CASE responses 2014
International Planning Law Conference on The new Environment & Planning Act (Omgevingswet),

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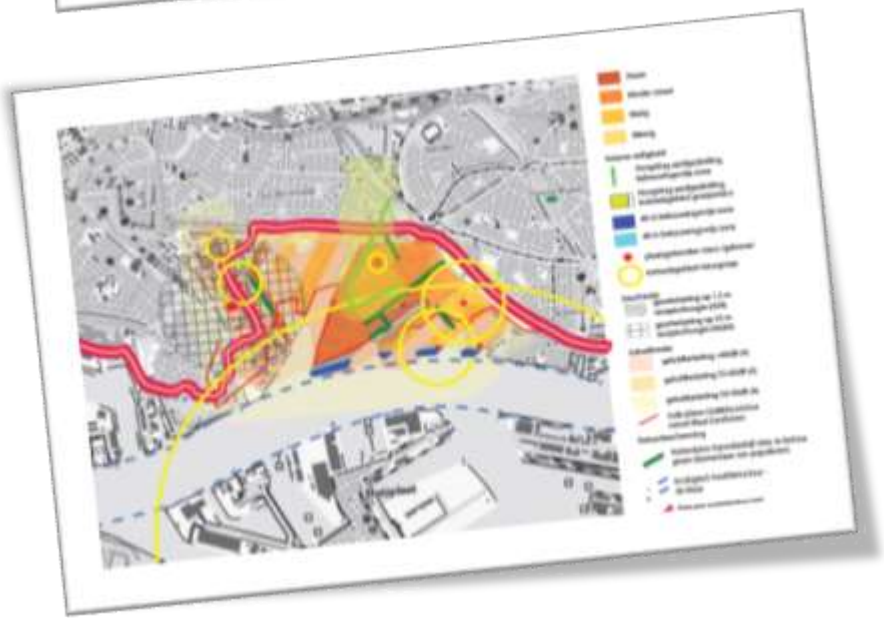

INHOUD

INTRODUCTION: THE ENVIRONMENTAL PLANNING ACT

With the Environmental Planning Act the legislation in the field of planning and environmental law will be integrated and simplified. The current Dutch system of planning and environmental law is complex and not sufficiently efficient in case of (widely supported) developments. Necessary consents, which are numerous in complex projects, take a lot of time and effort to be granted. The current sectoral laws all have their own principles, procedures and requirements. The lack of consistency between the laws creates insecurity among citizens, businesses but also among officials who work with the laws.

Purpose and principles of the Environmental Planning Act

Where planning and environmental law has been developed from sectors, the Environmental Planning Act is designed from an integral perspective. The fragmented sectoral regulations are bundled in an orderly manner, procedures are streamlined. Fifteen existing laws are fully integrated into the Environmental Planning Act and parts of about 25 other laws (the planning/environmental part of these laws) are placed to the Environmental Planning Act. With this the Environmental Planning Act provides a comprehensive legal framework for the management and development of the living environment.

The main objective of the Environmental Planning Act is to create a safe and healthy environment, and managing in a sustainable and efficient manner and develop the environment.

The law involves among other things, the following principles : 1. An equivalent level of protection of the environment. 2. Based on the existing division of responsibilities between municipalities , provinces, water board and the central government 3. Integration of plans, procedures and assessment frameworks within the Environmental Planning Act (by cleaning up and deleting rules and better reflecting the practice). 4. Better connection to sustainable development. 5. More space for administrative decision (decentralized) and regional and local initiatives (flexibility and less administrative burden by establishing general rules instead of permits and consents). 6. Faster and better decision-making under the new Environmental Planning Act. 7. More efficiently dealing with research obligations. 8. Better connection to European legislation (no stricter than absolutely necessary based on the European legislation).

The Environmental Planning Act reduces the number of instruments to 6: Environmental Planning Strategies, Environmental plan and programmes, Integrated environmental permit, Project decisions, General binding rules at national level, Environmental impact assessment.

For more information:

- Brochure of the Ministry of Infrastructure and the Environment, "Simpler and Better. The Environmental Planning Act: the main changes", august 2013 - Report of the Ministry of General Affaires, “Main points on simplifying environmental planning legislation in The Netherlands”, june 2012

CASE MERWE-VIERHAVENS

(STADSHAVEN ROTTERDAM/CITY PORT ROTTERDAM)

The case City Port Rotterdam, Merwe-Vierhavens is a good example for the benefits the Environmental Planning Act should be able to provide.

In cooperation with private companies, the City of Rotterdam and the Rotterdam Port Authority take initiative to create innovative living and working areas in the city port area in the coming 20 to 40 years. Goal is to reinforce the economic structure of the city and the port.

MERWEHAVEN- VIERHAVENS

One of the areas within Stadshavens is Merwehaven - Vierhavens. Fruit and juice companies are setting the scene in this area at this moment. In the future an innovative home-based work environment will be created. Follow this hyperlink for more info: http://stadshavensrotterdam.nl/en/deelgebieden/merwe-vierhavens/.

Because of the existing contours and conditions coming from the Dutch legal framework of planning and environmental law it is very difficult (or impossible) to develop this area. In short, the planning and environmental legislation isn't tailored to the nature and extent of this type of transformation areas with a plan horizon of 25 years.

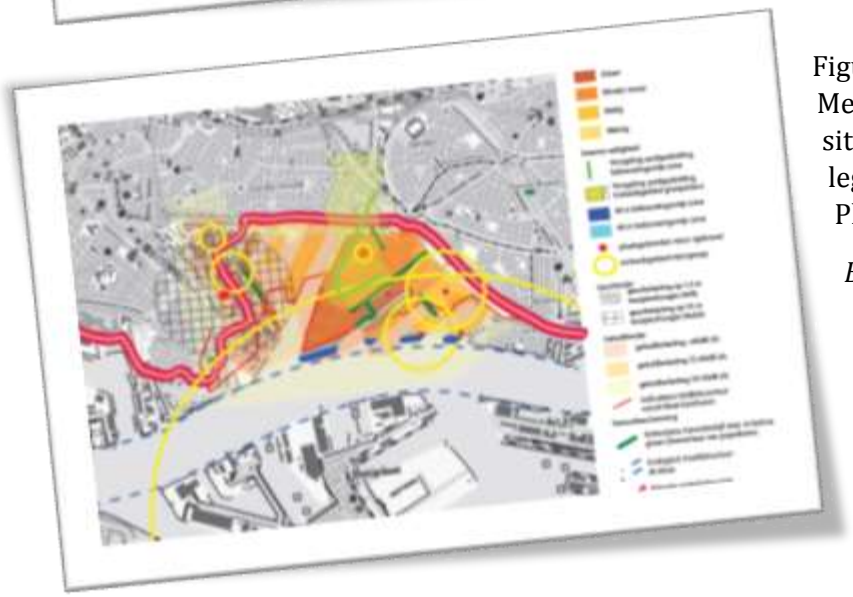

Figure: contours/conditions Merwe-Vierhavens in the current situation coming from existing legislation (pre Evironmental Planning Act).

Bron: Ilka Demeny, Student TUD

QUESTIONS

1. The companies in this area are allowed, according to the environmental permit, to cause hindrance (noise, stench, danger, pollution). This causes problems for new developments, especially if the development involves new dwellings.

a. Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance by diminishing the existing contours) or to impose measures (for instance measures which reduce nuisance)?

b. If so, who has to bear the costs of damages and/or the measures that have to be taken?

c. In case it is necessary for the development to buy out companies, who has to bear the costs?

2. Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe-Vierhavens?

3. Does the National system on planning law contain a binding planning instrument for prolonged developments (20 to 40 years) like Merwe-Vierhavens and other projects in City Port Rotterdam?

4. Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", PER/PELJ 2010 (13)) it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop). a. Does the existing national legislation of your country make a similar derogation possible? b. If so, what implications does this have for the assessment framework?

Mr. A.Z.R. (Regina) Koning

1. CASE STUDY – THE NETHERLANDS

By A.Z.R. (Regina) Koning

1. The companies in this area are allowed, according to the environmental permit, to cause hindrance (noise, stench, danger, pollution). This causes problems for new developments, especially if the development involves new dwellings.

a. Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance by diminishing the existing contours) or to impose measures (for instance measures which reduce nuisance)?

The Dutch legislation has an instrument to make this possible. First it should be noted the Dutch legislation still has a sectoral system. The past years some legislation came into force that introduced a more integrated system, like the Environmental Licensing (General Provisions) Act (Wet algemene bepalingen omgevingsrecht). Several new instruments were introduced in the legal system of environmental and planning legislation, main objectives are to fasten and simplify administrative decision making processes and make developments possible on locations with significant environmental issues.[1] Merwe-Vierhavens in Rotterdam is a good example. Zoning around commercial and industrial activities leaves almost no space for new developments in the area (the so called permitted environmental space, in Dutch milieugebruiksruimte). What is needed is a competent authority that has the power to obligate companies to take measures that compensate the hindrance (the negative effect of the activities on the living environment) and as a result thereof can diminish the existing contours.

The Dutch legislative framework on planning law for legal binding plans, land-use plans, is based on the principle of 'permission planning' (Dutch: toelatingsplanologie). Based on this principle it is not allowed to include positive obligations in a land-use plan.[2] The Crisis- and recovery Act (CRA)3, contains experimental legislation on so called development areas (art. 2.1-2.3a CRA). In these urban or industrial development areas, designated by the central government, environmental standards apply only to the entire area and no longer to individual polluters. J. Verschuuren characterizes this as the "bubble" concept.[4] In this regard, the provisions of Article 2.3 (2) (a,b,c) and (3) CRA are of interest. Based on this it is possible to include positive obligations in a land-use plan. That is to ensure measures are taken to meet the obligations in existing legislations on for example noise nuisance, after a maximum of 10 years (art. 2.3 (7) CRA). The measures are further carried out by permits and other decisions which are tested against the land-use plan. In art. 2.3 (3-5) CRA it is explicitly regulated for industrial activities (which have a negative effect on the living environment and are bound to environmental

[1] See F.A.M. Hobma, LL.M., Ph.D, *Rethinking planning law in the crisis era: the case of the Netherlands*, Paper to the seventh international conference of the Platform of Experts in Planning Law, Faculty of Political Science and Public Administration, University of Athens, Greece, October 17-19, 2013. (Download from the website International Planning Law: http://internationalplanninglaw.net.technion.ac.il/files/2013/10/case-responses.pdf)
[2] Conditional obligations are allowed, there is quite some jurisprudence set in motion with the Lingerveld-ruling ABRvS 22 of March, case 200508505/1, ECLI:NL:RVS:2006:AV6268, *GST* 2206/74 and *AB* 2006/421. See further on this P.J.J. van Buuren & A.G.A. Nijmeijer, 'Bestemmingsplan en privaatrecht', in: M.N. Boeve & R. Uylenburg (red.), *Kansen in het omgevingsrecht. Opstellen aangeboden aan prof. mr. N.S.J. Koeman*, Groningen: Europa Law Publishing 2010, p. 427-430.
[3] This act got into effect in 2010. It contains various legal arrangements to simplify and speed up decision-making in the domain of the built and natural environment, notably urban development projects and infrastructure projects.
[4] See J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", *PER/PELJ* 2010 (13), p. 8.

legislation) for the competent authority to impose measurements to reduce the negative effect on the living environment. It is even possible for the competent authority to adjust the permit requirements. Combined with the possibility to deviate from environmental and spatial planning laws a complex development like Merwe-Vierhavens can proceed.[5] The permitted environmental space needed for the development, is created in time (with a maximum of 10 years, that is the maximum period for deviation of existing laws) within the conditions set by law.

b. If so, who has to bear the costs of damages and/or the measures that have to be taken?

According to art. 2.3 (10) CRA Burgomaster and Aldermen have to ensure the measures and public works enclosed in the Land-use plan. These works are qualified as to be tolerated works regulated in the Private Law Hindrance Act (Dutch: Belemmeringenwet Privaatrecht). This Act provides for a compensation of possible damage to the party having to tolerate. For damage resulting from constraining of the environmental permit (and/or imposing constraining measurements) art. 15:20 of the Environmental Management Act (Wet milieubeheer) contains a compensations scheme for the licensee. Should any damage occur due a revision of the land-use plan, then the compensation as regulated in the Spatial Planning Act (art. 6.1) applies.[6]

c. In case it is necessary for the development to buy out companies, who has to bear the costs?

If a municipality needs to buy out a company to accumulate the necessary permitted environmental space for the development, the municipality buys the ground and buildings on it. Preferable by amicable acquisition. If that is not the case (negotiations fail), it is under strict conditions set by the Expropriation Act, possible to expropriate. This is a heavy and long procedure.[7]

If the property right already belongs to the government, but encumbered with a limited user's right like a ground lease (Dutch: erfpacht), it depends on the ground lease. It is possible that through an agreement lessor and lessee conclude that they agree to terminate the ground lease. In that case the ground lease will be paid off by the government. The ground lease can also be ended on the basis of the lease conditions. For example the condition that the ground lease may be terminated after 25 years on the basis of "public interest". It is also possible to terminate the ground lease on the basis of the rules in the Civil Code (Book 5, article 97), because of "unforeseen circumstances". This is possible after 25 years. It is also possible to expropriate the ground lease.

The government can acquire grounds by exercising a pre-emption right (Dutch: voorkeursrecht), based on the Municipal Pre-Emption Rights Act (Dutch: Wet voorkeursrecht gemeenten). If a pre-emption right is established, the municipality has the right to be the first to enter into negotiations with a seller who intends to sell land and buildings.[8]

[5] A.R. Klijn, H.A.H. Stam, "Gebieds- en innovatie-experimenten in de Crisis- en herstelwet", *TBR* 2010/8. Conditions coming from European directives (for water and air) are excluded.
[6] See the Explanatory Memorandum on the Bill, *Kamerstukken II* 2009/10, 32 127, nr. 3, p. 56.
[7] The CRA introduced some changes in the Expropriation Act to fasten the procedure: 1) Standardization and streamlining of procedures for expropriation, and 2) disconnection of the procedure of the Land-use plan and the expropriation procedure.
[8] See F.A.M. Hobma and P. Jong 2014, p. 27 and 28.

2. Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe-Vierhavens?

In this case the possibilities in the Dutch legislation to deviate from existing obligations to meet environmental quality standards are of decisive importance. On this location noise nuisance coming from (heavy) industries is a difficult problem to overcome. An instrument used in resent legislation and also in upcoming legislation (the Bill Environmental Planning Act) is the 'programmatic approach'. The essence of this approach is the (policy) aim to make room for new spatial and economic developments, while at the same time the environmental quality will improve in order to attain the environmental quality standards.9 Examples of implementation of this approach in Dutch legislation is the National Programme for Collaboration on Air Quality (Dutch: Nationaal Samenwerkingsprogramma Luchtkwaliteit, NSL). This new approach came into force in the Netherlands in august 2009. With this programme it was allowed for The Netherlands to postpone the achievement of the limit values for NO2 and to get an exemption for PM10. M.N. Boeve and G.M. van den Broek: "The Dutch air quality programme had to include all measures to improve air quality and all planned activities that can lead to a further deterioration in air quality. If a new (spatial) development is listed in the programme an individual assessment of the project in the light of the limit values on air quality is not required. By using an 'on balance system' (measures versus polluting developments) the overall outcome of the programme should result in an improvement in the air quality in the Netherlands. Furthermore, the Dutch air quality programme provides a framework for cooperation between national, regional and local authorities. The obligation to comply with air quality standards is considered to be a shared responsibility of national, regional and local authorities. Both general (European and national) measures and specific (regional and local) measures are included. Local and regional authorities have cooperated in establishing regional cooperation programmes, including specific measures for zones where limit values are being exceeded. These regional cooperation programmes are included in the national programme. In the programme various sources of pollution are addressed. It includes measures aimed at reducing emissions caused by traffic, agriculture and industry. The competent authorities are obliged to carry out the measures in good time.".[10] A similar programmatic approach is laid down in the Nature Conservation Act; the Programmatic Approach Nitrogen Dioxide (Dutch: Programmatische aanpak stikstofdioxide, PAS). This programme includes measures to bring down the deposition of nitrogen dioxide. In case the deposition declines more rapidly than the required intermediate targets set in the program, it creates 'development space'.

The programmatic approach is also incorporated in the CRA, the regulations on development areas in art. 2.1-2.3a CRA. The Land-use plan for the development area, as explained under question 1a, includes measurements to meet the environmental quality standards after a given period (max. 10 years). This can be considered as a programmatic approach; a programme with a set of measurements have to ensure the environmental quality standards are met and meanwhile the project or development can start.

3. Does the National system on planning law contain a binding planning instrument for prolonged developments (20 to 40 years) like Merwe-Vierhavens and other projects in City Port Rotterdam?

