RETHINKING PLANNING LAW IN THE CRISIS ERA: NEW SCOPE, NEW TOOLS, NEW CHALLENGES

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CASE

1. Introduction

The on-going European sovereign debt crisis, along with the global financial crisis of the late 2000s and the consequent global recession, have hit, among other policy areas, the world of planning. Although there are considerable differences in the manifestation of economic crisis across countries, there seem to be common trends in the ways planning is being affected or even reformed in times of crisis. Government downsizing and reduction of public expenditures, loss of confidence in the old models of urban development and housing finance, increasing privatization and outsourcing of planning powers and planning services to private firms and non-profit organizations and foundations, along with a shift of planning objectives towards the promotion of economic growth, competitiveness and entrepreneurialism, seem to be among the most important effects of the crisis in the field of planning. Within this new context, the role and the instruments of planning seem to be questioned and even reengineered in many countries.

It is the aim of this Conference to identify, analyze and compare changes in national planning laws and policies as a consequence, among other reasons, of the economic crisis. To this end, the Conference will focus on three major themes-developments that are considered critical for comparative discussion and research.

2. Shifts in the role and scope of planning: from spatial ordering to spatial development?

Traditional planning was mostly turned on spatial ordering. In this respect, statutory urban and regional plans were, most frequently, directed towards anticipating growth, protecting the countryside and natural resources, and providing services and infrastructure. National planning laws, under this model, used static zoning techniques and maps to plan land-use and achieve equilibrium among different, and sometimes competing, land-uses and corresponding interests. The focus of planning, within this context, was to control and restrict rather than to facilitate development.

In recent years, however, especially after the economic crisis, new attitudes to planning are emerging worldwide. The need to achieve economic recovery in order to reduce economic uncertainty, unemployment and poverty, along with the need to provide competitive and attractive spaces for investment and business, are driving national planning policies towards more development-oriented and entrepreneurial directions. Within this new international economic and social context, the role and the scope of planning are changing. Planning has to reinvent itself in

order to become more positive and effective, enabling thus development instead of only regulating it.

3. Shifts in the shape and function of planning tools: from rigidity to flexibility?

Traditional planning was mostly based on regulatory tools, such as land-use plans, zoning ordinances and building regulations, and various kinds of permits and licenses as well. These tools provided legally-binding and, often, static rules for development and construction which corresponded to the certainties of the welfare state and the continuing economic progress and social stability of the post-war world.

However, already from the 1990s, the increasing globalisation of the economy, the growing complexity of social phenomena, the fluidity of location behaviours and the rapid acceleration of change, revealed the difficulties of conventional planning tools in responding to new needs and priorities in appropriate time frames. The problem has been aggravated after the crisis. So, too often, rigidity along with long planning processes make spatial plans very vulnerable and unable to cope with changing circumstances and shifts in the market and the society.

Under these constraints, many countries have proceeded during last years in various "planning reforms" in order to render their domestic planning legislation simpler, more dynamic and supple and to respond, thus, to increasing economic demands for flexibility and responsiveness in planning processes.

4. Shifts in planning governance and planning institutions: decentralization or re-centralization of planning powers?

Traditional planning was, in principle, organized at different levels. The latter reflected the spatial scale at which different plans operated (national, regional, local) and/or the government level at which they corresponded. In most countries, a, more or less, hierarchical structure between different levels of plans was established with the higher tier being usually binding on the tiers below it.

However, in recent years, new attitudes in planning governance have emerged showing the willingness to cut, or at least amplify, traditional vertical and hierarchical dependencies between different levels of planning and to give, thus, more room to local and/or regional planning initiatives and to corresponding public-private partnerships (decentralization).

On the other hand, during that period, several initiatives towards the centralization (or re-centralization) of planning powers took place in order to ensure central control over projects of national significance, large-scale infrastructure projects in particular.

Planning reforms underway in some countries reveal that strengthening central powers in certain planning areas may go along with pro-market "localism", in a joint effort to encourage development and growth both from the top-down and the bottom-up. These developments show that the post-crisis institutional context of planning seems more complex and fuzzy than ever before.

5. Questions for Conference participants:

a) Which, do you consider, to be the main effects of the economic crisis, if any, on your country's planning law and policy? Has your national planning law experienced, during last years, a minor or major reform as a result of the crisis or for other reasons and in which directions? Would you say that new attitudes to planning law have emerged as a result of these changes and, in a positive case, which?

b) Are there any recent efforts (2008 onwards) in your country for the simplification and speeding-up of plan-making (including the revision of existing plans) and in what direction? How does planning legislation in your country deal with projects that are not in conformity with existing land-use plans? Are there any provisions for, large-scale or minor-scale, deviations from existing land-use plans and under which conditions? Are there any provisions in your planning legislation for 'projects plans', that is, plans tailored to specific, public or private, land-development projects? After all, do you consider planning law in your country as flexible and responsive or not and why?

c) Are there any institutional changes in the relationships between different planning levels/authorities in your country during last years? Are these changes indicative of a more decentralized or more centralized system of planning-making? According to your planning legislation, do more levels of government make legally binding plans and, if so, are there any mechanisms to ensure co-ordination between them? How can national government influence the content of regional or local land-use plans? Which authority is responsible in your country to deliver planning permission for public and private projects of national, cross-regional or supra-local significance?

Georgia Giannakourou, Athens June 2013

CASE STUDY – GERMANY

by Dr.-Ing. Tim Schwarz, Urban Planner and Research Assistant, Technische Universität Berlin

a.1) Which, if any, do you consider to be the main effects of the economic crisis on your country's planning law and policy?

The current economic and financial crisis has not yet resulted in any direct changes within the planning law.

However, in the planning practice it is noticeable that since the German reunification in 1990 less service planning[1] and more project-based planning[2] is carried out. This can be traced back to the financial situation in towns and municipalities, which is ambivalent presently. On the one hand, a large number of towns and municipalities, which are partly under state supervision[3], have to cope with increasing debt stocks and exponentially growing liquidity loans. On the other hand, there are also regions which are economically strong and in which the financial situation of the municipalities is subject to fluctuations, especially within trade tax revenue. Nevertheless, many municipalities are currently financially overwhelmed. In the field of urban planning, this has resulted in a reduction of urban development promotion programs in 2011, while the social sector is facing an increasing variety of tasks. Against this background, a financial relief of towns and municipalities cannot be assumed within the current financial distribution patterns in the next years. As a result the urban develpoment of municipalities also depends on private investments. This means the privatisation of urban development since the beginning of the nineties will continue. The legal framework for this kind of privatisation within urban planning is primarily the project and infrastructure plan (Section 12 of the Federal Building Code) as well as the urban development contract (Section 11 of the Federal Building Code).[4] Increasingly, more and more towns and municipalities manage their urban development mainly on the basis of private investments.[5]

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1 The term „service planning" is used for a binding land-use plan which is established by the municipaility for a non specified number of different projects which can be realised in the area designated by the plan. For example: housing areas, commercial or industrial areas. While there is a certain demand for these type of land use it is not predetermined when the plan is carried out in the way every plot of the site is developed. The legal binding arrangements of the plan give a framework for a variety of different projects of a certain type and scale of land-use.

2 The term „project-based planning" is used for a binding land-use plan which is established to create the prerequisites for the builing permission of a certain project which is normally carried out by a third party. While the project is more specific the plan is more detailled and covers only a small area, sometimes only a single plot of land.

3 Vgl. Beckmann 2011, 5; vgl. Eltges & Müller-Kleißler 2010, 803 ff.

4 Vgl. Stüer, Der Bebauungsplan, 4. Aufl., München 2009, Rn. 167.

5 Vgl. Mitschang, Steuerung der städtebaulichen Entwicklung durch Bauleitplanung, München 2003, S. 485 ff.

a.2) Has your national planning law experienced, during recent years, a minor or major reform as a result of the crisis or for other reasons and in which directions?

In recent years, there were several amendments to the planning law, not due to the economic crisis but for reasons of european integration, climate protection and inner-urban development.

The law for adaption of the german building code to european directives **(EAGBau 2004)** was in particular used for the implementation of the directives 2001/42/EG and 2003/35/EG, i.e. the integration of the strategic environmental assessment of plans and programs and the introduction of the early public participation.

The amendment of the building code in 2007 **(BauGB-Novelle 2007)** should substantially strengthen inner-urban development and accelerate major planning projects. To achieve this, the obligation to conduct an environmental assessment has been lifted for plans including land restoration, the redensification or other measures of inner-urban development (binding land-use plan for inner development) covering only a small area. [6] This exception of the general obligation to submit all spatial plans and programms to an environmental assessment is based on Article 3 Section 5 of the Strategic Environmental Assessment Directive (Plan-UP-Richtlinie: 2001/42/EG). According to this it is possible to determine plans, which are likely to have environmental impacts and therefore require an examination by specifying types of plans and programs. The exception for the environmental assessment obligation is justified by the size of the plans, which is limited to an maximum ground-plan area of 20.000 m². Within this size of the ground-plan area significant environmental effects are generally excluded so that there is no obligation to make an environmental assesment. Nevertheless, environmental issues have to be taken into account in the planning procedure but not in the formalised SEA procedure.

Furthermore binding land-use plans, which protect and develop central supply areas, can be drawn up since 2007. Central supply areas are "spatially delimited areas of municipalities which on the basis of existing retail uses – often supplemented by a range of services and dining offers – have a supply function going beyond the local catchment areas" [7]. The preservation and development of central supply areas is an essential urban planning task due to their importance for urbanity and appeal of city centers.

A third major modification concerned the "private initiatives for urban development" in section 171 sqq. of the Federal Building Code) In simplified terms, inner-city sites following the example set by the American Business Improvement District should be developed on the basis of urban development

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[6] Vgl. Battis, in: Battis/Krautzberger/Löhr, BauGB – Kommentar, 10. Aufl., München 2007, § 13a BauGB, Rn. 1.

[7] BVerwG, Urt. v. 26.04.2007 – 4 CN 3.06 – NVwZ 2007, 1081.

and measure concepts and all property owners who benefit from the measure, should be charged financially.[8]

The Federal Building Code was primarily amended in 2011 **(BauGB-Novelle 2011)** for reasons of climate protection. General objectives of urban land-use planning such as climate protection and adaption have been added (so-called climate protection provison "Klimaschutzklausel", Section 1 (5) sentence 2 und Section 1a (5) of the Federal Building Code). Furthermore there have been several supplements for better incorporation of climate change issues into planning, for example the expansion of regulatory possibilities for the binding land-use plan, the matters regulated by urban development contracts as well as the objectives of redevelopment measures.[9]

The most recent amendment of the Federal Building Code was in 2013 – the so-called "inner-urban development amendment" **(Innenentwicklungsnovelle 2013)**. Just as in 2007 the aim was to strengthen the inner-urban development. On the one hand, the main objectives of urban land-use planning in Section 1 (5) of the Federal Building Code have been expanded. While weighing interests it has to be taken into account that the urban development should be primarily carried out through measures of inner-urban development. On the other hand, the so-called "soil protection provision" was strengthened by an obligation to state reasons for urban land-use planning when it intends the conversion of agricultural or forestry areas into building land. According to this the potential of inner-urban development and also the population development should be recognized and have to be taken into account in the planning process.

