it infringes a vested right such as withdrawal of a building permit already granted or a change in the previous status of the site resulting in direct, material and indisputable damage to property. The latter comes close to a 'taking,' and in fact rarely applies. Strict application of this principle, which makes landowners subject to unequal treatment, has naturally met with considerable opposition and has led to the generation of *de facto* and *de jure* loopholes. In France

for example, the introduction in 1976 of procedures for the transfer of development rights falls under this heading and was attacked as a breach of the principle of 'no compensation.'

The underlying principle is different in the U.S. Although the constitutional legality of zoning has been well established since *Euclid* in 1926 (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365), the dividing line between admissible constraints under police powers, which are ineligible for compensation, and excessive constraint subject to compensation (due to 'takings') including compensation due to expropriation (eminent domain) is constantly shifting. The term 'taking' which may be read as 'seizure' originates in the Fifth Amendment to the U.S. Constitution "(…) nor shall private property be taken for public use without compensation". So it must be understood that a severe restriction in land use resulting from zoning can be considered a form of expropriation, at least in regards to compensation. As illustrated by a number of recent decisions of several courts and the rise of the movement of private property rights, attention is drawn to recent developments which have tended to restrict the implementation of regulations and constraints (in particular the Clean Air Act and the Endangered Species Act) via systematically playing the compensation card, thereby inhibiting the regulator.

The manner in which case law in this matter has developed over time matches the gradual change that has taken place in property rights law in which a distinction is made between what is private property in the strict sense of the term (and thus may be placed on the market) and what is common property. With respect to this point, it appears TDRs in the U.S., where they have developed to some extent, appear as a tool to compensate restricted landowners in order to make zoning more acceptable rather than developing a market in development rights where buyers meet sellers and prices adjust to supply and demand. The same reasoning appears to some extent in the Space for Space experience in the Netherlands where landowners are compensated when they agree to stop their livestock activities.

9.2.3 Trading and transferring a right to develop

Postulating the existence of transferable rights assumes that there is something to trade, in other words, that one of the parties is ready to relinquish an attribute of his property (the right to build, for example) to another owner. Whatever the circumstances, no market will operate unless the exercise is worthwhile, or in other words, unless there is a demand for the rights. This raises the issue of the initial allotment of rights. The two concepts can be distinguished, depending on the methods used to value land and real estate which are themselves based on the way property is conceived.

Under one concept, which is fairly widespread in northern Europe, ownership of land does not include the right to the development value that re-

sults from urban growth in general and the provision of infrastructure. This is, for example, what happens (or rather happened) in Sweden or the Netherlands, but by means of different mechanisms (long-term land reserves for Swedish towns and the key role of towns in the development process in the Netherlands). Most of the value added by urban development is collected by the community – the notion of 'betterment recoupment' that has been widely accepted but is now questioned.

The other concept which prevails, for example, in several countries in southern Europe (there is no pure case and it is therefore difficult to be more precise here) consists of allowing the original landowner to keep the capital gain subject to tax corrections – for example, value added tax. In such systems, the introduction of urban development regulations or their amendment is generally perceived as a constraint on previously held rights, the assumption being that ownership was at the outset unconditional and included the development rights. Later, however, the reality was quite different. However, the argument which sets forth that zoning restrictions create a 'loss' for the landowner continues to be used.

Such is the context in which it is possible to conceive of trading a 'right' that is assumed to be in existence but the actual use of which has not been authorized. This point is essential to understanding the crucial importance of the original allotment of rights and the conventional nature of that allotment.

Other land rights' markets exist. The market in shooting rights, for example, which is still extant although of minor importance, or fishing rights if water is assimilated to land (legally not completely irrelevant). However, the heart of the problem and the major experiments in rights trading concern the market in rights to intensify land use which are essentially the rights to engage in urban development or, more and more, redevelopment. This chapter focuses on these rights.

9.3 Origins and applications of a market for development rights as a non-financial compensation: the case of France

This section compares the current systems employing the transferable rights technique in France with elements used in other countries. The legal, economic and institutional backgrounds vary widely – as do their aims and sphere of application. As indicated in Section 9.2.2, French urban development law – as in most European legal systems – is based on the principle of 'no compensation' for urban development constraints or, in the American terminology, 'police powers' trump the powers of 'eminent domain'. This feature clearly creates inequities for landowners whose land is adversely affected by urban development schemes.

In France, such inequities raised a particularly thorny problem in the early 1970s with the launch of urban planning through the Land Use Act (*Loi d'Orientation Foncière*, December 31, 1967) which for the first time introduced zoning as a general principle (*Plan d'Occupation des Sols*) from which there was no exemption. After a number of abortive attempts and lengthy controversy, the Urban Development Reform Act *(Loi sur la Réforme de l'Urbanisme*, December 31, 1976) finally made it possible, in some zones, for development rights to be transferred from one subzone (transmitter site) to another (receiver site). This principle is embodied today in article L 123-2 of the Urban Development Code, "In zones to be conserved because of the quality of the landscape (…) land-use plans may determine the conditions under which the development potential determined by the land-use coefficient set for the zone as a whole may, subject to authorization of the administrative authorities, be transferred in order to promote concentration of development on other lots in one or more sectors of the same zone." This wording is somewhat ambiguous in its reference to zones "to be conserved because of the quality of the landscape." There is no case law as yet regarding the intent to exclude productive agricultural areas, or zones available for development or whether a distinction can be made between them.

The provision generated a great deal of debate before, during and after its adoption. Considerable criticism has been targeted to three points: the tie to zoning, incompatibility with the principle of no compensation for zoning restrictions, and distributive justice.

With regard to the first point, the difficulty resides in using the term 'quality of landscape' which seems to be equated with a conservancy area in the local plan in which all development is prohibited. The issue of how productive agricultural areas can be excluded since these are often areas in which the landscape is of outstanding quality is still controversial.

With respect to the second point, what is being questioned is the very principle of the transfer of a development right. It implies compensation for constraints since it applies solely to land to be "conserved because of the quality of the landscape," in opposition to a basic principle of land use law in France. From the point of view of distributive justice, it can be said that the equity of the procedure is basically conditioned by the original distribution of land holdings. Were land distributed in a fairly equitable way among all the inhabitants, the procedure would be neutral in terms of distributive justice. However, the situation is generally very different to this, at least in France. The technique then represents a transfer from the community as a whole, the legitimate beneficiaries of any value added by urban development, to the subgroup represented by the landowners in the zone concerned. Such a notion of equity can be discussed.

Although the law allowing the transfer of development rights has now been in place for nearly 30 years, applications remain few, disparate and dif-

ficult to summarize. Not all of them are completely convincing. The examples are confined to a limited number of geographical areas, mostly coastal and mountain areas where the pressure of tourist development generates important increases in land prices. This 'windfall' to be shared is usually an important facilitating condition for the implementation of TDRs. Moreover, it has mostly been used where a powerful mayor was in a position to firmly implement his land use plan. Thus, it was more a compensating device designed to help the implementation of a plan than the actual market mechanism it was supposed to be.

9.4 Land readjustment as a non-financial device for compensation

Another interesting non-financial compensation device, exemplified in several preceding chapters is land readjustment. The land readjustment technique in France has long been extensively used in agricultural areas using a well known and straightforward mandatory device led by the Ministry of Agriculture. It includes subsidies distributed to affected landowners to reorganize their farming activities.

This device has been extensively applied to improve the land ownership pattern of agricultural areas in order to reach better agricultural economic efficiency. However, as a compensation device it has only in a very limited form been extended to urban and suburban areas. In contrast to Germany *(Umlegung)* or Japan *(Kukaku Seiri)*, for example, land readjustment has been used as a compensation device under the name of *remembrement-aménagement* (readjustment and development) in only a very limited and non-significant number of cases. The legal process is complicated, and political acceptability is limited – factors that explain this failure.

9.5 Some criteria for an economic evaluation of markets for development rights[119]

As a whole, trials which include the use of non-compensation devices have not yet reached critical mass levels that would allow statistically reliable conclusions to be drawn. Even though there is a fairly large number of examples in the U.S., they are in different geographical areas, have different aims, use different operating methods and, naturally, show different results. Many examples of the practice – generally on an informal level – occur among very

119 Some of these elements have been developed in Renard (2007).

small groups of owners and operate by consensus without any formal legal or institutional framework being involved. Such examples, generally occurring in built-up areas, have a long history in the form of TDRs in the U.S. and private law constraints in France. On the other hand, use of the method in a vast geographical area by means of a universally applicable mechanism formally established in advance is still fairly limited, and the various experiences that are described in the preceding chapters display both a profusion of experiences but also the lack of a systematic and general legal and economic framework. Most examples have specific features, making it difficult to reach general conclusions.

The examples presented and the information available on other schemes nevertheless enable some assessment of the practice of attaching tradable rights to land and using them as a compensation device, be it TDR or something else. After an examination of the real nature of the rights being traded, a look will be taken at the key link between tradable rights and zoning. In addition, a consideration of the way these trading rights markets operate and the prices/market prices they generate will illustrate the distributive effects of the system.

The goals attributed to most schemes are generally environmental or architectural. The most frequent is nature conservancy. Many examples, often smaller in size, focus on architectural merit and the preservation of listed structures. Nevertheless, the most frequently cited case remains nature conservancy, preservation of sites of outstanding natural beauty and protection of agricultural land in the vicinity of built-up areas. Indeed, it is often in terms of the 'surface area preserved for conservation in perpetuity' that the success of a program is measured. An area 'conserved in perpetuity' is taken to mean one that has transferred all its development rights and is thus closed to development. However, this particular aim is frequently merely the backdrop to the prime objective of the technique which is distribution, namely to provide compensation for the constraints which society places on the use of property, or in other words, to render acceptable the inequalities created by zoning laws which by their nature cause development rights to be distributed inequitably.

The goal of nature conservancy, or of the preservation of structures of architectural merit, is the prime objective of the regulatory procedure. The TDRs technique is, therefore, to be regarded more as an intermediate instrument to facilitate implementation of a plan. The concept of equity promoted by TDRs schemes will be discussed later.

The technique may also serve as a legal safety net for the planner. Even if the scheme is not in operation, the mere fact that it is in place will enable disputes over compensation for constraints to be avoided. This is an important aim in North America in view of the widespread litigation prompted by potential 'takings.'

9.5.1 The legal nature of transferable development rights

In all countries that have made use of TDRs of one sort or another, the legal status of those rights has been a point of contention, and of litigation. It has been questioned whether they are an integral part of a property (even when destined to be used at another site) or whether they are merely a financial instrument to provide compensation for value lost as a result of a constraint. This is an important point, both because of its impact on the legal viewpoint on the issue (in France and Germany, for example, it is unlawful for planning restrictions to be subject to compensation except in very special circumstances) but also because of the way it is applied and in the way compensation is assessed.

As explained earlier, in the U.S., the case law on zoning ('takings') has played a key part in determining the way urban development operates and development rights are managed by providing compensation for an owner when a regulation considered extremely restrictive is viewed as 'taking.' With the sword of Damocles – represented by the threat of litigation under the Fifth Amendment to the Constitution – hanging constantly over the planner, he may find TDRs an acceptable means of mitigating the threat. It was in fact as a consequence of proceedings of this sort (the decision in *Penn Central Transportation Company v. City of New York* (1978), referred to in Chapter 7 about the U.S.) that the practice was described in detail. Case law, however, while it may have assimilated the principle that the title to one plot of land might include, even if only implicitly, a right to make use of another plot, has set limits to the practice, which have not yet been finalized.

The concept of property rights itself has never been ultimately defined. Many commentators turn to the idea of a 'bundle of rights' whereby ownership of land consists of a series of autonomous, separable rights – rights to use, to access, to develop, to fly over, and to cross, for example. However, this idea does not settle the question of transferable rights in legal terms, namely which of the rights attached to land are by their nature part of ownership (such as the right to farm the land) and which are rights whose attributes may be determined by the social function of the property (such as the right to build).

The Penn Central decision, which had a major impact on case law on 'takings' in the U.S., expressly took the stand that TDRs were a useful instrument to secure compensation for some of the effects which regulation had on land and housing values. In Justice Brennan's own words while explaining the majority view, "[w]hile these rights may not have constituted 'just compensation' if a 'taking' had occurred, these rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."

Whether or not a 'taking' had occurred, the procedure was an additional instrument that could help landowners to accept stringent zoning regulations.

The Suitum decision of 1997 provides a good illustration of current trends in the relevant case law which has taken a clear stand on the point. Under the Lake Tahoe transferable developments rights scheme, the U.S. Supreme Court concluded that the right to build was an inalienable part of property rights, was as such usable *in situ* and was not transferable to another site. This was the first time such reasoning had been taken all the way to the Federal Supreme Court. The Suitum decision was thus of major importance because it questioned whether it was lawful for the procedure to set limits on the financial implications of land use regulations.

Such a decision is clearly at odds with several experiences described in this book, where development rights are used essentially as currency.

In a quite different context, a similar debate has been going on in France, although from a different starting point since the basic premise is that constraints are not subject to compensation. When the Act was drafted, voices were heard denouncing the risks involved in introducing rights that could be considered as 'imaginary' (Lenôtre-Villecoin, 1975). Like the Suitum decision in the U.S., this amounts to an attack on the very principle behind the creation of the legal entity of 'transferable rights.' According to J. Lenôtre-Villecoin, "the capacity to transfer an imaginary development right establishes a *jus abutendi*, or a right of disposal, in a case in which the public interest, in the form of regulation of urban development, is against existence of the right to build at all." Perhaps it is time to deal finally with the inseparable trio (*usus*, *fructus* and *abusus*) which 'abuse' opinion in Latin countries.

9.5.2 The relationship between zoning and the use of non-financial compensation

There is a clear link between zoning and the use of non-financial compensation. Non-financial compensation, be it TDR or another device, is in itself a zoning instrument since it implies a division into emission and reception zones. Greater precision may well be introduced by stipulating that the zones must be of precisely specified dimensions; otherwise the whole scheme will be invalidated. If the scheme is to operate properly, owners in both emission and reception zones need to be given appropriate incentives, which should help to balance supply against demand with respect to development rights.

In the case of reception zones, where conventional planning regulations operate as usual, the purpose of zoning is to ensure a high standard of urban development. The quality of urban development is thus the criterion to be taken into account. As the process proceeds, however, it becomes difficult to provide adequate incentives. Many TDR programs, such as the Pinelands in the U.S., or Space for Space in the Netherlands, use a system of 'bonus zon-

ing,' in other words, the density authorized increases if transferable rights are purchased. This makes it very tempting for the planner to reduce the ordinary density (where no rights have been purchased) and increase the bonus density. However, such a policy is likely to fall foul of the principle of vested rights and to lead to litigation. Incentive zoning is thus a difficult process to handle.