The Implementation Decree Crisis and Recovery Act (Dutch: Besluit uitvoering Crisis- en herstelwet), includes experimental legislation for land-use plans. In art. 7a (3) it is stated that, in deviation from the Spatial Planning Act, it is allowed to establish a new land-use plan after 20

[9] M.N. Boeve and G.M. van den Broek, "The Programmatic Approach; a Flexible and Complex Tool to Achieve Environmental Quality Standards", *Utrecht Law Review* volume 8, Issue 3 (November) 2012, p. 78.
[10] M.N. Boeve and G.M. van den Broek 2012, p. 79.

years instead of 10 years (as regulated in art. 3.1 Spatial Planning Act). This is possible only for in the decree (Implementation Decree Crisis and Recovery Act, IMCRA) listed projects. It must be clear, and motivated, that the project or development up for listing cannot be completed within the timeframe of 10 years.

4. Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", PER/PELJ 2010 (13)) it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop).

a. Does the existing national legislation of your country make a similar derogation possible?

I refer to the article of J. Verschuuren for a short description of the instruments in the CRA. See also Fred Hobma in his Paper to the seventh international conference of the Platform of Experts in Planning Law.[11]

Subsequently the Interim Act on an Urban and Environment Approach (Interimwet stad-en-milieubenadering)[12] should be mentioned here. This Act, preceded by the Experimental Act Urban and Environment from 1997-2003, entered into force in 2006 and still current law. This Interim Act focuses on an integrated approach of environment and spatial planning especially on locations developments are extremely complex because of a poor environmental quality of the living environment. The Interim Act enforces a three step process that need to be followed: 1) reduce the source of hindrance/pollution as much as possible, 2) examine the possibilities of measures and planning/design, 3) as a last resort derogation is possible (limit; standards coming from European legislation).

The essence of this Act is that all parties work together in an early stage of the development to find solutions within the current legislation.

This Act has been used in a few projects in the Netherlands, it is considered in Merwe-Vierhavens. At this location it is impossible to meet the noise standards laid down in the Noise Abatement Act (Dutch: Wet geluidhinder). Applying the Interim Act could help to find a solution, but it'll be mainly used for the third step: to deviate from the noise standards. This is possible based on the Interim Act, but isn't preferable. Is it possible to obtain an acceptable living environment with such a high level of noise hindrance? This brings us to the last question.

b. If so, what implications does this have for the assessment framework?

As explained in the preceding answers, the CRA and the Interim Act provide the possibility for the competent authority to deviate from existing legal environmental quality standards, like noise standards. This authority comes with a boundary, although the boundaries in both Acts are quite open and wide formulated.

According to the CRA (art. 2.3 (1)) the land-use plan has to be focused "on the optimization of the permitted environmental space for the purpose of enhancing sustainable spatial and economic development of the area in conjunction with the establishing a good quality of the living environment.".

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[11] Fred Hobma, LL.M., Ph.D, *Rethinking planning law in the crisis era: the case of the Netherlands*, Paper to the seventh international conference of the Platform of Experts in Planning Law, Faculty of Political Science and Public Administration, University of Athens, Greece, October 17-19, 2013. (Download from the website International Planning Law: http://internationalplanninglaw.net.technion.ac.il/files/2013/10/case-responses.pdf)

[12] *Stb. 2006/7, see the website https://wetten.overheid.nl.*

The Interim Act provides in art. 3 a boundary. The deviation has to be: “in the interest of a frugal and efficient use of space and the achievement of an optimal quality of the living environment.”.

The further interpretation of these open norms by the competent authority have, logically, implications for the assessment framework. The more open the norm is formulated in legislation, the more freedom the competent authority has in its balancing of interest with respect to the decision-making. It also means the competent authority has less handhold and the public less legal certainty. This comes inevitably with the flexibility the legislation offers.

For instance Merwe-Vierhavens. How can a “good quality of the living environment” (CRA) or an “optimal quality of the living environment” (Interim Act) be ensured in case deviation of the noise standards, and thus noise hindrance sometimes up to 70 dB, is needed for the development of a residential area? This is a difficult assessment and needs a well thought balancing of interests and possible measures that compensate the noise hindrance. In practice the competent authority most probably needs professional advice to be able to determine what level of noise is acceptable if measures are taken into account like (for instance) a next door park, noise measures on the façade of the building and a low noise area(s) in the neighbourhood. In other words, a custom-made assessment framework for each (complex) development is needed.

2. CASE STUDY – FINLAND (A. EKROOS)

By prof. A. Ekroos, professor of Economic Law, Aalto University

1. The companies in this area are allowed, according to the environmental permit, to cause hindrance (noise, stench, danger, pollution). This causes problems for new developments, especially if the development involves new dwellings.

a. Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance by diminishing the existing contours) or to impose measures (for instance measures which reduce nuisance)?

In practice this can be done (and also done, sometimes not in purpose) by planning dwellings close to industrial sites. But in Finland there not really instruments to do this in purpose such as it maybe can be done in the Netherlands according to new the Act. There are several cases in which environmental permit has been made stricter in revise procedure because of the new residences "too close" to industrial site or other site that causes hindrance. Industry has been complaining about this.

b. If so, who has to bear the costs of damages and/or the measures that have to be taken?

The holder of the environmental permit will have to pay costs that are result of the revised permit. This does not go outside of the site (e.g. traffic noise). Compensative damages has not been paid in practice. (Cases on compensations are very rare in Finland outside road building and water pollution, which are regulated according to special provisions.)

c. In case it is necessary for the development to buy out companies, who has to bear the costs?

In practise this has not been taken place. The issue can be handled other way in land use planning and land use policy (e.g. new detailed plan and land use agreement). The result will be more valuable land because of the new purpose (residential) and more permitted building volume for the company.

2. Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe- Vierhavens?

There are no special instruments for this in Finnish legislation that have been used in practice. We have special provisions in Land Use Planning and Building Act (132/1999)

on special development areas (sections 110 to 112), but instruments are too weak or not practical. Therefore they have not been used. Because of this "special development" has been dealt with e.g. land use agreements, detailed plans and environmental permits.

3. Does the National system on planning law contain a binding planning instrument for prolonged developments (20 to 40 years) like Merwe-Vierhavens and other projects in City Port Rotterdam?

No there are not that kind of legislation in Finland.

4. Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", PER/PELJ 2010 (13)) it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop).

a. Does the existing national legislation of your country make a similar derogation possible?

No.

b. If so, what implications does this have for the assessment framework?

None.

3. CASE STUDY – FINLAND (T. HÄRMÄLA & E.WERDI)

By Timo Härmälä, Senior Adviser to the Mayor, City Planning and Real Estate, City of Helsinki & Erja Werdi, Senior Legal Advisor, Ministry of the Environment, Department of the Built Environment

1. The companies in this area are allowed, according to the environmental permit, to cause hindrance (noise, stench, danger, pollution). This causes problems for new developments, especially if the development involves new dwellings.

a. Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance by diminishing the existing contours) or to impose measures (for instance measures which reduce nuisance)?

Not in general, but for public purposes it is possible to expropriate private property, if only for full compensation. In practice expropriation is used very seldom, voluntary purchases instead. The possibility to expropriate may sometimes help reaching voluntary agreements on purchase.

Sometimes also agreements to exchange plots may be reached, so the municipality may show a new location for the company in exchange of the present one.

Many functions producing hindrances have to have an environmental permit, and permits may be authorized for a certain time on individually set conditions. When a new permit is due after the old one expires, the conditions of the new permit may be stricter, requiring the best available technique (BAT).

In cases of similar type in Helsinki the solutions usually rely on long term land policy measures. In Helsinki the city has acquired land for years, now owning about two thirds of its land area. This means that much of the industrial activities still in the city is taking place on city owned land on basis of long term land lease contracts.

For industrial purposes the contracts are usually made for a 30 year period. Normally, if there is no reason for a change in land use, the contracts are routinely renewed. If however the city wishes to change the land use of an area, for instance change a harbor area into a residential one, the contracts for harbor purposes are not renewed. Then the lessee has to take down his buildings and other structures and clean the soil in case pollution is discovered, and give the area back to the land owner, who then can develop it into new uses.

This is what was done for instance at a former oil harbor in Herttoniemi, which now is a residential waterfront area.

b. If so, who has to bear the costs of damages and/or the measures that have to be taken?

If talking about renewing an environmental permit, the one carrying the activity bears the costs of new conditions of the permit. If the company has to be expropriated or purchased out, the municipality bears the costs for it.

c. In case it is necessary for the development to buy out companies, who has to bear the costs?

See above.

2. Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe- Vierhavens?

Voluntary purchases or expropriation, if considered in public need. The Finnish legislation also knows an instrument called special development area. The local authority may designate one or more specified areas of the municipality as special development areas for a maximum fixed period of 10 years. This has hardly ever been used, being very complicated to apply. The idea anyway is to share the costs and benefits of developing the area between the land owners of the area.

The Helsinki case again is different with its remarkable land assets.

Land Use and Building Act contain provisions of the land use planning system. The most important ones are binding land use plans. The land use plans (local master plans and local detailed plans) are used to determine the use of the area for different purposes (housing, transportation, business, industrial areas, parks, roads and streets etc.). The strategic environmental assessment (SEA) of an each land use plan is completed in land use planning process. The approved land use plan is valid until abolished (detailed plan) or substitutes of another same level plan or replaced by a more detailed plan..

- The main rule is that the detailed plan is needed for obtaining a building permit. On the countryside this is not the case but the building permit is granted if the project fulfills more preconditions enacted by the law.
- Wind-power turbines are allowed to be built based on a general plan

The EIA is used in projects, it can be combined with the land use planning process. The environmental legislation is applied to cases like this, for example Nature conservation legislation, Pollution prevention legislation and so on. Each enactment contains provisions of obligations and also sections for deviation which be granted if the preconditions are fulfilled.

- For example if the soil is polluted -> the soil has to be cleaned till certain level/quality depending of the future use of the area in question. A permit is needed.
- For example is there is a flying squirrel or any other species under strict protection, a deviation permit of the protection may be applied from the authority.

3. Does the National system on planning law contain a binding planning instrument for prolonged developments (20 to 40 years) like Merwe-Vierhavens and other projects in City Port Rotterdam?

The land use plans (see answer for question 2) are binding and do not expire. The hierarchy is shown in a picture. A more detailed land use plan replaces the more general one. A detailed plan or part of it may be substituted by another (new, same level) detailed plan.

According to the Land Use and Building Act, the assessment of whether the local detailed plan is up to date needs to be done in certain cases. The obligation belongs to the local authority (municipal authority) to ensure that the detailed plans are up to date, and to take actions to revise outdated plans.

- The grounds for the assessment are the following: that the plan has been in force more than 13 years and remains to a significant extent unimplemented.
- The time may be expanded or reduced (maximum time period 20 years) in special cases in local detailed plan.
- If the plan is not up-to date, a building permit must not be granted. The plan has to be amended in order to carry the project. The building prohibition comes to force as the local authority´s decision.

4. Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", PER/PELJ 2010 (13)) it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop).

a. Does the existing national legislation of your country make a similar derogation possible?

Yes. But it is based on each enactment. This text is about Land Use and Building legislation: The Land Use and Building Act contain provisions for deviation. The deviation mechanisms create flexibility in the system. The need to deviate depends on the type of the plan, the written regulations of the plan and the building project itself. The need to deviate may rise from the sections of the Land Use and Building Act, Decree, the Building Code or regulations of the plan in question.

If the detailed plan contains many written regulations, the need to deviate can originate from that fact. Typically the detailed plans in Helsinki include details and demands in written regulations for plots in various themes like the cityscape issue.

The three types of deviation are the following: deviation as a separate decision (a precondition prior the building permit), minor deviation in building permit and deviation during building process.

The deviation as a separate decision prior a building permit is granted by the municipality of the regional state authority. The deviation is possible from almost all other requirements of the Land Use and Building legislation. This type of deviation can be granted for an area instead of a single project. The "areal deviation" is possible since 1st Jan 2009, but only in certain types of situations.
Minor deviation in building permit is also possible. The deviation is granted from the legislation, regulations, prohibitions or other restrictions and it must be minor. Deviation from the essential technical requirements (Building Code) must not replace the most important essential requirements of the building in question.
The deviation during construction work means that there is a need to deviate from the designs approved in the building permit. In minor cases, the civil servant who undertakes the supervision from the behalf of the authority may grant the deviation. If the deviation not minor, the right to deviate belongs to the local supervision authority (local municipal board).

The deviation mechanisms in Land Use and Building Act are used in order to carry on ordinary building projects, experimental projects and small and big projects. If deviation cannot be granted, the detailed plan has to be changed and then the planning process is applied with public participation.

There is a special enactment (Act of 1257/2010, Laki kevennettyjen rakentamis- ja kaavamääräysten kokeilusta, valid till 31st Dec 2018) for 10 largest (by population) cities to have the power to deviate instead of regional state authority. The preconditions for granting the deviation are the same as enacted in Land Use and Building Act. The aim is to promote building homes and houses especially in larger towns and so on. The act is applied to Helsinki, Espoo and Tampere just to name some.

b. If so, what implications does this have for the assessment framework?

Assessment in land use planning (SEA) is completed in land use planning

as mentioned above. It is done to all plans and the content varies according to the plan level (see hierarchy) and the purpose of the plan. Assessment in projects (EIA) is done per project. It can be combined to SEA-process or it is conducted after the plan is finalized. There is no general deviation mechanism in Finland for all environmental law based duties and obligations to be granted by one administrative permit.

The building permit process as such does not include EIA. If EIA process is obligatory for the project (based on EIA legislation), the applicant will then attach EIA document to the building permit application.

The answer is that there are no implications for assessment framework.

4. CASE STUDY – GERMANY

By dr.-Ing. Tim Schwarz, Urban Planner and Research Assistant, Technische Universität Berlin

Question 1

The companies in this area are allowed, according to the environmental permit, to cause hindrance (noise, stench, danger, pollution). This causes problems for new developments, especially if the development involves new dwellings.

a. Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance by diminishing the existing contours) or to impose measures (for instance measures which reduce nuisance)?

PRELIMINARY REMARKS

In order to answer the question, first of all it is necessary to explain the relationship between immission control legislation and planning law.

a) IMMISSION CONTROL LEGISLATION

The Federal Immission Control Act (BImSchG) stipulates that the establishment and operation of installations likely to cause harmful effects on the environment (cf. Section 4 (1) 1 BImSchG) shall be subject to approval. A definitive list of the affected types of installation can be found in the Ordinance on Installations Subject to Approval (4th Immission Control Ordinance – BImSchV). Even after establishment and initial commissioning, an installation subject to approval must always be operated in compliance with the basic obligations stated in Section 5 BImSchG and with the ordinances featured in Section 7 BImSchG, i.e. particularly in accordance with state-of-the-art engineering and be updated according to state-of-the-art engineering. To this end, specific official stipulations can be made (cf. Section 17 BImSchG). Insofar as these requirements are met, as a basic principle such installations may be operated for an unlimited period.

The relationship with planning law results from immission control approval. A legal claim to immission control approval exists when:

1. it is certain that the operator obligations (Section 5 BImSchG) are heeded together with the requirements resulting from the legislation issued on the basis of the BImSchG (e.g. prevention of hazardous incidents in the 12th BImSchV, traffic noise protection in the 16th BImSchV or the Technical Instructions on Noise Control (TA Lärm) and the German Clean Air Act (TA Luft) and

2. there is no impediment from other public law provisions, including construction and planning law, together with occupational health and safety issues.

This means that the immission control procedure also has to review planning law stipulations. What counts here is whether the project lies within the scope of a building plan (planned area), in the unplanned inner or outer area. For projects in the scope of a building plan that stipulates the structural use in the form of building areas (industrial estate, commercial estate), permissibility is defined according to whether the project is permitted in the building area as a

general rule or as an exception, or not. The stipulations of the building plan are authoritative. A project being planned in the unplanned inner area (Section 34 German Building Code - BauGB) is permissible if it merges in with the particular nature of the nearer surroundings. For projects in the outer area (Section 35 BauGB), it depends on whether this refers to a privileged project or other project. Privileged projects may not be in contradiction to public concerns; other projects may not even be detrimental to public concerns.

b) PLANNING LAW

As illustrated above, the planning law requirements are also reviewed in the framework of immission control approval. A building plan which stipulates a certain estate category (Sections 4 to 9 Federal Building Use Ordinance – BauNVO) with the possibility of detailed control by structuring the estate according to the type of permitted use and the type of companies and installations with their special needs and characteristics (Section 1 (4) BauNVO), can be used in particular to impose planning law restrictions on the incident response or emissions of a company. If the requirements are fulfilled, the project is permissible under planning law and is issued an immission control approval if the other prerequisites named above have been met.

Companies and installations that have been established correctly are subject to fundamental "grandfathering", with a distinction between active and passive grandfathering.