In many German cities places of amusement "Vergnügungsstätten" are a problem, disturbing the inner cities because of their large numbers and impacts (e.g. noise and trading-down-effects).[10] Against this background, the so-called "places of amusement binding land-use plan" was introduced as a special form of the binding land-use plan (Section 9 (2b) of the Federal Building Code). Using this new instrument the possibilities for planning control should be supplement and improved.[11]

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8 Vgl. Schink, Private Initiativen zur Stadtentwicklung, in: UPR 2012, S. 132 ff.; vgl. Binger/Büttner, Business Improvement District (BID) – Ein Erfolgsrezept für Innenstädte, Stadtteilzentren oder Luxusmeilen? Erfahrungen aus Hamburg, in: Lübke (Hrsg), Kooperative Stadtentwicklung durch kooperative Planung. Band 1 der Schriften des Fachbereichs Architektur Stadtplanung Landschaftsplanung der Universität Kassel, Berlin 2010, S. 167 (169 f.).

9 Vgl. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger (Hrsg.), BauGB – Kommentar, Loseblattsammlung, Stand: 106. Lfg. September 2012, Einl. Rn. 338 ff.

10 Vgl. Mitschang, Bebauungspläne zur Steuerung von Vergnügungsstätten, in: Mitschang (Hrsg.): Stärkung der Innenentwicklung – BauGB-Novelle 2012/13, Frankfurt am Main 2013, S. 7 f.

11 Vgl. Mitschang/Schwarz, Zwischen Planung und Markt – Steuerungsmöglichkeiten der Stadtentwicklung durch Bauleitplanung, in: Kummer/Frankenberger (Hrsg.), Das deutsche Vermessungs- und Geoinformationswesen, Berlin 2013.

a.3) Would you say that new attitudes to planning law have emerged as a result of these changes and, in a positive case, which?

Basically, planning represents an official act of the municipalities by controlling the urban planning and development of a city or town. Extending the cooperation opportunities within urban land-use planning, for example by the project and infrastructure plan or urban development contracts, binds private investors closer to planning and leads generally to greater acceptance towards planning.[12] Nevertheless, there are also doubts about planning with investors while weighing public and private interests. To guarantee and show that municipalities are in charge of planning is the responsibility of a modern administration. A significant facilitation for planning is the accelerated procedure for inner-urban development (Section 13a of the Federal Building Code). It led to increased urban planning activities since the procedure usually takes less time and is less expensive.[13]

b.1) Are there any recent efforts (2008 onwards) in your country for the simplification and speeding-up of plan-making (including the revision of existing plans) and in what direction?

The accelerated procedure for binding land-use plans on inner-urban development was introduced as part of the amendment of the Federal Building Code in 2007 with the objective to improve the inner-urban development and to reduce land consumption. In this planning procedure certain facilitation measures are provided by which an acceleration of the urban land-use planning process can be achieved. Through these different reliefs the municipalities are "rewarded" when inner-urban development is given priority instead of external development.

The term inner-urban development is a professional planning term. It means the development within settlement areas like brownfields in contrast to the external development and the use of unconsumed land like greenfields. Section 13a (1) sentence 1 of the Federal Building Code lists several possibilities for inner-urban development. These include land reclamation (land recycling), densification as well as other measures like interim uses. The facilitations of the planning procedure can be summarised as following:

- There is no obligation to carry out a strategic environment assessment (SEA).
- The early participation of the authorities and the public is not necessary.
- The participation can be reduced to the authorities and the public which is affected by the plan.

12 Vgl. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger (Hrsg.), BauGB – Kommentar, Loseblattsammlung, Stand: 106. Lfg. September 2012, § 11 BauGB Rn. 4.

13 Vgl. Siedentop et al., Nachhaltige Innenentwicklung durch beschleunigte Planung? Analyse der Anwendung von § 13a BauGB in baden-württembergischen Kommunen. Landesamt für Umwelt, Messung und Naturschutz Baden-Württemberg, Stuttgart 2010, S. 62.

- The binding land-use plan doesn't need to be developed from the preparatory land-use plan but may also deviate from it. The preparatory land-use plan will be adjusted later.

The elimination of these steps regularly leads to an acceleration of the planning procedure.[14] The accelerated planning procedure can be carried out while issuing, changing or complementing a binding land-use plan. It is also possible to combine the accelerated planning procedure with the project and infrastructure plan. The advantage of this combination is that a special designated plan for a specific project can be established in a short time, which is of course relevant for private investors.

In planning practice, the binding land-use plan for inner development is used regularly by towns and municipalities because of its facilitation of the planning procedure. A survey in the state of Baden-Württemberg for example showed that between 2007 and 2009 about 40 percent of the binding land-use plans were established by using the accelerated planning procedure (Section 13a of the Federal Building Code).[15] It is assumed that in other states (Bundesländer) the instrument is used to a similar extent. Since the amendment of 2007 there were no further efforts to simplify and accelerate planning procedures. By using this new instrument very often the preparatory land-use plan is loosing his relevance as an strategic instrument for inner-urban development. Despite of this, informal planning instruments like strategic city development plans or master plans become more relevant to proof the compliance of binding land-use plans with the objectives of the strategic development of a municipality.

b.2) How does planning legislation in your country deal with projects that are not in conformity with existing land-use plans? Are there any provisions for large-scale or minor-scale deviations from existing land-use plans and under which conditions?

Within the area of a binding land-use plan a project is permissible if the infrastructure has been ensured and if it is in compliance with the legally-binding arrangments of the plan (Section 30 (1) of the Federal Building Code). This also applies to a project-based binding land-use plan, which will be developed in collaboration with a private third party (Section 30 (2) of the Federal Building Code). Consequently, a project is not permissable and therefore cannot be realized, if it is not in compliance with the arrangments of the binding land-use plan.

There are two possibilities for deviation. On the one hand, exceptions of the legally-binding arrangments of the binding land-us plan can be approved if there are explicitly provided for the binding land-use plan according to type and scale of land use (Section 31 (1) BauGB). In addition

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[14] Vgl. Mitschang, Städtebauliche Planungsinstrumente für die Innenentwicklung, in: ZfBR 2013, S. 324 (333 ff.).

[15] Siedentop et al. 2010, 62.

Section 31 (2) of the Federal Building Code enables an exemption of the legally-binding arrangments if the basic intention of the plan is not affected, and:

1. a dispensation is required for the public good, or
2. a deviation is justifiable in the interests of urban development, or
3. implementation of the binding land-use plan would result in evidently unintended hardship.

Also the interests of neighbours have to be taken into account (Section 31 (2) BauGB).

The climate change amendment in 2011 introduced a special rule for economical and efficient use of energy. According to Section 248 of the Federal Building Code planning law allows subsequent changes of existing buildings for the purpose of energy saving or solar use.[16] That is because energy saving measures, like thermal insulation on roofs and facades or solar panels on rooftops, change the structure of the existing buildings. If these changes go beyond the scale of use set in the binding land-use plan they would not be permissible normally. In these cases, Section 248 of the Federal Building Code allows an exception of the arrangments of the plan for the purpose of energy saving measures.[17] However, this special regulation covers only existing buildings and is not applicable to the construction of new buildings.

If there is no way to make an exception of these rules, it is also possible to change the binding land-use plan in a respective planning procedure. Therefore the accelerated planning procedure may be used according to Section 13a of the Federal Building Code to facilitate the process, but only if the respective conditions are met (binding land-use plan for inner development). The local authority must consider that the amendment of the binding land-use plan is required for the urban development (Section 1 (3) of the Federal Building Code). But within this decision the municipality has a wide scope of discretion. But at last it is always the genuine decision of the municipality. There is no legal claim for third parties to force the municipality to establish a land-use plan, not even through a contract.

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[16] Roeser, in: Schlichter/Stich (Hrsg.), Berliner Kommentar zum Baugesetzbuch, 3. Auflage, Köln, Loseblattsammlung Stand: 21. Lfg. 6/2012, § 248 Rn. 1; Söfker, in: Ernst/Zinkahn/Bielenberg/Krautzberger (Hrsg.), Baugesetzbuch Kommentar, C.H. Beck, München, Loseblattsammlung Stand: 101. Lfg. 9/2011, § 248 Rn. 2.

[17] Söfker, Absicherung von Wärmedämmmaßnahmen, in: Mitschang (Hrsg.), Klimagerechte Stadtentwicklung – Die neuen Regelungen der BauGB-Novelle 2011, 219 (222).

b.3) Are there any provisions in your planning legislation for 'projects plans', that is, plans tailored to specific, public or private, land-development projects?

The project-based binding land-use plan according to Section 12 of the Federal Building Code is prepared for a certain project (project planning) other than the normal binding land-use plan (service planning). The project developer is committed to realise the project.[18] Using this instrument, the aim is to relieve municipalities of planning and infrastructure tasks and to strengthen the initiative of private third parties.[19] The project-based binding land-use plan consists of three components. These include:

- the project and infrastructure plan of the project developer,
- the implementing contract between municipality and project developer and
- the project-based binding land-use plan,

which is prepared and adapted as a bye-law by the local council. In the project and infrastructure plan the project developer specifies the project, which he wants to realise on his land. The implementing contract is entered between the municipality and the project developer. Here there project developer commits himself to realize the project within a certain period and fully or partly assumes planning and land improvement costs.[20] The project-based binding land-use plan, which is based on the project and infrastructure plan, is prepared like a binding land-use plan by the local authority. Normally the project developer wants the municipality to prepare the binding land-use plan and asks for starting the binding land-use plan procedure according to Section 12 (2) of the Federal Building Code. Then the municipality has to prove accurately the request of the investor.[21] However, there is no obligation to establish a binding land-use plan nor can the adaption as a bye-law be claimed. If the municipality agrees with the preparation of a binding land-use plan, it will go through the formal planning procedure.[22] If the rehabilitation of a brown field site in settlement areas takes place, the accelerated planning procedure can be used. This way the cooperative and implementation-orientated elements of the project-based binding land-use plan may be combined with the simplified planning procedures according to Section 13a of the Federal Building Code. This temporal aspect has an enormous importance for project-based planning and its implementation. Furthermore, the binding land-use plan preparation procedure including the project-based plan can be transferred to a private third party – e. g. Planning office (Section 4b of the Federeal Building Code).

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18 Finkelnburg 2011, Rn. 17.

19 vgl. Löhr 2009, § 12 BauGB, Rn. 3.

20 Krautzberger 2011-2, Rn. 14.

21 Krautzberger 2009, § 12 BauGB, Rn. 22.

22 Finkelnburg 2011, Rn. 25.

b.4) After all, do you consider planning law in your country as flexible and responsive or not and why?

In particular, the integration of EU regulations has resulted in an increase in complexity of planning procedures. For example, the number of environmental assesments has increased.[23] At the same time, there are also various instruments to ensure a flexible approach to different case scenarios. These include in particular the project-based land-use plan and the accelerated planning procedure for the binding land-use plan for inner-urban development that can be also used used for preparing a binding land-use plan.

c.1) Are there any institutional changes in the relationships between different planning levels/authorities in your country during last years?

The relation of the individual planning levels or institutions to each other was unaffected by the amendments. The two states (Bundesländer) Berlin and Hamburg as city-states (Stadtstaaten) are an exception. In both cities the preparatory land-use plan for the entire city is prepared by the state government (Senat). However, the superordinated district authorities (Bezirksverwaltungen) are responsible for the preparation of the binding land-use plans.[24] If a binding land-use plan is prepared in the accelerated procedure according to Section 13a of the Federal Building Code, the plan may differ from the regulations of the preparatory land-use plan being still within the regulations of the development order (Entwicklungsgebot) according to Section 8 (1) sentence 1 of the Federal Building Code. The preparatory land-use plan will be adjusted afterwards by being corrected (Section 13a (2) no. 2 of the Federal Building Code). As a consequence, the districts (subordinated planning level) must consider the requirements of the state administration (higher planning level).

c.2) Are these changes indicative of a more decentralized or more centralized system of planning-making?