Another sensitive issue is the eligibility of a zone to be designated an emission zone which opens the way to granting transferable rights. The subject is one of endless debate with no clear way of settling it on a systematic basis. First of all, it involves agricultural land and the issues of whether such land should be allocated TDRs and if so, on whose behalf. Generally speaking, the price of agricultural land could be considered to reflect its productivity, the current net value of its future yield. It is paradoxical to allot 'development rights' to land on which farming is expected to continue even if the rights are not to be used on that land. Arguments are often based – this is generally the case in France and in most of the American examples – on the natural beauty and biological diversity of the site. However, this takes no account of the existing usage and places owners with quite different relationships with their land on the same footing.

Although no general conclusion can be reached on the linkage between zoning and transferable rights, note should be taken of the risk of distorting zone demarcations and urban planning regulations in order to propel the rights market to function. It is important to maintain a proper perspective; the transferable rights procedure is no more than an aid to good urban planning and not an end in itself.

9.5.3 Technical and institutional feasibility

The examples described above and the comments make it clear that sensitive management is needed to make the technique work.

The landmark examples described and analyzed all rely on an ad hoc institutional base – such as the Pinelands Commission – which assumes responsibility for the whole area concerned, without any right of oversight by common law institutions, counties or districts. This structure takes care of both zoning and the management of development rights, possibly creating a bank of development rights. On the other hand, when an elected council is responsible for operating the system, an election often succeeds in undoing a previous body's achievements.

Another difficult matter, in addition to zone demarcation as mentioned above, is management over time. The initial allotment of rights in transmitter and receiver zones has to correspond to some point of equilibrium at some given time in order to enable the market to operate and give sellers an incentive to sell and buyers an incentive to buy. The question arises as to what long-term dynamics of the system should be expected. From the standpoint

of the seller, a plot of land that has been stripped of its development rights is closed to development in perpetuity. Then as time passes, and if demand remains at a given level or increases, pressures will build and the price of rights will soar. Should more rights then be allotted to land that has been stripped of them, and under what circumstances? Can the initial allocation of development rights be considered immutable even if this is likely to lead to a price boom? What should be done with regard to owners in the emission zone who hold on to rights, speculating on a rising market? Should their development rights be expropriated?

Few of the examples discussed have yet had to face this problem. Either the mass of rights has been very large, or demand has been overestimated, or incentives were not strong enough, or the scheme was too new, or the problem has not yet taken an acute turn. Its advent is inevitable, and the reallotment of rights will require very careful handling. In any event, schemes need at the outset to determine what the medium-term prospects are and to define the reallotment procedure to be used: such is the core of the difficulty in applying long term strategic planning in a world of flexibility and market volatility.

Another technical question to be resolved is the manner in which rights are to be managed. In order to allow the market to operate, there has to be a body with the power to buy, stock and sell rights at any given time. In view of the special nature of such a market and the likelihood of discontinuities, it is a mistake to think that it will be able to operate on a decentralized basis from the beginning. Here again, the examples that are working well are doing so with the help of a development rights bank which operates in close association with the general aims of the system.

One last need is to educate owners, both emitters and receivers. Trading in TDRs is an activity that is not self-evident and needs extensive explanation and demonstration in order to work properly.

9.5.4 Price of rights: a 'market price'?

It would be great to be able to answer this question, taking market price to mean the price that would balance supply against demand under conditions of atomicity, transparency, and so forth. Even in the most successful cases, the number of transactions involved (low) and the time the scheme has been in operation (short) does not allow statistically significant conclusions to be drawn. The only firm conclusion, reached in settings as different as Auckland in New Zealand, Torino in Italy, Montgomery County in Maryland or the commune of Taninges in the French Alps is that prices rise sharply when the procedure is beginning to settle down and then level off or even decline.

To be more specific on this important point, there has to be a way to make detailed analyses of local markets in order to set the 'market price' of a devel-

opment right on a residual basis (from the market price of the end product, the building, less the costs of the operation, deduction is made the highest level of land tax likely and thus, the value of the development rights to be purchased). The actual price will then probably be seen to be nowhere near this 'market price' unless the purchase of tradable rights is mandatory and there is no alternative nearby (e.g. a development zone not subject to the transfer system). This comes back to the paradox mentioned earlier, that this system of tradable rights will only work properly in a context where land use is subject to strict planning regulations. And this non-financial compensation is then the result of a negotiation among public authorities, developers and the landowners.

9.5.5 Equity and efficiency

The concept of equity has to be considered from the point of view of landowners and from the point of view of the inhabitants of a zone as a whole. In the first case, tradable rights fulfill an essential function in the absence of a fiscal system capable of removing added value. The price of land is very dependent on the development rights allowed by the zoning regulations. Tradable rights make it possible to correct the inequities introduced by zoning. If the concept of equity is extended to all inhabitants, assessment of the method becomes more difficult and depends on the way property rights are conceived and the tax system which allows them to be put into operation.

There are two contrasting situations. In some countries, such as in North America and south western Europe, there is no universally applicable mechanism for recovering capital gains from urban development and/or payments for development rights. The practice of transferring development rights or granting development rights somewhere else is thus equivalent in such cases to distributing the overall capital gain by urban development among landowners only, whereas it might well be expected to return to the community as a whole, in particular when the public amenities that give rise to that added value are funded by the taxpayer. Introducing rights transfers is thus, roughly speaking, a means of formalizing a transfer from those acquiring houses to landowners. This is a limited view of equity, which may admittedly be of help in particular cases, at the cost of a broader notion of equity. This applies unless land is divided up in a very comprehensive and equal way among the inhabitants, which is unusual.

The second type of situation, which is found mainly in northern Europe, is founded on the principle that the capital gain due to urban development should return – at least in very large part – to the community. Such is the very principle of betterment recoupment. Using various methods discussed above, the initial procedure that increases the value of land essentially benefits the community rather than the landowner. This leads again to the very definition

of the right of property – on land and its contents. Stating that non-financial compensation is a compensation for the loss of a right relies on the assumption that the development right was the property of the landowner. This is a strong assumption, especially in countries with a flexible planning system.

9.6 Conclusion: towards a redefinition of the right of property on land

We are thus brought back once more to the definition and content of property law, the key to the problem. The mechanism of non-financial compensation basically relies on the assumption of an extensive definition of the right of property, including the right of 'capital gain' on land, even if this gain is the result of the general evolution, of urban growth, or of the construction of infrastructure by public authorities without any input by the landowner.

As noted by Donald Krueckeberg (Krueckeberg, 1995): "Property is not just the object of possession or capital in isolation, but a set of relationships between the owner of a thing and everyone else's claim to the same thing. This understanding of property highlights considerations of distributive justice that are particularly important in light of the issues in the contemporary debate about property rights. Rights to personal use of property are fundamental to individual and social well-being: rights to profit from property, in contrast, have always been subject to reasonable constraints for the benefits of the entire community and society. Attempts to establish a contrary case by appealing to natural rights, market necessity, liberty, social utility, or just desert all fail to withstand scrutiny. (…) These concepts of use rights and profit rights in property are at the heart of the planning question".

The limited success of the method in the U.S. is due to the specific legal content of its property law and above all to its case law on added and lost value. The radical differences in practice with West European countries, in particular, may partially explain the difficulties of transferring the system.

The last word may be left to Ann Louise Strong, an expert in the field, who showed great interest in and enthusiasm for these schemes at the outset. She now has a more reserved outlook: "Although there has been some success with TDRs, we are skeptical of the technique in general. It has generated far more discussion than actual land preservation. There are serious practical and legal obstacles to implementing it. (…) The author believes that the limited success stories, such as the one in Montgomery County, Maryland, result from regulation, with TDRs as only one small part of the programme" (Strong *et al.*, 1996).

The final conclusion about this set of mechanisms which are now spreading all around the world – first in the U.S. and in Western Europe, then in South America and now in China – may appear pessimistic. Our comment is

not questioning the very principle of creating rights and organizing markets for the exchange of rights. Such mechanisms are innovative and promising. The mechanism with carbon markets, greenhouse gas emissions, which is now being developed around the world, is probably a good way to limit such emissions in an efficient way, connected with other instruments. We would like here to insist on the specificity of the mechanism as applied to land and land betterment, where the practical and theoretical issues are different and require a deeper analysis and economic practice.

References

Hagman, D. & D. Misczynski (1978), **Windfalls for wipeouts, land value capture and compensation**, Chicago: ASPO.

Krueckeberg, D. (1995), The difficult character of property. To whom do things belong?, in: **Journal of the American Planning Association** (61), pp. 301-309.

Lenôtre-Villecoin, J. (1975), **Urbanisme et propriété du sol. Les propriétaires vont-ils pouvoir monnayer des droits de construire fictifs?** Les Études.

Renard, V. (2007), Property Rights and the Transfer of Development Rights: Questions of Efficiency and Equity, in: **Town Planning Review 78** (1), pp. 41-60.

Strong, A.L., D.R. Mandelker & E.D. Kelly (1996), Property rights and takings, in: **Journal of the American Planning Association** (62), pp. 5-16.

10 Property, law and non-financial compensation

Philip Booth

10.1 Introduction

The idea that owners of land might be compensated as a result of restrictions imposed on the way in which that land is occupied and used implies a particular understanding of the nature of property and its legal formulation. It relies on the premise that there is such a thing as a right to future development of land that can be separately identified and given legal existence, and that, because it is a right, it requires compensation if it is removed. What is striking from the earlier chapters in this book is that such an understanding appears to be widely shared. In particular, the phrase that is used frequently in relation to property is that of the 'bundle of rights' which owners are said to enjoy. This in turn suggests that rights may be selectively restricted or disposed of without ownership as a whole being affected, and that owners might reasonably expect to be compensated if some of the bundle is removed from their control. A right to future development (if it actually exists) would form part of the bundle. The purpose of this chapter is, therefore, to explore the origins of the 'bundle of rights' thesis and locate the question of non-financial compensation within the legal traditions of Europe and America.

10.2 Concepts of property: the common law and Roman law traditions

What is clear from legal history is the energy which legal systems have devoted to understanding, shaping and limiting concepts of property. Property in land is of course only one element of property law, but one which poses particularly intractable problems. There is an important point to make at the outset. In common English parlance property often signifies the tangible object (land or buildings). But in its origins, property is in fact an abstract concept which designates the attributes of ownership. Referring to property as a bundle of rights is helpful in restoring the meaning of the word. What, lawyers have inquired, does it mean to possess land? If someone occupies land and uses it, what status is thereby conferred? Answers to such questions have given rise to alternative versions of what property in land is, and these alternative versions are, we may argue, in conflict. The 'bundle of rights' conceptualization, enormously important though it is, is potentially at odds with views of property as absolute dominium. We need to start, therefore, by exploring the concept of property as a bundle of rights.

Though he did not himself use the phrase, the 'bundle of rights' approach to understanding property derives from the great American legal theorist,

Hohfeld (1913; 1917). At pains to try and determine the nature of legal rights in land, he began with the idea that ownership is primarily a relational concept: your rights in property are about the obligations that you owe to others and others owe to you as a result of your owning property. It follows that the rights and obligations consequent upon ownership are multiple and separable. Hohfeld distinguished between rights *in personam* and rights *in rem*, which refer respectively to rights against a particular individual and against the generality of people. To that basic distinction, Hohfeld then adds further categorizations, to include rights, privileges, powers, immunities and duties, each of which may be either against individuals or people in general. Hohfeld continues to be a point of reference for the development of legal theories of property, even if there has been much argument about the categories that he identified. But it is worth noting that the phrase 'bundle of rights' coarsens the fine distinctions he was making: he himself refers to "an aggregate of rights (or claims), privileges, powers and immunities" (Hohfeld, 1917: 746). In this formulation, Hohfeld identifies, by implication, future development not as a right, but as a privilege of ownership.

Hohfeld's work is located within a specific legal tradition, that of common law as it developed in both England and America. There are two distinct aspects to that tradition that have a bearing on the legal conceptualization of property in land. One is the process of law and of the forms of legal reasoning to which it gave rise. The other is the system of property developed under the feudal regime in the England of the Middle Ages. Both set English property law concepts apart from those of continental Europe and require explanation.

Common law itself is described as being largely a product of the administrative reforms of Henry II, designed to establish central control in the face of baronial opposition. Common law was in effect a system of courts put in place to ensure justice that was common to the country as a whole. The courts were focused on finding remedies for alleged injustice which in turn led to an emphasis upon case law to provide the framework within which later judgments would be made. From this emphasis came the tendency to derive fundamental principles from facts of particular cases which could then be applied to subsequent cases. At its beginnings, the system of justice represented by common law was little different from that which obtained in continental Europe, with one important distinction: common law applied to the kingdom as a whole, whereas in continental Europe, legal systems were fragmented. This meant that while legal practice shaped doctrine in this country and the Inns of Court offered apprenticeship to would-be lawyers, in continental Europe law became an academic discipline. Legal theory turned increasingly to Roman law in the search for abstract concepts which would underpin legal systems. In time, this was to lead to the development of the civil code tradition in which codified legal rules were based upon abstract principles. Though some theorists in England did study Roman law, the prag-

matism of the case law tradition was maintained, and English and continental law gradually diverged (Van Caenegem, 1988; Booth, 2007).

As important, however, was the development of attitudes toward property. Feudal systems of property had evolved in continental Europe and were to be found everywhere. But nowhere was the feudal system applied more single-mindedly than in England after the Norman Conquest. The right to occupy and use land was, as West (1975) and Gray and Symes (1981) have explained, the consequence of entering into a relationship with a feudal superior: tenure was the reward for service, be it military, agricultural, domestic or even religious. It meant that there was only one absolute owner of land in England, and that was the monarch; everyone else had tenure by virtue of a grant from someone above them in the hierarchy of status, and anyone with tenure might grant others certain kinds of right as the result of service. It was necessary to envisage land as being the locus of a whole series of overlapping rights, duties and privileges. There was a further complication in that these rights might exist in the future, so that time became a fourth dimension in the concept of property (see also Booth, 2002).

There is some doubt as to whether the feudal system ever really existed in England in its pure form. Certainly by the later Middle Ages property relations had evolved well beyond the basic concept of property as a consequence of service. Service was transmuted into money payments and it became increasingly possible to exchange land on the payment of a fee. Lawyers struggled to find ways of expressing what exactly an individual with tenure actually had and how, in the event of conflict, one could establish who had the greater right to occupation or use. From this came the doctrine of estates which was a way of giving concrete expression to an essentially abstract concept of tenure and to the understanding that there could be competing interests in a single piece of land. Although this is far from Hohfeld's conceptualization of property as a series of rights and privileges accruing to one owner, the feudal system of property does establish a way of thinking about property and ownership that is multi-dimensional.