Active grandfathering protects the installations that were legitimately approved. The owner can claim the approval of subsequent measures for continuing the original use (cf. Baden-Württemberg Administrative Court 1979). This includes modernisation work, protective measures or also quantitative extensions, such as the construction of garages (cf. Fickert/Fieseler 2008, Sections 2-9 BauNVO, recital 10.62).

By contrast, passive grandfathering does not allow any modification measures but merely legitimises the use of the legitimately established installation. Grandfathering of this kind applies even if approval of the installation would no longer be feasible today on account of changed legal provisions (cf. Fickert/Fieseler 2008, Sections 2-9 BauNVO, recital 10.61).

Restriction of existing rights imposed by planning law

In the framework of inner development (reutilisation of land, redensification and comparable measures aiming at economical, gentle use of land and ground), different uses are often in close physically proximity to each other, or uses needing particular protection such as residential uses move closer to emitting uses or emerge for the first time in the environment of such uses. In the case of inner developments, it is often not possible to solve the resulting immission conflicts by complying with the stipulated clear spaces. The closer the uses requiring protection and the emitting uses come together, the greater the degree to which the planning process must address the issues and provide measures for prevention and reduction.

As a basic principle, it is possible for an existing building plan to be rescinded, changed or replaced by a new plan in the framework of land-use planning. As a result, a previously permitted use of a plot of land can be rescinded or modified. This is possible for example in the "down-zoning" of usage intensity, e.g. changing an industrial estate into a commercial estate or a commercial estate into a restricted commercial estate or mixed area. Immission conflicts can be prevented in this way.

Together with stench, vibrations or air pollution, inner development projects usually have to pay special attention to noise or noise protection as an essential problem. Here in particular it is possible to stipulate what are known as emissions quotas for certain areas when drawing up a building plan. Standardised methods pursuant to DIN 45691 can be used to ascertain the

permitted emission values applying to the respective uses subject to protection (immission site). On the basis of these calculated emission quotas, it is possible to allocate a share of the total emissions to every installation in the affected area so that the noise immission thresholds of the TA-Lärm are not exceeded (cf. Kuschnerus 2010, recital 532, 534). The stipulation of emission quotas divides the estate up according to the type of company and installation together with their special needs and characteristics (Section 1 (4) 2 BauNVO). This is possible when planning new estates and also for the revised planning of an already existing estate. Restrictions on existing uses are therefore not just possible but also necessary in planning terms in order to create the prerequisites for implementing an urban planning concept in a situation already subject to immission problems. Otherwise the development of residential uses in mixed estates would regularly fail as soon as the limit, indicative and orientation thresholds for noise, air pollution or other immissions are exceeded.

Together with sovereign measures that impose controls by means of the stipulations in a building plan, it is naturally also possible for (public law) urban planning or private law contracts to be used as instruments for defusing immission conflicts in the planning stage. These are consensual instruments based on a concurring declaration of intent, presuming that the contract partners are willing to reach a settlement. For the emitting company or installation, this means for example reducing noise emissions by structural or operational measures. A settlement cannot be reached against the will of a contract partner. But contracts play a very important role as an instrument for defusing such conflict situations, as they can be used to regulate aspects that cannot be stipulated in the framework of building planning, such as defining the hours that a company is allowed to work or stipulating certain arrival and departure routes for suppliers or reducing the risk of major accidents by waiving the storage or handling of dangerous substances.

When changing an existing building plan or drawing up a new one in this kind of environment, it is necessary to produce detailed records of the corresponding existing immission issues so that these can be assessed and measures developed to avoid and reduce conflicts. Corresponding surveys therefore have to be produced in advance, providing the basis for developing stipulations in the building plan or for negotiating contractual provisions.

b. If so, who has to bear the costs of damages and/or the measures that have to be taken?

If when changing an existing building plan or drawing up a new one it is necessary to change or rescind a permitted use, this is covered by what is called planning damages law as stipulated in Sections 39 to 44 BauGB.

This is the case for example if emitting installations can no longer be used for the approved purpose. The owner can claim compensation for intervention in the practised use if the permitted use of a plot of land is rescinded or changed, resulting in a significant deterioration in the value of the land. If the permitted use of a plot of land is rescinded or changed within seven years of approval (legal validity of a building plan), the amount of compensation depends on the difference between the value of the land on the basis of the permitted use and its value resulting from rescinding or changing the use (Section 42 (2) BauGB). If the permitted use of a plot of land is rescinded or changed after a period of seven years (after the legal validity of a building plan), the owner can only demand compensation for intervention in the practised use. The amount of compensation for deterioration in the value of the land depends on the difference between the value of the land based on the practised use and the value resulting from the planning restrictions (Section 42 (3) BauGB).

As a basic principle, the compensation payments that result from rescinding or changing a permitted use must be made by the local authority. This also includes the costs for measures that can be stipulated pursuant to Section 1 (10) BauNVO for making an external installation more compatible with an area when revising an existing development zone. But such compensation payments can also be allocated to others, such as the investor as project developer, on the basis of a consequential costs agreement (Section 11 (1) 2 (3) BauGB) or a commitment agreement (Section 11 (1) 2 (2) BauGB).

c. In case it is necessary for the development to buy out companies, who has to bear the costs?

If it is necessary for the development of an estate for companies to be taken over, this can only take place under private law, with the local authority or project developer as purchaser. This also includes the purchasing of land and buildings.

However, such compensation payments can also be allocated to others, such as the investor as project developer, on the basis of a consequential costs agreement (Section 11 (1) 2 (3) BauGB) or a commitment agreement (Section 11 (1) 2 (2) BauGB).

Question 2

Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe-Vierhavens?

In practice, a mixture of informal and formal instruments is used for preparing and implementing large, complex urban developments.

1. INFORMAL INSTRUMENTS

Informal concepts or planning projects act as the counterpart to the formal approach involved in regional planning and land-use planning (cf. Pahl-Weber 2010, 227). These are also called "non-formalised plans for urban development overall or for spatial or functional sub-areas" (Thiel 2004, 73). The informal concept or planning is characterised initially by the lack of statutory specifications for the content and the compilation procedure used (cf. Austermann 2012, 199; Spangenberger 2002, 155). Furthermore, as a basic principle informal concepts are not binding by nature, unless adopted by the local authority. It is therefore also possible for these to be modified or rescinded at any time (cf. Thiel 2004, 74). The advantages of informal planning is seen above all in the flexibility it offers in terms of content and formal aspects (cf. Albers 1993, 401; Krautzberger 1986, 213), thus permitting "flexible planning in accordance with the situation, with problem-related intensity in the planning statements" (Academy for Spatial Research and Planning 2005, 44) (cf. Thiel 2004, 73). In this way, the local authorities can develop "basic planning concepts" (Albers 1993, 406) before these are turned into formal land-use planning.

1.1 URBAN PLANNING DEVELOPMENT CONCEPT (STÄDTEBAULICHES ENTWICKLUNGS-KONZEPT)

Urban planning development concepts and other urban planning include for example urban development plans, master plans, urban rejuvenation concepts and framework plans (cf. Spangenberger 2002, 155). As a rule, urban development plans cover the whole territory of the local authority or city, while framework plans are usually drawn up for districts or quarters (cf. Krautzberger 1986, 210). With regard to contents, these informal concepts can integrate urban planning, open space and infrastructure aspects or be focused on a specific issue, such as an inner development concept. The urban planning targets stipulated in the framework of a

development concept can be implemented by visualising the land utilisation plan or stipulations of a development plan (cf. Thiel 2004, 74).

1.2 Framework plan (Rahmenplant)

The urban planning framework plan (cf. Koppitz & Schwarting 2005, recital 69) is a form of informal planning frequently found in practice regardless of the size of the city or local authority. "Framework planning refers to plan types that differentiate and detail the authority's development planning and the area use plan for sub-areas (district plans, plans for cohesive sub-areas with similar planning problems) or functional sub-areas (use plans, traffic plans, supply plans, open space plans or design plans)" (Krautzberger 2014, Section 1 BauGB, recital 78). Framework plans can act as a link between the planning levels by putting the statements of an area use plan into more concrete terms in the context of inner development prior to binding implementation in planning law by compiling a building plan (cf. Spangenberger 2002, p. 154; Koppitz/Schwarting 2005, recital 69). The advantage of framework planning in turn is its flexibility in terms of contents and space (cf. Koppitz/Schwarting 2005, recital 70). While urban planning development concepts are usually drawn up for the whole city or local authority area, a framework plan can feature concepts for functional and spatial sub-areas (cf. Mitschang 2002, 20; Thiel 2004, 74). This can be appropriate particularly when it comes to stipulating the objectives for a larger sub-area (cf. Koppitz/Schwarting 2005, recital 70), thus bridging the gap in standards between area use planning and building planning. For example, a framework plan can put a redensification concept for a quarter or district into concrete terms by checking to what extent available reserves can be exhausted within the existing planning law or to what extent the existing planning law will have to be modified for more extensive use. Here for example test specifications can be drawn up for redensification or also for developing brownfield sites, as well as putting functional and design aspects into concrete terms for public space in focal town or city centre areas (cf. Spangenberger 2002, 159).

If a framework plan is available, it can also help to accelerate the building planning process: pursuant to Section 3 (1) 2 (1) BauGB, it is possible to waive early public participation in the framework of the land-use planning procedure if information and discussion have already taken place on another basis.

2. Formal Instruments

2.1 Preparatory land-use plan

The preparatory land-use plan as area use plan is the planning instrument with which the towns and local authorities can provide a basic visualisation of the type of ground use resulting from the intended urban development for the whole local authority area according to the probable needs. In accordance with the two-tier principle for land-use planning, the building plans are to be developed from the area use plan. This development requirement in Section 8 (2) BauGB ensures that the building plans compiled for sub-areas or for individual plots of land are based on the planning concept of the area use plan for the whole local authority area (cf. Söfker 2007, 7). Furthermore, the area use plan transforms the regional stipulations for town and country planning through the adaptation obligation pursuant to Section 1 (4) BauGB and also integrates statements about the various spatial functional planning into the local land-use plan.

While the focus in inner areas or to be more precise at their edges was primarily still on comprehensive extension planning right through to the 1990s, today local authorities are faced

with the issues arising out of demographic change and have to deal with sustainable development of existing structures, converting and maintaining the supply infrastructure, requirements arising from climate protection and climate adaptation together with the energetic efficiency of settlement structures. In the settlement context, formal area use planning is regularly deemed to be too inflexible to react to these challenges, even though the contents of the visualisation catalogue of Section 5 82) BauGB was extended to include installations, facilities and other measures counteracting climate change (Section 5 (2) 2b BauGB) or serving to make adaptations to climate change (Section 5 (2) 2c BauGB). But here it is important to note that visualisation of the area use plan in inner areas regularly depends on implementation by the building plan.

2.2 BINDING LAND-USE PLAN (BEBAUUNGSPLAN)

As the second stage of land-use planning, the binding land-use plan serves to stipulate to all and sundry the local authority's urban development objectives in a legally binding form. It decides whether, what and how construction may take place on a plot of land (cf. Kuschnerus 2010, recital 7), which is of crucial significance in terms of economic utilisation for the owner of a property. The contents of a binding land-use plan are defined in the finalised specification catalogue pursuant to Section 9 (1) BauGB (cf. Löhr 2009, Section 9 BauGB, recital 6). The binding land-use plan is to be adopted as a statute by the local authority pursuant to Section 10 BauGB. If this has been developed out of the area use plan pursuant to Section 8 (2) BauGB, the building plan no longer needs approval from the next highest administrative level, which in turn helps to accelerate the land-use planning process (cf. Löhr 2009, Section 10 BauGB, recital 26). The classic binding land-use plan consists of what is known as supply planning and stipulates an admissibility framework for a whole number of projects that as a rule are still not yet known at the point in time of drawing up the plan. This results from the specification possibilities pursuant to Section 9 (1) BauGB in conjunction with the provisions of the BauNVO. For building planning, special significance is attributed to the typified building areas pursuant to Sections 2 to 10 BauNVO, because when the provisions regarding the generally permissible and exceptionally permissible uses are applied, they become an integral part of the building plan and are thus one of the deciding factors for the permissibility of a project within the specific scope under planning law. While the classic binding land-use plan usually addresses the extension of settlement areas at the edges of towns and cities, it is also fundamentally possible to replan already developed areas. Moreover, a binding land-use plan can also modify existing building rights. When replanning developed areas, the continued existence of the buildings that are already there is protected and there is initially no obligation to implement the new plans (cf. Battis et al. 2010, 39). But the new provisions of the binding land-use plan then have to be heeded when modifying the existing buildings, e.g. with conversions or new buildings.

a) BINDING LAND-USE PLAN FOR INNER-CITY DEVELOPMENT

The binding land-use plan for inner-city development is a special case of the classic binding land-use plan that was introduced with the law to simplify planning projects for the inner development of the cities (cf. BauGB 2007). In order to strengthen inner-city development and thus reduce land consumption, this instrument provides procedural simplifications for accelerating the overall land-use planning procedure. The legislator thus "rewards" local authorities that give priority to inner development over outer development.

Inner-city development is a planning term that refers to development in settlement areas in contrast to a development in the outer area which would entail using up previously unused ground (cf. Söfker 2008, 3). The provision of Section 13a (1) 1 BauGB lists various possibilities for inner-city development. They include the reutilisation of land (area recycling),

redensification and, as a catch-all element, other measures of inner-city development including e.g. also interim utilisation. Like the classic binding land-use plan, the binding land-use plan for inner-city development can act as tender building plan in defining the planning-law framework for a large number of projects in its particular scope. But it can also be combined with a project-related binding land-use plan. Here the procedure-related simplifications can be coupled with the greater flexibility in terms of planning contents and the cooperative planning elements. In planning practice, the building plan for inner development has become established in the towns and local authorities on account of the related procedural simplifications.

b) PROJECT-RELATED BINDING LAND-USE PLAN

In contrast to the classic tender binding land-use plan, the project-related binding land-use plan as per Section 12 BauGB is drawn up in the context of a specific project whose project developer is obliged to proceed with implementation (cf. Finkelnburg 2011, recital 17). This instrument addresses the objective of relieving the local authorities of the planning and development tasks and enhancing the initiative of private third parties (cf. Löhr 2009, Section 12 BauGB, recital 3). The project-related binding land-use plan consists of three parts. These include the project and development plan of the project developer, the implementation contract between local authority and project developer and the project-related binding land-use plan drawn up by the local authority and adopted as statute. The project developer uses the project and development plan to specify in concrete terms the project that he wants to implement on his plot of land. As a rule, the initiative for drawing up the plan comes from the project developer who approaches the local authority with his planning intention and applies for the building plan procedure to be initiated pursuant to Section 12 (2) BauGB. The local authority is then obliged to decide on the investor's application. But this does not result in any obligation to draw up a binding land-use plan or to issue a statute (cf. Finkelnburg 2011, recital 25). If the local authority agrees to draw up the project-related binding land-use plan, it goes through the formal land-use planning procedure. If it includes for example the recycling of a brownfield site in the settlement area, the accelerated procedure can be used so that the cooperative, implementation-oriented elements of the project-related binding land-use plan can be combined with the procedural simplifications pursuant to Section 13a BauGB. This time aspect in particular is of huge significance for project-related planning and its implementation.

Other special aspects for the project-related binding land-use plan refer to the plan contents, which are characterised by greater flexibility than the classic binding land-use plan. For example, the local authority is not tied to the specification catalogue of Section 9 (1) BauGB and the BauNVO or the planning design ordinance (PlanzV) (cf. Krautzberger 2009, Section 12 BauGB, recital 7). This makes it possible to develop specifications in the project-related binding land-use plan that are tailored specially to the project being implemented. For example, the permitted use can be specified without being tied to the typified building areas as per Sections 2 to 20 BauVNO, or it is possible to exceed the upper limits of the structural use dimensions pursuant to Section 17 (1) BauNVO. Going over and beyond the specifications in the project-related binding land-use plan, which must always have an urban-planning relevance, the implementation contract can also stipulate additional provisions resulting for example from the catalogue of Section 11 (1) 2 BauGB and going over and beyond land law (cf. Krautzberger 2009, Section 12 BauGB, recital 7).

Like a tender building plan, the compilation of a project-related binding land-use plan is not tied to a certain area size. As a basic principle, a building plan can be used to replan a whole quarter or just a single plot of land. As a rule, a project-related binding land-use plan refers to the plot(s) of land owned by the project developer. But this will regularly not be the case for larger urban planning development measures. It is basically possible for several building plans to be drawn

up with various project developers. For example, one building plan can be drawn up for implementing a residential area, while another building plan is drawn up to solve immission control conflicts in the framework of replanning the existing building structures. Here the afore-named binding land-use plan can only be implemented if the building plan for replanning the existing building structures with solution of the immission control conflicts is legally in force. Similarly, it is possible to couple the binding land-use plan for implementing residual use with an urban development contract that solves immission control conflicts. In this case, replanning the existing building structures can be waived if a contractual solution is sufficient to warrant immission control. But here again, the contract is necessary for implementing the binding land-use plan.