The planning system in Germany is decentralized. The amendments in planning law in recent years have changed nothing within this. Binding urban land-use planning is part of the self-government-tasks of municipality. Self-government means that the affairs of a local community can and have to be managed by the municipality on their own responsibility within regulations. Local self-government is ensured in Article 28 of the Basic Law.

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23 Schink, Herausforderungen des Umweltrechts für die Bauleitplanung, in: Krautzberger/Rengeling/Saerbeck (Hrsg.), Bau- und Fachplanungsrecht – Festschrift für Bernhard Stüer zum 65. Geburtstag, München 2013, S. 443 (447 ff.).

24 In the other states the binding and preparatory land-use plans are prepared by the municipilaties, that means by one institution.

c.3) According to your planning legislation, do more levels of government make legally binding plans and, if so, are there any mechanisms to ensure co-ordination between them?

Various administrative levels are responsible for spatial planning in Germany. Figure 1 represents an overview.

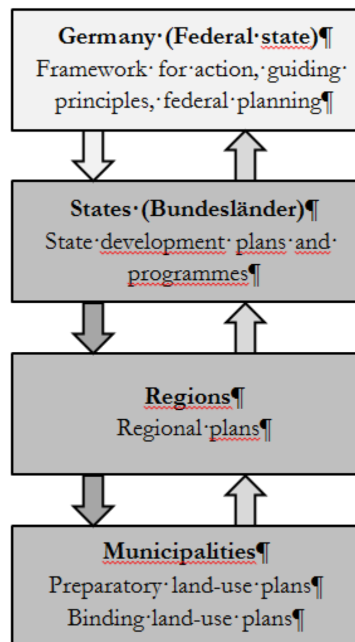

Figure 1: System of spatial planning in Germany

Due to the principle of countervailing influence the planning levels are influenced by each other. On the one hand, the subordinate planning level is involved in the planning of the higher level. (Section 4 and 10 of the Federal Spatial Planning Act) The municipalities share their development ideas with the superordinate regional planning. These ideas have to be taken into account in the planning procedure. On the other hand, the binding land-use planning within municipalities is bound to superordinate and other sectoral planning regulations. (Section 1 (4) of the Federal Building Code). While weighing interests the principles of spatial planning are taken into account. (Section 3 (1) no. 3 of the Federal Spatial Planning Act). Superordinate planning and projects (sectoral planning) have priority over land-use planning law (Section 38 of the Federal Building Code). However, while weighing interests sectoral planning authorities need to involve the municipalities and consider supra-local interests.

c.4) How can national government influence the content of regional or local land-use plans?

At the federal level, the Federal Spatial Planning Act and the Federal Building Code influence the regulations in spatial and land-use plans. These set the framework for what can or shall be decided in

spatial and land-use plans. While the content of spatial plans (Section 8 (5) of the Federal Spatial Planning Act) and preparatory land-use plans (Section 5 of the Federal Building Code) are not final, the regulations of binding land-use plans are limited to the contents of Section 9 (1) of the Federal Building Code. Furthermore, there is no possibility for the municipalities to invent additional regulations. Within these guidelines of the regulations, the municipalities are responsible for the content of the superordinate spatial or land-use plans.

Another way of influencing is possible within narrow limits. On the one hand, the federal state can establish a spatial plan for the whole federal territory. But these can only be a concretisation of single principles within spatial planning (spatial development of the federal territory) according to Section 17 (1) of the Federal Spatial Planning Act or have to be limited to certain transnational issues (location concepts for ports and airports) according to Section 17 (2) of the Federal Spatial Planning Act. But these spatial plans do not have a binding force on spatially relevant planning or activities of the different states.

c.5) Which authority is responsible in your country to deliver planning permission for public and private projects of national, crossregional or supra-local significance?

In Germany, the lower building supervisory authority is responsible for giving permission to construction projects. The authority is either located within the district administration or city administration (independent cities). Deciding on the permissibility of projects, it does not matter whether they are public or private projects or projects with supra-local significance. The constructions of the states or the federal state form an exception. If certain conditions are met, only a consent and no permission procedure is needed.[25]

[25] z. B. § 80 Bauordnung des Landes Nordrhein-Westfalen (BauO NRW), Art. 73 der Bayerischen Bauordnung (BayBO).

CASE STUDY – SWEDEN

DR. J. (JENNY) PAULSSON (SWEDEN)

a) The planning law and policy in Sweden has not been affected by the economic crisis and it has not led to any reforms as a direct result of the crisis. The housing production in Sweden is low and the rent is also low at the moment. There is a shortage of housing and during the last decade only half of the number of apartments has been constructed compared with other OECD countries. However, it is mainly due to other factors than the economic crisis, such as that the building companies' unwillingness to construct houses.

b) There are substantial recent efforts in Sweden for the simplification and speeding-up of plan-making. The legislation - or rather, the application of it - has been criticized in several respects. It relates in particular to the planning and permitting process being too cumbersome and time consuming. An investigation shows that the median time required for a "normal plan" is 2.5 years, but the time can vary from about ten years to a few months.

   In recent years the government has appointed several government inquiries, giving suggestions on fairly radical changes to the legislation. In 2011 the Housing Minister initiated several investigations on the so-called municipal special requirements of construction, the system of planning and plan implementation, municipal plan preparedness and municipal land allocation. Recently two governmental reports were presented, one on a more efficient plan implementation (SOU 2012:91), and the other on a more efficient planning and building permit process (SOU 2013:34).

   The Inquiry on construction requirements has identified local differences in the application and interpretation of technical requirements of buildings and analyzed the production cost and productivity development when municipalities make different requirements for the construction that go beyond national building regulations. The inquiry on increased housing and coordinated environmental requirements through consistent and predictable building regulations argues that municipal special requirements are an inefficient method of achieving sustainable development. National regulations would be the most effective instruments for the design of buildings.

   The Inquiry on plan implementation suggests that housing should be made a national interest in the Planning and Building Act. More emphasis is placed on comprehensive planning. Questions of a comprehensive nature, such as environmental quality standards, inter-municipal coordination or national interests, should hence be investigated already at this level before the subsequent dialogue between the developer and the municipality regarding detailed planning and concrete construction projects. Citizens' influence should be on this comprehensive level where there is a real possibility of influence.

   The Detailed Plan should be a purely enforcement tool. During the plan's implementation period a building permission should not normally be required in order to build in accordance with the plan. If the comprehensive plan meets certain criteria, e.g. that it clearly shows the land use in a so-called area plan for an urban area or a neighbourhood, no subsequent

detailed plan shall be required. Development projects can then be directly examined in conjunction with the building permit. Given the many problems associated with outdated detailed plans, it is proposed that these plans are partially repealed after expiration of the implementation deadlines. Thereafter, the plans should only regulate basic issues such as land use, traffic supply and building heights. New buildings should be adapted to the style, character and building structure of the surroundings.

Finally, it is proposed that the formal statutory requirements on both the comprehensive and the detailed planning processes - with consultation and citizen participation – should be restricted. It will be up to the municipality to determine in what form they want to consult the citizens.

Other ongoing investigations include coordination between the Planning and Building Act and the Environmental Code in respect of noise standards in order to facilitate the planning and construction of housing in noisy environments. Other inquiries concern the application of shore protection rules and how the process for appeals of municipal decisions under the Planning and Building Act can be simplified. There will also be an inquiry aimed at evaluating and analyzing the coordination between regional and municipal planning and its impact on housing supply.

The Swedish planning and permit system rests on the principle that the detailed development plan is prepared prior to the development projects are known. The plan is meant to provide a framework and detailed issues are then handled at the building permit examination. However, today the initiation of major construction projects is normally made before the work with the detailed development plans begins. This means that the detailed development plan, having previously been just a “plan” for future settlements, has transformed into a first permit for a concrete project. This is then followed up with an additional permit in the form of a building permit.

If the development project differs from the detailed development plan, basically three situations can arise:
1) The deviation is considered “small” and planning permission can be granted, provided that the neighbours may comment on the deviation. This complicates the processing of the building permit, since in urban environments neighbours under the Planning and Building Act may include a large number of property owners, residents and others.
2) The deviation exceeds what can be considered “small”. In this case, the plan must be changed.
3) The third option is to “give up”, that is, the plan is followed and construction is made in a way that does not correspond to the wishes of neither the municipality nor the developer.

Regarding rules for the permitted use of buildings, the Planning and Building Act, as opposed to the rules regarding the building location, design and size, makes no room for deviations from the plan. The only remaining alternative is then to change the plan.

c) Planning and permission activities of the Planning and Building Act - through the municipal planning monopoly – is basically a municipal task, even if the state / County Administrative Board may intervene in the municipal planning in terms of national interests, issues concerning several municipalities, standards for environmental quality, shoreline protection, and issues related to public health and safety. It is primarily the municipality that decides, through the planning and permit procedure, how land and water resources are to be used.

Basically, the municipality alone decides where, when and how a plan is to be drawn up. The Government cannot make an order for the municipality to adopt, revise or cancel plans, except when necessitated by national interests or by interests involving several municipalities.

The Planning and Building Act provides for three types of plans:
• The regional plan, which can be used to coordinate the planning of several municipalities in areas such as roads, buildings and green spaces. Regional planning is aimed mainly for the metropolitan areas where many municipalities naturally are affected by overall development and infrastructure issues.
• The comprehensive plan, which is mandatory and covers the entire municipality. The purpose is to specify the main features of land use and building development, including guidance for subsequent plans, permits and decisions. The comprehensive plan, however, is not binding.
• The Detailed Development Plan, which regulates land use and building development in a binding way, as well as property division, joint facilities, etc. In urban developments of any importance detailed development plans are always drawn up. The Detailed Plan is legally binding, i.e., when the plan acquires force of law, rights and obligations are incurred, above all by the municipality and property owners.

There is an on-going Governmental Inquiry on the relationships between different planning levels and the regional planning. A parliamentary committee is appointed to investigate and propose such changes in the regulatory framework governing land use planning and development of planning at the regional level as needed to meet housing needs and sustainable development in all parts of the country. The Committee will evaluate the system of regional planning under the Planning and Building Act and how it relates to the system of regional development strategies and regional plans for transport infrastructure, as well as regional transport supply programs. Furthermore, the Committee shall evaluate how the coordination of the management of housing supply issues at the regional and municipal level functions today. The Committee shall also investigate what should be included in planning at the regional level and in this context analyze the need to balance national and regional objectives, plans and programs on a regional level.

CASE STUDY - THE NETHERLANDS

***Fred Hobma, LL.M., Ph.D.*[1]**

1. NEO-LIBERALISM AS THE BACKDROP OF PLANNING LAW REFORMS

The Netherlands is seen by many as a 'planners paradise', with great governmental powers in spatial planning.[2] However, since the mid-1980s many legislative reforms have taken place with the purpose to simplify the process of decision-making and speed-up plan-making. Simultaneously, the various tiers of government promoted a growing influence of private sector on spatial planning decisions. Therefore, the many changes in Dutch planning law following the crisis of the late 2000s, can be seen as a continuation of previous legislative reforms.