The contrast with the tradition of Roman law is clear, at least in principle. The Romans, in using the concept of *dominium,* assumed that all powers over land were in the hands of the owner-occupier: the owner had the right to enjoy land both in its current state and in the future and that right extended from the heavens to the depths of the earth (Parisi, 2002). The Romans contrasted the power of the owners over their land, subsumed in the term *dominium*, with the over-arching authority of the state, expressed in the term *imperium* (Gaudemet, 1995). The owner had absolute control over land unless reasons of state required interference. Although Roman property law formed the base of all European legal systems, in practice it underwent a radical transformation as a result of feudalism (Parisi, 2002). It was revived, to become the basis of the civil law tradition, one may deduce, under a dual impetus.

On the one hand is the fact that legal theory in continental Europe was developed, not on the basis of practice as in England but in the rarefied atmosphere of the universities, where the search for ideal models of law was encouraged. Roman law, we can argue, offered a way out of the muddle of contemporary legal practice. Rather more potent, however, was the revolt against feudalism that occurred throughout Europe between the 16th and 19th centuries, and the development of philosophies which proposed an entire set of property relations. Locke argued that the right to property in land was natural and preceded states and governments, and was won by honest labor. The Lockean ideal was taken up by Rousseau in the 18th century and the idea that the right to property was an essential part of the liberties of mankind became a tenet of the French Revolution. For the French, property became *un droit inviolable et sacré* (an inviolable and sacred right), which could in fact be violated if reasons of state provided an overwhelming reason to intervene. But in principle the sovereign state was set entirely apart from the process of landowning (Halpérin, 1995).

The U.S. inherited the English system of common law. But the Lockean principle of the natural right to property became deeply embedded in the American revolutionary psyche, and property was directly related to freedom (Gordon, 1996). But if Americans believed ownership rights to be absolute, American law could also conceptualize the incidents of ownership in the same way English law did. What was lacking was any vestigial remnant of feudalism such as remained in England where the sovereign is still in theory the only person who has absolute title to the land. Indeed, Americans developed a mistrust of government interference of all kinds and particularly in relation to property rights. The courts developed the doctrine of 'taking' and have been at pains to protect individual property owners from the arbitrary exercise of power. Planning powers have always been particularly suspect in this regard (Cullingworth, 1993), even if zoning ordinances were ruled to be constitutional as in the celebrated case of *Amber Realty v. Village of Euclid* in 1926. Hohfeld's analysis of property rights must, therefore, be seen in the light of this American ideal. Property for Hohfeld remains multi-textured, but whereas traditionally the textures were created by overlapping interests vested in several individuals, for Hohfeld it was the multi-layered range of rights and privileges vested in a single – possibly absolute – owner that was at issue.

Parisi (2002) argues that absolute ownership offers a more flexible and efficient system of property than does the common law tradition. Neale, on the other hand, argues that the concept of property as a series of separate interests offered exceptional flexibility and was a major factor in the creation of the urban environment in England in the 18th and 19th centuries. Nevertheless, it also true that successive attempts have been made to simplify property law since the Middle Ages, culminating in the Law of Property Acts of 1920-1925. Already at the end of 13th century, the ability to create new feu-

dal tenures was removed, and the round of major reform in the 1920s was designed to restrict forms of tenure to two only: freehold, and leasehold for a term of years. Yet even that division came to seem problematic as leaseholders viewed themselves as being in absolute possession of their land and buildings. The most recent reforms in Britain have aimed to give increased possibilities for leaseholders to acquire the freehold of the buildings in which they have leases.

This tension between two visions of ownership and the nature of property goes beyond the scope of this chapter. What we can begin to discern, however, is a distinction between the nature of ownership and the character of the owner. The late medieval common law rationalization of feudal tenure was able to conceive of multiple and possibly competing interests in a single parcel of land. The Roman law tradition as it came to be formulated in the 18th century postulated property vested in a single owner without the hierarchical constraints implicit in the feudal system. As for the nature of ownership, Roman law viewed the rights, privileges and obligations of possessing land as a single indivisible entity, in stark contrast to the Hohfeldian vision of the bundle of rights. It is this distinction that allows Hohfeld to perpetuate a feudal understanding of the multi-textured nature of property, while working within the American tradition that prized the independence of the absolute owner of land.

10.3 The right to future development

Within these competing concepts of property and the nature of landownership, we can begin to explore the question of future development. Is it indeed a right, as is implied by all the examples given in the preceding chapters? Certainly it is widely held to be so. Within the Roman law tradition, all aspects of ownership were considered indivisible. This meant that potential for future use and development was as much part of what the landowner acquired on taking possession of land as the benefits that it yielded in its current state. Of course, we have already noted that the concept of absolute ownership written into the French constitution after the Revolution was a fiction insofar as the state reserved the right to intervene if necessary for reasons of state. In time, therefore, in the countries of the civil code tradition, the absolute right to ownership was set about with constraints, in particular on the way in which owners might develop their land. Codified regulations were the means by which the over-arching needs of the state were expressed. And in continental Europe, although not in America, the state reserved considerable rights to expropriate land if necessary to pursue a national goal. None of this removed the idea that future development was an indissoluble part of what it meant to be an owner of property in land. In the civil code countries there was a right

to develop, but within the constraints imposed by the code.

The common law tradition had a rather different outlook on the right to develop. Not everyone with an interest in a parcel of land would have the right to benefit from its potential for development. It would depend entirely on the nature of the interest. Some forms of tenure allowed the person in possession only to benefit from land in its current state. Anyone with an interest in reversion, in other words, at a point when someone else had ceased to occupy a particular parcel, had no right to current enjoyment of the land. In leasehold tenure, where someone would be granted the right to use land for a fixed term of years, the lessee would indeed have a right to future development, but only for the period of the lease, after which the land, now possibly improved in value, reverted to the freeholder. The original use of this form of tenure in England was apparently to control the conversion of arable land to (profitable) sheep-grazing but from the early modern period onwards, it became a potent means of controlling future urban development (Holdsworth, 1927). A lessee would be given a right, by contract, to put up buildings from which the lessee might extract a short-term gain. But in the long term, once the lease was up, the land and the buildings would revert to the ground landlord and the final lessee would acquire no capital advantage from the property. By the late 19th century this had come to seem nothing short of scandalous, that the final lessee might have invested in improvements which then accrued to the benefit of the freeholder not the lessee. Even more scandalous was the fact that to renew the lease, the lessee would be required to pay a premium to the freeholder (Acland, 1914).

Yet within this English common law tradition, freeholders clearly did come to see themselves as having a right to the future development of land. We can argue that this right was more fiercely defended because, in the case of aristocratic landholdings, the right to dispose of property might be very seriously curtailed by the terms of inheritance. An inheritor of an estate might be limited to benefiting from it during his lifetime only, with reversion already settled on his offspring; he would not under those conditions be free to sell outright. This made the necessity of raising an income by developing the land ever more pressing. Thus, if not all those with an interest in land had a right to develop, the idea that the freeholder at least had such a right was also deeply ingrained within the English system of property.

If conceptions of property include, in one form or another, an understanding of future development as a right, the notion of compensation follows swiftly in its train. Interestingly, this notion of compensation for the withdrawal of a right to future development seems to have been better articulated earlier in the English system than in the countries with the civil code tradition. If ownership is expressed as *dominium,* with the owner in absolute control of the parcel which he or she occupies, but the law recognizes the right of the state to exercise its *imperium* for the greater good of the nation, the

question of compensation for the loss of development rights as a separate category might not arise (even if the loss of property as a whole would indeed merit compensation). If, on the other hand, future development is seen as a separable part of what is entailed in landownership, then it becomes much easier to argue that when that right is removed for whatever reason, the loss should be compensated. This was precisely the debate that took place in Britain in the first half of the 20th century when statutory townplanning was first introduced. It is, therefore, to the British case that we must now turn.

10.4 Compensation and betterment: the English dilemma

In the range of countries represented in this book, Britain is conspicuous by its absence. This is because, in the narrow sense of Transferable Development Rights (TDRs), non-financial compensation is almost entirely absent in Britain. The fact of its absence sheds interesting light on the nature of property rights and the right to future development in particular, and on the problem of how landowners might be compensated for their loss.

The introduction of legislation for townplanning in 1909 was a contentious affair. There had, of course, been a strong lobby arguing for the end of a development free-for-all that appeared to have nefarious consequences for the quality of life. But it was scarcely surprising, given the extent to which landowning was still the definer of status in Britain at the beginning of the 20th century, that there should have been considerable opposition to any control even of the relatively limited kind proposed by the 1909 Housing, Townplanning etc. Act. In the end, opposition was overcome and the legislation was granted royal assent, but opponents managed to ensure that the law included a right to compensation for owners who were not allowed to build on their land as a result of the provisions of a townplanning scheme[120] (Booth, 2003; Cox, 1984).

The argument that landowners should be compensated for the loss of a right to future development engendered a counter argument. If some landowners could lose from state intervention of this kind, it could also be argued that others might acquire a significant benefit from that intervention, by virtue of their land being identified as suitable for development. In that case, was it not appropriate that the benefit should accrue to the state and not to the individual landowner? So it was that the early townplanning legislation not only included a right to compensation but also allowed for the collection of betterment – the increase in value as a result of land being declared devel-

120 Townplanning schemes were a form of zoning plan introduced by the 1909 Act.

opable – by the state as represented by the municipal authorities that created the townplanning scheme.

The theory is simple enough, but the practice proved quite otherwise. In particular, the proportion of betterment that the state might collect was much contested, and the mechanics of collecting the betterment largely defeated local authorities. Very little money, it seems, came to the state as the result of the provisions of the 1909 Act or its successors until 1947. But there were two inherent problems with compensation and betterment. One was that not all land could be said to have the same development value. Close to an existing urban area, a parcel might very well have considerable development potential. Further away, however, land might have little or no value for development. Yet the entitlement to compensation was equal. The result was that local authorities regularly allocated far more land for future development and in so doing partially negated the benefits of having a townplanning system. Collecting betterment was ultimately even more problematic, even if the problems were only to emerge after World War II when for the first time compensation was collected in a rigorous fashion. The problem was that if the betterment tax was set at too high a level, the incentive for landowners to develop might be removed and in so doing also defeat the purposes of townplanning (Booth, 2003; Cox, 1984).

By the 1940s when the question of what shape the townplanning system should take in Britain after peace was declared, the question of how to resolve the twin problems of compensation and betterment became inescapable. The task was given to Lord Chief Justice Uthwatt whose reports (Uthwatt, 1941; 1942) remain an unequalled exploration of the difficulties sketched out above. His solution to the twin problems was to extinguish the right to future development and, ultimately, for the state to nationalize all land needed for development. Until that ultimate nationalization was achieved, however, the state would collect all the betterment accruing on development, and do so nationally, not locally.

Uthwatt was the first person to articulate the dilemma with compensation, that at any given moment in time only some land was actually attractive to potential developers and thereby had development value. His proposal to extinguish the right to develop was to offer compensation only to those who could claim that, but for the outbreak of war, their land was 'dead-ripe' for development. There would then be no further claim for compensation, and anyone wishing to develop land would require permission from the state to do so.

Uthwatt's proposals were not carried forward in their entirety into the Town and Country Planning Act 1947 introduced by the reforming Labour government of 1945. The move to nationalize development land was abandoned. The collection of betterment was introduced, but rapidly became mired in controversy, and that part of the Town and Country Planning Act was repealed

by a Conservative government in 1952. On the other hand, extinguishing development rights did endure as a central part of the legislation. The payment of compensation to those who had legitimate claims was also problematic but was ultimately a short-lived problem in that the number of landowners who could claim that their land was dead-ripe for development in 1939 was limited. But the central principle, that no one was entitled to develop their land without permission granted by the state, was not subsequently modified and remains the cornerstone of the British system of townplanning. The state had thereby nationalized the future development rights of all land – a term that had been deliberately used in the run-up to the legislation. It had deliberately insinuated itself into a structure which conceived of ownership as a multiplicity of interests and a range of different rights. The state was not over and beyond private property as the imperium/dominium model implied, it held an interest in land that was cognate with any other.

If the right to compensation was extinguished, and the state recognized no rights to development except those which it itself had granted, it follows that transferring development rights and non-financial compensation hardly exist as concepts in the British townplanning lexicon. There is a right to financial compensation where a landowner can claim that the activities of the local planning authority have led to an effective blighting of land as a result of the particular land use allocation that has been made. There has also been another problem that arises because of the fact that between 1947 and 1962, once a planning permission had been granted it could not be repealed except upon payment of compensation. As the pressure for development began to escalate once war-time and post-war restrictions on building were lifted at the end of the 1950s, this rapidly came to be seen as a major obstacle to rational townplanning. An amendment to the law restricted the validity of permissions to five years, a period which was reduced in 2004 to three years. Normally in the rare cases when a local authority has wanted to extinguish a planning permission, the chosen route has been by financial compensation, not by transferring rights. A recent exception to that rule was the case of a quarry owner in a national park who was persuaded to forego permission to extend a quarry that predated 1962 by the grant of an extension to another quarry outside the park. But this is very much an exceptional case.

10.5 Contractual agreements and the transfer of rights

If in the British case compensating for the loss of rights by mechanisms such as the Dutch Space for Space program is largely absent, there is another way in which non-financial compensation does in fact take place in British townplanning. It is, however, a case of the developer compensating the state rather

than the other way round.

From the earliest townplanning legislation, local authorities have always had the power to enter into contracts with private sector developers in order to ensure that townplanning objectives could be met. Since 1968, that power has been used specifically in conjunction with the granting of planning permissions for development and, in one interpretation at least, become the means by which the state could recover betterment in kind rather than in cash. Termed 'variously planning agreements,' 'planning obligations' and, most recently, 'planning contributions,' the underlying principle has remained the same. The developer enters into an agreement with the local authority that, should planning permission be granted for development, the developer will undertake to provide some kind of extra benefit for the good of the area as a whole. This benefit is described in the official literature as 'planning gain.'

The question of planning gain and the use of agreements to achieve it has been the subject of extensive and often agonized debate in planning literature and cannot concern us in any more than outline here (but see Healey, 1995; Campbell *et al,* 2000). What is relevant to the current discussion is that the nature of the gains achieved is highly diverse. A planning agreement or obligation may be a way of securing improvements to infrastructure, in whole or part necessary to sustain the development proposed. It has also been used as the means of securing additional facilities for an area in the form, say, of a new library or an extension to a school, the need for which may be only slightly related to the development. Or again, a developer may agree to dedicate part of the land for public use as open space. What is particularly striking about this mechanism is the way in which what started as an entirely private transaction between a local authority and a developer has become increasingly integrated into a national policy for development.