Question 3

Does the National system on planning law contain a binding planning instrument for prolonged developments (20 to 40 years) like Merwe-Vierhavens and other projects in City Port Rotterdam?

As a general rule, the normal binding land-use plan, the project-related binding land-use plan or the binding land-use plan for inner-city development will usually be suitable binding planning instruments for prolonged developments (cf. answer 2). Particularly where several building plans have been compiled or several project organisations are involved, informal planning will be necessary in order to safeguard the development objectives.

Another possibility is the urban planning development measure pursuant to Section 165 BauGB, which combines these instruments and is explained in greater detail below.

1. TARGETS AND PURPOSES OF THE MEASURE

The instrument of the urban planning development measure permits the development of districts and other parts of the local authority area according to their special significance for urban development and order (Section 165 (2) BauGB). This is suitable for the initial development and also for urban reorganisation for social, economical and ecological reasons. In the concept of an urban planning development measure, the local authority has to create the prerequisites to allow a functional district to emerge with appropriate provision of goods and services in accordance with its economic structure and the composition of its population (Section 166 (2) BauGB). Possible measures include for example reactivating converted land or making brownfield sites suitable for use again together with vacant buildings and highly underused parts of the town. The objectives of an urban planning development measure are usually put into concrete terms by means of an urban planning development concept or framework plan.

2 OBJECT OF THE URBAN PLANNING DEVELOPMENT MEASURE

The urban planning development measure is stipulated by the local authority in the form of a development area for building land development and formally adopted as statute (development statute). Swift, targeted planning can be warranted above all on account of the municipal land purchase and reprivatisation obligation. This permits the reorganisation of a plot of land without a formal redistribution system, while also exploiting the measure-related appreciation of the affected plots that can be used to finance the measure.

3 SCOPE

The instrument of urban planning development measures can be applied specifically to concepts, strategies and measures for coping with urban development challenges (economic structural change, internationalisation, decline in population and ageing society). New mixed-use districts, land-saving construction methods, multi-generational living projects, self-use concepts and local owner associations are just a few examples of issues where the urban planning development measure can be used.

4. PREREQUISITES

For the formal definition of a development area, the local authority draws up a development statute (Section 165 (6) 1 BauGB). Four prerequisites need to be fulfilled for a statute to be adopted (cf. Section 165 (3) 1 BauGB):

1. The development statute must correspond to the inherent objectives and purposes of the measure - development of functional districts in accordance with their special significance.

2. Proceeding with the urban planning development measure must be necessary for the public good, particularly for covering an increased need for places to live and work, for providing amenities to cover local needs and related facilities or for returning brownfield sites to further use.

3. It must not be possible for the objectives and purposes addressed by the development statute to be achieved to the same extent using alternative planning instruments.

4. Swift implementation of the measure must be warranted.

5. Implementation

As a rule, the development measure is prepared and implemented by the local authority. Before the local authority adopts the formal definition of the urban planning development area as development statute, those affected by the planning process must be heard (Section 169 (1) BauGB). On adopting the statute, the local authority must proceed immediately to draw up building plans for the development area (Section 166 (3) BauGB).

To implement the measure, the local authority purchases and develops the plots of land in the urban planning development area and sells them again as land ready for construction with associated planning rights. Owners wanting to building on their own land according to the objectives and purposes of the statute must pay compensation to the local authority corresponding to the appreciation of their land.

6. Example: Rummelsburger Bucht development area, Berlin

In Germany, the urban planning development measure has already been used successfully in many projects. One of these examples is the Rummelsburger Bucht development area in Berlin, which is presented briefly below.

Figure 1: Rummelsburger Bucht development plan (SenStadt 2007, 29).

The urban development of the meanwhile popular quarter to the north or Rummelsburg Lake began already back in 1994. At the start of the development measure, the area covering 131 hectares was characterised mainly by a diffuse utilisation structure consisting of obsolete vacant industrial property and individual residential buildings. In April 1994, the Rummelsberger Bucht development area was formally defined in order to restructure this underused area close to the city centre to offer a new residential quarter with compatible trade use.

In view of the expected high demand for housing after German reunification, the new quarter was to provide up to 5,000 homes and be implemented as quickly as possible. However, to warrant swift development, it was necessary to proceed with property reorganisation of the area on account of the widely differing ownership structures. These circumstances eventually resulted in the decision taken in 1994 to define the area as an urban planning development area. Given that planning consultants had already developed an overall urban development plan for the area back in 1992/1993, construction work could begin in 1995. Five of the six building plans have now been adopted and most of the construction work in the area completed.

The development measure was funded on the one hand from the revenues generated by the appreciation in land value due to the development, and on the other hand from state budget funds. Even though such inner-city urban planning development measures are not profitable in monetary terms, private follow-up investment and structure growth can still generate a return.

Question 4

Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", PER/PELJ 2010 (13)) it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop).

a. Does the existing national legislation of your country make a similar derogation possible?

With a project-related binding land-use plan as per Section 12 BauGB it is possible to deviate from the stipulation provisions of Section 9 BauGB together with the Federal Building Use Ordinance (BauNVO) and the planning design ordinance (PlanzV) (Section 12 (3) 2 BauGB). This means that the project developer is not tied to the stipulations of the Building Use Ordinance in

planning a project in cooperation with the local authority. In this way it is possible for instance to achieve special forms of utilisation (new estate types) or higher building density. However, all immission protection requirements from existing legislation and ordinances still apply. During the planning process it is still necessary to provide verification that the requirements for healthy living and working conditions are upheld. These requirements are put into concrete sub-statute terms by means of ordinances, such as the 16th BImSchV (traffic noise ordinance), the 18th BImSchV (recreation ground noise ordinance) or the standard DIN 18005 (noise abatement in town planning) together with the Technical Instructions on Noise Control (TA Lärm). Their requirements are to be viewed and heeded as limit, guideline or orientation values, depending on the particular legal scope. Where these are just orientation values for noise control in urban planning, as is the case with DIN 18005, it is possible within the planning framework to deviate both downwards (lower noise levels) and also upwards (higher noise levels) in situations where there are conflicts with pre-existing loads. A deviation of this kind may prove necessary in the special urban planning situation, but meticulous justification will be necessary in this case. In the framework of land-use planning, there is also a need to ensure that requirements from sub-statute regulations can be fulfilled in the approval process. If this is not the case, the planning is not enforceable, nor is it necessary pursuant to Section 1 (3) BauGB. As well as reclassifying conflicts to the downstream approval level, it is also possible for immission conflicts to be solved definitively on the land-use planning level, thus already fulfilling the requirements in the approval process.

The planning of Hamburg's HafenCity provides an interesting example of how noise immission conflicts can already be solved on the level of land-use planning by stipulating special noise protection windows. Instead of a facade with windows that cannot be opened, which would comply with the noise protection requirements, here adequate noise protection was reached by using what have been called "Hamburg windows". Here a technical solution makes it possible to tilt these windows for ventilation while still achieving greater noise protection than other windows. This fulfils the protection target of the TA Lärm, although the outside noise level that is authoritative for the TA Lärm could not be fulfilled (cf. Dolde 2013, p. 376). In the opinion of the Federal Administrative Court, the protection target of the TA Lärm consists in being able to open windows despite existing noise sources in order to meet the need for quiet and natural ventilation (cf. BVerwG 2012, recital 24). The use of the "Hamburg window" is an atypical special case where higher outside noise levels do not make the planning inadmissible in this special case (cf. Dolde 2013, p. 376).

b. If so, what implications does this have for the assessment framework?

The assessment framework for approving of a project in the framework of a project-related building plan is stipulated by Section 30 (2) BauGB. Accordingly, a project is permissible if it does not contradict the stipulations of the building plan and the development is safeguarded. For example, if in order to solve an immission conflict in the building plan, certain windows are planned with certain noise insulation or properties, then the project is only permissible if this requirement is fulfilled.

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5. CASE STUDY – POLAND

By Anna Brzezińska-Rawa, Ph.D. and Justyna Goździewicz-Biechońska, Ph.D.

1. The companies in this area are allowed, according to the environmental permit, to cause hindrance (noise, stench, danger, pollution). This causes problems for new developments, especially if the development involves new dwellings.

a. Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance by diminishing the existing contours) or to impose measures (for instance measures which reduce nuisance)?

b. If so, who has to bear the costs of damages and/or the measures that have to be taken?

c. In case it is necessary for the development to buy out companies, who has to bear the costs?

1. SHORT INFORMATION ON PLANNING LAW SYSTEM IN POLAND AT THE LOCAL LEVEL

The main instrument regarding local planning is land use plan. As a rule, plans are not mandatory (except some areas specified by the law, like: cemeteries, airports). It results in major areas left without plans. However, it doesn't mean that these areas can't be developed, but the development requires administrative decision on the condition of development and spatial management decision (zoning decision). Depending on the type of investment, the two different types of the above decision are issued: either decision on the condition of development, or decision on the location of the public investment.

2. ANSWER TO THE QUESTION

The general answer to the question above should be: no, it is not possible for authorities to decrease existing rights of companies or to impose measures in the sense mentioned above.

The change of land use in local plan is not immediately implemented. The owners are authorized to use the land in a way it had been used before the plan was implemented until they develop the land in accordance with plan (Article 35 of the Land Planning and Management Act of 2003). There are no instruments to compel the owners to adjust or change the previous use of land. Following that, the change of plan can not impose the change of type or scale of commercial activity.

3. ADDITIONAL INFORMATION ON EXPROPRIATION AND COMPENSATION

The Polish Constitution in Article 21, section 2 states that expropriation may be allowed solely for public purposes and for just compensation. It must be noted that this provision was in fact applied for expropriation of land for future roads. There has not been so far cases of expropriation of existing rights of companies (land where commercial activity is undertaken). Also from the financial point of view such development would rather not pay off.

According to Article 36 of the Land Planning and Management Act of 2003, if, as a result of adopting or changing land use plan, the use of property in the former manner has become impossible or is limited in an essential manner, the land owner or its perpetual user may demand compensation for the actual damage or the buy-out of the whole or the part of the land. Compensation claims may be satisfied by offering other property as a replacement.

Also, pursuant to art. 112 of the Land Administration Act of 1997, expropriation of the property is the deprivation or restriction, by a decision, the right to property, perpetual usufruct or other property right on the property and is possible in areas designated in local plans for public purposes, or to the property, for which the decision on conditions on the location of the public investment (a kind of zoning decision) was issued. Expropriation of real estate can be made if public purposes cannot be achieved in any other way than by deprivation or restriction of property rights, and these rights cannot be acquired by civil agreement.

According to the Land Administration Act, compensation for expropriation is provided (art. 128). Moreover, if the remaining part of land (not expropriated) cannot be properly used in a previous manner, the owner may compel the government (also local) to purchase the remaining land.

Article 128 Sec. 4 of the Land Administration Act provides a right of compensation for the depreciation in value to the rest of the plot caused by restriction on the manner of using property for the construction of public infrastructure.

There are provisions in the Environment Protection Law of 2001, which provide:

- Protection from the nuisance / noise protection (art. 112),
- Compensation rights for damage resulting from restrictions of property use due to environment protection (Art.129),
- Compensation rights for damage resulting from restrictions of property use due to protection of environmental resources,(Art. 130),

- but none of these provisions would be relevant in the above case.

2. Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe-Vierhavens?

There is no separate planning instrument for large developments as a category. The complexity of the development is also not a factor which would differentiate investments as regards planning instruments.

However, there are separate provisions for certain large and complex developments, like airports. The procedure is completely different from the “standard procedure”, but it must be noted that it is used in greenfield developments.

According to Article 55 and following of the Air Law the airport can be build after obtaining permission issued in form of administrative decision issued by the President of the Office for Civil Aviation. The application for permission must contain, inter alia:
- Extract of the regional spatial development plan, if it has been adopted, and

- the extract from the local zoning plan for the area of the airport and its surrounding areas, located in the zone of its influence, and

- a decision on the environmental conditions.

- also the airport development plan (general plan) is necessary and it includes, inter alia, the concept of spatial development as well as development zones around the airport; [agreed]? municipalities whose areas were included in the general plan.
For areas covered by the plan to draw up a general zoning plan is mandatory, including the provisions relating to closed areas. If the enclosed covered by the plan lose the general status of the area closed, drawing up local development plan for this area is mandatory. General Plan is

updated every five years, or more frequently if the existing or planned technical and operational characteristics of airport or economic, operational, environmental and financial conditions require substantial changes to the plan.

There are also few acts regarding special developments, like Act on the investments in regasification terminal for liquefied natural gas in Swinoujscie of 2009 with its own procedure (location on a basis of separate type of decision and separate compensation rights).

3. Does the national system on planning law contain a binding planning instrument for prolonged development (20 to 40 years)?

No. Polish planning law system does not contain such instruments separate from other planning instruments.

Polish law concerning development process does not differentiate legal procedures depending on the duration of the planned investment or the moment of its launch. Moreover, the size of investment is not a differentiating criterion, too. An investor can apply for initiating of local land use plan procedure but his application is not binding for municipality. In case of lack of the plan, he can make an application for condition of development and spatial management decision (zoning decision). However, this decision can be taken, only if the conditions specified in law are met.

Prolonged development**s** are examples of issues that exposes some deficiencies of Polish planning system. These are:

- ad hoc planning and instrumentation of plans (passing small plans for specific investments without considering the broader spatial context – fragmentation of planning)
- inflexibility of the plans (each, the smallest change of plan requires the same procedure as its enactment)
- high level of detail in plans (no master plans, only detailed local plans),
- lack of integration of spatial planning with investment planning (no dependence of plan's adoption on the infrastructure investment by the municipality) - no adjustment of infrastructure and the possibility of its development to the needs of the market
- no effective planning coordination (no integrated planning) - the tradition of sectoral planning (space as one of the planning sectors) and a tendency of specialist planning
- lack of effective legal solutions for public-private partnerships

Polish legal system also includes a special legal regulation on the implementation of the investment in the so-called special economic zones. (Act of 20 October 1994 on special economic zones (consolidated text: Journal of Laws of 2007 No. 42, item 274, as amended). Special economic zones are administratively separated areas of the country where investors can operate business on favorable terms. The aim of SEZs is to support regional development through the promotion of new investments and creating new jobs. Entrepreneurs operating there can benefit from state aid granted in the form of income tax exemptions. Poland has 14 special economic zones. Zone management company has also powers in the field of spatial planning.

4. Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", PER/PELJ 2010 (13)) it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop).

a. Does the existing national legislation of your country make a similar derogation possible?

b. If so, what implications does this have for the assessment framework?

Polish law, as a rule, does not provide this form of support for innovative and complex developments. However, there are special acts regarding particular procedure for special types of developments.

Inefficiency of regulations and administrative procedures regarding the preparation and implementation of projects results in a tendency of special legislation progress. The bills containing extraordinary instruments regarding development and construction process of specific types of investment are passed. Recently, this special legislation has developed. Currently, there are about ten of these acts, regarding among others: railway, airport, port of gas, shipbuilding, flood, nuclear.

The first special law appeared in 2003 and was intended to streamline the developments of roads and motorways. This Act has been amended several times and introduced more extraordinary provisions. Currently binding version is the Act of 10 April 2003 on special rules for the preparation and implementation of developments in public roads (Journal Laws of 2013, item 687 consolidated text with amendments). It contains legal provisions which are of special, extraordinary type. It concerns the implementation of new road projects (roads and traffic engineering structures such as bridges, tunnels). It contains the specific legal regulations concerning the determination of the location of roads, partition of real estates and the acquisition of these real estates for the road.

The decision on license for execution of road development is an integrated administrative decision that replaces the decision on the location of roads and the building permit. It expropriates the rights to the property at the road area, approve the partition of real estates. This decision may also restrict the rights to use the neighboring real estate in the aim of the technical infrastructure reconstruction and the preparation of a lower category roads. Due to the specific nature of the road development being linear, several procedures and administrative decisions are connected in the Act. Therefore, there is only one consolidated procedure resulting in one administrative decision to authorize the execution of road development.

However, it should be noted, that this consolidated procedure does not apply to proceedings regarding environment impact assessment of road development. Special provisions of the Act application follows the procedure for environment impact assessment.

There is a special procedure specified in Construction Law of 1994, enabling derogation from technical and construction provisions. This procedure can be applied before the construction permit is issued and does not concern spatial planning. It must be pointed out that this derogation (that may constitute the new technical solutions, too) can’t cause deterioration of the environment.