In broad lines, the legislative planning law changes since the mid-1980s up to and including the current crisis, must be seen against the backdrop of 'neo-liberal' policies. Neo-liberalism can be defined as:

> 'An approach to economics and social studies in which control of economic factors is shifted from the public sector to the private sector. Drawing upon principles of neoclassical economics, neoliberalism suggests that governments reduce deficit spending, limit subsidies, reform tax law to broaden the tax base, remove fixed exchange rates, open up markets to trade by limiting protectionism, privatize state-run businesses, allow private property and back deregulation.'[3]

The start of neo-liberal policies and subsequent legislative changes in the Netherlands lies in an economic crisis – not the current crisis, but the 1980s crisis. Western governments reacted to the 1979 oil crisis by using Keynesian economic principles. This implied anti cyclic economic policies to stimulate economy. This, however, led to enormous government budget deficits and inflation. As a reaction, new political leaders, such as Lubbers in the Netherlands, Thatcher in the UK and Reagan in the USA, made reorganisation of the finances a prime policy objective. A new vision on economic governmental policy grew. Contrary to Keynesian principles, the idea rose that government should minimally intervene in economy. Taxes were cut, governmental companies were privatised, serious deregulation started and governmental expenditures declined.[4]

From the 1980s to mid-1990s Dutch governments were led by prime minister Ruud Lubbers. Following neo-liberal principles, one of the main goals of his cabinets was to make the Netherlands more competitive. Retrenchments and cutting of governmental tasks became important policy instruments.[5]

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[2] A. Faludi and A. van der Valk, *Rule and order – Dutch planning doctrine in the twentieth century*. Kluwer Academic Publishers, Dordrecht, The Netherlands, 1994.

[3] Definition taken from www.investopedia.com.

[4] D. Harvey, *A brief history of neoliberalism*. Oxford University Press, Oxford, UK, 2005.

[5] W.J.M. Kickert, Beneath consensual corporatism: traditions of governance in the Netherlands. *Public Administration*, Vol. 81, no. 1, 2003 (119-140).

In the Netherlands and elsewhere in Europe, these basically economic policies, exerted major influence on spatial planning as well. During the 1980s and 1990s, the private sector entered the realms of urban planning and governance.[6] Here, all countries witness a diminishing role of national governments and a rearrangement of planning powers across a diversity of (semi or non-) governmental bodies.

This neo-liberal shift in urban planning and development has fostered an increasing amount of new public-public and public-private relations and interdependencies, particularly in efforts to realise spatial projects that cut across different disciplines, government sectors and administrative jurisdictions. In The Netherlands, by the end of the 1990s, the preponderant top-down designation of land-uses by government bodies made way for more entrepreneurial, market-led approaches, which Dutch spatial planners termed 'development planning' *(ontwikkelingsplanologie)*. Project development companies and real estate investors showed an increasing capacity and interest to scope-up their projects, integrating the development of infrastructure and other public works into large-scale urban development proposals. As a consequence of the rise of private parties significance, gradually the heart of spatial planning moved from 'plans' to 'projects'. Planning law changed accordingly.

An example from environmental law may demonstrate the type of the changes in legislation leading to relaxation of obligations for private parties and reduction of governmental costs at the same time.

> Initially virtually all activities that led to environmental nuisance (noise etcetera) needed an individual permit. All applications were individually assessed by the competent authority. Later, the act was changed. Nowadays, the law *(Activiteitenbesluit milieubeheer)* discerns three types of companies, depending on their environmental impact. Type A companies need to comply with certain environmental rules, but do not need to report their activities to government in advance. Type B companies merely need to report their activities (once) in advance. The company itself performs the input of data. There is no prior check by government. Only type C companies need an individual environmental permit.
> Needless to say that businesses are greatly served by this type of legislation.

In summary, the 1980s crisis gave way to the rise of neoliberal politics. Neoliberal policies since effected whole society: welfare, employment etcetera.[7] It also exerted great influence on planning and planning law. Deregulation, relaxation of land-use regulations, removal of 'unnecessary planning burdens and regulations' for businesses, simplification of planning regulations and speeding-up of plan-making can all be seen in the light of neoliberal politics. Hence, the strong Dutch legislative changes in planning law following the economic crisis of the late 2000s – notably the new Crisis and recovery act – can be seen as a continuation of long-established neoliberal politics.

It is now possible to answer the conference's first question. Question a) reads:

Which, do you consider, to be the main effects of the economic crisis, if any, on your country's planning law and policy? Has your national planning law experienced, during last years, a minor or major reform as a result of the crisis or for other reasons and in which directions? Would you say that

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[6] For an elaborate description of the growing influence of the private sector on urban development, see chapter 1 in E. Heurkens, *Private Sector-led Urban Development Projects – Management, Partnerships & Effects in the Netherlands and the UK*. Doctoral dissertation, Delft University of Technology, 2012. http://abe.tudelft.nl/article/view/Heurkens/heurkens.

[7] R.S. Turner, *Neo-liberal ideology – History, concepts and policies.* Edinburgh University Press, Edinburgh, UK, 2008.

new attitudes to planning law have emerged as a result of these changes and, in a positive case, which?

Summarising answer to question a):

The economic crisis in the late 2000s has had a major effect on Dutch planning law. The crisis was the impetus to a new act: the Crisis and recovery act (*Crisis- en herstelwet*). This planning act was drafted as a direct effect of the economic crisis.

The planning law reforms since the crisis are directed toward simplification, speeding-up of plan-making and decision-making, relaxation of 'restrictive' (environmental) regulations and limitation of (citizen's) power to delay. Insofar, they can be seen as a continuation of a direction that was taken earlier.

Since the introduction of new 'crisis legislation', gradually Dutch municipalities became used to the new instruments. National government, in its evaluations, is positive regarding the effects of the new legislation.[8] It emphasises that the Crisis and recovery act is not only a crisis instrument, but also 'new thinking'. Some legal scholars, however, are less positive. Their concerns primarily relate to the limitations of legal protection against governmental decisions.[9]

2 Recent efforts for simplification and speeding-up

The past five years (since 2008) have witnessed many changes of planning law in order to simplify and speed-up. The new Spatial Planning Act got into effect on July 1st, 2008. However, now, in 2013, we cannot consider it a 'new' act anymore. That is why I will concentrate on more recent changes in legislation instead. These changes are divided into two categories: changes in general law of administrative procedure (section 2.1) and changes brought about by the Crisis and recovery act (section 2.2).

2.1 Changes in general law of administrative procedure

The recent changes in general law of administrative procedure affect the whole of administrative law. This includes spatial projects and plans. That is why it is relevant to take a look at those changes. The changes are effected through a special act, the 'Act amending law of administrative procedure' *(Wet aanpassing bestuursprocesrecht)*. It is a recent act; it is in effect since January 1st, 2013. The act means that the existing General Administrative Law Act *(Algemene wet bestuursrecht)* is amended on many points. In essence, the goal of the new rules is to create more decisive legal proceedings at the administrative court. Thus, the legislative changes can be seen in the light of pursuit of efficiency and effectiveness. The idea is that the administrative judge must be able to settle a dispute fast and definitively.

This section will give an overview of some of the changes in general law of administrative procedure that are of most effect to planning law issues.[10]

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[8] The latest evaluation of the Crisis and recovery act is from July 2013. Ministerie van Infrastructuur en Milieu, *Praktijkervaringen Crisis- en herstelwet – Voortgangsrapportage 2012-2013.* Ministerie van Infrastructuur en Milieu, Den Haag, juli 2013.

[9] Discussion between legal scholars and members of parliament during the Second Chamber of Parliament Roundtable on February 29th, 2012 in the framework of legislative proposal nr. 33135.

[10] For a more complete overview in Dutch, see M. Blokvoort, De Wet aanpassing bestuursprocesrecht vanuit vastgoedperspectief. *Vastgoedrecht*, 2013 – 2, p. 43-49.

(a) Administrative loop

Prior to the 'Act amending law of administrative procedure', a separate improvement was introduced: the administrative loop *(bestuurlijke lus)*. It is enacted in section 8.2.2A General Administrative Law Act. The administrative loop may be appropriate when the judge observes a defect in an administrative decision. In such a case, he can deliver an interlocutory judgement in which he invites (or requires) the administrative body to repair the defect. The advantage of this loop is that the judge does not need to nullify the administrative decision. Nullification would lead to a new administrative decision (and possibly a new procedure before court) and would require a lot of time. Since its introduction, the administrative courts use the administrative loop frequently.

(b) Definitive dispute settlement

Article 8:41a General Administrative Law Act stipulates that the administrative judge will settle the dispute definitively as much as possible. This article aims to prevent that the judicial decision is just an intermediate step and that parties, after the judicial decision, need again follow all kinds of procedures to get a definitive decision.

(c) Disregard of defects

Article 6:22 General Administrative Law Act specifies that the court may disregards defects of the administrative decision. This means that administrative decision can be left intact (that is: need not be nullified by the judge) despite breach of a formal rule or a material legal norm, provided that interested parties are not put in a disadvantage. If the court disregards defects, the appeal will be denied.

(d) Upholding of legal consequences

If a defect cannot be disregarded, the court will have to nullify the administrative decision. However, the court will have to examine whether, in combination with nullification, the legal consequences of the administrative decision can be upheld. If the legal consequences are upheld, the nullification is of no use to the applicant. Article 8:72, section 3, under a, General Administrative Law Act, gives the legal basis for the court's decision to uphold legal consequences.

(e) Protective norm theory

In the Netherlands, legal standing before court *(locus standi)* is only possible for 'interested parties' *(belanghebbenden)*. Once a party is qualified as an interested party, it is limited in the grounds it can bring forward. This is due to the so called 'protective norm theory' *(relativiteitsvereiste)*. The applicability of this theory is laid down in the new article 8:69a General Administrative Law Act as a consequence of the 'Act amending law of administrative procedure'. The protective norm theory can be described as follows:

> 'violation of a provision of public law results in a violation of a person's subjective right(s) only when the violation aims to, besides protecting the public interest, protect the person's interest'.11

[11] Definition taken from K. Relve, Standing of NGOs in relation to environmental matters in Estonia, *Juridica International*, XI/2006, p. 166 et seq.

In essence this means that a person (X) cannot invoke violation of a rule if the rule did not intend to protect X. An example from case law may make the protective norm theory clear.12

> Appellant X lives in the vicinity of a site where new houses are to be build. For this project a new land-use plan has been adopted. To enable the project, the municipality took a 'decision to set a higher noise standard' *(vaststellingsbesluit hogere waarden)*. This decision makes it possible to build houses that will be subject to more noise than preferred.
> X argues that the project is in conflict with the Noise Abatement Act. To this end he brings forward (among other things) that the municipality left behind to examine the effectiveness of certain measures to reduce noise.
> The Administrative Jurisdiction Division of the Council of State finds that X does live in the vicinity of the project. But he is not going to live in one of the new houses. Nor is he the owner of one of the houses for which the decision to set a higher noise standard was taken. Furthermore, the land-use plan does not enable the construction of a new road that could lead to noise nuisance for X.
> In addition, the council rules that the rule (i.c. the Noise Abatement Act) did not intent to protect X. Thus X cannot invoke this rule. Therefore, the municipal decision will not be nullified.13

2.2 Changes brought about by the Crisis and recovery act

The Crisis and recovery act *(Crisis- en herstelwet)* got into effect on March 31, 2010. It was intended to be a temporary act, with a life span of four years. However, before the term, the act is extended for an indefinite period of time. The 'permanent' Crisis and recovery act is in effect since April 25th, 2013.[14]

The Crisis and recovery act can be seen as a twofold experimental garden. First, some of the instruments in this temporary act got permanent anchoring through insertion in the (later) 'Act amending law of administrative procedure' (see section 2.1). Second, because, in future, the achievements of permanent Crisis and recovery act will be incorporated in the new Environmental Planning Act *(Omgevingswet).* The Environmental Planning Act is a huge legislative project, aiming at integration of (almost) all current Planning and Environmental acts.[15]

The Crisis and recovery act is a response to the economic crisis that hit the Netherlands and many other countries since 2008. The Explanatory Memorandum to the draft Crisis and recovery act leaves

[12] Administrative Jurisdiction Division of the Council of State 30 November 2011, nr. 201011839/1/R3, LJN: BU6355. Annotation by A.G.A. Nijmeijer in *Ars Aequi*, March 2012, p. 222.