This recruitment of private contractual agreements into a national policy has come about for several reasons. In the first instance, the Conservative government of the 1980s was concerned that local authorities were abusing the freedom granted by the law and exacting gains from developers in an unwarranted fashion. Later, however, the government was to realize that contractual agreements could have their benefits and in something of an about-turn, from 1988 onwards it became national policy that local authorities should use agreements of this kind to secure affordable housing in any proposal for residential development. That policy, introduced by a Conservative government, has continued under the Labour administrations since 1997. The Labour government has also proposed a new reform that would see a prescribed tariff for planning gain to ensure that the gains were proportional to the development for which permission was being sought. This reform, introduced in the Planning and Compulsory Purchase Act 2004, has yet to be brought into effect and may not be so, because of a new proposal to capture betterment value through the payment of what is called the Planning Gain

Supplement. This money payment would not, however, entirely exclude the use of agreements for minor forms of planning gain.

10.6 Non-financial compensation in the U.S.

Given that the U.S. inherited the English common law tradition and with it an understanding of property which was essentially of the same order as that in England, it is appropriate to enquire why non-financial compensation in the form of TDRs should have surfaced as a practice there when it did not in Britain. English law sought to articulate the nature of property as a series of interests which it then saw as its duty to protect. But the articulation of property was done in the context of a hierarchy of status which was intimately connected with the possession of land. The American Founding Fathers had settled America in order to escape this hierarchy and the injustices it brought with it. The right to the unfettered ownership of land was, therefore, an integral part of the freedoms won by settling in the American continent. Absolute ownership without interference from anyone was central to the American dream.

The major concern of lawyers in the American system was to ensure that government interference, whether at federal or state level, was kept to a minimum. In particular the doctrine of 'taking' developed as a way of giving expression to unwarranted intrusion by public authorities in the legitimate concerns of landowners, and this made any control of land in the public interest difficult (Cullingworth, 1993).

In this context, as we have seen, the understanding of property as multiple interests vested in many people gave way to the concept of multiple rights vested in one owner. For government to interfere with any one of the multiple rights was to run the risk of an unconstitutional taking and this was clearly true of an identifiably separate right to future development. And if the right to future development was separately identifiable, it could clearly also be traded separately. The use of non-financial compensation in the American context is therefore the natural extension of a legal formulation that married a post-feudal common-law approach to property and a philosophy of natural rights in land and their relationship to the freedom of the citizen.

10.7 Non-financial compensation in the Civil Code tradition

Given that the Civil Code tradition did not recognize multiple, separable, rights in property in the same way as the common law, it is perhaps surprising that Hohfeld's view of property as a bundle of rights appears, from the ev-

idence of earlier chapters alone, also to be taking root in continental Europe. Perhaps the explanation for this shift is to be found in the inherent tension we noted above between *dominium* and *imperium*. If the landowner had a constitutional right to property but that constitutional right was in fact subordinated to overriding reasons of state, a landowner might paradoxically have even less right of redress against the state than in the common-law tradition, where property rights were only ever contingent and partial. The 'bundle of rights' conceptualization allows a potential injustice to be put right but in a way that is less costly than compensating for complete expropriation. And of course Hohfeld's extension of common-law doctrine was being applied in a context in which the ideal of absolute ownership was not only aimed for but achieved. There is less strain in translating a common-law doctrine into the civil code tradition than might at first appear.

There are, however, other ways of exploring the problem. Just as in the American tradition, landownership is strongly identified with personal liberty in the countries represented in this book. Systems of inheritance were designed to ensure that owners could not readily accumulate land and by so doing, replicate the old inequalities of feudalism. It is very much from this civil code tradition that the European Convention on Human Rights has identified, as a right for a natural or legal person, the "peaceful enjoyment of his possessions," (Art. 1 First Protocol) although the same article recognizes the right of governments to control property in the general interest. This does not, of itself, imply that if deprived of their rights in the general interest, landowners may expect to be compensated, but it is clearly only a small step to adopting such a position.

In practice, the civil code tradition of spatial planning has been at pains to identify the specific rights that a landowner does enjoy in a system of absolute ownership. Systems of zones and regulations that apply in all the countries covered in this book correspond very well to this concern by spelling out in detail what a landowner might or might not do with the land in his or her possession. The absolute right to property of the French constitution became a right to act in accordance with the townplanning code and its spatialized representation, the zoning plan. The single right to property in effect becomes a multiple right, to a certain way of using the land, to a particular form and quantity of building, both now and in the future. This is not exactly the Hohfeldian vision of rights in property, although it is broadly analogous, and it allows the individual rights to be separately enumerated. Once articulated in this way, the right to compensation if any of those rights are removed becomes inescapable.

In this context, transferring those rights in order to achieve a particular goal in the general interest of citizens becomes both possible in a legal sense and attractive. Financially, transferring rights rather than offering financial compensation for removing them is likely to be the attractive option for pub-

lic authorities. But the argument goes further than financial considerations alone. It is clear that in some countries at least, notably in Japan and the U.S., there is considerable reluctance to use compulsory purchase or eminent domain powers, precisely because to do so would infringe deeply held convictions about civil liberties. In these circumstances it is far better to negotiate for the transfer of rights than to expropriate and then to offer financial compensation.

There is another impact of the civil code tradition on property which is relevant to this discussion. Fragmentation of landownership seems to be a consequence of the insistence on the right to absolute dominium and the measures that are taken to ensure that land is not concentrated in particular hands. That this makes the achievement of objectives in the public interest difficult to achieve is clear from the accounts of Spain and Japan in this book, and transferring development rights becomes part of a bigger program to amalgamate landholdings and in this way organize space in the public interest.

10.8 Conclusion

The account of the way in which the two contrasting systems of law have dealt with the right to future development might suggest a convergence. Certainly, the fact that future development is being treated as a separable entity within the countries represented in this book suggests that implicitly a common-law approach to property is gaining ground. On the other hand, the move everywhere towards affirming absolute ownership even within countries of the common-law tradition suggests that the Roman law conception of *dominium* is also gaining ground. The convergence is indeed real enough within the narrow confines of the topic of this book. In a larger sense, the older distinctions still obtain, even if they are undergoing substantial change.

Convergence is, however, less important than a deeper issue. Non-financial compensation assumes that there is indeed a right that is concerned with the future utilization of land. Deeply ingrained though this understanding may be, there is no inherent reason why it should be a right. The European Convention on Human Rights refers to 'peaceful enjoyment' of property, but not specifically to the right to develop land. If future development of land was recast in terms of privilege and not a right, the whole question of compensation would be very different, indeed might disappear.

However, this is to accord a larger instrumental role to law than it in fact has. The law is the articulation of societal values and not the other way round. Property ownership retains a powerful hold in the collective psyche of the developed world, and different legal systems have striven to give the concept of property expression, but the concept itself precedes law. Non-financial

compensation and the various mechanisms described in this book are about finding legal ways of offsetting private interest against general interest and ensuring that public policy objectives for the spatial distribution of activities and development are met.

References

Acland, A.H.D. (1914), **Report of the Land Enquiry Committee**, Vol. 2, **Urban**. London: Hodder and Stoughton.

Booth, P. (2002), Nationalising development rights: the feudal origins of the British planning system, in: **Environmental Planning B: Planning and Design** (29), pp.129-139.

Booth, P. (2003), **Planning by consent: the origins and nature of British development control**, London: Routledge.

Booth, P. (2007), The control of discretion: planning and the common law tradition, in: **Planning Theory** (6), pp. 127-145.

Campbell, H., H. Ellis, C. Gladwell & J. Henneberry (2000), Planning obligations, planning practice and land use, in: **Environment and Planning B: Planning and Design** (27), pp. 759-775.

Cox, A.M. (1984), **Adversary land and politics**, Cambridge: Cambridge University Press.

Cullingworth, J.B. (1993), **The political culture of planning: American land use planning in a comparative perspective**, New York: Routledge.

Gaudemet, J. (1995), *Dominium–imperium*: les deux pouvoirs dans la Rome ancienne, in: **Droits: Revue juridique française** (22), pp. 3-17.

Gordon, R.W. (1996), Paradoxical property, in : Brewer, J. & Staves, S. (eds.), **Early modern conceptions of property**, London: Routledge, pp. 95-110.

Gray, K.J. & P.D. Symes (1981), **Real property and real people: principles of land law**, London: Butterworth.

Halpérin, J.L. (1995), Propriété et souveraineté de 1789 à 1804, **Droits : Revue française de théorie juridique** (22), pp. 67-79.

Healey, P., M. Purdue & F. Ennis (1995), **Negotiating development: rationales and practice for development obligations and planning gain**, London: E&FN Spon.

Hohfeld, W.N. (1913), Some fundamental legal conceptions as applied to legal reasoning, **Yale Law Journal** (23), pp. 1-59.

Hohfeld, W.N. (1917), Fundamental legal conceptions as applied in legal reasoning, in: **Yale Law Journal** (26), pp. 710-770.

Holdsworth, Sir W. (1927), **An historical introduction to the land law**, London: Oxford University Press.

Parisi, F. (2002), Entropy in property, in: **American Journal of Comparative Law** (50), pp. 595-632.

Uthwatt, A.A. (1941), **Expert committee on compensation and betterment: interim report**, Cmnd. 6291, London: His Majesty's Stationery Office.

Uthwatt, A.A. (1942), **Expert committee on compensation and betterment: final report**, Cmnd. 6386, London: His Majesty's Stationery Office.

Van Caenegem, R.C. (1988), **The birth of English common law**, 2nd edition. Cambridge: Cambridge University Press.

West, F.J. (1975), On the ruins of feudalism, capitalism?, in: Kamenka E. & R.S. Neale (eds.), **Feudalism, capitalism and beyond**, London: Edward Arnold, pp. 50-60.

11 Comparing the cases and planning for the future of non-financial compensation

Menno van der Veen, Marjolein Spaans, Bianca Putters and Leonie Janssen-Jansen

11.1 Introduction

In this chapter we analyze the international experiments and practices of non-financial compensation in planning as described in this book. As mentioned in Chapter 2, the country chapters on experiences with non-financial compensation in Japan, Korea, Spain, Italy, the U.S. and the Netherlands can be read as sequential presentations of descriptive data, but in accordance with a common framework to ease comparison between the different cases. This study does not aim to explain causal relations, but to mirror different approaches to an abstract problem in order to be inspired by, learn from or even transplant other experiences. By showing different planning innovations and solutions to comparable problems we hope to give assistance to planners who face similar problems in their countries. For each abstract problem we start by comparing the information in the summarizing tables for each of the six countries. In the first part of this chapter, after discussing differences and similarities in the cases (Section 11.2), we provide an overview of the abstract cases that we asked the writers to discuss. The three sections each include a table that provides an overview of the conservation (Section 11.3), conversion (Section 11.4) and re-allocation cases (Section 11.5).

In the second part of this chapter we draw conclusions on the methodological challenges we encountered in writing this book and the general conclusions of the cases. We also provide suggestions for further research. Despite the general formulations in abstract cases, the question remains whether the problems were really comparable or whether we forced the cases to fit our abstract case categories. A further refinement might be needed in the future. In the conservation case for example, we initially focused on preserving an open area that is now being used for extensive farming. For this category it seems wise to include an urban category as well, for example when it concerns conservation of landmarks like in the Penn Central case. An interesting addition to the conversion category can be found in necessities from outside such as disaster prevention in Japan or reducing emission in the Dutch case. Also ambitions from the inside such as the political decision to redevelop the Hudson Yards and the Japanese Katsuragi example offer interesting contributions. In our re-allocation case we focused on compensation for non-development, for example via restructuring incentives, to include owners of these plots as well in redevelopment processes in order to improve the overall quality of the area. Instruments on land readjustment belong to this category as well. These cases also address a variant of the non-financial compensation per se, which

is non-financial incentives. In future research these seem worthwhile additions to broaden up the abstract case categories. In our initial research set-up, some categories had a somewhat limited definition. But some authors interpreted these categories more broadly. This is why – where appropriate – we have included this in our comparison of the conservation, conversion and re-allocation cases.

11.2 Differences and similarities between the cases

In all countries, except for the Netherlands with its more regional perspective, the focus was on the local level. We also saw other purposes of the instruments used. In Chapter 2 we briefly introduced a variation on non-financial compensation *per se:* the non-financial incentive. It turned out some of the authors approached non-financial incentives as an integral part of the concept of non-financial compensation, which resulted in refinement of the concept with demarcation between non-financial compensation and incentives during the workshops held to discuss the submitted draft papers. In Section 11.6 we further elaborate on both compensation per se and incentives.

To summarize, in Korea, Italy and the Netherlands the focus was generally on non-financial incentives, probably because the property rights systems have little experience with the idea of takings. These countries do not seem to have development rights as such at their disposal that could be compensated. Another explanation for this difference might be the divergent views of the concept of non-financial compensation between planners and legal experts. The planners among the authors approached the idea of non-financial compensation more from the context of the case as a whole, whereas the lawyers regard the specific instrument within the context of compensation (i.e. loss of property rights). This distinction can also be explained as the perspective of the regulating government versus the perspective of the individual property owner. The first is predominant in Korea, Italy and the Netherlands, the second in Japan, Spain and the U.S. In these latter countries the focus is primarily on non-financial compensation, although in Japan and Spain some incentive-like uses of the instruments can also be identified. In Japan we saw a transfer of Floor Area Ratio (FAR) between areas in order to increase densities in specific areas and to conserve monuments or historical districts. In Spain the concept is used as a way of developing new housing areas. The U.S. focus is predominantly on the compensation side. There are many more incentive zoning examples to be found in the U.S. that have not been included in this book. In the U.S. the number of potential cases was enormous, though not all examples can be seen as 'best practices'. In Korea only cases of re-allocation could be found, and all with a focus on non-financial incentives via density bonuses.

The extent to which solutions are reached in each of the countries is perhaps also dependent on the adoption of the non-financial compensation techniques developed by each nation. In the Netherlands, the red for green instruments have yet to be implemented, and in the U.S. examples are in existence, but widespread or even consistent use is far from reality. Japanese planning practice has developed and puts its 'conservation' instruments into use as envisioned, and the same can perhaps be said about Italian planning practice. Nevertheless, it may be premature to divide the instruments into successes or failures based on their current implementation. It remains to be seen if a shift in economies or a modification of current provisions would affect the use and perceived value of these instruments.