6. CASE STUDY – SPAIN

Marta Lora-Tamayo / Pablo Molina

FOREWORD. The Spanish Planning law and land use law in a nutshell

Taking into account the precise and specific nature of the questions, we consider it appropriate to specify some of the basic concepts in the Spanish legal system. Otherwise, the answers to the questions formulated in the questionnaire submitted to all parties risk to be too broad and, therefore, not useful enough.

a. The Constitutional recognition of property rights

Article 33 of the Spanish Constitution recognizes the right of property. In line with the constitutional traditions of other European States, the Spanish Constitution enables expropriation only on grounds of public interest and through the corresponding compensation (which must not necessarily be previous).

Section 2 of article 33 of the Spanish Constitution provides that the content of the right of property will be determined "by the laws", expression that under the constitutional tradition refers to Laws and to Regulations of any rank.

Article 53 of the Spanish Constitution, in its turn, defines that the rights included in the Constitution are made up by an "essential" or nuclear part and by a "normal", or non-nuclear part of the right. The Constitutional Court has defined the essential part of the right as being integrated by those abilities that enable the right to be recognized in a specific socioeconomic context.

Accordingly, the right of property land use/property rights, in the Spanish system, is composed by a nuclear part, and by a "normal" or "non-nuclear" part. Whereas the content of the nuclear part is considered to be indistinguishable from the right and inherent to that right, the normal part will configured, as article 33.2 of the Constitution states, "by the laws"

The ability of the laws to configure the normal content of the right of property also enables the law to define which abilities will be included in the normal content of the right of property and when (and under which circumstances) will those abilities enter into the normal content of the property right of any individual.

Accordingly, in the Spanish system it is not only important which abilities and rights are included into the right of property of each individual, but also when and how can these abilities be included into those rights. Until all circumstances stated in the "laws" are met, the ability cannot be included into the individual right of property.

This concept of property is central to the legal planning system. Although it is a very fragmented legal system -the competence in planning legislation being attributed to the autonomous region- the definition of the right of property and the moment and mechanism of acquisition of the abilities included therein is the sole competence of the Central Government.

The Spanish land use law -Real Decreto legislativo 2/2008, mediante el que se aprueba el Texto Refundido de la Ley de Suelo- defines in its articles 7 and 8 that:

- Some rights are included in the right of property by direct provision of the land use law. Those rights are considered to be automatically included in the right of property. Depending on which

type of land the owner is[13], the Law establishes a different set of rights -and obligations-. Those rights and obligations conform a very basic set of rights. For instance, in rural land, the right of using the land according to its rural nature. In land subject to development by the planning instrument, the Law recognizes the right of the owners to participate in land developing operations -but not the right of initiative of such operations unless expressly stated by the plan-[14]. The right to build is generically recognized to the owner of the land after he has fulfilled all obligations established by the Plan.

- Most importantly, all other content of the property rights depends on the provisions established in the Plan, which will include the land into a specific category and assign a zoning situation to that land. Any potential land use provisions are legally stablished first and developed by statutory regulations in the plans. The land use legal regime has created a closed system of rights and duties in each type of land (rural, urban…) and till 2008 it carried am specific valuation of land (used in case of expropriation/compulsory purchase or redistribution systems)

- Finally, that the mere prevision of building rights and usages in the planning instrument does not entail acquisition by the owner of the property of such rights. The referred rights are to be acquired only through the fulfillment, by the owner of the plot, of the corresponding planning obligations. This means that developing rights are not supposed to be included in the nuclear/essential content of property rights.

This singular concept of the right of property has a singular relevance in the case submitted to consideration. As a logical consequence of the legal configuration of the right of property:

- The modifications in planning instruments do not grant necessarily any obligation for the Administration proponent of the plan to indemnify the owners of plots.

- In fact, the only occasions when such an obligation is expressly foreseen in the Law are the following

    - When the planning circumstances are modified before the owner of the plot has been able to build and to obtain the building permit and only in case the owner has fulfilled all planning obligations established in the plan and the modification of the plans takes place before the deadline established in the Plan in order to be executed.

    - When the plan is modified, the owner has obtained the corresponding building permit, and the Administration expressly revokes the license

    - When the plan imposes an obligation to the owner of a plot on account to its individual circumstances (e.g. Historical buildings) that restrict the development rights of the plot below the rights assigned to the neighbouring plots.

    - If the plan subjects the plot to expropriation, and even in this case compensation will only be claimable when the expropriation takes place.

[13] The Law defines two types of land, rural land and urban land, on account of their physical status. As the physical status is the main criteria, land set for development -but not still developed- should be considered rural land. Land is considered to be developed when it has all the necessary basic urban services at the land or when it is surrounded by built land on the proportion defined by the planning instrument of application.

[14] This list should not be considered as comprehensive, but only for exemplification purposes

- In all other cases, the modification of the urban plan, even though it affects individual owners or plots, does not generate a right to be indemnified/right of compensation (it's not consider as a "taking"), because it only modifies potential rights[15], but not acquired prerogatives.

b. The planning system. Nature and role of urban plans

We will center the exposition of the planning structure on the Catalan legislation on planning, as each community has a slightly different set of plans[16].

According to the Planning Law of Catalonia (hereinafter, PLC), the structure of the planning system is the following:

- Territorial plans. These sets of plans are purely strategic, and refer general/partial/special strategic planning of the Community. Those plans do not define the property rights and generate neither rights nor duties on the owners of plots

- Urban plans.(land use plans) Those define the right of property according to the Constitution and to the Spanish land use law. This set of plans is hierarchically ordered/stablished, and have the legal rank of regulations. In the hierarchical distribution within the legal system, urban plans rank below the Law and the general regulations in planning. The system of urban plans is organized as follows:

  - Director Urban Plans. Those plans are approved by the government of the Autonomous Community. Director plans are needed when a supramunicipal instrument is needed either because the planned development exceeds the physical term of a municipality or because of the essential and strategic "country-wise" nature of the development.

  - General Urban Plans. Those plans cover whole municipalities (although in some cases they can cover more than one municipality), and all types of land (rural, land subject for development and urban land). These instruments are approved by the municipality on an initial and provisional approval, and definitively approved by the Autonomous Region's Government. It is an essential tool, whereby the municipalities define the urban model and design the relationship with the rural land. It represents the maximum power of decision of local governments (the definitive approval by the regional government might **only** be refused in case of illegalities or in case of conflict with regional interests).

  - Partial Urban Plans (Zoning plans). Those plans define with precision the land use, building rights and procedure (and timing) for developing the land set for development. Partial Urban Plans may not contradict the rules set forth in the General Plan.

  - Urban Development Plans. Those plans are used for the regulation and definition of urban areas. Those areas might be defined in the General Plan, but the Urban Development Plans might further precise the regime of the General Plan. Also, Urban Development Plans might be used in order to approve and to regulate urban renewal projects. Although the Urban

[15] In this case, it is particularly interesting article 6 of the legislative Decree 1/2010, which approves the Planning Law of Catalonia, and where it states (in a rough translation) that the regulation of usage of plots and land through the planning instruments, as it implies mere specifications that define the content of the right of property, does not grant owners of plots any right to request an compensation, except in the situations and conditions regulated in the Law.

[16] Arising from a common planning tradition, the definition of the different planning instruments and their relation is easily applied, albeit changing minor aspects, such as names, procedures, etc. to all other autonomous regions in Spain

Development Plans might not contradict the urban model set forth in the General Plan, the Case-Law recognizes a certain amount of flexibility for those planning instruments.

- Special Urban Plans. Those plans are to be used for many specific purposes, such as sewer organization, aerospacial easements, definition of uses on conflicting zones, etc.

Urban plans are always approved by the relevant administration (municipal or regional). Director Urban Plans are strictly proposed and approved by the Administration. General Urban Plans and their amendments might be proposed by individuals but can only be approved prior express acceptance of the plan by the municipality. There is not a right to the approval of the plan.

Planning instruments will express discretional decisions of the municipal governments, and adopted always following criteria of opportunity. The natural limits of plans are the interdiction of arbitrary decisions -which is established in the Spanish Constitution- and, of course, the Laws and Regulations approved on planning.

c. The development of the plans

Execution of the plans -i.e. the ensemble of legal and physical operations carried out in order to transform the provisions of the plans into tangible and legal reality- can be carried out through systematic operations, where the benefits and the prejudices granted by the plan are distributed equally among owners included within one planning zone, or individually, where it is not possible or convenient to distribute the rights and obligations arising from the plan among the owners included within its territorial scope.

Systematic execution of the plan can be carried out through expropriatory measures -the administration will acquire the property of the plots before the execution of the necessary physical works- or through a reallotment project, whereby the properties of original owners are re-distributed, transformed into the plots established by the plan, and re-assigned to the original owners which will be obliged, as well, to pay for all development costs, including indemnities to other owners for the loss of buildings, closure of activities, etc.

d. The environmental factor on planning

The transposition of Directive 2001/42/CE, of June 27th, of the European Parliament and the Council has taken place, in the Spanish legal system, through the Spanish Law 9/2006, of April 28th, on the evaluation of the environmental effects of some plans and programs (recently substituted by Law 21/2013, of December the 9th, on environmental evaluation). The autonomous regions have also adopted their own Laws of transposition of the Directive in relation to their competences -planning is a regional competence- such as the Law 6/2009, of April 28th, on environmental evaluation of plans and programs.

Those Laws detail the evaluation for the environmental evaluation of plans and programs. It must be noted that, as Spain transposed the directive well after the expiration of the delay conferred to the Member States, the obligation evaluate the environmental effects of the planning instruments and of the programs had been imposed on the administration through several Court rulings that directly applied the Directive, such as the ruling of the Catalan Superior Court of Justice on April 3rd, 2009, that declared null and void a Plan approved by the Catalan Government on 2005 in order to build a regional prison on agricultural land that was being used by a flock of Montagu's Harrier for nidification.

The Court declared the nullity of the plan, among other reasons because no evaluation had been done -notwithstanding the clear obligations established in the Directive and the expiration of the delay in order to transpose it- on the effects of the intended prison to the environment[17].

Both Laws, the Spanish one and the Catalan one introduced the formal procedure for the evaluation of the environmental effects on plans. This procedure emphasizes the protagonism of the administrative body charged with the approval of the plan, and the need to take into account the environmental factor of the plan right at the starting point of the procedure.

Accordingly, the plans that are set forth in the Law as having, on account of their own nature, a probable effect in the environment -such as general plans, or the plans for the implementation of building or activities on rural land- include in the procedure the obligation to submit a preliminary document analysing the possible planning alternatives -including one alternative that consists in not doing anything-. This document will then be sent to the administration in charge of the procedure. This, in its turn, will proceed to issue a document stating the main environmental issues to be analysed (the "reference document").

Once the reference document has been issued, the promoters of the plan may prepare the version for the initial approval, which will incorporate a separate document -the environmental sustainability report-. The presence of this document will enlarge public participation from one months to 45 business days.

After the required public participation, the environmental sustainability report shall be adapted to the result of the suggestions introduced by the public and stakeholders and independently approved by the environmental authority. After this approval, the plan might be definitively approved.

e. Environmental issues on activities (activity and business permits)

The traditional control on activity in the Spanish legal system arises from the Decree 2414 of 1961, which regulated activities suitable to generate toxic emissions, insalubrity and nuisances on neighbouring plots.

Decree imposed the obligation to all activities suitable to generate nuisance or, in short, pollution (although environmental concern was not the aim of the Decree) to obtain an activity permit, prior to building the installations of the property (machinery, electrical wiring, plumbing, etc.). After the setting up had been completed, then the activity had to obtain an opening permit, certifying that the installations had been executed according to the project.

However, after the enactment of Council Directive 96/61/EC, of 24 September 1996[18] changed the emphasis of activity authorization from the "Nuisances and Toxic" approach to the environmental (or integrated) approach.

This approach was reflected into the Spanish legal system through the transposition legislation. Among others, act 16/2002 of 1st of July, on Integrated Pollution Prevention and Control (issued

[17] Unfortunately, as the judicial process took so long -the plan was approved in 2005 and the ruling granted in 2010- and no provisional injunctions are granted in Spain against urban plans, when the ruling was issued the prison was already built and under operation, so the unknown -but suspected- and unstudied effects on the environment were already irreversibly consummated

[18] Replaced by Directive 2008/1/EC, of the European Parliament and of the Council, of 15 January 2008, and in its turn replaced by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), which repealed the above 2008 Directive with effect from 7 January 2014.

by the Spanish Central Governments) and, within the autonomous regions, among others, the Catalan Law 3/1998, of March the 13th, 1998, on Integral Intervention of the Environmental Administration, later repealed by Law 20/2009, of 4th of December, on Environmental Prevention and Control of the Activities.

The interesting issue in this transpositional legislation is that all these laws introduced two new concepts in the Spanish legal system of environmental authorizations: the Best Available Technologies[19] and the need to periodically review the permits conferred by the Administration in order to ensure their permanent compliance with the Best Available Technologies[20].

In this sense, the Spanish legislation now provides for a permanent review and need of adaptation of the activities subject to the IPPC legislation –not all activities are subject with the same degree of severity- to the reference values as determined through the application of the Best Available Techniques.

This provision constitutes an anomaly in the content of the property rigths implementation as exposed above. Concerning activities, the obtention of an activity or environmental permit itself does not ensure full patrimonialization of the activity, but only as long as the activity meets the requirements established in the BAT at the time of the scheduled review. Consequently, it may well happen that, even without any modification in the planning conditions, the combined factor of (1) the delay for review of the environmental or activity license (2) a modification of BAT and (3) a non-adaptation of the activity to the BAT, could entail a loss of the right to carry out the activity without the corresponding compensation.

[19] Article 4 of Law 20/2009
[20] See. For example, article 25 of Law 16/2002

QUESTIONS of the Case-Study submitted to the participants

1.a. Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance, by diminishing the existing contours) or to impose measures (for instance measures which reduce nuisance)?

Under the Spanish legal system, it is possible for the authorities to decrease existing rights of companies, if that restriction is justified under the grounds of general interest.

Taking into account its effects, the restriction might be:

- An absolute restriction (a complete taking), which will end up by the closure of the activity and/or demolition of the buildings, such as an expropriation, a substitution of the activity through the execution of a urban plan or an obligation to cease an activity (which are exceptional)

- A relative restriction, reducing the scope of the activity and eventually driving it to its more or less foreseen / wanted disappearance.

Taking into account the instruments used in order to impose such a restriction, the main mechanisms are:

- Planning mechanisms. Through the approval of a new planning regime incompatible with the activity. In this case, the incompatibility might either be absolute or relative

    - Absolute incompatibility (fuera de ordenación) would apply in those cases the new plan pretends the publification of the land. In this case, the properties might not be subject to important repair works nor to refurbishment. If the adaptation of the activity to BAT requires important repair or building works, those works would not be permitted, and the activity will be obliged to cease. In some of the circumstances of absolute incompatibility the owner of the plot is entitled to require the expropriation of its plot, which will take place *ex lege* if the Administration does not start the corresponding procedure[21].

    - Relative incompatibility (volumen disconforme) would apply in case that the new plan is incompatible with the existing situation, but does not require the plots to become public domain. In this case, the buildings might be subject to extended reform or repair works, or even to full refurbishment, but the disappearance of the building would entail the need of adapting the new building to the new planning situations. Uses, too, could remain in the property notwithstanding their incompatibility with the new plan unless those uses are subject to forced ceasing.

    - Inclusion of the plot within an area subject to transformation. This would include the plot into an area defined by the plan as subject to renewal, transformation, or some sort of modification that would imply, either an expropriation of the plots (with the corresponding entity) or the execution of the plot by a community of owners. In this case, the activity will

[21] This possibility has given way to an enormous economic risk for the Adminsitrations in the Metropolitan Area of Barcelona and has led to the catalan region to perform subsequent modifications of the planning Law that progressively restrict the possibility of requesting forced expropriation from the Administration. The successive restrictions of this guarantee in practice imply that owners of plots in situation of absolute incompatibility are strongly restricted in the possibilities offered to them, but cannot move from that situation, neither executing their plots and obtaining the corresponding compensations nor requesting the expropriation of their plot. This situation seems to be in contradiction with the doctrine set forth by the ECHR in the Ruling *Sporrong & Lonnroth v. Sweden* (23-9-1982) http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580

continue to develop on the land as in the "volumen disconforme" regime until either a group of owners of the renewal zone or, in some regions, the winner of a tendering process executes the plan. Either the owners or the winner of the tendering process will have to assume the indemnity corresponding to the costs either of the complete closure of the activity or corresponding to the displacement of the activity to some other places, equally fit for the process.

- License or permit mechanisms. Through these mechanisms, the Administration (mainly the Municipalities) could control the natural substitution of the activities, leading to a progressive disappearance of those. It could consist, for instance, on a planning instrument or a local regulation restricting the opening of new activities at a distance inferior to a standard distance to other activities. These restrictions are fully admissible on the grounds of European Law, according to the ruling of the Court of Justice of the European Union in the case "Euroean Comission v. Spain" (24th of March 2011), as long as the restrictions respond solely to planning and environmental factors, and not to economic or commercial purposes[22].