[13] One could argue that X stood up for the future residents of the housing project – to prevent that they would be subject to more noise than preferred. But the protective norm theory prevents X to do so. Even if could be concluded that the project *is* in conflict with the Noise Abatement Act, it cannot lead to nullification of the municipality's decision if it is brought forward by X.

[14] I will refer to the 'original' Crisis and recovery act, which came into effect in 2010, as 'Crisis and recovery act'. I will refer to the later Crisis and recovery act, which succeeded the original act in 2013, as 'permanent Crisis and recovery act'.

[15] For a brochure regarding the Environmental Planning Act in English, see *Simple and better – the Environmental Planning Act: the main changes.* Ministry of Infrastructure and the Environment, The Hague, August 2013. Available through https://omgevingswet.pleio.nl/pages/view/9262692/publicaties-eenvoudig-beter. The main reasons for the new Environmental Planning Act are explained in another brochure: *Main points on simplifying environmental planning legislation in The Netherlands.* Available through: http://www.government.nl/documents-and-publications/reports/2012/06/28/main-points-on-simplifying-environmental-planning-legislation-in-the-netherlands.html. Ministry of Infrastructure and the Environment, The Hague, 28 June 2012.

no doubt that the economic crisis is the cause of the act.[16] The aim is that the provisions of the act make it easier (= faster) for building projects and infrastructural projects to finish administrative and legal (= court) procedures. The line of thought is as follows: if barriers to projects are removed, they can be built shortly and thus stimulate economy.[17]

However, as so often, it may very well be that certain politicians, as it were, 'waited' for a crisis to occur. In this line of reasoning, some political powers had, for a longer period of time, plans to introduce instruments to simplify and speed-up decision-making. But they knew that under normal circumstances, there would be no support in parliament and society for relatively far-reaching legislative measures. The crisis, however, was the opportunity to press the new instruments. The expression: 'a solution waiting for a problem' may apply here.[18]

The Crisis and recovery act does not apply to all building projects and infrastructural in the Netherlands. For instance, a small project consisting of the building of less than 12 houses does not fall under the act. Nevertheless, we can rest assured that all major projects fall under the act. In short, the act applies to certain *categories* of activities (like construction of a new motorway), to (many) *projects* that have been named explicitly (like windfarm Second Maasvlakte) and to *areas* that have appointed later by council in order (like the redevelopment of the city harbours of Rotterdam).

For analytical purposes, we can divide the provisions of the Crisis and recovery act in two parts: changes in law of administrative procedure (section 2.2.1) and new instruments (section 2.2.2).[19]

2.2.1 CHANGES IN LAW OF ADMINISTRATIVE PROCEDURE

The Crisis and recovery act holds a number of changes in the law of procedure which come on top of the changes introduced by the 'Act amending law of administrative procedure' (section 2.1). As said, these 'extra' facilities only apply to categories and projects that fall under the Crisis and recovery act. The facilities are aimed at speeding-up (court) procedures.

(a) Legal standing

Usually, municipalities have the power to appeal against national government's decisions. However, under the Crisis and recovery act, municipalities do *not* have legal standing in case of national decisions. This is laid down in article 4.1 the Crisis and Recovery Act. An example is the decision of national government to deviate from municipal land-use plans, in order to enable the construction of a new motorway.

The purpose of this provision is to make for swift decision-making. In the past, before the Crisis and Recovery Act came into effect, it was not unusual for local government to lodge appeal with the Council of State against, for instance, infrastructure track decisions. The legislators, however, were of the opinion that branches of government (for instance minister and municipality) should not fight each other in court, but should settle their disagreement through consultations.

[16] Kamerstukken II, 2009-2010, 32127, nr. 3.

[17] The Crisis and recovery act also holds provisions to promote ecological innovation. Basically, all kinds of experiments are granted permission to deviate from existing regulations. These existing regulations otherwise hinder the experiments that are of benefit to the environment. I will not elaborate on this part of the Crisis and recovery act.

[18] W.C.T.F. de Zeeuw en F.A.M. Hobma, Crisis- en herstelwet: megaproject in turbotempo. *Tijdschrift voor Bouwrecht,* nr. 1, januari 2010, p. 2-9.

[19] For the sake of overview, not all provisions of the Crisis and recovery act will be discussed in this paper.

(b) Time period for judgment

Another way to make for swift decision-making is that the Council of State must come to a ruling within six months (article 1.6, para. 4, Crisis and Recovery Act).

(c) Appeal pro forma

An appeal pro forma (that is: an appeal where the grounds are given at a later stage) is not possible in cases that fall under the Crisis and recovery act (art. 1.6, section 2).

(d) Re-use of examinations

For spatial decisions, usually a lot of examinations have to take place: soil survey, noise measurements, protected species etcetera. The Crisis and recovery act stipulates that the examinations need not to be redone – thus can be re-used – in case a decision that was nullified by the court is repaired by the administrative body (art. 1.10).

2.2.2 New instruments

The Crisis and recovery act has introduced a number of new instruments. All have the purpose to simplify and speed-up decision-making. Two most relevant instruments are discussed in this section: development areas and project implementation decisions.

(e) Development areas

Development areas *(ontwikkelingsgebieden)* are specifically appointed areas (chapter 2, section 1 Crisis and recovery act). In these areas, local authorities can create scope so that new projects, such as the construction of houses, can be realised – which otherwise would have been very difficult or impossible due to (environmental) limitations. Development areas are located in existing urban areas or existing industrial areas. So far, more than twenty areas have been appointed.

'Create scope' means that environmental limitations are redistributed or decreased. For instance a noise nuisance zone in an area – where the project has to be realised – is made smaller, so that there is 'room' for the project. In order to create scope, for instance far-reaching demands can be made on companies. In the example of a noise nuisance zone, the company causing noise can be required to build a wall that would diminish the noise zone. Also, temporary deviation of environmental norms is possible (maximum 10 years). However, the deviation of environmental norms cannot be in conflict with European legislation. An example may clarify this.

> The city of Rotterdam wants to build many houses in the existing city harbour area. There is a fair amount of vacant space in the city harbours, because many companies moved to the new Second Maasvlakte (a huge project of land reclamation). However, not all companies have yet moved to the Second Maasvlakte. So, there still is noise nuisance from these companies. The city of Rotterdam does not want to wait building the new houses until all companies have moved and there is no longer noise nuisance. Under the status as 'development area', the city is allowed to build the new houses now, although there will be too much noise according the Noise Abatement Act. A condition is that the municipality can prove that within ten years, the noise norm will be observed.

(f) Project implementation decision

For construction projects holding more than 12 houses a special legal instrument is available. This instrument is called the project implementation decision *(projectuitvoeringsbesluit)*. Actually, this special instrument is not only available forhousing projects. It also applies to 'projects of societal relevance', such as building projects for care institutions and hospitals. The project implementation decision is regulated in art. 2.9 et sequens of the Crisis and recovery Act. So far, it has been used in less than twenty cases.

The essence of a project implementation decision is that just one governmental decision satisfies to allow the whole project. This decision, the project implementation decision, is taken by the municipal council. The project implementation decision replaces all permits, exemptions, authorisations etcetera that otherwise would have been necessary for the project.[20] Thus, once the project implementation decision has been taken, the project can be executed without the need to follow the usual permit procedures, such as the environmental permit. Should the project implementation decision be in conflict with the land-use plan in force, the project implementation decision will count as a deviation from the land-use plan.

Notwithstanding the fact that only one decision is needed for the project, all the assessment frameworks *(toetsingskaders)*, that usually apply to the project, will have to be used by the municipal council in taking the project implementation decision. This means, for instance, that the design of the project still has to be tested against the stipulations of the Building Decree, being one of the assessment frameworks.

The project implementation decision is an optional instrument. It is not imperatively to be used for projects above 12 houses. Municipalities can choose to apply the normal procedures to such projects. This means that not one, but several individual governmental decisions need to be taken to allow the project.

There is one possibility for interested parties to appeal: they can lodge an appeal against a project implementation decision with the Administrative Jurisdiction Division of the Council of State.

It is now possible to answer the conference's second question. Question b) reads:

Are there any recent efforts (2008 onwards) in your country for the simplification and speeding-up of plan-making (including the revision of existing plans) and in what direction? How does planning legislation in your country deal with projects that are not in conformity with existing land-use plans? Are there any provisions for, large-scale or minor-scale, deviations from existing land-use plans and under which conditions? Are there any provisions in your planning legislation for 'projects plans', that is, plans tailored to specific, public or private, land-development projects? After all, do you consider planning law in your country as flexible and responsive or not and why?

Summarising answer to question b):

After 2008 legislation has been adopted by parliament in order to simplify and speed-up decision making. Two acts stand out: the 'Act amending law of administrative procedure' and the Crisis and recovery act.

[20] This is not completely true. In some instances, one or more separate permits may still be necessary, next to the project implementation decision.

Projects that are not in conformity with existing land-use plans usually are made possible by granting an environmental permit to deviate from the land-use plan. This is a normal and often used procedure that is laid down in the Environmental Licensing (General Provisions) Act *(Wet algemene bepalingen omgevingsrecht)*.

However, national infrastructure projects (motorways, railways and waterways) that have followed procedures under the Infrastructure Planning Act *(Tracéwet)* overrule local land-use plans by law. Furthermore, the Crisis and recovery act holds a ‘project implementation decision’, which is a one-decision project plan tailored to a specific project (housing or ‘projects of societal relevance’).

In the 1970s it took 33 months form the initiative to the start of construction of a housing project. Around 2008, it was increased to more than 70 months. Of course, this cannot fully be attributed to (new) procedures, but for a major part it can. [21] In my opinion, if a housing project takes over 70 months, the planning law in a country is not flexible and responsive. Attempts to simplify and speed-up, while maintaining high quality of decision-making, therefore must be welcomed.

3 Relationships between different planning levels

Municipalities actually have the most important powers in Dutch spatial planning. Not surprisingly, therefore, the Dutch Spatial Planning Act is characterised by a large measure of decentralisation, which is particularly evident in the link between the environmental permit and the land-use plan. The Municipal Executive decides on environmental permit applications (art. 2.4, para. 1, Environmental Licensing [General Provisions] Act). An environmental permit is not granted if the building plan is in conflict with the land-use plan (art. 2.10, para. 1, under a, Environmental Licensing [General Provisions] Act), which is adopted by the Municipal Council (art. 3.1, SPA). The land-use plan designates to which end the land can be used. It also includes regulations concerning the use of the land and any structures located on it (art. 3.1, SPA).

The conference’s question c) relates to the relationships between the different planning levels and reads:

Are there any institutional changes in the relationships between different planning levels/authorities in your country during last years? Are these changes indicative of a more decentralized or more centralized system of planning-making? According to your planning legislation, do more levels of government make legally binding plans and, if so, are there any mechanisms to ensure co-ordination between them? How can national government influence the content of regional or local land-use plans? Which authority is responsible in your country to deliver planning permission for public and private projects of national, cross-regional or supra-local significance?