11.3 The conservation problem

We started our research project by providing the authors of the country chapters with three abstract cases and asked them to report on how these problems were dealt with in their countries. The problem of conservation was described as follows: one or more local government would like to preserve an open area that is now being used for extensive farming. A residential neighborhood will be created nearby. The preservation and maintenance of the green area is too expensive for the farmer. The local government does not have any funding available for maintaining the green area and would therefore like the developers of the residential neighborhood to contribute to the green area, which could even be upgraded into a green recreational and wildlife area. Do the local governments utilize an instrument to force the developers to do that? In this conservation category, protection – and even upgrade – of the existing land use is important as well as whether the existing land use is 'open space' or contains monuments. The conservation problem of each case is systematically described in Table 11.1.

A review of the conservation cases presented in this text reveals the existence or application of different instruments, all geared to resolving concerns within the unique set of legal, social, physical and philosophical circumstances and tendencies inherent in each country: Japan, Italy, Spain, the U.S. and the Netherlands. As such, the instruments in use or as proposed appear to be well-tailored to each country's set of current problems or concerns. Two types of conservation are dealt with: conserving historic districts and buildings, and the protection of green (or blue) areas.

In Japan, for example, non-financial compensation in the Marunouchi District is being used in a conservation mode to provide fill-in in a land with very limited acreage and with a history of low density development. An increase in FAR was made possible through the developer's investments in public amenities such as open space, cultural facilities and the construction of a passage-

Table 11.1 The conservation problem

	Japan	Korea	Spain
Name of the case	Compensation for the non-development of Tokyo Station	–	Almería General Plan
Period in which the case was introduced	Bubble economy period (1986-1991)	–	1984-1988. Our case study finished in 1988 but the experience that started in 1984 lasted several more years
General objectives of the proposed instrument	Special FAR applied district: efficient utilization of lands in commercial districts	–	General objective was to boost restoration of historic buildings in derelict condition and to reuse them as public equipment to assist the cultural and social needs of the city center of Almería
Characteristic factors	- Preservation and restoration of the old station building - Area in front of station converted into a plaza (west side) - A large promenade deck planned with a high-rise building at each end (east side)	–	All the techniques involved were applied on a willing basis between private and public actors
Particular economic and social circumstances that have determined the instrument	A decade of low growth of the economy (1991-2001) resulted in several deregulation measures that were supposed to recover the economy	–	- Public reaction against a previous historic process of development which neglected the preservation of heritage - Financial difficulties for the public sector
Fit with the planning and legal system: What relation with spatial plans?	Project carried out in accordance with the city planning vision established for the Marunouchi District	–	- Regulatory framework established by ordinance contained in the General Plan (Master Planning instrument) of the municipality - Special physical provisions drafted in the planning
Were specific laws and regulations drawn up?	Amendment of the City Planning Law and Building Standards Law in 2001	–	Only at the local level
Spatial level at which the case is tackled		–	Local (municipality)
Relevant public actors and role	- National government: provider of subsidisation for the renovation of Tokyo Station - Tokyo Metropolitan Government: provides the conditions for the FAR applied district	–	- City council of Almería established the policy and the rules and controls its enforcement - Developers and building owners are the economic actors by means of free agreements amongst them - 146 TDRs achieved

Italy	U.S.	Netherlands
Schio	Malibu, California	Limburg experiment VORm
From 1960	2005	Still in set-up phase, first experiments started in 2006
Actuating management of the municipality General Town Plan (GTP) choice	No increase in development in environmentally- sensitive areas	Reinvesting windfall profits of a few additional development sites in provincial nature development program
- Little urban vision - Public/private negotiation is very informal	- Sending area is the Santa Monica Mountains Area coastal zone - Receiving areas are only two districts in the City of Malibu – MF (Multiple Family) and MFBF (Multi-Family Beachfront)	Use of profits in urban land uses for provincial policy on nature development
Need for public control of the expansion of large urban areas	- The California Coastal Commission was afraid that development from LA would spread to Malibu - Large number of undeveloped parcels with limited infrastructure	Decision of national government to economize on nature development
This instrument is used in a few parts of the municipality General Regulation Plan	Special coastal regulation: but basically TDCs are within the city Zoning Code that conforms to the city Land Use Plan	Initiatives have to be laid down in the local land use plans
General national and regional legislation	Not for this particular case	No
Only in the areas for the actuating plans	Because of sending area being outside of the City of Malibu, this is regional-like	Provincial level
Municipality	The City of Malibu approves the transfer of TDCs	Province of Limburg (initiative and coordination) and local authorities (implementation of additional sites)

▶

Table 11.1 continued

	Japan	Korea	Spain
Balance between private and public exchange	The redevelopment project is an outcome of negotiations between private and public parties, and not so much a result of regulations set up by the government in advance	–	- Building owners or developers not interested in its restoration battled with the municipality in exchange for development rights allocable in other areas. - Properties of the historc buildings transferred to the municipality which restored and reused them as public facilities
Parties which financed the case	National government, JR East and some other private parties	–	- Properties are contributed by the private sector - Public sector finances the restoration works
Possibility for public participation	No, only a master plan was made which is seen as a 'gentlemen's agreement' by the involved parties	–	Each one of the deals which performs a TDR is subject to a period of public participation to allow possible representations and suggestions of third private parties

way (the Marunouchi Building); it was made possible through the transfer of FAR from one building to another (the Industry Club of Japan Building); and, it was made possible through the 'use substitution instrument' which allowed an exchange of uses between different buildings in the district (the Tokyo Building). This last example allowed, in effect, a relaxation of the use substitutions in Marunouchi.

Transferable Development Rights (TDRs) are used in Spain even though the laws do not include them per se. They are viewed as a form of the land readjustment technique. With the newly elected democracy came the ambition to conserve its special historic resources and thus to halt the common practice of demolishing historic buildings.

In Italy, non-financial compensation instruments have been applied to preserve green areas and historic districts where eminent domain costs are prohibitive for a city, and disputes and the lack of political consensus further complicates and impedes necessary development. The transfer of development rights from areas designated as suitable for public use to areas designated as appropriate for additional development makes it possible for the city to acquire the land it needs and simultaneously provides developers with opportunities not previously available.

The use of transferable development credits (TDCs) in Malibu has helped to protect an environmentally-sensitive section of the area while allowing a landowner to subdivide his parcel of land within city limits. This TDC program is an example of collaboration between a municipality and a broader region that can be viewed as a winning measure for the overall region in that it limits development to an area with closer ties to infrastructure and allows more remote areas to remain undeveloped. However, at the time of publica-

Italy	U.S.	Netherlands
More public interest than private	- Negotiations take place between owners of sending lots and owners of receiving lots - The Planning Director calculates TDCs and maintains the records of transfer	Mainly a contract between province and local authority. Local authority then passes on the recouping of profits of the additional site to private developers
Private	The landowner who subdivided the two lots paid for the TDCs	Ultimately the private developers (and thus the end users) pay for the nature development
Low	Public notice and review took place	Through the formal public participation in the local land use plan, as the linking of additional development site and nature development has to be laid down in this plan

■

tion, widespread application of the program had not materialized.

Similarly, in the Netherlands, the Limburg VORm experiment (tradable development rights) as exemplified, in part, in the red for green policy, takes the profits resulting from favorable zoning laws and reinvests them in projects that benefit the public.

The Dutch non-financial compensation models exemplify the very close relationship that exists between all the models and their respective country's general attitudes and philosophies toward property, its ownership, its use and the laws promulgated to regulate it. In the Netherlands, the idea of the public recapture of added value resulting from favorable zoning amendments fits in neatly with the society's long-standing outlook on public justice and equality. In Japan, the ingrained sacredness of land ownership affects the ability to develop efficiently, yet this long-standing respect is not tampered with. As such, the non-financial compensation tools developed there include unparalleled flexibility. The U.S. example of the City of Malibu's TDCs likewise follows a pattern of a very appropriate adaptation of the city's residents' expectations: the expensive parcels can ultimately be subdivided and the residents' protective attitude towards the natural landscape prevails when acres of land are dedicated to conservation status. The Italian examples are adapted to the country's particular situation which consisted of an impasse to the development of public necessities such as green areas and the preservation of historic resources and which provided the funds necessary to expand the large urban areas.

11.4 The conversion problem

The conversion problem was described as follows: a local government would like to demolish existing high-rise buildings in a certain area and replace them with one and two-story (low-rise) buildings. It does not have the financial resources available to compensate the real estate owners for the lower income they will receive as a result of the conversion. Is there an instrument available that the local government could use to fulfill its goals? In this conversion category, the improvement of the current land use is important. The conversion problem of each case is systematically described in Table 11.2.

In contrast to the use of non-financial compensation instruments for conservation problems, the use of these instruments for conversion purposes appears to be more common practice, particularly in the cases of Italy and Japan where a series of applications is discussed. Examples in the U.S. and the Netherlands appear to be more limited in scope – that is, tied to the respective projects discussed. In Japan, for example, as of 2002, a minimum of 385,000 hectares of land had been developed using the Land Readjustment Method and 860 hectares had been developed using the Urban Redevelopment Method both within Tokyo and in the urban fringes.

In Italy, the Intervention Integrated Plans (IIPs) have been in use since 1995, and the Park Ex Feltrinelli IIP in Cremona is only one case of many in Lombardy. The IIPs provide contracts between a municipality and the other parties involved. In this unique set of instruments, private parties can contract to manage public services including public gardens and sports facilities. The public entity has been granted the power to negotiate with the private sector and can therefore grant public services as well as development rights. The flexibility of this instrument resolves the previous level of conflict which otherwise caused legal disputes in the urban planning of towns. As such, IIPs are an appropriate adaptation which more than adequately resolves the problems previously encountered.

The Japanese instruments, Integrated Land Readjustment and Urban Redevelopment are well adapted to promote more efficient land use and resolve certain land use problems with long-standing origins. At the core of these solutions is the idea that the landowners accept a smaller plot of land or property after the instruments are applied in order to benefit the greater good. As such, these solutions are viable in this society which incorporates the philosophy of the greater good in many aspects of its structure. These unique solutions may not be viable in a country with a different perspective on the general well-being.

The successful redevelopment of the Francia Avenue Sector in Valencia (Spain) took an area of the city that was formerly industrial and converted it into thriving commercial and much-needed residential space. Land readjustment made it possible to assign 80% of the area to public uses and even in-

spired regional legal reform in Spain. The focus in this case was on the extent and quality of the renewal rather than the typical emphasis on an increase in density. Once again, this Spanish example of non-financial compensation is an exceptional case study of adaptation to a country's circumstances and resolution of a problem.

In the Netherlands, the vacant buildings that resulted from the steps taken to meet EU standards for the reduction of phosphate and nitrate emissions were seen as a problem. The non-financial compensation instrument Space for Space incorporated a solution to funding which was not previously available and resulted in a benefit perceived by society as beneficial for the general population (the countryside cleared of abandoned stables) and a benefit to a few individual landowners who after re-zoning were allowed to build more expansive and expensive housing. The instruments work to resolve the unique situation and particular goals of this tightly-knit country with limited land area.

TDRs in use for the Hudson Yards project in New York City will assist in developing the last area of underdeveloped land in Manhattan. A gritty industrial area will be converted into much needed housing and appropriate support facilities, and in turn spare additional sprawl which was otherwise inevitable. The complex arrangements to finance this large project – the building of a deck over the Eastern rail yards – is well adapted to the magnitude of plans for residential buildings, a convention center, parks and related infrastructure over the rail yards. It appears that the long-term planning of the financing of this project should provide some measure of the guarantee of its success, although as it is still in the initial stages it remains to be seen how all the instruments, including TDRs, will contribute to its success.

11.5 The re-allocation problem

The problem of re-allocation was described as follows: a new commercial business area will be created and as a result the landowners will enjoy a considerable increase in the value of their land. Within the area, however, some of the plots have been zoned as green areas. Consequently the owners of these parcels will suffer a decrease in the value of their land, and as a result they do not cooperate. Expropriation of these owners is not an option since the local government does not have the financial resources to compensate the owners. Is there another way to compensate the owners of the green areas and thus convince them to include their land in the project? In this re-allocation category, the compensation for non-development is important. The re-allocation problem of each case is systematically described in Table 11.3.

As discussed in the two previous categories above, the non-financial compensation instruments applied to the re-allocation problem show a close ad-

Table 11.2 The conversion problem

	Japan	Korea	Spain
Name of the case	Towards a safer and more efficient land use a) Katsuragi b) Asahi Machi	–	Francia Avenue Program (Valencia)
Period in which the case was introduced	- Bubble economy period (1986-1991) - 1998 (three years after the big earthquake in Kobe)	–	- First public decision (official announcement of a public contest) in 1991 - Public works of urbanization finished in 1986 - Building process finished in 2006
General objectives of the proposed instrument	- Integrated land readjustment: Coordinated development of railways and their surrounding areas - Urban redevelopment: Disaster prevention Provision of public facilities Efficient utilisation of land	–	Redevelopment of a very large industrial area between the city center of Valencia and its seafront
Characteristic factors	- After land readjustment: Public land: 26%, Private land: 74% (of which 35% is commercial land and 34% residential) - After the urban redevelopment: On 60% of the 0.64 ha project area two high-rise buildings have been constructed. The remaining land is public.	–	- Relevant public infrastructure works developed or afforded by the private sector - Global impact in the life of a major city - Pioneer experience of public contest to choose a developer in charge of an area that exceeds its own property
Particular economic and social circumstances that have determined the instrument	a+b) High growth of the economy led to a large influx of people into the urban areas (1950s onward) b) Great fires in urban areas (1960s)	–	Financial requirements that exceed the possibilities of the public budget. Large number of landowners affected (170) with passive attitudes and the need to find leading actors to promote the private involvement in the public targets
Fit with the planning and legal system: What relation with spatial plans?	a+b) District plan	–	Private project selected in public contest inside the guidelines prior established in the General (Master) Plan drafted by the municipality
Were specific laws and regulations drawn up?	a) Special law on the housing land and railroad system development (1989) b) Urban Redevelopment Law (1969)	–	No, only at the regulatory local level. Procedure legally foreseen but never before applied. Relevant practical discovery (possibility of a third actor between landownership and public administrations). The experience inspired major legal changes at the regional and national levels

Italy	U.S.	Netherlands
Cremona	Hudson Yards Project	Brabant's Space-for-Space programme
From 1995	2003	2001
Actuating management of the modification requirements-integration of the GTP by the privates(?)	- To make use of an underutilized section of the City (part of Manhattan borough) where land is scarce and valuable - To provide office space - To defer sprawl	Financing the demolition of stables of intensive livestock industries (and thus reducing emissions) by using additional profits by additional housing sites
- Urban vision is requested - Public/private negotiation is public	- Sending areas are: Eastern Rail Yard (ERY) and Phase II Hudson Blvd & Park - Receiving areas for ERY is located to the north of ERY For Phase II districts C2-8, C6-2, C6-4, and M1-5	Embedding non-spatial policy aims in a spatial plan
Creating flexibility of the public instrument to face the requirements of the private landowners	- TDRs help finance the deck over the Eastern Rail Yards - TDRs allow the density levels appropriate and necessary for NYC	Need to meet the EU objectives on reduction of phosphate and nitrate emissions and thus need to create a financial fund to facilitate the demolition of stables on intensive livestock farms
This instrument is used with a strategic vision document related to the municipal General Regulation Plan	TDR provisions are in municipal zoning resolution	Doubts about legally sound elaboration: relation between demolition of stables and recouping of windfalls of land use with no relation to the stables. Link has to be included in the local land use plan
Specific national and regional legislation	Hudson Yards area was rezoned in 2005	Yes: the Regulation on ending of livestock branches and the Brakkestein Pact (2000)

▶

Table 11.2 continued

	Japan	Korea	Spain
Spatial level at which the case is tackled		–	Local (municipality)
Relevant public actors and role	a+b) National government and local government providers of subsidization	–	City council of Valencia directed the process. 170 property owners contributed in different ways to the development. Professional developers managed and financed the process
Balance between private and public exchange	a) The plan was developed by the government after consulting the landowners involved b) The plan was developed by the private landowners themselves with the help of an outsider (private developer)	–	Public targets performed by the private sector. The city gains a new neighbourhood located at an industrial area in an obsolete position as it also obtains many properties and major infrastructures. No cost for the public sector. Profitable results for the numerous private actors affected
Parties which financed the case	a) Urban Renaissance Agency and Ibaraki prefecture b) Urban renewal association and Sumitomo Fudosan (a private developer)	–	- Private developers - Landowners contribute with properties
Possibility for public participation	a+b) Yes, both cases have to undergo the city planning procedure	–	Through formal public participation in the local land use plan

aptation to their individual country's set of circumstances. For example, in Japan, where 'negotiation-led planning' is the norm, the Special FAR 'applied district' was used to successfully redevelop the Tokyo Station Building. Proceeds from the sale of FAR were used for the redevelopment, and FAR was made available to increase density in the surrounding vicinity. The non-financial compensation tools employed matched the Japanese method of focusing on the economy and providing flexibility.