The Uses Plan for downtown Barcelona ("Pla d'Usos de Ciutat Vella") is a good example of such an approach, as it restricts the possibility of opening new public establishments (such as Bars, Hotels, etc.) in the vicinity of other premises with similar use. The grounds there are purely related to urban planning policies (to prevent homogeneity in any part of the city)[23].

- Environmental license or permit mechanisms. Finally, another instrument used in order to decrease existing rights of companies is the adjustment of the environmental requirements through the review process of the environmental licenses granted in order to ensure full adaptation to the BAT standards. This instrument, of course, can only be used with those activities subject to periodical license review -which are the ones with the most important environmental risk-.

1.b. If so, who has to bear the costs of damages and/or the measures that have to be taken?

This question must be answered in the scope of the analysis of the land use property rights exposition given exposed above.

From a strict approach, there will only be a damage, as such, in the moment the measure affects a right included within the right of property and acquired by the owner of the plot or the owner of the activity. Following the taxonomy of instruments stated above, not all measures to be taken imply the obligation of paying compensation to third parties, as not all of them are considered to affect the right of property:

- The "Absolute incompatibility" situation does not generate an immediate obligation to pay for damages as, as long as the expropriation or the ceasing of the existing use has not been carried out, there is no affection the patrimonial situation of the plot or the activity owner. Of course, if the expropriation takes place, the corresponding indemnity will be due. In this case, the

[22] In this case, the Comission brought in front of the Court the compatibility of the Law on Commercial equipments of the Catalan Region -which mainly restricted the possibilities of opening new commercial premises outside consolidated urban areas, and obliged the Administration to consider market conditions and the concurrence in order to decide before granting a license) only to conclude that those restrictions not directly linked to planning or environmental reasons are not acceptable under EU Law.

[23] Which can be found at http://w110.bcn.cat/portal/site/CiutatVella/menuitem.ce0c3f9b5cffb30bc29d5291817409a0/?vgnextoid=95e54db7da392410VgnVCM1000001947900aRCRD&vgnextchannel=95e54db7da392410VgnVCM1000001947900aRCRD&lang=es_ES

expropriating administration or the beneficiary of such an expropriation -the administration might expropriate on behalf or on the benefit of another administration, or of the winner of a public tender- will have to assume the burden of the indemnity.

- The "relative incompatibility" situation does not generate any right of compensation, as its effects cannot be considered as affecting or diminishing the right of property of the owner. As article 6 of legislative Decree 1/2010 issued by the Catalan Government, on Planning, states, as the determinations of the plans are supposed to define the right of property, the approval of a plan does not give any right to compensation, except in the cases specifically stated as so by the Law.

- In the areas defined as "subject to transformation", there will be indemnities to be paid to the owners of plots or activities subject to transformation whose rights cannot be maintained after the renewal operation. This is the case for all the activities incompatible with the new planning situation that will be executed. This activities are deemed to cease in the moment of approval of the execution instrument with the corresponding indemnity for damages generated, either for the closure of the activity or for its displacement. The indemnity for the closure (which is exceptionally recognized) will take into account the goodwill of the company or activity being closed and capitalize it for a set amount of time (between 8 and 10 years). The indemnity for the displacement will equal all costs and expenses borne by the activity as a result of the new situation (moving costs, difference in rents between the former premises and new ones, etc.)

- The restriction of the concession of new licenses does not confer a right of indemnity, as it is a "prospective" situation, and does not affect to any right already acquired by the owner of the plots or of the activity.

- Finally, as the obligation to maintain the activity always in terms and adapted to BAT is already established in the Law, the requirements thereof do not generate any right of compensation from the owner of the activity.

1.c. In case it is necessary for the development to buy out companies, who has to bear the costs?

The buying out of companies would only apply either in expropriatory situations or in transformation or urban renewal areas.

Within an expropriatory situation, the compensation will be assumed either by the administration or by the beneficiary of the expropriation. In the Spanish legal system, only territorial administrations (that is, the State, the Regions and the Municipalities) are recognized expropriatory powers. This means that other administrations needing to expropriate will do so through any of the territorial ones, and will be considered "beneficiary" of the expropriation.

When the expropriation is carried out in execution of a public instrument or project, but through a private company -because it is owned by the Administration, or as a result of a public tender- this company will also considered beneficiary of the expropriation and will be obliged to satisfy the cost of the indemnity.

Finally, in renewal operations or urban transformation the initiative can be carried out by the administration or by a group of owners -or even by private companies having been granted a public contract-. In this case, the entity carrying out the initiative will have to bear the cost of the extinction of rights. In case this obligation falls upon a group of owners, those must create a special company (called Junta de Compensación) that is granted some administrative powers in order to approve urban projects and to liquidate and perceive fees from its associated members.

2. Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe-Vierhavens?

Under the Spanish legal system, the problems such as the ones submitted in the case-study would be dealt through the possibilities offered by the planning system.

According to the definition and functioning of the land use rights, as stated before, the planning instrument could define the general operations to be undertaken, and a broad regime of incompatibilities, which would generate a general dynamic of natural substitution and replacement of activities within the scope of the plan.

Additionally, the planning instrument could define specific areas, subject to development, which should be developed through an Urban Development Plan, or even permit or enable that, through subsequent Urban Development Plans, new areas are created in order to be developed.

This has been the case, for instance, in several planning instruments, such as the one being developed in Barcelona, called the "Marina de la Zona Franca". In this project, the mixt organisme between the Town Hall of Barcelona and the Regional Government[24] approved on June the 1st, 2006 a Modification of the General Plan of Barcelona that foresaw the transformation of a previously industrial area (key 22@ under the general Metropolitan Plan of Barcelona) into a residential / tertiary area[25].

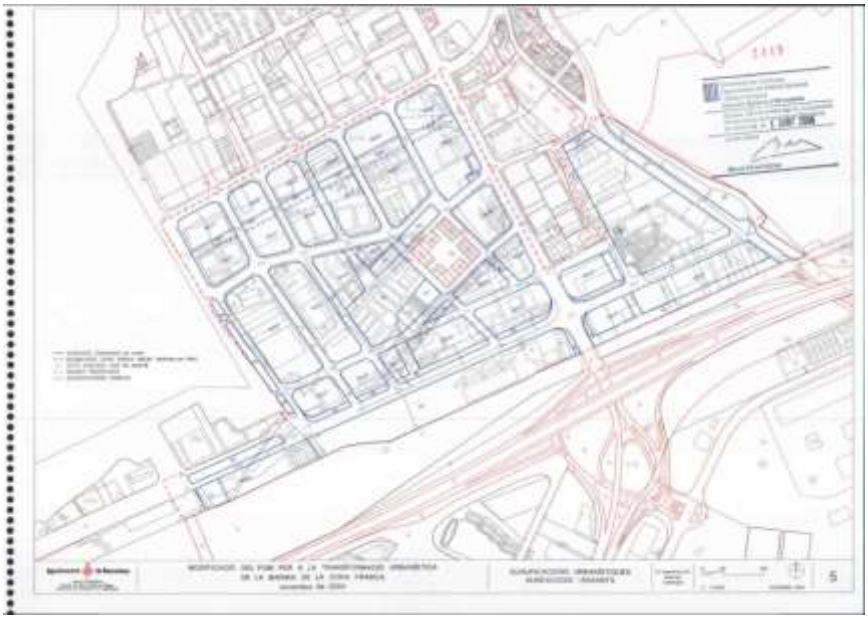
This plan reflects the status of the industrial area prior the intervention:

Which corresponds to the photography reflected below

[24] Article 66 of the Special Law for Barcelona (Law 22/1998, of December 30th) provides for a special regime in order to approve planning instruments in the City of Barcelona, according to the technological means available to that city

[25] Some data; 456,349 sqm non subsidized dwelling, 412,888 sqm. subsidized dwelling; 315,420 sqm tertiary uses; 27,000 sqm. new green areas; 14,800 sqm. dotational buildings

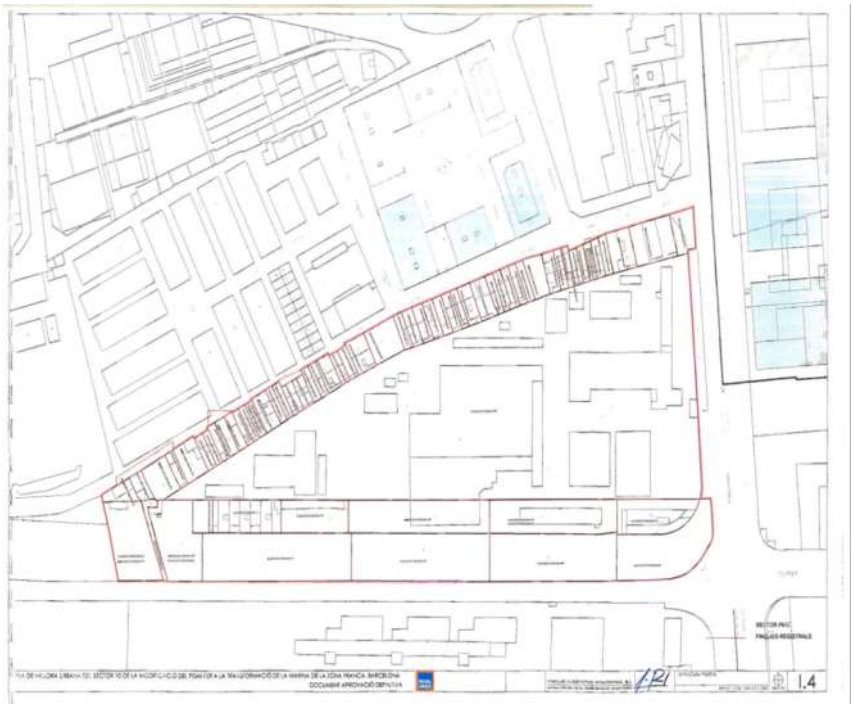
According to the modification of the Plan, the area was designed to be converted to residential and tertiary uses, with disappearance of former industrial ones. The following plan is the normative, compulsory plan foreseeing the modification:



The sole prevision of the modification did not give way to the extintion or the closure of the activities being carried out within the scope of the plan. In order to make the execution possible, the plan divided the area into 14 development areas (called “sectores”) as indicated in the image below:

Sector 10 detailed below was later developed through a Urban Development Plan, definitively approved on November 30th, 2007

In this plan the property was identified as follows (extremely fragmented)



And the conditions for redistribution of the development rights and properties were also established, as the Urban Development Plan identified the plots to be approved in the development[26]

[26] In fact, distribution of the plots was established in the modification of the Urban Development Plan definitively approved on July 23rd, 2010

According to the information submitted in the Public Registry of the Town Hall/Municipality of Barcelona, sectors 3[27], 8[28] and 14[29] have also been the object of the corresponding Urban Development plans.

Sector 10 has been realloted, the development works have been (yet partially) executed demolition of (part) of the old buildings has been executed and the building of the foreseen buildings is taking place as established in the Plan

The reallotment project dealt with all problems existing from compensations due to plot owners for the buildings that must be demolished in order to enable the execution of the project. It also dealt with the indemnities due to owners of activities subject to finalization or to displacement.

Sector 10, in this case, was executed under the initiative of the private sector (owners of plots) that drafted the Urban Development plan (and its modification) and subsequently constituted a Compensation Board and approved the Reallotment project. The compensation board is in charge of executing the urbanization works and of paying all outstanding amounts due to owners or activities.

Whenever the execution led by the private sector is unfeasible -because of a strong public presence or because opposition from the owners-, the Administration can execute the plan through expropriation or a reallotment project. In case of expropriation, the indemnity will have to be paid by the Administration (or the beneficiary). IN case the Administration approves a reallotment project, all expenses will be invoiced by the Town Hall to the owners of plots.

[27] Definitively approved on March 25th, 2011

[28] Definitively approved on September 28th, 2007

[29] Definitively approved on February 4th, 2011

3. Does the National system on planning law contain a binding planning instrument for prolonged developments (20 to 40 years) like Merwe-Vierhavens and other projects in City Port Rotterdam?

In the Spanish planning system, all urban plans integrate themselves and innovate the legal corpus. Hierarchically, urban plans rank among the regulations (and under the regulations approved by the Government in execution of planning Laws).

This legal and hierarchical position necessarily means that planning instruments are binding and presumed to have an indefinite duration, and to be enforceable until the moment they are repealed and substituted by a subsequent planning instrument.

It is not strange, in the Spanish planning system, for plans to last more than 20 years without being repealed[30]. Particularly concerning General Plans, the political and technical effort of drafting and approving a plan is such that municipalities tend to maintain the general plan over time, and amend it, if needed be[31].

On the other hand, plans that regulate complex areas, especially when dealing with important areas of the City (because of their strategic value or their extension), subject to renewal, usually contain a calendar for the execution of their main dispositions that outlasts 10, 15 or even 20 years. Schedules for developing the plans are theoretically compulsory -and the Law regulates the consequences of non-executing the Plan, such as possible expropriation of the plots or possible forced execution of the urbanization works- in practice, the main consequence of non-executing the plan within the approved timeframe is that the plan might change -including the reversion of the land to rural land, in case it has not been transformed into urban area- and the loss of any potential rights to be acquired.

One of such examples is the Urban Director Plan for the Synchrotron Area of Barcelona. This plan provides for the transformation of an area formerly occupied with a mix of agricultural activities, extractive activities (quarries), garbage dump sites and industrial activities. The identification of the area was performed in the General Metropolitan Plan of Barcelona (1976) and the area has been subject to several plans and amendments to the General Plan until the approval of the Director Plan on April 28th, 2014

[30] Among the eldest plans, the General Metropolitan Plan of Barcelona was approved on July 14th, 1976, and is still in force. The General Plan of Madrid was definitively approved on April 17th, 1997

[31] Amendments are frequent and common, and might not affect the essential structure of the Plan nor the model of city the plan is designing. If the amendment does affect such aspects of the plan, it is deemed to be a new plan (and has to be approved as such), not an amendment of the existing one.

The plan foresees for the implementation in the zone of a scientific equipment (Synchrotron), residential uses, commercial uses and light industry. The plan considers an execution schedule lasting 15 years since its definitive approval.

In this case, the Plan initially provided for an expropriatory development, and most of the land was acquired by the Administration. Later on, however, the development tools or instruments was changed to a reallotment project led, in this case, by the Administration, which means that the Administration will decide on the infrastructure works to be performed and will charge the owners of land according to their building rights.

Another example of a planning instrument for renewal lasting more than 20 years is the "22@" district of Barcelona. Current district 22@ was the main industrial area of Barcelona, basically occupied by heavy industries.

This part of Barcelona had been occupied without respecting the urban structure as defined by the Cerdà plan of enlargement of the City of Barcelona, as shown in the aerial military photograph from dated 1956

The aim of the 22@ plan was to reconstruct the urban structure originally designed as well as to substitute the deteriorated industrial occupations of the land with a mix of residential, tertiary uses and technological activities.