Summarising answer to question c):

The economic crisis of the late 2000s did not really affect the decentralised character of Dutch planning law. Actually, recently national government rather withdrew from spatial planning – apart from a number of topics that have been found to be of national interest.[22] So we cannot say that the crisis caused a more hierarchic or more centralised spatial planning system. The new instruments created by the Crisis and recovery act (see section 2.2.2) are instruments to be used by municipalities – not by national government. However, it must be admitted that some of the elements of the Crisis

[21] H. van Harssel, Procesduur van het ontwikkelingstraject en woningproductie. *Opinar*, mei 2008.
[22] *Structuurvisie Infastructuur en Ruimte*, Ministerie van Infrastructuur en Milieu, Den Haag, maart 2012.

and recovery act do have a centralising effect, notably the rule that municipalities do not have legal standing in case of national decisions (see section 2.2.1).

In the Netherlands, only municipalities make legally binding plans – that is, legally binding for applicants of permits to build. However, national government or provinces can take over the power to make a local land-use plan from the municipal council. Thus, it is possible that a province adopts a land-use plan 'where provincial interests are involved' (art. 3.26 Spatial Planning Act). The minister responsible for spatial planning may also adopt a land-use plan 'where national interests are involved' (art. 3.28 Spatial Planning Act). Such a land-use plan is called an 'imposed land-use plan' *(inpassingsplan)*. If a province or minister decides to exercise their powers to adopt an imposed land-use plan, the municipal power to adopt a land-use plan is taken away for that area.

One of the other instruments that can be used on the provincial tier is the adoption of *general rules (algemene regels)*. Such general rules are laid down in the legal form of a provincial bye-law *(provinciale verordening)*. The general rules are primarily directed towards the municipal governments. The general rules are an instrument to influence the content of local land-use plans. Article 4.1 Spatial Planning Act stipulates: 'If necessitated by provincial interests in order to achieve proper spatial planning, rules regarding the content of local land-use plans (…) and of management regulations may be issued by or by virtue of provincial bye-law'. An example, relating to the protection against high tide, may clarify this.

> A provincial bye-law could hold the stipulation that land-use plans must make the construction of new houses within a certain distance to the winter bed of the river impossible. The municipal councils, subsequently, are obliged to adapt their land-use plans to this stipulation within one year (art. 4.1, para. 2, Spatial Planning Act).

Just like provinces, national government has the power to set general rules. The municipalities have to adapt their land-use plans to the general rules. General rules from national government are not laid down in a bye-law (like provinces do), but in an order in council *(algemene maatregel van bestuur)* (art. 4.3 Spatial Planning Act).

RETHINKING PLANNING LAW IN THE CRISIS ERA: NEW SCOPE, NEW TOOLS, NEW CHALLENGES – THE CASE OF OREGON

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I. Context

The United States has no national spatial planning regime. Each state has provided for its own set of planning rules. In that sense, Oregon is a different planning entity than other states. Its planning system is unique in the American and international fields. That is not to say, however, that Oregon does not have the same difficulties as those facing other American states or the developed world as a whole. The same economic phenomena that strained other planning systems in the recent recession manifested themselves in Oregon as well.

As with Europe, the effects of the recession in the United States were profound in terms of growth and employment.[1] With respect to unemployment, Oregon suffered more profoundly than the nation as a whole.[2] The state had made the change in its economic base from being quite dependent on natural resources to a mixed service, marketing and service economy, and becoming more dependent on international trade.[3] The recent recession has accelerated the demise of the timber and fishing industries, which continue to lose employment due to loss of natural resources and market adjustments.[4] Many rural residents are left with a market that features minimum-wage jobs. While urban areas lost jobs as well, it was not nearly to the same extent.[5]

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[1] From December 2007 to June 2009, unemployment nationally increased from 5% to 9.5%, greater than in any other recent recession, and job openings decreased by 44% and employment by 5%. *See* Bureau of Labor Statistics: BLS Spotlight on Statistics: The Recession of 2007–2009 http://www.bls.gov/spotlight/2012/recession/audio.htm and http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

[2] In Oregon, unemployment grew from 5% in the spring of 2007 to 11.69% in two years. See Oregon's Economy: Overview in Oregon Blue Book (2013) at http://bluebook.state.or.us/facts/economy/economy01.htm.

[3] http://bluebook.state.or.us/facts/economy/economy01.htm.

[4] Porter, *Newly Poor in the Great Recession,* (Oregon State University, 2010) at http://oregonstate.edu/cla/mpp/sites/default/files/pdf/newpoor_0.pdf; United States Department of Agriculture, United States Forest Service *Oregon's Forest Products Industry and Timber Harvest, 2008: Industry Trends and Impacts of the Great Recession Through 2010*, at http://www.fs.fed.us/pnw/pubs/pnw_gtr868.pdf. Tax contributions from the forest industry to state and local governments peaked at $375 million in 2005 and decreased to $242 million in 2010. Oregon Forest Resources Council, *The Forest Report* at http://theforestreport.org/economic-contributor.php/. Oregon Economic Analysis: Southern Coast Counties, (2013) at http://oregoneconomicanalysis.wordpress.com/2013/05/30/oregons-southern-coast/.

[5] Edwards, Porter and Weber, *The Impact of the Great Recession on Low-Income Households and the Food Assistance Safety Net in Rural and Urban Areas*, (Oregon State University and Oregon Department of Human Services (2011) at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fruralstudies.oregonstate.edu%2Fsites%2Fdefault%2Ffiles%2Fpresentation%2Fppt%2FOSU-DHS-SNAP-analysis.pptx&ei=aFwmUoPzBYLfiAL7o4DwCw&usg=AFQjCNGz3RWpc90x1TDebW791Ua1yuYMIQ&sig2=ngaow_s70mLqJjewQfk5QA.

Given the economic climate, it is not surprising that there are calls for planning to become less concerned with spatial forecasting and more concerned with jobs and economic development.[6] Under this newer view, planning practice has become even more of an ally of market forces.[7] Let us be clear – planning has not completely changed by the Great Recession, but it is not the same as it was in 2007 either. The profession and its practitioners are more conscious about the market economy, more likely to be active in creating conditions to assure a stable and growing economy and more likely to be active than passive in dealing with opportunities for employment and growth.

Oregon has experienced those same exhortations.[8] As will be demonstrated in this paper, some of them have found fertile ground, while others have been rejected. The most successful of the new approaches advances the notion of focused investment is specific projects with a quicker and narrower review process. However, even those changes are, thus far, minimal. Nevertheless, the depth of the recession and the search for remedies to economic hard times has led to a different way to undertake planning in a state known for the most advanced planning system in America.

II. <u>Planning in Oregon</u>

A full explication of the history and structure of planning in Oregon is beyond the scope of this paper.[9] However in short form, Oregon has a statewide planning program in which the legislature has entrusted policy to a seven-member body, the Land Conservation and Development Commission ("LCDC"), which has the power to adopt binding planning policies ("Goals" and implementing administrative rules) on state agencies and local governments and to review local plans and land use regulations for compliance with those Goals.[10] Moreover, general purpose local governments (i.e., cities and counties) must adopt and enforce (through zoning and other regulations) a comprehensive plan for present and future development.[11] The essence of the program is to draw urban growth boundaries ("UGBs") around existing cities to provide for twenty-years of urban land needs within those areas, while limiting development outside them to resource-related uses and sparse rural development.[12] In addition, most local government land use decisions are reviewable by another state agency, the Land Use Board of Appeals ("LUBA"), instead of local courts, subject to further review by the appellate courts.[13] This model differs from that of most other states, which generally do not require the adoption and use of a binding plan, though authorizing local governments to

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[6] Lovering, *Will the Recession Prove to be a Turning Point in Planning and Urban Development Thinking?* 15 Intl. Plann. Studies 27 (2010). Even "Smart Growth" advocates favor the cultivation of industrial opportunities. Hoelzel and Leigh, *A New Normal After the Great Recession? Smart Growth Policies for Urban Industry*, Smart Growth Network: National Conversation on the Future of Our Communities (February, 2013).

[7] *See* Mohammaddzadh, *Neoliberal Planning Practice as Uncertainty Creator or What?* at http://www.academia.edu/1530328/NEOLIBERAL_PLANNING_PRACTICE_AS_UNCERTAINTY_CREATOR_OR_WHAT

[8] *See e.g.,* Keillor and Chase, *Ports: Partnering for Job Growth*, Oregon Planners Journal, March/April 2013. State of Oregon *10 Year Plan for Oregon Project Economy & Jobs Policy Vision* (April, 2012). The Oregon Prosperity Project, *It's Time to Pass Some Jobs Bills!* http://www.bipac.net/page.asp?content=pass_jobs_bills&g=OREGON

[9] These matters are set forth recently in Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. Marshall L. Rev. 357 (2012). For an older explication, *see* Sullivan, "The Legal Evolution of the Oregon Planning System," in Planning the Oregon Way (Abbott, Howe, and Alder, eds.) Oregon State University Press, 1994.

[10] *See generally*, ORS 197.005 to .283.

[11] ORS 197.175(2).

[12] Sullivan, *The Quiet Revolution Goes West*, note 9 *supra.*

[13] ORS 197.805 to .850.

undertake land use regulation, and leave it to the courts to deal with the lawfulness of regulatory action.[14]

The point is that planning in Oregon is coordinated and planning policy emanates from a central state source. Local regulatory actions must be consistent with the local plan, which must be consistent with the Goals. While most land use decisions are made by local governments, the centralization of policy at LCDC and, ultimately, the legislature, provides the opportunity for those who seek policy change (and their lobbyists) to do so in one place, in lieu of attempting to persuade 36 counties and 261 cities of the merits of their proposals.

III. Shifts in the role and scope of planning: from spatial ordering to spatial development

Introduction: The suggestion posed by the questions for this conference infers that there has been a change in the role of planning and planners in dealing with development. The Oregon experience bears out this inference. While t the stated objective for the Oregon planning program is not aimed primarily at "chasing smokestacks" or participating in a race to the bottom in competition for jobs and growth, it is fair to say that Oregon, as with all American states, is competitively seeking those opportunities.

The Role of the State' Economic Development Agency: Oregon's competitiveness as a large state on the West Coast, thus open to the markets of the Far East, has been enhanced by recent legislative action, such as through tax incentives, as has been done in many states.[15] In the field of planning and land use regulation, there are comparable attractions. Business Oregon, the state's economic development agency, has identified what it considers to be competitiveness problems in seeking industry and has fostered a plan for "shovel ready sites" for heavy and light industrial uses by the traded sector in an effort to attract and retain employment centers.[16] To resolve the identified problems, the plan recommends changes in policy, practice and attitude that increase (1) the supply of shovel-ready, large-lot, industrially-zoned land; (2), infrastructure funding, and (3) the speed of the entitlement (permitting) process.[17] While such an approach may be good for the real estate industry,

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[14] *See* Sullivan and Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 Urban Lawyer 75 (2003). Twenty Years After – Renewed Significance of the Comprehensive Plan Requirement, 9 Urban Law Annual 33, 1975 (with Laurence Kressel).

[15] *See e.g.,* the list of tax and related incentives set out by the state's economic development agency, Business Oregon at http://www.oregon4biz.com/The-Oregon-Advantage/Incentives/. Nevertheless, there has been some "sticker shock" over some of this activity. *See* the controversy over tax credits for wind farms in http://www.oregonlive.com/opinion/index.ssf/2013/08/hearings_on_wind_farms_will_be.html

[16] http://www.oregonbusinessplan.org/Initiatives/Make-Land-Quickly-Available-for-High-Wage-Jobs.aspx. The agency sets out the problem as follows:

The problems with industrial land supply are multi-fold. Here are a several:

1. Insufficient coordination of economic development strategies among various levels of Government
2. Absence, in most communities, of a short-term land needs analysis
3. Lack, in most communities, of a competitive short-term supply of land. Oregon's land use laws make it very difficult to get enough land, and to make that land ready for employment uses. Oregon cities face years of expensive processes and appeals to make relatively modest amounts of land available for employment.
4. Lack of mechanisms to protect key areas of industrial designated land. Even where development constraints are not fatal, other land uses like commercial, housing, retail, schools, churches and open space and natural resource conservation compete with industrial uses for the existing zoned land and the conversion of industrial lands to other uses reduces the available industrial land supply.
5. Lack of mechanisms to pay for the infrastructure upgrades required when developing industrial sites.