Likewise, the non-financial compensation program used in Rome, which transfers land to the municipality in exchange for development rights, resolves the problem of the scarcity of public resources to expropriate and ensures equitable treatment of the landowners.

In environmentally-conscious Portland, Oregon, where TDRs appear in several provisions of the zoning code, their focus is the protection of environmentally-sensitive areas and the development of low-income housing. A TDR bank may be necessary to promote their use since examples of their application are not plentiful. However, successful projects have resulted where TDR projects have been implemented.

In the Netherlands, an extension of long-standing land re-adjustment is being employed in Vleuterweide and in the Amsterdam Zuidas where sport fields will be re-allocated and realized above existing tracks and highway on a

Italy	U.S.	Netherlands
In new areas not provided for by the actuating plans	Municipal	Provincial level
Municipality	- New York City - Metropolitan Transportation Authority - Two corporations formed to manage the finance and construction (HYIC and HYDC)	Province of Noord-Brabant (initiative and coordination) and local authorities (implementation of additional sites)
Good balance	- Control of financing and management is in public hands - Private developers will pay for density bonuses and TDRs - Tax exemptions will be available to private parties	- Strong coordinating role of public sector (province and local authorities) - Individual farmers ending their business and developers also benefit
Private and Public	- New York City (general fund) and private developers - Sale of long-term bonds to be financed by revenues from the improvements	Revolving fund of Space for Space development company includes 5 private developers and financial institutions (each 16% share) and province (20% share)
Medium	Public notice and review took place; public forums in November 2002 and February 2003	Through the formal public participation in the local land use plan ■

dock that is part of the new project. The current playing fields will be home to high-rise offices whose revenues will be used to finance the dock and sports fields. Non-financial compensation principles are helping to convert Dutch planning from a government-centered activity providing the common good to a more market-centered activity which includes developers contributing to the same goal.

In Korea, non-financial compensation-like District Unit Planning applications in Jeonong-dong and Sinseol-dong are illustrations of market-driven devices in a historically top-down planning regime. These examples include density transfer in a limited fashion – the transfer is within a single development track. Therefore, the technique is limited and does not function for the preservation of environmentally-sensitive areas or historic resources. The applications are in their very early stages and it is therefore premature to evaluate their success. Recent legislative changes have been made, however, which may expand their effectiveness and provide for inter-district transfers. Their promotion in this way may be due to the realization that they provide a solution to the shortage of public funds to provide for public spaces.

Finally, in Spain, land readjustment in the Orriols Sector of Valencia, which employs value coefficients to determine FAR development rights, was used to re-allocate future urban development. In conjunction, transferable develop-

Table 11.3 The re-allocation problem

	Japan	Korea	Spain
Name of the case	Redevelopment of the Marunouchi District (Tokyo)	Jeonong-dong, Sinseol-dong and Isoo development tract (Seoul)	Land readjustment Orriols (Valencia)
Period in which the case was introduced	Bubble economy period (1986-1991)	Since 2003	The bases were established in the General Plan of Valencia in 1988. Orriols operation started in 1995 (public contest) and finished in 2001 (completion of the public facilities and land readjustment)
General objectives of the proposed instrument	FAR bonus instruments: - Ensure balance between public infrastructure and buildings - Achieve a pleasant urban environment	Re-allocation (provision of public amenities without public finance)	Development of a new neighborhood in green land. Land readjustment among 300 properties connected with 12 other land readjustments around different parts of the city
Characteristic factors	Introduction of non-office usages such as retail, conference, restaurants to an office dominated Central Business District	Implemented on the basis of a single developer	The case combines the techniques of land readjustment with TDRs, and public contest to select the developer in charge. The number of landowners affected was unusually large
Particular economic and social circumstances that have determined the instrument	Rapid growth of the economy resulted in high development pressures on the Central Business District	- Shortage of public finance to meet the demanding public spaces - The burgeoning trend of market-oriented approaches to planning	Typical development in Valencia region during the mid- 1990s. The premise was that all the landowners of green land affected by development around the city had to have equal development rights gauged in terms of financial value
Fit with the planning and legal system: What relation with spatial plans?	Projects carried out in accordance with the city planning vision established for the Marunouchi District	Compatibility with the relevant urban planning required	Spatial planning of 1988 established all the relevant physical and social parameters which rule the development
Were specific laws and regulations drawn up?	- Tokyo Building made use of the Special FAR applied district regulation (2001) - Marunouchi Building and Industry Club of Japan Building made use of existing FAR regulations (1961)	Yes - PUNTA at the national level - City ordinance for specific regulation	No. Only the details of the land use regulation were drawn up for the case, but it was based on previously established parameters. It was also necessary to establish the economic details related to the landowners' participation, but they were strictly fixed, applying the general legal rules and also the result of bids offered during the public contest
Spatial level at which the case is tackled		National and local levels combined	Local (municipality)

Italy	U.S.	Netherlands (1)	Netherlands (2)
Rome	Portland, The Sally McCracken Building	GEM Vleuterweide (City of Utrecht)	Zuidas enterprise in South Axis (City of Amsterdam)
2005	Early 1990s	Contract signed in 2000	Proposal was signed in 2005 by partnership
Introduction upon drawing up the GTP of the management and transfer rules of the building rights	To encourage development of new low-income housing, specifically SROs (single-room occupancy buildings)	Comprehensive development of new housing area with 6,000 houses via re-allocation of development rights	Relocation of landowner AFC within the project
- Urban vision is necessary - Public/private negotiation is planned and organized	Owners of qualifying sites can transfer unused floor area to any location in the Central City Plan District	Re-allocation of plots in order to get optimal overall quality of the area	Relocation of sports fields of a powerful football club within a major internationally competing business district
Lack of public resources to expropriate and equity of treatment of owners in a preventive way and not in retrospect	Loss of low income housing due to gentrification	VINEX goals to develop 30,000 houses in Leidsche Rijn (and 6,000 in Vleuterweide) – divided ownership of land in the area	Powerful landowner with land to be redeveloped in the project who caused problems in the relocation of land within the project
The instrument is an important part of the new municipality GRP.	TDR provisions for this case appear within one of the plan districts (Central City Plan District). Areas that have unique characteristics or resources can form a District.	Proposed development has been laid down in a local land use plan	Deal of original landowners with public private partnership. Ultimately inclusion of the relocation in land use plan
Regional legislation	Not for this particular case	No	No
Both in the actuating plan and all over the municipality territory	District level	Project and local level	Project and local level, with also national interference

▶

Table 11.3 continued

	Japan	Korea	Spain
Relevant public actors and role	- Tokyo Metropolitan Government: provides the conditions for the FAR incentives - Chiyoda Ward: involved in the planning of the minor public facilities (local road, local parks)	- Local government (The City of Seoul) - The role of formulating the DUP plans and issuing the development permit on negotiation	City council of Valencia directed the process. 300 property owners contributed in different ways to the development. Professional developers managed and financed the process
Balance between private and public exchange	The several redevelopment projects are the outcomes of negotiations between private and public parties, and not so much a result of regulations set up by the government in advance	Resolved by rounds of negotiation between the city and the developer (in the third example, between city and property owners, mediated by the development company)	Development rights equally redistributed among landowners proportional to their respective original area. Participation of external properties assigned for public uses in order to compensate the greater development possibilities in the area
Parties which financed the case	Mitsubishi Corporation	- Example 1+2: Individual property owner (developer) - Example 3: the development company and the future residents to be housed in the developed property	Developers and landowners.
Possibility for public participation	No, only a master plan was made which is seen as a 'gentlemen's agreement' by the involved parties	Not legally required	Through the formal public participation in the local land use plan. The experience proved that public contest stimulates public participation.

ment rights were used to transfer development rights from land set aside for public use to the areas in the outskirts referred to as sectors. The technique worked to develop a new neighborhood in green land and involved 300 properties connected with twelve other land readjustments around different parts of the city. The project began in 1995, and the public facilities and land readjustment were completed in 2001. Therefore, the technique was not in any way experimental, and it resolved the needs of the many private landowners involved and the municipality, and thus proved to be an excellent adaptation to the citizens' circumstances.

11.6 The concept of non-financial compensation revisited

This book introduces a new concept in spatial planning: the concept of non-financial compensation. Now it is time to draw conclusions. Does this new concept, together with the case studies, provide new and innovative results for spatial planning?

Italy	U.S.	Netherlands (1)	Netherlands (2)
Municipality	City of Portland approved the transfer	Former City of Vleuten-De Meern (contracts have been adopted by the City of Utrecht)	Local authority of Amsterdam (public actor in public private partnership and responsible for land assembly)
Equalization between private interests	Private companies owned sending and receiving properties	Joint venture on 50-50 basis (risks, influence etc.)	Hardly. Deal between landowner and public private partnership about relocation of land use
Private	Sending area was building owned by a non profit organization; owners of adjacent receiving lots were owned by another company	Developers and municipality	Public private partnership responsible for the overall financing of the project (banks, national government, etc.)
High	Public notice and review took place	Through the formal public participation in the local land use plan	Through the formal public participation in the local land use plan, but in the specific deal on relocation

■

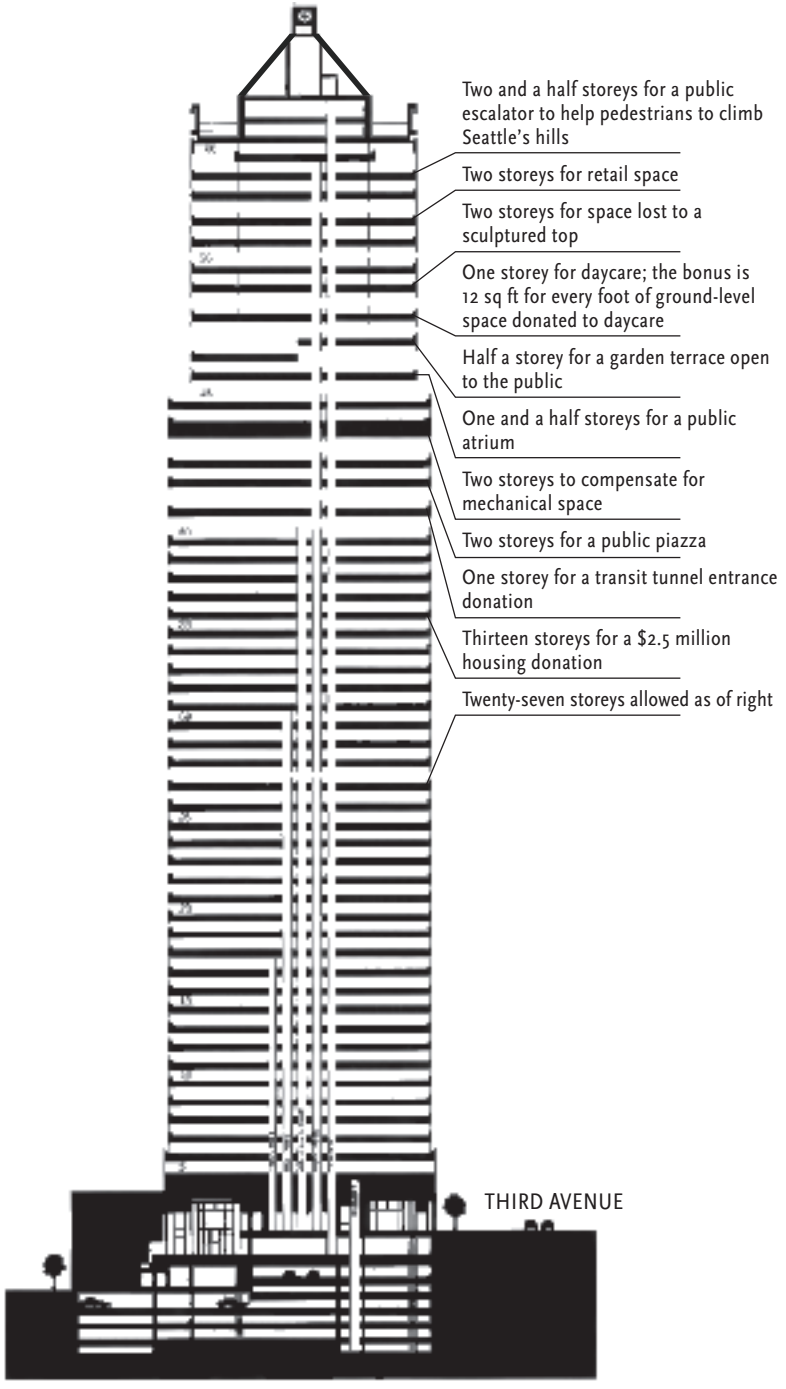
In Chapter 2 we showed that there are two main reasons why governments use the concept of non-financial compensation in spatial planning. The first one is compensation per se; the second aims more toward compensation as an incentive. In the first category a government compensates a person or company with an interest in land for the loss of one or more of his property rights therein by creating a new property right that he can either use or sell. The incentive category is used by a government to ensure that landowners and developers realize certain planning goals on either their land or on someone else's land, respectively. By creating an incentive, the government does not directly subsidize that realization but creates a property right that landowners and developers can use or sell, respectively, when they have realized the goals.