In order to perform this operation, a Modification of the General Plan of Barcelona was approved on July 27th, 2000, in order to create the 22@ zone, destined to the renovation of the former industrial areas of Poblenou, in Barcelona[32]

This amendment of the General Plan defined 6 areas to be necessarily transformed. In those areas, the transformation would generate, the following building rights:

- 2 sqm/sqm[33] that consolidated, as the building rights arising from the previously existing industrial zone, and, **on top** of those building rights:

  - 0.2 sqm/sqm that were recognized to the owners deciding to reform as a compensation for the assumption of the Special Plan for Infrastructures (the new infrastrucures plan that would renovate the area)

  - 0.5 sqm/sqm recognized to the owners deciding to reform if the renewal foresaw for the implementation of "@" activities[34]

  - 0.3 sqm/sqm recognized in favour of the Town Hall for the building of subsidized dwelling

  - 0.2 sqm/sqm recognized in favour of the Town Hall for the provision of parking spaces

Other areas not included within the areas subject to compulsory transformation could be transformed through the corresponding Urban Development Plans for each block of houses –or semi-block-. Those areas would also obtain a substantial increase in building rights:

- 2 sqm/sqm as the building rights arising from the previously existing industrial zone, and, **on top** of those building rights:

  - 0.2 sqm/sqm that were recognized to the owners deciding to reform as a compensation for the assumption of the Special Plan for Infrastructures (the new infrastrucures plan that would renovate the area)

  - 0.5 sqm/sqm recognized to the owners deciding to reform if the renewal foresaw for the implementation of "@" activities

  - 0.3 sqm/sqm recognized in favour of the Town Hall for the building of subsidized dwelling

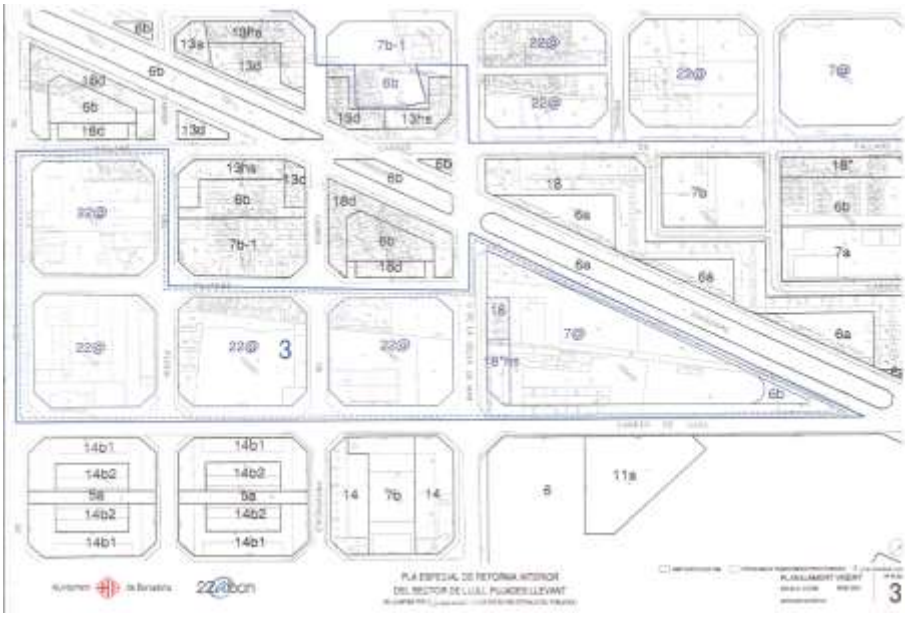
  Finally, in order to speed-up the transformation, the Amendment foresaw that, on plots measuring above 2,000sqm a Special Plan could be submitted to the Town Hall in order to implement "@" and hospitality buildings on the plot. In this case, and if the Special Plan was

[32] The modification had a scope of 1,159,626 sqm. Foresaw the creation of 4,000 new dwellings and the renewal of 4,141 existing ones. The increase of green zones in 114,000sqm and of public dotational services in 145,000sqm.
[33] Meaning sqm of building per sqm of land
[34] Being Offices, Tertiary use, audiovisual industries, technological industries, etc.

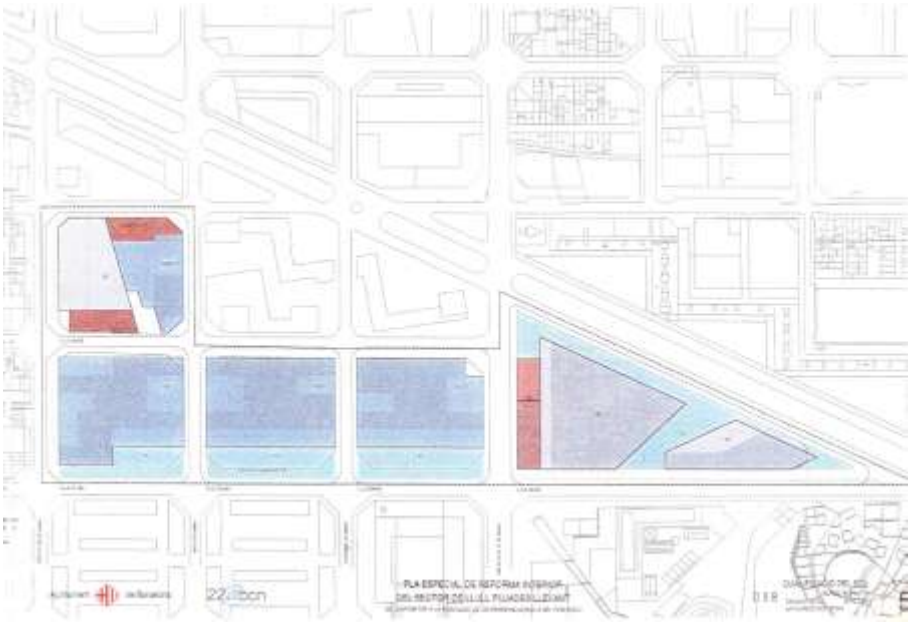
submitted with the building project and a responsible declaration assuming the obligation to build immediately after the approval of the plan and the granting of the license, building rights would be increased from 2sqm/sqm up to 2.2 sqm/sqm.

The execution of the 22@ zone is still underway. The main transformation zones were further defined through the corresponding Urban Development Plans, and the execution was carried out through the corresponding reallotment project, that enabled to tackle all the complexity inherent to the transformation of a zone where rights had already been consolidated.

The images below illustrate Urban Development Plan named "Llull-Pujades-Llevant"[35]



(initial plots and delimitation of the Urban Development Area)



(final plots and planning qualifications)

[35] Definitively approved on June 1st, 2001

Some Urban Development Areas (sectors) such as the one named “Llull-Pujades-Ponent” were even divided into subsectors in order to adjust the development to the needs of the area.

The execution of the area has been, accordingly, carried out according to the availability and the disposition of the owners, and the possibilities of the Administration. New uses (residential, tertiary, technological) are gradually replacing old industrial activities.

Llull-Pujades Ponent (passat i present)

4. Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Duthc Crisis and Recovery Act: Economic Recovery and Legal Crisis?" PER/PELJ 2010 (13)), it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop).

a. Does the existing national legislation of your country make a similar derogation possible?

Neither the planning nor the environment legislation provide for exceptional derogations of the existing laws in order to perform experiments or to perform complex or innovative projects.

The hierarchical principle is paramount in the Spanish legal system. This principle entails the automatic abrogation of any Decree or regulation infringing the applicable Laws.

In its turn, the Planning Law considers null and void any exception conferred by the plans to the legal regime as conformed by the applicable Laws, Decrees on planning, and urban plans of a hierarchically superior in rank to the plan being approved. Accordingly, no a urban plan cannot grant any exceptions to any actuation, for any of purposes, however worthy.

Notwithstanding the above, the truth is that on occasion of some projects considered of exceptional importance, the Government has managed to introduce an exception in the principle stated above. The path for the approval and implementation of extraordinary projects has been traditionally through the approval of a specific Law enabling such a project.

The approval of a specific law could not be, in theory, identified as a punctual derogation from existing law and regulations because (1) it is not punctual, as laws, in principle, have indefinite duration, and (2) should not be considered as an exception of the existing regulatory framework, because it contains and contemplates the creation of a specific, purpose-made legal framework.

Specifically, the only limits arising to such laws are of a competential nature –each parliament, regional or national, should legislate within its own competence - and of a conceptual nature: laws approved to enable exceptional projects and create a new legal category should comply with the two main traits of a Law, as opposed to an administrative act: should be general, and not case-specific, and ought to be applicable to an indeterminate number of operators (not person-specific). Otherwise, although retaining the name and the formal rank, such a law would fail to be recognized as such.

In the Catalan autonomous region of Spain there have been at least two projects that are, arguably, on the limit for the consideration of the conceptual nature of laws. The first one is a theme park, one of the biggest in southern Europe. In order to create this park, a special law was enacted[36] that provided for two big recreative and touristic centres in the global territory of Catalonia.

The Law also provided for extraordinary measures to be conferred upon the operators of those centers, such as the ability to build installations and buildings that ordinarily would not fit into rural land, the empowerment to request expropriatory measures in order to obtain the soil necessary for the activity, the execution of certain infrastructures, etc. The selection of the operator of the Center would be through the corresponding public tender.

[36] Law 2/1989, of February 16th, on Recreative and Touristic Centers. It is a zone measuring roughly around 8,000,000 sqm.

Decree 152/1989 of June 23rd, granted the project of the theme park to the winner of the tender, and introduced several obligations to be executed by the contractor, such as, among others, a certain level of investment and schedule thereupon, and a specific limit of building rights.

Although this Law is not formally a single-case law –it defines two territorial zones where a Recreative and Touristic Center could be implemented- the truth is that in nature this project has operated as single one, under the auspices of a law that, in practice, operates as a single-case law.

Most recently, the closure of the "El Bulli" restaurant has been followed by the proposal, of its former operators (the chef Ferran Adrià) of an international foundation called "El Bulli Foundation" in the vicinities of the former restaurant. However, as the former restaurant was within a Natural Park –and thus was granted the maximum level of protection under the Law 4/1998, of march 12th, of the protection of the Cap de Creus-, a specific Law has been proposed, and it is currently under public consultation, and in the midst of a heated public debate.

This specific Law states that the Bulli Project should be considered of public interest , that the land occupied by the Project must be of public ownership –the Project will obtain a lease on the land- and that the building parameters specified in the Law rank above and on top of any other planning or legislative measure. Accordingly, schedule 1 and 2 of the Law specify the building parameters to be applied to the project.

b. If so, what implications does this have for the assessment framework?

In full accordance with the thesis submitted in the article being considered, the existence of exceptions, no matter how worthy the objective, to the standard obligations and rights, and to the standard procedures enacted in the regulatory system should be considered with great care and caution.

It is unclear whether these mechanisms of exception to the Law and to the Regulations contribute to the generation of a better economic framework or increase the efficiency of the entrepreneurship among the population. It is certain, however, that these mechanisms can contribute to the generation of an important amount of arbitrary decisions –which are the "worthy" causes?- that ultimately can lead to the generation of an important degree of legal uncertainty.

Paradoxically, legal uncertainty is one of the main ingredients in the ecosystem where the economic crisis thrives.

7. CASE STUDY – USA (OREGON)

By Edward J. Sullivan[37]

THE OREGON CASE RESPONSE: INTEFRATING AND STREAMLINING THE DEVELOPMENT PROCESS

Oregon has a longstanding and extensive commitment to planning, law and property rights that reflects a longstanding and extensive experience in the area. Some characteristics that distinguish land use planning law in Oregon from other American states include:

- The requirement that each general purpose local government (i.e., cities and counties) adopt a comprehensive plan
- The requirement that plans provide the basis for implementing land use regulations and for most regulatory decisions as well
- Standards for planning set forth, and enforced, by a state agency
- The establishment of a specialized tribunal for review of local land use decisions

The Oregon system began over forty years ago and has evolved with experience and response to political and social demands.[38] The purpose of this paper is to discuss recent efforts to integrate and streamline that system in three discrete areas: population forecasts, the siting of industrial uses, and changes to urban growth boundaries (UGBs). These subjects illustrate the need for an active planning system is to rationalize and reinvent itself as necessary constantly to respond to changing demands. The three topics at issue are important to the state and its planning process. Let us examine each:

I. POPULATION FORECASTS

-- For many European countries, a centralized agency charged with tracking population and other information on demographics is well accepted. In America, there is a required decennial census[39] but no other enumeration is required. While all states track demographic changes, there is no necessarily binding federal law that requires adherence to other census standards. Moreover, in many states the absence of such a requirement allows state agencies and local governments to use a variety of methodologies to predict demographic changes and their consequent impacts on the ground.

Oregon was no different. In spite of a more centralized planning system, Oregon law charged individual counties with allocating changes in populations for those cities within the county.[40]

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[37] B.A., St. John's University (N.Y.), 1966; J.D., Willamette University, 1969; M.A. (History), Portland State University, 1973; Urban Studies Certificate, Portland State University, 1974; M.A. (Political Thought), University of Durham; Diploma in Law, University College, Oxford, 1984; LL.M., University College, London, 1978.

[38] For a review of the nature and history of that system, *see* Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 John Marshall Law Review 357 (2012).

[39] Article I, Section 2 of the U.S. Constitution empowers the Congress to carry out the census in "such manner as they shall by Law direct"

[40] OR. REV. STAT. 195.025(1) (originally OR. REV. STAT. 197.190 (1973)). Individual counties (subdivisions of the state) performed the coordination function, except in the Portland Metropolitan Area, where the Metropolitan Service District (Metro) performed that function. In particular, the statute provided in relevant part:

Local politics, and lack of standards as to how population, industrial and housing demand determinations were to be made, however, made that seemingly straightforward decision more difficult. Forecasting population growth correctly results in more accurate land need projections. Commercial enterprise favors areas that were growing and possessed a consequent larger range of services and facilities. Inflated population forecasts thus leads to less efficient land use in urban areas. Moreover, although the Oregon planning system encourages channeling most growth to urban growth boundaries, some jurisdictions were more willing to embrace the idea of infill than others. In those places in Oregon outside the Willamette River Valley and a few other places, additional population and attendant economic development was scarce and highly sought. The typical coordination decision makers, i.e., county governing bodies, not wishing to battle competing cities over population growth and the consequent allocation of urban lands, found it easier to do nothing. In 2007, compromise legislation allowing cities to make their own population forecasts by extrapolating from existing trends[41] was perceived to be inadequate for those communities growing faster than previous trends projected.

The result of this intense local infighting was the passage of legislation to overhaul the population projection scheme.[42] The new system tasked the Portland State University Population Research Center to undertake that work.[43] While local governments could comment and could ask for reconsideration of the Center's forecasts,[44] the forecasts that resulted were final. For the Portland Metro Area, Metro, the regional government, retained population forecasting duties for the twenty-five cities and urban portions of the three counties within the region.[45]

The result of these changes is to provide for final decisions on population forecasts – both for the Portland region and for the remainder of the state. The planning system is now both more predictable and coherent.

II. SUPER-SITING OF THE INDUSTRIAL DEVELOPMENT PROJECTS OF STATE SIGNIFICANCE

– An economic recession beginning in 2008 continued to affect the Oregon economy, which had already seen a significant decrease in forestry and other resource based industries and casting about searching for a new industry to help that economy. However, that situation was a common one among the states. In an effort to increase Oregon's changes of landing a new industry in that highly competitive market, the State provided for expedited procedures for identifying and designating "industrial development projects of state significance."[46]

[E]ach county, through its governing body, shall be responsible for coordinating all planning activities affecting land uses within the county, including planning activities of the county, cities, special districts and state agencies, to assure an integrated comprehensive plan for the entire area of the county. * **

[T]he governing body of the metropolitan service district shall be considered the county review, advisory and coordinative body for Multnomah, Clackamas and Washington Counties for the areas within that district.

41 2007 c.689 §1, *former OR. REV. STAT.* 195.034. This statute was repealed by 2013 c.574 §7 as part of the reforms in population forecasts.

42 Ch. 574, Or. Laws, 2013 (Enrolled HB 2253). Among other things, this legislation repealed the optional population projection system for cities described in note 5, *supra.*, retained the system in use for the Portland Metro Area and enacted new provisions, set forth below.

43 OR. REV. STAT. 195.033.

44 *Id.*

45 OR. REV. STAT. 195.036.

46 Ch. 564, Or. Laws, 2011. Section 2(2) of the legislation described such projects as those that:
(a) Create jobs with average wages above 180 percent of the minimum wage.
(b) Create a large number of new jobs in relation to the economy and population of the area directly impacted by the development.

Under the legislation, if a proposed industrial site qualified, the landowners could pursue an expedited single approval for all state and local permits before the newly-created Economic Recovery Review Council (ERRC).[47] The ERRC was authorized to approve permits for up to ten such projects per year.[48] Only a single notice and hearing is required, but state agencies and local governments are relegated to an advisory role to the Council, whose decision is binding at both the state and local levels of government[49] unless successfully appealed.[50] To date, no such combined application has been made or approved.[51]

This temporary legislation will be repealed after a certain report is made that the state unemployment has fallen below six percent.[52] The legislation was designed to deal with a specific economic crisis as quickly and efficiently as possible by integrating state and local responses to improve the competitiveness of the state among other states and countries competing for industrial uses.

III. REGIONALLY SIGIFICANT INDUSTRIAL AREAS

– The 2011 legislature also attempted to integrate and make industrial lands policy more coherent throughout the state. The result was a series of statutes allowing the ERRC to designate between five and 15 "Regionally Significant Industrial Areas" (RSIAs) per year by June 28, 2014.[53] Once designated, the new law protects the RSIA from incompatible development on

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(c) Create permanent jobs in industrial uses.

(d) Involve a significant investment of capital in relation to the economy and population of the area directly impacted by the development.

(e) Have community support, as indicated by a resolution of the governing body of the local government within whose land use jurisdiction the industrial development project would occur.

(f) Do not require:

(A) An exception taken under ORS 197.732 to a statewide land use planning goal;

(B) A change to the acknowledged comprehensive plan or land use regulations of the local government within whose land use jurisdiction the industrial development project would occur; or

(C) A federal environmental impact statement under the National Environmental Policy Act.

In other words, the projects that may be designated must result in an immediate gain to the state's economy and did not present a significant change to the existing land use system.

47 §3, ch. 564, Or. Laws, 2011. The Council reports directly to the Governor and is staffed by the Oregon Business Development Department. *Id.* §§3 and 4.

48 §§2 (3) and (4), ch. 564, Or. Laws, 2011.