[17] *Id. See also* the discussion of "certified sites" at http://uscertifiedsites.com/CertifiedSite.asp and the state's touting of its successes at http://www.ocwcog.org/Files/SiteReadiness%20Single%20Pages%20(2).pdf

one must question its effectiveness as a metric regarding the effectiveness of these tools in bringing employment and growth to the state.

Regionally Significant Industrial Areas: Oregon's Plan for retention and attraction of business has had concrete impacts in planning law. In 2011, the Oregon Legislature provided for designation of five to fifteen "regionally significant industrial areas" (RSIAs) by a newly-created "Economic Recovery Review Council."[18] In addition to protection of RSIAs, development of these sites is given statutory funding priority consideration[19] and an expedited development permit process with limited standing and judicial review.[20] Although several sites have been designated as RSIAs,[21] the review process has not been fully tested as yet.

Urban Growth Boundary Management: Additionally, the Oregon Legislature in 2013 provided for an easier process to add lands to urban growth boundaries as another means for easing concerns over providing for industrial and employment land needs.[22] Thus, instead of being required to revise much of the existing plan to respond to the significant change to an urban growth boundary, a process not unlike periodic review, the new legislation allows the amendment to proceed under much less stringent standards.[23] This more relaxed review process has provided local governments and entrepreneurs with a more user-friendly atmosphere by which projects may proceed more quickly.

Redesignation of Industrial or Employment Lands: One of the remaining difficulties not resolved outside the RSIA context, however, is the temptation to remove a parcel of industrial or employment land from an inventory at the request of a landowner who may have a more immediate, and profitable, use for the land. While such a change may well be unlawful, the local decision to do so must be challenged, rather than being void *abs initio.*[24]

Urban Renewal: Another area of Oregon planning that has changed to a different development orientation is urban renewal. As with other states, urban renewal agencies were, from the end of

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[18] ORS 197.723. Under subsection (3) of this statute:

> An area containing multiple sites certified by the Oregon Business Development Department as ready for development within six months or less is eligible for designation by the council if the area is a regionally significant industrial area.

Designated RSIAs are protected from certain subsequent local planning and regulatory activities that may reduce the availability or effectiveness of industrial activities at these sites. The Commission is abolished shortly after it is certified that the state's unemployment rate is less than 6%. §13, ch. 564, Or. Laws 2011. In addition, the planning authority for the Portland region has its own process for RSIAs. *See* *http://www.oregonmetro.gov/index.cfm/go/by.web/id=5370*.

[19] ORS 197.723(8).

[20] ORS 197.724 and .726. *See also* Oregon Business Development Department, *The Oregon Advantage: Regionally Significant Industrial Areas* at http://www.oregon4biz.com/The-Oregon-Advantage/Sites/Industrial-Development/Industrial-Areas/ and a description of the process at http://www.oregon4biz.com/The-Oregon-Advantage/Sites/Industrial-Development/Industrial-Areas/RSIA-FAQ.pdf and http://www.oregon.gov/LCD/ECODEV/pages/significant_industrial_areas.aspx.

[21] *See* designations in Douglas County at http://www.uedpartnership.org/tag/large-industrial-sites/ and Lane County at http://www.lanecounty.org/Media/News/Pages/GoshenDesignatedaRegionallySignificantIndustrialArea.aspx.

[22] The concerns of those seeking to add these lands were not wholly groundless. The UGB amendment process was difficult and often successfully opposed. *See 1000 Friends of Oregon v. LCDC (McMinnville),* 244 Or App 239, 268-269, 259 P3d 1021 (2011) and *1000 Friends of Oregon v. LCDC (Woodburn)*, 237 Or App 213, 225, 239 P3d 272 (2010).

[23] Ch. 575, Or. Laws, 2013, especially §§ 4 and 5 which create a new urban growth boundary amendment process for cities of under 10,000 and 10,000 or more respectively and focus on the sufficiency of urban land and its efficient use within that urban area. The legislation does not apply to the Portland metropolitan area.

[24] ORS 197.610 to .625. *See Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

World War II, a means for removal of "blight," a term applied fairly loosely.[25] As a practical matter, urban renewal agencies found a new mission in economic development, as a loose definition of "blight" combined with their condemnation authority, tax-increment financing mechanism[26] and bonding authority all militated toward those agencies being an effective publicly-owned development agency.[27] Moreover, it was infinitely more popular to avoid the sometimes racially and ethnically tinged efforts to "blight removal" and concentrate on development and job opportunities. While there was a severe public response to the use of condemnation authority against individual homeowners over the last ten years, leading to the withdrawal of authority in some states to that use,[28] urban renewal remains a formidable tool for economic development. Even with the limiting or loss of the power to acquire, the urban renewal authority has planning, bonding and capital formation functions that the private sector lacks. Moreover, because these agencies are controlled in some way by the political process – its governing body either being local elected officials or appointed by such officials – the agencies lend themselves to being development tools of the political process.

Urban renewal agency leaders also tended to find urban renewal financing as less limited than property or other tax revenues, as it was, at least in theory, a means to repay public investments for public works, such as new streets, water and sewer facilities and the like. There were downsides, such as depressing the property tax revenues of other taxing agencies through the tax increment financing process,[29] and the relative freedom of urban renewal agency leaders to choose projects to be paid for from urban renewal funds.[30] But the temptation to use the easy financing for popular pet projects resonates with every political actor. In this sense, Oregon is no different and the change from spatial arrangement to spatial development in urban renewal agencies is, if anything, more pronounced.

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[25] The seminal decision is that of the United States Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954), which allowed broad scope to urban renewal agencies to determine and respond to blight. A 5-4 decision upholding that scope was found in *Kelo v. City of New London*, 545 U.S. 469 (2005), but also conceded that states were free to limit this scope. Many states responded by doing so and being more exacting in a showing of "blight."

[26] This tool allows for segregation of property taxes for the incremental addition of value to the area, presumably by the actions of the urban renewal agency, as a means of repayment for the capital outlay to undertake those works. *See* Lincoln Institute of Land Policy, Tax Increment Financing: A Tool for Local Economic Development (2006) at http://www.lincolninst.edu/pubs/1078_Tax-Increment-Financing.

[27] Gordon, Blighting the Way: *Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 Ford. L. Rev. 305 (2003). *See also* the 2007 monograph prepared for the National Association of Realtors by Robinson & Cole, entitled URBAN BLIGHT: An Analysis of State Blight Statutes and Their Implications for Eminent Domain Reform at http://www.ocpa-oh.org/Foreclosures%20and%20Crime/Urban%20Blight%20-%20An%20Analysis.pdf.

[28] Somin, *The Judicial Reaction to Kelo*, 4 Albany Govt. L. Rev. 1 (2011).

[29] For example, the property within the urban renewal area was taxed as if there were no improvements, with the increment going to pay off the urban renewal bonds that financed the public works. The property tax revenues were thus artificially depressed until the bonds were paid off. That meant the property tax revenues to the affected local taxing agencies were artificially low and required other property taxpayers to pay a larger share to make up for the loss of those revenues for the time while tax increment financing was used to pay off the bonds. In Oregon, some of the strongest opposition to urban renewal projects comes from other local governments. *See* Bjork, *In Oregon, a Stand Against Urban Renewal*, Oregon Daily Journal of Commerce (August 11, 2010) at http://djcoregon.com/news/2010/08/11/in-oregon-a-stand-against-urban-renewal/ and Squires, *Urban Renewal: Government's Addiction to the Double-Edged Sword*, (November 2, 2011) at http://blog.oregonlive.com/myoregon/2011/11/urban_renewal_governments_addi.html.

[30] Perlman, *URAs: Piggy Banks for Politicians' Pet Projects* in Mid-County Memo (April, 2010) at http://www.midcountymemo.com/apr10_uras.html. That freedom is somewhat constrained by the statutory processes for urban renewal planning. *See Friends of Urban Renewal v. City of Portland,* 58 Or LUBA 148 (2009). However, those process limitations can be met.

Rural Issues: Indeed the very face of planning practice and planning law is changing in Oregon as well. While the protection of resource lands is holding, various efforts are made to get the legislature to sanction permitted non-resource uses on farmlands.[31] Moreover, the use of wineries as event centers for weddings and other gatherings has steadily increased.[32] More recently, the legislature authorized a separate category of uses on farm lands called agric-tourism[33] which specifically allows for certain "events" (limited by number of dates and participants) on farmland. The jury is still out on the impacts of these activities on resource uses.

Urban Issues: In urban areas there are other changes in planning law and practice in recent years, the principal one of which has been "Supersiting," i.e., bypassing or limiting all those pesky permit applications and appeals by creating a process by which state or local permits must issue. This generally *ad hoc* technique has been used for metropolitan solid waste facilities,[34] prison facilities,[35] juvenile offender facilities,[36] certain energy facilities,[37] and has considered a supercollider facility.[38] Given this history, it should come as no surprise that the 2013 Oregon legislature buried the mandatory siting of a public safety training facility in a bill relating to education[39] and considered siting a manufacturing facility by legislative fiat.[40]

Conclusion: The changing face of planning law and planning practice towards a greater interest in incentivizing growth and development, along with the concentration of scarce infrastructure funds for designated projects, should be of concern to planners and lawyers involved in planning. Legislative bodies, landowners and entrepreneurs are more interested in "getting things done" than the careful consideration, lengthy testimony and fine tuning that the planning process offers. In Oregon, the road to legislative override is well trodden and reduction of planning to be a response to the ephemeral legislative desires of the moment, combined with a desire to remove perceived "barriers" in the way of the flavor of the month is disconcerting.

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[31] The statutes permitting such nonfarm uses were first instituted in 1963 under ORS 215.213. In 1983, a separate category of farmland was instituted. In every legislative session since that time, the list of permitted nonfarm uses has been added to. Between the two statutes, there are now 99 statutorily permitted nonfarm uses, some permitted outright; others permitted as a matter of discretion.

[32] Wineries were originally "commercial activities in conjunction with farm use" but were allowed to sell souvenirs with logos as incidental items, to use grapes from other vineyards and have a tasting room in *Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989). The legislature that year began specifically authorizing wineries and increasing authorization to hold events which are of great value to the winery owners (and sometimes a problem for their neighbors). *See* ORS 215.213(1)(p) and 215.283(1)(n), and 215.452 and .453, as amended by ch. 679, Or. Laws 2011.

[33] ORS 215.213(11) to (13), 215.238 to .239 and 215.283(4) to (6). More recently, the legislature has amended farm use legislation to allow a wider variety of "events" at wineries. Ch. 554, Or. Laws 2013.

[34] Ch. 679, Or Laws 1985.

[35] ORS 421.611 to .630. *See City of Wilsonville v. Department of Corrections,* 326 Or. 152, 951 P.2d 128, (1997); *Dunning v. Corrections Facility Siting Authority*, 325 OR 269, 935 P.2d 1209 (Or. 1997); *Committee in Opposition to the Prison in Malheur County v. Oregon Emergency Corrections Facility Siting Authority*, 309 Or 678, 792 P.2d 1203 (1990).