In this book three abstract cases were provided which lead the reader to 'real live' cases in the six countries which are discussed in this book. These cases cover conservation, conversion and re-allocation problems. To avoid the risk of losing ourselves in an enumeration of facts, we decided to discuss the innovative planning instruments in a structured way. Moreover, the method of using three abstract cases, dealing with very concrete planning issues and problems, made it easier to compare the cases.

The six country chapters are followed by a number of concluding chapters. Vincent Renard (Chapter 9) looks at the concept of non-financial compensation from an economic perspective, whereas Philip Booth (Chapter 10) focuses on the legal perspective and origins. They both criticize non-financial compensation practices. Renard does not question the very principle of creating rights and organizing markets for the exchange of rights, as he thinks such mechanisms are innovative and promising. However, he stresses the specificity of the mechanism as applied to land and land betterment, where the practical and theoretical issues are different and require a deeper analysis and economic practice. Booth concludes that non-financial compensation and the various mechanisms described in this book are about finding legal ways of offsetting private interest against general interest and ensuring that public policy objectives for the spatial distribution of activities and development are met.

A noteworthy example in the cases is the density bonus in Korea, which is an example of a non-financial incentive. It can be seen as an alternative source of capital financing for new facilities needed to realize public purposes. Local governments usually lack financial resources, and, therefore, the general tax revenues are inadequate to finance the public services and infrastructure needed. This is a variation within the concept of non-financial compensation, in which density bonuses can be achieved for doing something in return. Density bonus ordinances permit, for example, developers to increase the number of units allowed on a piece of property if they agree to restrict the rents or sales prices on some of the units. The New York example shows that it is possible to obtain density bonuses in return for incorporating plazas, arcades and other on-site amenities into new developments. Planning via density bonuses or non-financial incentives is a variant of incentive zoning (Murphy & Stinson, 1996). Incentive zoning is intended to provide a reward-based system to encourage development that meets established urban development goals. Typically, a base level of prescriptive limitations on development will be established, and an extensive list of incentive criteria will be established for developers to adopt or not at their discretion. A reward scale connected to the incentive criteria provides an enticement for developers to incorporate the desired development criteria into their projects. Common examples include FAR bonuses for affordable housing provided on-site, like in our Japanese case, and height limit bonuses for the inclusion of public amenities on-site. Incentive zoning is an attractive tool for communities seeking to encourage compact development. An interesting illustration of incentive zoning can be found in Seattle. The Washington Mutual Tower gained twenty-eight of its fifty-five stories as a result of amenities, in particular affordable housing, offered by the developer (see Figure 11.1). This developer incentive seems to work, in addition to the levy for affordable housing and tax exemptions in other neighborhoods (Metcalf, 2007).

Figure 11.1 Incentive zoning in Seattle



Source: Pacione, 2001, p. 174

In our definition of non-financial compensation we did not include instruments of non-financial incentives. However, we did distinguish multi-purpose from single purpose non-financial compensation. Examples of multi-purpose non-financial compensation are Hudson Yards and the Highline in New York. In the latter case, TDRs were used not only to compensate landowners for their loss of development rights, but also to promote the construction of high-rise buildings outside the area itself. This can be seen as an incentive. Tokyo Station is a good example of a single-purpose non-financial compensation scheme. The two motives for the project were conservation of the Tokyo station and promotion of the construction of high-density buildings in the areas that could receive the TDRs. It resembles the Penn Central example in New York (see Chapter 7 on the U.S.).

The borders between non-financial compensation and incentives are vague. Not only the Hudson Yard case shows this, but also the Dutch example of Space for Space where farmers were compensated for demolishing empty stables. The project itself was initially introduced as an incentive to encourage farmers to reduce their stock farming, which resulted in empty stables. The Korean cases strike us as a typical example of density bonuses. In multi-purpose non-financial compensation a non-financial incentive is quite often included, as the example of Space for Space shows. As a result of feedback on the draft papers during the workshops we organized between the contributors, we distinguished between non-financial compensation and incentive. Further research into planning with non-financial incentives might be an interesting addition to this study of non-financial compensation. Together they more or less cover all the non-financial planning practices and are broader and have a more neutral concept than the better known and often misused concept of TDRs.

11.7 Comparing the planning context of the six countries

As explained in Chapter 1, there is hardly any relevant literature on the methodological approach to international comparative research by discussing different schools and the aims of comparative research. Since the 1990s there has been a growing interest in investigations into different aspects of spatial and urban policy. A number of generally descriptive international comparative studies have been done on spatial and urban policy in West European countries (e.g. Newman & Thornley, 1996; Schmidt-Eichstadt, 1996; CEC, 1997; Spaans, 2002; Booth *et al.*, 2007). A number of these studies consist of collections of separate chapters dealing with individual countries written by local experts, including adequate introductions and conclusions. Others are limited to comparisons between cities and regions. Much of this comparative research

in planning is done to increase knowledge and to develop ideas for new policies and instruments to improve or change individual systems. In this study we distinguished three levels of increasing intensity in the transfer of planning instruments and practice: inspiration, learning and transplantation (Section 1.3).

We ended Section 1.3 with De Jong's (2004) conclusion that planners who want to adopt transplants from countries varying greatly in terms of administrative culture and structure should reckon on considerable institutional complications, caused by the different cultural, political, administrative, legal, social and economic circumstances. We also concluded that it is commonly assumed that transplanting planning institutions from countries with similar political, legal and cultural characteristics is easier.

In this section we will try to compare the planning context of the six countries. There have been wide-ranging theoretical discussions with respect to the comparison of welfare states. A large number of West-European countries laid the foundations of their welfare state in the early years after World War II. The discussion of the welfare state has been dominated by the distinction between convergence and divergence. Those who adhere to the convergence thesis assume that under the influence of similar political, economic, demographic, and technological developments, the national welfare arrangements will become increasingly similar. The divergence perspective, on the other hand, is based on the assumption that the national welfare states will show very different reactions to similar internal societal trends and external international developments (Spaans, 2002; Engbersen *et al*., 1994).

When categorizing countries – be it in welfare state regimes, planning, legal or other types of families – the focus is often on European countries, sometimes complemented by countries such as the U.S., Australia and Canada, but rarely with Asian, Latin American and African countries. Esping-Andersen (1990) elaborated a classification of countries into a number of clusters of different types of welfare states. Some researchers have applied this classification to other fields, such as housing. Starting from the three classes of regimes, they expand on the dichotomy of divergence and convergence (Smidt, 1989; Oxley, 1991; Boelhouwer & Van der Heijden, 1992; Doling, 1997).

When distinguishing between planning families, the categorization very much depends on the approach used. Spatial planning systems are influenced by three main contextual factors, which include constitutional law, government structure and responsibilities for spatial planning, and the legal framework (CEC, 1997). As a consequence, the planning context in individual countries is shaped by their history. Sorensen (2005) demonstrates the example of Japan in which institutional specifics very strongly determine the planning systems. The Japanese planning is shaped by a distinct state-society relationship characterized by a persistent notion of individual and collective sacrifice for the sake of national interests. The distinctly centralized style of Japanese

planning draws on this culture of sacrifice; and in this top-down approach, the Japanese planning bureaucracy is supported by both political parties and business elites, forming a mutually supportive triangular relationship.

The roots of the modern Korean planning system can be traced back to the period of Japanese colonial rule between 1910 and 1945. While the Japanese City Planning Laws have taken a holistic and authoritative stance towards the planning process, the Korean framework focuses on master planning, concerned with broad visions rather than detail. The planning system is one of broad zoning and subsequent technical control, all administered at the city government level (Gallent & Kim, 2001).

As described in Chapter 7, land use controls have a long history in the U.S. In the early days few problems existed with the taking of land for public purposes due to the abundance of land. Now when zoning is used as a land use device which superimposes a grid on land, dividing the different zones into categories generally including types of use, area requirements, we see a very protected property rights regime. According to U.S. property law, the owner of land is entitled to a certain 'bundle of rights' which includes components such as the right to develop land, air rights and mineral rights. Development is often 'as-of-right', implying that the owner is entitled to certain benefits as long as his plan fits the existing regulations. This right cannot be taken from a property owner for public use without compensation, making zoning a difficult undertaking in the U.S. Planning and land use regulations in the U.S. are for the most part accomplished at the municipal level of government and the forces in favor of zoning differ between states.

From the legal perspective, countries can be categorized according to their legal system. The essential characteristics of spatial planning are often established by the countries' constitution. What is essential is the extent to which the countries' constitution defines individual or government rights and responsibilities and what structure of government establishes the constitution and allocates responsibilities in relation to spatial planning functions. When specifically looking at legal systems, a distinction is often made between common law and civil law countries. Booth (2005) for example demonstrates that even though the planning systems in both France and Britain were inspired by German townplanning in the nineteenth century, they evolved in very different ways, due to differences in their legal systems: common law in Britain and civil law in France.

Planning in the Netherlands is shaped by a set of circumstances created not only by its geography but also by its Protestant tradition, its corporatist structure of decision making, and a culture with a soft spot for planning (Faludi, 2005). Planning contexts vary not only amongst different nations in the world, but also within nations, particularly those with federal governance structures. In Italy, planning is caught in the duality between city-state tradition and central-state government. Somewhere in between there are the

regions. Comprehensive spatial planning in Italy is narrowed by the construction activities of local organizations on the one hand and by project implementation of central-state planning authorities on the other (Keller *et al.*, 1996).

The EU Compendium of Spatial Planning Systems and Policies (CEC, 1997) proposes four major traditions of spatial planning:

- The regional economic planning approach, in which spatial planning has a very broad meaning relating to the pursuit of wide social and economic objectives.
- The comprehensive integrated approach, in which spatial planning is conducted through a very systematic and formal hierarchy of plans from the national to the local level, which coordinate public sector activity across different sectors but focuses more specifically on spatial coordination than economic development. The Netherlands is one example.
- The land use management approach, where planning is more closely associated with the narrower task of controlling the change of use of land at the strategic and local levels.
- The 'urbanism' tradition, which has a strong architectural flavor and concern with urban design, townscape and building control. Regulation has been undertaken through rigid zoning and codes. Spain and Italy are examples of this category.

Countries may move from one approach to another over time. Britain, for example, is currently moving from the land use management approach towards the comprehensive integrated approach. These traditions are based on the European context, but may be extended to countries worldwide. If we put the other three countries into these European based traditions, we would include Japan in the first tradition and Korea and the U.S. in the third category.

This leaves four aspects that are relevant to understanding the position of a non-financial compensation scheme in a country (see Table 11.4). First it is necessary to determine into which family the planning system can be situated and, since non-financial compensation schemes rely on private parties for their success, how strong the gap between public and private parties is in that country. In the Netherlands, for example, the government relatively often plays the role of 'land developer' both to generate revenues and to steer or control development, and this is accepted by private parties, whereas in the U.S. it is very hard for public parties to interfere in development. The second aspect includes the level of government that enables the existence of the scheme (local, regional or national) and the scale of the scheme itself (local or regional). Then the question would be whether the non-financial compensation scheme is an accepted or an experimental approach. Finally, the question is whether such a scheme exists as an as-of-right scheme or as part of a negotiation process. As-of-right means that compensation is automatically grant-

Table 11.4 Typology of the six countries

	Level	Embeddedness in national system	Planning approach	As-of-right/ negotiation
Japan	Local	General practice	Regional economic planning approach	As-of-right
Korea	Local	Experimental	Land use management approach	As-of-right
Spain	Local	General practice	Urbanism tradition	Mixture
Italy	Local	General practice	Urbanism tradition	As-of-right
U.S.	Local and regional	General practice	Land use management approach	As-of-right
Netherlands	Local and regional	Experimental	Comprehensive integrated approach	Mixture

ed to a landowner or developer if he fulfils the (paper) requirements whereas negotiation schemes involve negotiations on the amount of compensation. An in-between variant existed, where the initial developers were involved in a compensation scheme (at the level of a specific project), after which it became general practice.

11.8 Concluding remarks: planning for the future

Research approach and comparability among cases

We used an abstract case-approach for the analysis of the actual cases in the countries. The objective of this analysis was to find out which non-financial compensation instruments solve the conservation, conversion and re-allocation problems in the countries considered. In taking this approach, we necessarily paid less attention to the differences between the various planning systems of the countries. The surplus value of this approach, aimed to provide better comparability between the various countries.

At the end of this book, the question remains as to whether this approach proves useful beyond the context of this book and actually results in comparable answers and solutions. Starting with the latter, the answer is complex. Planning operates within a real life context that involves a wide variety of issues such as culture, history and politics. Non-financial compensation instruments are no exception to this rule and the real-life cases in this book cannot be fully understood without some knowledge of the background of the planning systems. However, from a more abstract point of view, the various instruments show some striking similarities both in their aims and in their legal designs. The Marunouchi case in Japan is very similar to the Penn Central case in New York, the innovative District Unit Planning-system in Korea turned out to be a density bonus-system that will certainly strike readers from the U.S. as familiar.

What certainly worked was the 'zooming in approach'. Normally, practices such as non-financial compensation practices are presented as part of a wider planning case. It is then just one of the issues presented, and the reader is not presented with a full description of the non-financial compensation scheme. By zooming into one practice and starting from an abstract case, the authors were asked to work the other way around – to start with the non-financial

compensation practice and then explain the context. We claim that this approach is helpful for planning practitioners. Planning in the 21st century is complex and in daily practice can only be done by a team of specialists. Specialists presented with the problems in this book will find this book useful. The case studies may not provide them with all the details they need to solve their cases, but it may tell them which approaches they need to look into and which to avoid.

This brings us to whether this approach is also useful beyond the context of this book. We believe it is. Although one has to be aware of the various issues that come with any real-life case (see Chapter 1), the abstract case-approach is useful for both academics and planners who want to exchange experiences. The chosen approach thus encourages cross-country learning. In our book we show that planners face similar problems in planning practice across countries. Although the planning systems in these countries vary considerably, planners looked for inspiration beyond their borders. This results in innovative instruments which are adapted to the specific circumstances of the national planning system. We have observed a search for new planning tools to address similar problems across countries.

Further research and conclusion

As is often the case after finalizing a project such as this book, one ends up with more questions than one started with. Earlier on in this chapter we introduced one direction for further research: exploring in more depth the concept of non-financial incentives. The second direction for further research remains closer to the issue addressed in this book: taking a broader geographical perspective of the concept of non-financial compensation than the Japanese, Korean, Italian, Spanish, American and Dutch perspectives. The idea of non-financial compensation and incentives will be dealt with in other countries as well, probably under different names.

Market-oriented planning instruments have recently received a lot of attention in many countries. They reflect a strong awareness of the need for a more balanced and sustainable spatial development with excess space for future development. It is increasingly assumed that it is the market and not the state that should resolve planning problems either without or with minimal (financial) public intervention. This issue is also linked to the global trend from government to governance, in which government takes a step back from planning and leaves more and more development to the private sector. In this view, government creates the preconditions and sets out the policy objectives. Citizens and private parties enjoy greater freedom in this setting, as public authorities are less preoccupied with whether the objectives will be attained in one way or another. The idea of recouping value and 'pay-as-you-grow' systems are gaining in popularity, but also the idea of planning via compensation.

We have discussed the concept of non-financial compensation in this book. Though the idea of this exchange is not completely new and is already known under different labels as TDRs, the Valencia model, District Unit Planning and Space for Space, this book contributes to planning theory and science by elaborating this concept and defining it more clearly.

Even though there appear to be many pitfalls to the implementation of the concept of non-financial compensation and the fact that it will always require active government interference, it seems to offer an interesting new perspective to planning. Even though new instruments will always result in some new failures, the failures of non-financial compensation might be less harmful to society as they foster creativity.

The steering role of government in a planning system which includes non-financial compensation schemes is not weaker than in a more permissive planning system, rather it is stronger. Private actors will get – as long as they carry public interest in sustainable development with them – a more prominent role in a planning system. The aim is not necessarily that non-financial compensation planning as such will be more profitable, but that this kind of planning will result in a greater number of initiatives that will strengthen the creativity and innovative solutions and will ultimately result in improved sustainability. The answer, after reading this book, is that this result is indeed possible.

References

Boelhouwer, P. & H. van der Heijden (1992), **Housing systems in Europe: Part I; a comparative study on housing policy**, Housing and Urban Policy Studies 1, Delft: Delft University Press.

Booth, Ph. (2005), The nature of difference: traditions of law and government and their effects on planning in Britain and France, in: Sanyal, B. (ed.), **Comparative Planning Cultures**, London: Routledge, pp. 259-283.

Booth, Ph., M. Breuillard, C. Fraser & D. Paris (eds) (2007), **Spatial Planning Systems of Britain and France**, London: Taylor and Francis.

Commission of the European Communities (CEC) (1997), **The EU compendium of Spatial Planning Systems and Policies, Regional development studies**, Luxembourg: Office for Official Publications of the European Communities.

De Jong, M. (2004), The Pitfalls of Family Resemblance: Why Transferring Planning Institutions Between 'Similar Countries' is Delicate Business', in: **European Planning Studies** (12), pp. 1055-1068.

Doling, J. (1997), **Comparative Housing Policy; Government and Housing in Advanced Industrialized Countries**, Houndsmill: Macmillan Press Ltd.

Engbersen, G., A.K. Hemerijck & W.E. Bakker (eds) (1994), **Zorgen in het Europese huis; Verkenningen over de grenzen van nationale verzorgingsstaten**, Beleid en Maatschappij Jaarboek 1992/93, Amsterdam: Boom.

Esping-Andersen, G. (1990), **The Three Worlds of Welfare Capitalism**, Princetown: Princetown University Press.

Faludi, A. (2005), The Netherlands: A Culture with a Soft Spot for Planning, in: Sanyal, B. (ed.) (2005), **Comparative Planning Cultures**, London: Routledge, pp. 285-308.

Gallent, N. & K.S. Kim (2001), Land zoning and local discretion in the Korean planning system, in: **Land Use Policy** (18), pp. 233-243.

Keller, D.A., M. Koch & K. Selle (1996), 'Either/or' and 'and': first impressions of a journey into the planning cultures of four countries, in: **Planning Perspectives (11)**, 1, pp. 41-54.

Metcalf, G. (2007), Moving Seattle forward while respecting the past, a conversation with Jet City's top planner, in: **SPUR Newsletter**, February 2007, San Francisco: SPUR: pp. 12-17.

Murphy, M. & J. Stinson (1996), **Incentive Zoning**, http://www.law.pace.edu/landuse/incent.htm.

Newman, P. & A. Thornley (1996), **Urban Planning in Europe; International competition, national systems and planning projects**, London: Routledge.

Oxley, M. (1991), The Aims and Methods of Comparative Housing Research, in: **Scandinavian Housing & Planning Research** (8), pp. 67-77.

Pacione, M. (2001), **Urban Geography: A Global Perspective**, London: Routledge.

Schmidt-Eichstadt, C. (ed.) (1996), **Land Use Planning and Building Permission in the EU**, Deutscher Gemeinderberlag/Verlag W. Kohlhammer.

Smidt, S. (1989), Convergence Theory, Labour Movements, and Corporatism: The Case of Housing, in: **Scandinavian Housing & Planning Research** (6), pp. 83-101.

Sorensen, A. (2005), The Developmental State and the Extreme Narrowness of the Public Realm: The Twentieth Century Evolution of Japanese Planning Culture, in: Sanyal, B. (Ed.) **Comparative Planning Cultures**, London: Routledge, pp. 223-258.

Spaans, M. (2002), **The implementation of urban revitalization projects; An international comparison**, Housing and Urban Policy Studies 20, Delft: Delft University Press.

About the authors

Francisco Blanc is a lawyer specializing in Spanish planning and real-estate law. He has advised public institutions and private companies. He has also taught planning law at various Spanish universities and has written articles and essays about Spanish planning law and related subjects. During the late 1980s and the early 1990s he was directly involved in the relevant legal reforms that took place in the Valencia Region.

Philip Booth is Reader in Town and Regional Planning at the University of Sheffield. His work has focused on the public control of private sector development both in Britain and abroad, particularly in France. His published work include *Controlling Development* (UCL Press: 1996) and *Planning by Consent* (Routledge: 2003).

Cheol-Joo Cho is Professor of Planning at the Department of Urban and Regional Planning, Cheongju University (Korea). His fields of interest, besides planning and development regulations, include employment generation, income maintenance and the social consequences at the city and community levels.

Paul Chorus holds a degree in urban planning from the University of Amsterdam. An internship at the Royal Netherlands Embassy in Tokyo resulted in his master's thesis *Multiple and intensive land use in Tokyo, a good example for the Netherlands?* (2002). In 2005 he was awarded a Mombusho Scholarship by the Japanese government and returned to Japan, where he conducted research for his PhD on driving forces behind station development. He was a guest researcher at the University of Tokyo until April 2007. He is currently continuing his PhD research at Dutch National Railways.

Leonie Janssen-Jansen is assistant professor at the University of Amsterdam (Amsterdam institute for Metropolitan and International Development Studies). She received her PhD from the University of Utrecht in 2004. Her current research interests include regional governance, international metropolitan development and land-use regulations. Her work on this publication was sponsored by the Dutch Scientific Organization.

Giancarlo Leoni is an architect. He worked as a planner at the Provincial Administrations in Milan (1981-83) and Mantua (1983-2008), where he was responsible for the Territorial Provincial Plan and the Municipality General Town Plans evaluation office. He has been an urban planning teacher at Milan Polytechnic since 1997. He has also managed a number of European projects (MILU.net, Foresight-Blue Print, RITTS, AlpFrail) and is a member of the Italian Town Planning National Institute.

Bianca Putters teaches Historic Preservation Law at Southwestern Law School in Los Angeles with a focus on the federal, state and local laws that affect historic properties and districts. In addition, she is a practicing attorney in San Francisco, California, where amongst other areas, she practices historic preservation and land use law.

Vincent Renard is a land economist. He works as a **s**enior researcher at the CNRS (National Center for Scientific Research) and at the laboratory of econometrics of the *Ecole Polytechnique* in Paris. He also teaches at the *Institut d' Etudes Politiques* in Paris, the University Paris I- Panthéon-Sorbonne and the *Ecole Nationale des Ponts et Chaussées*, and has lectured in several other countries. He has worked as a consultant for various organizations.

Marjolein Spaans is a spatial planner. She is a senior researcher at Delft University of Technology (OTB Research Institute of Housing, Urban and Mobility Studies). Her research focuses on administrative and planning aspects and on spatial planning instruments in an international perspective. She is also program coordinator of the Delft Research Centre Sustainable Urban Areas. She has been involved in both academic and contract research.

Menno van der Veen is a PhD researcher at the Delft University of Technology (OTB Research Institute for Housing, Urban and Mobility Studies). His PhD research focuses on the contractual relations between governments and private developers in the context of strategic urban renewal projects. His thesis includes cases in Amsterdam, London and New York. He expects to finish his research in October 2008.

Sustainable Urban Areas

1. Beerepoot, Milou, **Renewable energy in energy performance regulations. A challenge for European member states in implementing the Energy Performance Building Directive**
   2004/202 pages/ISBN 90-407-2534-9 (978-90-407-2534-0)
2. Boon, Claudia and Minna Sunikka, **Introduction to sustainable urban renewal. CO_2 reduction and the use of performance agreements: experience from The Netherlands**
   2004/153 pages/ISBN 90-407-2535-7 (978-90-407-2535-7)
3. Jonge, Tim de, **Cost effectiveness of sustainable housing investments**
   2005/196 pages/ISBN 90-407-2578-0 (978-90-407-2578-4)
4. Klunder, Gerda, **Sustainable solutions for Dutch housing. Reducing the environmental impact of new and existing houses**
   2005/163 pages/ISBN 90-407-2584-5 (978-407-2584-5)
5. Bots, Pieter, Ellen van Bueren, Ernst ten Heuvelhof and Igor Mayer, **Communicative tools in sustainable urban planning and building**
   2005/100 pages/ISBN 90-407-2595-0 (978-90-407-2595-1)
6. Kleinhans, R.J., **Sociale implicaties van herstructurering en herhuisvesting**
   2005/371 pages/ISBN 90-407-2598-5 (978-90-407-2598-2)
7. Kauko, Tom, **Comparing spatial features of urban housing markets. Recent evidence of submarket formation in metropolitan Helsinki and Amsterdam**
   2005/163 pages/ISBN 90-407-2618-3 (978-90-407-2618-7)
8. Kauko, Tom, **Between East and West. Housing markets, property prices and locational preferences in Budapest from a comparative perspective**
   2006/142 pages/ISBN 1-58603-679-3 (978-1-58603-679-9)
9. Sunikka, Minna Marjaana, **Policies for improving energy efficiency in the European housing stock**
   2006/251 pages/ISBN 1-58603-649-1 (978-1-58603-649-2)
10. Hasselaar, Evert, **Health performance of housing. Indicators and tools**
    2006/298 pages/ISBN 1-58603-689-0 (978-1-58603-689-8)
11. Gruis, Vincent, Henk Visscher and Reinout Kleinhans (eds.), **Sustainable neighbourhood transformation**
    2006/158 pages/ISBN 1-58603-718-8 (978-1-58603-718-5)
12. Trip, Jan Jacob, **What makes a city? Planning for 'quality of place' The case of high-speed train station area redevelopment**
    2007/256 pages/ISBN 978-1-58603-716-1

13. Meijers, Evert, **Synergy in polycentric urban regions. Complementarity, organising capacity and critical mass**
2007/182 pages/ISBN 978-1-58603-724-6
14. Chen, Yawei, **Shanghai Pudong. Urban development in an era of global-local interaction**
2007/368 pages/ISBN 978-1-58603-747-5
15. Beerepoot, Milou, **Energy policy instruments and technical change in the residential building sector**
2007/238 pages/ISBN 978-1-58603-811-3
16. Guerra Santin, Olivia, **Environmental indicators for building design. Development and application on Mexican dwellings**
2008/124 pages/ISBN 978-1-58603-894-6
17. Van Mossel, Johan Hendrik, **The purchasing of maintenance service delivery in the Dutch social housing sector. Optimising commodity strategies for delivering maintenance services to tenants**
2008/283 pages/ISBN 978-1-58603-877-9
18. Waterhout, Bas, **The institutionalisation of European spatial planning**
2008/226 pages/ISBN 978-1-58603-882-3
19. Koopman, Marnix, Henk-Jan van Mossel and Ad Straub, **Performance measurement in the Dutch social rented sector**
2008/140 pages/ISBN 978-1-58603-961-5
20. Pal, Anirban, **Planning from the bottom up. Democratic decentralisation in action**
2008/126 pages/ISBN 978-58603-910-3
21. Neuteboom, Peter, **On the rationality of borrowers' behaviour. Comparing risk attitudes of homeowners**
2008/112 pages/ISBN 978-58603-918-9
22. Itard, Laure and Frits Meijer, **Towards a sustainable Northers European housing stock. Figures, facts and future**
2008/226 pages/ISBN 978-1-58603-977-6
23. Janssen-Jansen, Leonie, Marjolein Spaans and Menno van der Veen, **New instruments in spatial planning. An international perspective on non-financial compensation**
2008/258 pages/ISBN 978-1-58603-978-3
24. Coolen, Henny, **The meaning of dwelling features. Conceptual and methodological issues**
2008/164 pages/ISBN 978-58603-955-4
25. Van Rij, Evelien, **Improving institutions for green landscapes in metropolitan areas**
2008/226 pages/ISBN 978-58603-944-8

Copies can be ordered at www.dupress.nl.

Delft Centre for Sustainable Urban Areas carries out research in the field of the built environment and is one of the multidisciplinary research centres at TU Delft. The Delft Research Centres bundle TU Delft's excellent research and provide integrated solutions for today's and tomorrow's problems in society.
OTB Research Institute for Housing, Urban and Mobility Studies and the Faculties of Architecture, Technology, Policy and Management and Civil Engineering and Geosciences participate in this Delft Research Centre.

Transferable Development Rights, a market-oriented planning instrument developed in the U.S., has received a lot of attention in many other countries. It has been a source of inspiration for planning systems, resulting in instruments concerning the transfer of development opportunities between areas. These instruments often have a much broader scope than just the transfer of development rights and also relate to compensation, not financially, but in a non-financial perspective: governments compensating landowners non-monetarily for opportunity losses or loss of endeavors. It can also be used as an incentive structure to realize planning goals via the market. Therefore they can help realizing creative and flexible solutions.
This book is valuable for all concerned with market-oriented planning. It offers an elaboration on the concept of non-financial compensation and a systematic comparison of the use of several instruments of this type in six countries around the world.

NWO
Nederlandse Organisatie voor Wetenschappelijk Onderzoek

Habiforum

ISBN 978-1-58603-978-3

DELFT UNIVERSITY PRESS IS AN IMPRINT OF IOS PRESS