[36] Ch. 442, Or Laws 1995, §§27-37(e).

[37] ORS 469.300 to.441.

[38] *See* a 1987 news story that shows a state study to "land" such a facility and a $1million appropriation for that purpose. http://news.google.com/newspapers?nid=1310&dat=19871230&id=1Hw1AAAAIBAJ&sjid=e-EDAAAAIBAJ&pg=6863,7519621

[39] Ch. 725, Or. Laws 2013, §3. The bill is entitled "Relating to education; creating new provisions; amending ORS 343.035; and declaring an emergency."

[40] SB 845 (Oregon 2013 Legislative Session). The bill died in the waning days of the legislative session.

IV. Shifts in the shape and function of planning tools: from rigidity to flexibility

Introduction: Much of the discussion on this topic is found above. The tendency to convert planning into *ad hoc* project management has its own difficulties. Those wanting to "get things done" chafe at justifying the project in terms of the criteria set forth in the plan or land use regulations, which appear to them to get in the way of the project. On the one hand, they crave clear and objective standards for application in order to cut down on discretion.[41] On the other hand, they also crave flexibility in the application of those standards when the project does not, as often occurs, exactly fit those criteria.[42] Both cannot be present at the same time.

> Design Issues: Similarly, it is difficult, to create clear and objective standards for design review matters. Some discretion must occur if the alternative is not to be a binding rule for every design.[43] The Portland Comprehensive Plan, for example, contains this policy:
>
> Design Quality
>
> Enhance Portland's appearance and character through development of public and private projects that are models of innovation and leadership in the design of the built environment. Encourage the design of the built environment to meet standards of excellence while fostering the creativity of architects and designers. Establish design review in areas that are important to Portland's identity, setting, history and to the enhancement of its character.
>
> *A. Establish design districts and historic design districts for areas of attractive character within the City. Use design zones to enhance the character of the area. Establish guidelines of design acceptability that ensure continuation of each design district's desired character. Design guidelines should make the public's objectives for the design review process clear to those developing property.*[44]

All well and good; however, the code section implementing this policy is less than objective:

> Factors Reviewed During Design Review.
>
> The review may evaluate the architectural style; structure placement, dimensions, height, and bulk; lot coverage by structures; and exterior alterations of the proposal, including building materials, color, off-street parking areas, open areas, and landscaping.[45]

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[41] The residential development community requested the use of clear and objective standards to assure that "needed housing" would not face discretionary roadblocks by standards such as "compatibility with the neighborhood" and the like. ORS 197.307(4). The mining community also asked for similar standards in dealing with designated rock mining sites. *See* State of Oregon Department of Land Conservation and Development "Goal 5 Process for Aggregate" at http://www.oregon.gov/LCD/pages/goal5agg.aspx.

[42] In 2007, a review of the state's planning program resulted in a claim that there was insufficient flexibility for development proposals. *See* *http://lawoftheland.wordpress.com/2008/08/16/the-big-look-task-force-on-oregon-land-use-issues-preliminary-recommendations/*

[43] The dilemma is well presented in Kloos, *Planning for Housing: Don't Forget the Basics* (2008) at http://www.oregon.gov/LCD/docs/rulemaking/affordable_housing/kloos_article_on_goal_10.pdf.

[44] Portland Comprehensive Plan, Policy 12.7.

[45] Portland City Code §33.825.035. The code references maps for design districts in the city, which are equally less than clear and objective and apply to commercial, industrial and employment uses, but, under Oregon law, not to needed housing (which includes almost all single-and multi-family housing). Note 41, *supra.* In March 2009, the Portland Bureau of Planning and Sustainability released a report entitled: Monitoring and Evaluation Report of the Community Design Standards For New Residential Development, found at: http://www.portlandoregon.gov/bps/article/256272.
Among other things, this report advocated at p. 21:
Modifications to state law
The City of Portland is currently working at the legislature to modify state law to provide more flexibility for Portland to administer design regulations.
Portland made two efforts (in 2007 and 2009) to exempt itself from ORS 197.307(4), summarized in note 41, *supra.,* citing the need for "flexibility," but was unsuccessful and criticized for that effort. *See*, Sullivan and

Variances and Exceptions: A final illustration from Oregon may also be helpful in evaluating changes in planning law and practice. As a subset of land use regulatory decisions, the zoning variance has had a long history in the United States and is enshrined in the Standard Zoning Enabling Act of 1924,[46] suggested model legislation drawn up by a federal blue ribbon committee which was adopted by about three-quarters of the states. Section 7, *inter alia*, creates a Board of Adjustment and empowers it to:

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.[47] *At one time, Oregon followed the national trend which saw variances as extraordinary*

and rarely granted.[48] However, the Oregon courts gave deference to local governing bodies in dealing with discretionary land use actions not directly controlled by state law.[49] The impact on planning practice is to focus on the findings justifying the action, even in the variance case.[50] If the governing body findings are "plausible," they will be upheld. Parties to a land use regulatory action, as well as staff, now have additional incentive to prevail at the local level, in that review bodies (i.e., LUBA and the appellate courts) are required to give deference to the ultimate decision of the local governing body. Because deference is given only to (elected) governing bodies, the more recent federal constitutional equivalency of money and free speech[51] raises the specter of influential donors parlaying donations and deferential review, another change in planning law and practice.

V. **Shifts in planning governance and planning institutions: decentralization or recentralization of planning powers?**

Introduction: It is possible, even likely, that planning powers are in the process of centralization and decentralization at the same time. Neither the planning process nor the desirability of either result necessarily involves a binary response. The history of Oregon planning and land use regulation involves both centralization and decentralization. The changes individually may be good for the planning process, or not, but the changes go in both directions.

Richter, Portland Asks to Be Rescued – from Itself, Portland Daily Journal of Commerce, May 14, 2009. Thus in Oregon, the supply of needed housing trumps discretionary design regulation. Clear and objective regulations dealing *inter alia* with height, setbacks, parking regulations, continue to apply. Nevertheless, the strategy of going to the legislature to "fix" perceived problems is often used by governments as well as the development community.

[46] *See* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf. Oregon did not adopt this model act and left the nature, process and structure of municipal planning and zoning up to cities.

[47] *Id.*

[48] *See e.g., Moore v. Board of Com'rs of Clackamas County,* 35 Or .App. 39. 580 P.2d 583, (1978), *Bienz v. City of Dayton*, 529 Or.App. 761, 66 P.2d 904 (1977) and Dukeminier & Stapleton, *The Zoning Board of Adjustment: A. Case Study in Misrule*, 50 Ky. L.J. 273 (1962).

[49] *deBardelaben v. Tillamook County*, 142 Or App 319,922 P.2d 683, (1996). *See also Siporen v. City of Medford*, 349 Or 247, 243 P.3d 776 (2010) for a case that applies the deference rule to most local governing body land use decisions.

[50] The City of Portland, wishing to avoid the previous application of variance law, which it regarded as harsh, provided for a new technique, called an "adjustment" and asserted deference to its decisions. PCC §33.805.040. However, in *L'Heureux v. City of Portland*, ____ Or LUBA ____ (LUBA No. 2013-015, July 2013), LUBA said that Siporen deference was limited to governing bodies and not subordinate officers or bodies and remanded an adjustment decision on building height for lack of adequate findings.

[51] *See Citizens United v. Federal Election Commission*, 558 U.S. 210 (2010).

Centrifugal Forces: Regarding the centrifugal force of decentralization, Oregon has seen some recent significant changes:

- Deference in interpretation of local plans and regulations, as noted above, has focused review on the plausibility of the interpretation itself, rather than on overall planning policy, so that in terms of extra-local rationality of planning policy in general and internal plan coherence in particular, planning policy tends to be balkanized.
- Periodic Review of plans,[52] once a feature of the Oregon planning process, has all but expired in the face of the time and costs for a review of a local plan and land use regulations every 7 or 10 years.[53] As a result, most cities and counties are "on their own" in updating their plans and land use regulations to meet changing circumstances.[54]
- Two other tools that featured the Oregon planning system are effectively moribund. Citizen involvement is a touted element of the state planning program; however, it is underfunded and given only lip service.[55] Moreover, while it is possible for the Land Conservation and Development Commission to take strong action against a local government in violation of planning laws,[56] there is simply no funding to do so.
- Skeptics of the program claim that backsliding atavism results in constant efforts of rural landowners to avoid the stringent farm and forest protection measures that are a hallmark of the Oregon system in rural areas[57] and the proliferation of "events centers" at wineries and farmlands to accommodate weddings and parties and having a tenuous relationship with resource uses; and urban dwellers will attempt to avoid requirements to accommodate needed housing.[58] Time will tell.
- But by far the greatest danger from decentralization is the approach that stresses certain results, as opposed to a thoughtful goal-oriented planning process. The recent recession all too frequently emphasized jobs and growth as an immediate result, rather than as an objective on which policies and actions could be predicated.

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[52] ORS 197.628-.651.

[53] ORS 197.629(1). Under subsection (4) of the statute, such review is largely voluntary, except in certain instances where the state pays for the review or an area is growing very quickly.

[54] The prospect exists of smaller and more remote cities and counties having their plans acknowledged in the 1980s and not revisiting them because they are not required to do so. The 2013 legislature met some of those concerns with the passage of legislation that automatically updated local population figures and projections without any local action required (ch. 574, Or. Laws, 2013) and allowing changes to urban growth boundaries without revising local plans. (ch. 575, Or. Laws, 2013). This legislation is an example of decentralization and centralization occurring in the same field at the same time.

[55] *See* Oregon State University Natural Resources Digital Libraries, Land Use Explorer: *Land Use Sources,* which concludes:
Citizen involvement in land use planning peaked in the 1970s. For many Oregonians today, planning is part of a bureaucratic routine rather than an active contributor to livability. There is a need to reinvigorate public interest and involvement as new planning issues emerge.
http://oregonexplorer.info/landuse/LandUseSources.

[56] ORS 197.319 to .335. *See* Liberty, Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States, 22 Env. L. Rptr. 10267, esp. n. 44 (1992) in which the author terms the use of such orders when there were funds available as "modest in geographic extent or significance."

[57] *See* Sullivan and Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961-2009*, 18 San Joaquin Ag. L. Rev. 1, 2009 and Sullivan and Solomou, Preserving Forest Lands for Forest Uses - Land Use Policies for Oregon Forest Lands, 26 J. Envtl. L. & Litig. 179 (2011).

[58] Ross, NIMBYism: Overcoming Community Opposition to Affordable Housing (2012) at http://www.flhousing.org/wp-content/uploads/2012/07/NIMBYism-Overcoming-Community-Opposition-to-Affordable-Housing.pdf.

Centripetal Forces: Similarly, centralization of planning has occurred simultaneously to achieve instantaneous growth and employment. Recent centripetal forces include:

- State assumption of control over population projections.
- The emphasis on additional available industrial ("shovel ready") and employment lands by an expedited combined state-local permit process.
- Efforts toward direct legislative designation of industrial or employment land or a supersiting process.
- Efforts toward limiting standing and grounds for review of challenges to permits for industrial or employment lands.

VI. Conclusion

While the general trends towards loosening planning laws and practices to accommodate jobs and growth are replicated in Oregon, the phenomena by which these trends are manifested are rooted in that state's history, laws and traditions. While the actions to date do not endanger the Oregon Planning Program, they do provide a precedent for putting aside that process for immediately perceived needs. The planning process is an act of self-denial of the immediacy of instant gratification in favor of a shared vision and considered judgment of present and future needs. Planners and planning lawyers must continue to raise and argue that point which finds its basis in the very nature of planning.