49 §§2 (4) to (10), ch. 564, Or. Laws, 2011. Section 11 allows the Council to charge a fee "calculated to recover the costs reasonably incurred to conduct expedited review of the project" in lieu of any other fees otherwise required.

50 §2(13) provides for direct an expedited appeal to the Oregon Court of Appeals, but severely limits the grounds for appeal to whether there were "clear error" in determining the project qualified as an industrial development project of state significance, or partiality or corruption or unconstitutionality in the process.

51 Personal communication of the author with Rob Hallyburton, Oregon Department of Land Conservation and Development, September 23, 2014.

52 §13, ch. 564, Or. Laws, 2011.

53 *See* OR. REV. STAT. 197.723-.728, as amended by §§ 6-11, ch. 564, Or. Laws, 2011. A site may be designated a "regionally significant industrial area" if it is within an area planned and zoned for industrial use and it:

(a) Contains vacant sites, including brownfields, that are suitable for the location of new industrial uses or the expansion of existing industrial uses and that collectively can provide significant additional employment in the region;

nearby lands.[54] The designation is important, for a new or expanded industrial proposal may use the expedited industrial land use permit process discussed above.[55] For qualifying applications,[56] there is an expedited process for initial disposition[57] and review[58] of an industrial development application.

The three year period for designating RSIAs has now terminated. Five such areas were designated under the legislation[59] and are engaged in finding industrial occupants for their sites. Time will tell whether the legislation improved the economy of the state. Nevertheless, those efforts were worthwhile in bringing multiple state agencies and local government together to compete for industrial development. These reforms assure that Oregon is a competitive participant in seeking such development, without engaging in a "race to the bottom," which is all too often a byproduct of such competition.

IV. CHANGES TO THE PORTLAND METROPOLITAN URBAN GROWTH BOUNDARY

In Oregon, all urban areas require an urban growth boundary (UGB) to separate urban from rural lands and be sufficient so as to allow for an adequate urban land supply for a twenty-year period.[60] The Portland Metropolitan Area population is 2,226,009 (2010) of which 583,776 are in the largest city, Portland;[61] bounded by the State of Washington to the north (a portion of which is part of the Portland Metropolitan Area, but not subject to Oregon laws). The Portland State University Population Center estimated that the Oregon portion of the metropolitan area

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(b) Has site characteristics that give the area significant competitive advantages that are difficult or impossible to replicate in the region;

(c) Has superior access to transportation and freight infrastructure, including, but not limited to, rail, port, airport, multimodal freight or transshipment facilities, and other major transportation facilities or routes; and

(d) Is located in close proximity to major labor markets.

§6, ch. 564, Or. Laws, 2011. Local governments may nominate sites for inclusion and areas certified by the Oregon Business Development Department as ready for development within six months or less within a regionally significant development area are also eligible for designation. *Id.* §7. The Land Conservation and Development Commission is authorized to adopt administrative rules for RSIAs. §11, ch. 564, Or. Laws, 2011.

54 §7(4) and (5), ch. 564, Or. Laws, 2011. However, if 50% of the land is undeveloped after 10 years of designation, the RSIA designation shall be removed unless a majority of landowners oppose the removal. *Id.* §7(6).

55 §7(7), ch. 564, Or. Laws, 2011. In addition, §7(8) allows for possible priority funding consideration for transportation and other public infrastructure for RSIAs.

56 Those applications requiring an exception to a state planning goal, a change to local plans or land use regulations, or a federal environmental impact statement are excluded from consideration. §8(1), ch. 564, Or. Laws, 2011. Local governments, which administer the expedited process, may charge fees to cover the costs of processing and deciding permits. §10, ch. 564, Or. Laws, 2011.

57 That process is the same as for an expedited land division under OR. REV. STAT. §§197.365-.370, a quick and limited local review. §9(1), ch. 564, Or. Laws, 2011.

58 The review process follows the expedited land division process local review found in Or. REV. STAT. §197.375 and judicial review in the Oregon Court of Appeals with limited grounds, i.e. that the application does not concern an expedited industrial land use permit that there is a "clear, material error of fact based on the record," or there is a "clear material error of law" that overcomes any deference to local decision-makers, and these issues were raised locally. §9(3), ch. 564, Or. Laws, 2011.

59 Those sites are generally located on the west side of the Cascade Range – in Lane County (one site), Douglas County (3 sites) and Morrow County in Eastern Oregon (1 site).

60 Oregon Statewide Planning Goal 14, Urbanization. OR. ADMIN. R. 660-015-0000.

61 Portland Bureau of Planning and Sustainability, *Portland Demographics*, at https://www.portlandoregon.gov/bps/article/414463.

contains 1,789,000 people as of 2010.[62] While the growth trend was slower during the recession, the Portland metro area had strong growth so as to justify expansion of its urban growth boundary.[63] Such expansions are often hotly contested and, with many moving parts, are long and laborious in the process and sometimes remanded by the courts for failure to comply adequately with a number of (often vague) criteria.[64] The latest decision (in 2014),[65] followed five years of studies and hearings, resulted in a remand and the prospect of further time, expenditure and wrangling.

The timing of the remand was fortuitous, for it just so happened that the Oregon legislature was in session when this remand order was issued. The legislative assembly took matters into its own hand and redrafted the Portland Metro urban growth boundary and made several related territorial adjustments.[66] This ad hoc reform resolved the immediate issues, but without long range policy integration or rationalization. The result was an *ipse dixit* conclusion to a complex planning process to resolve issues for the moment, but which left open the prospect of future legislative interventions.

V. STREAMLINED METHODS FOR OTHER URBAN GROWTH BOUNDARY CHANGES

The legislative resolution of the Portland urban growth boundary and related issues in 2014 obscured the ongoing work at the state level in revising and restructuring state policy on urban growth applicable to the remainder of the state. After several years of work involving many interest groups, the Oregon legislature passed HB 2254[67] to respond to multiple complaints that the process and criteria for expanding urban growth boundaries was too difficult.[68]

The legislation requires the Land Conservation and Development Commission to adopt new administrative rules that are differentiated based on the population of a city.[69] In addition,

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62 Portland State University Population Research Center, 2010 Census Profiles, Oregon and Its Metropolitan Areas, at http://www.pdx.edu/sites/www.pdx.edu.prc/files/2010_PL94_MSA.pdf.

63 *See* Metro 2015 Growth Management Decision and 2014 Urban Growth Report at http://www.oregonmetro.gov/public-projects/growth-management-decision/2014-urban-growth-report.

64 *See*, Sullivan, Urban *Growth Management in Portland, Oregon*, (forthcoming, 2014).

65 *Barkers Five, LLC v. Land Conservation and Development Commission*, 261Or App. 259, 323 P.3d 368 (2014).

66 Ch. 92, Or. Laws, 2014. The bill dealt with two pending challenges to the Metro Portland land use designations. The *Barkers Five* case dealt with proposed additions to "urban reserve" lands that would be the presumptive additions to the urban growth boundary for the following 20-50 years. There was also a pending appeal of changes that Metro made in reliance of its urban reserves decision that was successfully challenged in *Barkers Five.* The legislature made adjustments to the Metro urban reserves lands (as well as for rural reserves, which were to be kept out of an urban growth boundary for a similar 20-50 year period) and set much of that boundary by statute.

67 Ch. 575, Or. Laws 2013.

68 Indeed state agency endorsement of revised urban growth boundaries were reversed and remanded in a number of cases. *See 1000 Friends of Oregon v. LCDC*, 237 Or App 213, 239 P3d 272 (2010), which remanded the original LCDC interpretation of compliance, and *1000 Friends of Oregon v. LCDC*, 260 Or App 444, 317 P.3d 927 (2014). Similarly, in 1000 Friends of Oregon v. LCDC (McMinnville), 244 Or App 239, 259 P3d 1021. (2011), the Court of Appeals remanded another complex decision for failure to comply with the Goals.

69 OR. REV. STAT. 197A.305 (2). For cities of less than 10,000 population, the resulting boundary must assure that the urban area has sufficient buildable lands and capacity for needed housing and employment opportunities to meet such needs over a 14 year period, not be less efficient in its land use as a result of the amendment, that generally the population per square mile will increase but the rate of conversion of agricultural and forest lands will not increase over time in the region, and must meet certain standards for predicting population and employment outcomes, land supply and development capacity.

the legislation also attempted to resolve two other difficult issues: notice to and coordination among public service providers in providing public facilities and services in areas inside and outside current urban growth boundaries regarding that provision,[70] the priority of land to be included within an urban growth boundary,[71] and a highly deferential review of a city action to change an urban growth boundary.[72] The fact that developers, local governments, environmental and government watchdog organizations participated in this legislation and that it passed without serious opposition bodes well for the forthcoming rules that will implement the changes to the urban growth boundary process in areas other than the Portland region.

By enacting this legislation, Oregon has signaled that it wishes to make revisions to urban growth boundaries less complicated, though conforming to state policy contained in LCDC administrative rules, and more deferential to city actions upon review. These reforms, taking note of the burdens on smaller cities, provide for an integrated policy approach to growth.

VI. CONCLUSION

In three difficult areas (population forecasts, industrial siting and urban growth boundary changes), Oregon has provided for an integrated policy to replace outdated and chaotic policies. These new policies provided for thoughtful changes in both land use procedures and substance, and responded to the needs of service providers, applicants and environmental advocates. The recent recession necessitated a quicker and more flexible system for resolving controversies. Oregon rose to the occasion and retains its primacy among American jurisdiction in planning and land use regulation

OR. REV. STAT. 197A.310. Similar, but more complex standards and procedures are provided for cities over 10,000 population. OR. REV. STAT. 197A.312.

70 OR. REV. STAT. 197.315. In particular, this statute deals with service providers which decline to enter into urban service agreements, which ultimately requires arbitration.

71 OR. REV. STAT. 197.320. The elaborate requirements of the statute become effective on January 1, 2016.

72 OR. REV. STAT. 197.325.

8. CASE STUDY – TAIWAN

by Dr. Tzu-Yuan Stessa Chao, Assistant Professor, Department of Urban Planning, National Cheng-Kung University

1.a) Is it possible, according to existing law of your country, for authorities to decrease existing rights of companies (for instance by diminishing the existing contours) or to impose measures (for instance measures to reduce nuisance)?

In Taiwan, there has been over 15 environmental related acts enacted since 1983. **The Basic Environment Act** was enacted in 2002 to make the whole environmental-related acts more cohesive. In the Basic Environment Act, the article 16 first indicates that any planning and development has to target at the goal of maintaining high living quality, comfortable and harmonious environments and on the basis of total environmental resource management. Also, the article 26, 27 clearly regulate that in terms of pollution control, the central government shall establish pre-approval, random check and enterprise self-reporting mechanisms for possible environmental pollution activities as well as government entities at all levels shall establish strict environmental monitoring networks and adopt necessary measures to decrease the nuisance may occur. In other words, in Taiwan, environmental protection is usually the priority when comes to development projects.

From planning law perspectives, zoning ordinance usually has very strict land use control over urban area in which developments shall parallel follow the **Air Pollution Control Law**, **Noise Control Act**, and **Water Pollution Control Act Enforcement Rules**. As for rural area, we practice planning permission for any development project. Before any planning permission could be granted to a development project, developer/applicant has to provide the official result of the EIA to the Planning Committee where the result will be consider as the conditions of the planning permission granted in the future. If the EIA report suggest the authority to require further nuisance control to diminish the possible nuisance, in most cases, the authorities will have to enforce such decision and moreover, monitor the result. Nevertheless, in practice, most of the extra controls are about water/ sewage control on certain development sites.

1.b) Who has to bear the costs of damages and/or the measures that have to be taken.

In the **Basic Environment Act**, Article 28 clearly indicates that the environmental resources belong to all citizens and future generations. The central government shall establish a system in which those who pollute or destroy the environment pay. Pollution control or environmental restoration fees that are collected from those who pollute or destroy shall be used to preserve the sustainable use of the environment. In terms of liability, Article 4 indicates the following, "Citizens, enterprises and government entities at all levels shall jointly share the duties and responsibilities of protecting the environment. Those who pollute or destroy the environment shall be responsible for the environmental harm or risk they create. The government shall bear responsibility in the event that those who pollute or destroy the environment in the foregoing paragraph do not exist or cannot be confirmed." However, since 2002, the "**Environmental Liability Act**" has been still under drafting. As a result, in the case of AU Optronics Corporation（AUO）[73]Development Project in Taichung Science

[73] **AU Optronics** (**AUO**) is a Taiwanese manufacturer of TFT LCD and other technologies that was formed in December 2001 by the merger of Acer Display Technology (established in 1996) and Unipac Optoelectronics

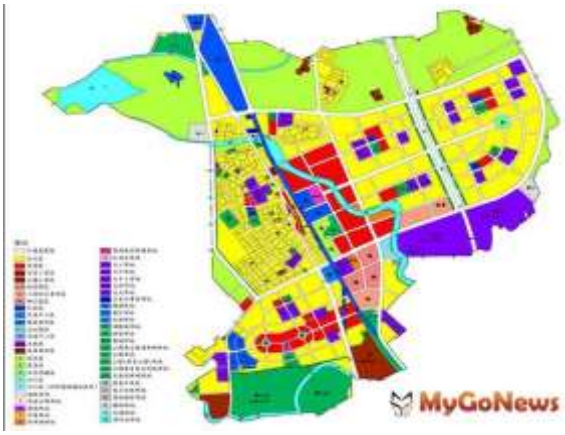
Park Phase III Extension, the AUO denied the establishment of the “environment and health insurance fund” requested by the EIA report.

Source: http://chingmeil.blogspot.tw/2014/05/blog-post_26.html

1.c) In Taiwan, so far, there has not been any case that the development could buy out the companies for the purpose of reducing the potential nuisance. In the cases involving New Town Development and Land Expropriation, the government may play the role of developer and buy out the companies located in the proposed site. According to the Land Expropriation Act in Taiwan, the value of expropriated land shall be compensated based on its current market value.[74]

2. Which instruments exist in the national legislation of your country to deal with the above mentioned problems in case of a large and complex development like Merwe-Vierhavens?

In Taiwan, large scale development cases like Merwe-Vierhavens are quite rare. Cases such as New town developments and Port area regeneration in metropolitan areas in Taipei and Kaohsiung would encounter similar problems as above. In certain cases, the local or central governments usually are the main developers considering most investors/developers in Taiwan are with limited funding resources. As for the existing legal instruments for the above development, the **New Town Development Act** (last amended in 2009), **The Land Expropriation Act**, and **Act for Promotion of Private Participation in Infrastructure Projects** (last amended in 2001) are applied most frequently.



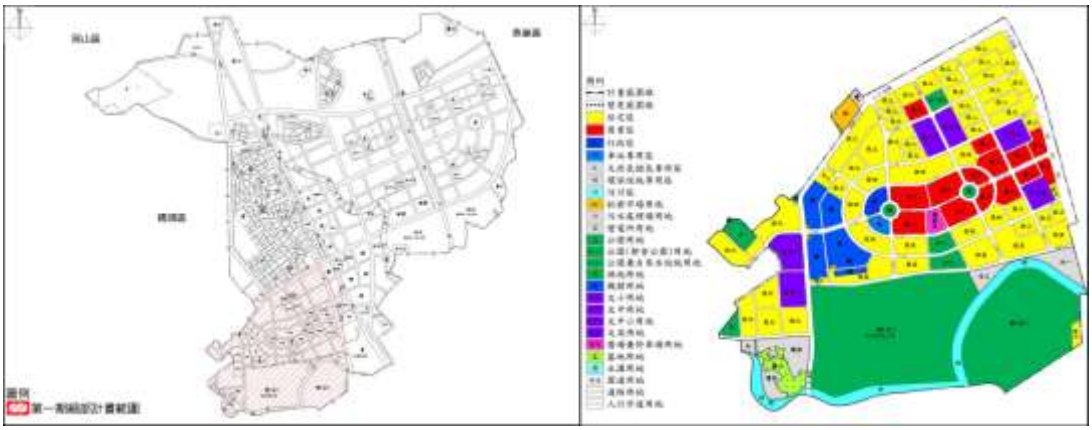
The Kaohsiung New Town Special District Master Plan (Source: The Ministry of Interior, 2012)

Corporation by BenQ Electronics. In April 2006, AUO announced the purchase of Quanta Display, Inc. At the time of merger, the combined companies represented 17% of the global TFT-LCD market.

[74] The Land Expropriation Act, Article 30

3. Does the National system on planning law contain a binding planning instrument for prolonged developments (20 to 40 years) like Merwe-Vierhavens and other projects in City Port Rotterdam?

NO. In the current planning law system in Taiwan, the longest period of planning is for master plan up to 25 years.[75] For other Detail plans, new town developments, or old area renewal plans, the usual planning and developments have to be realized within 10-year of time or at least reviewed every 3-5 years. For prolonged developments, in the current practice of the Kaohsiung New Town Development, the New Town Special District Plan was firstly announced in 1994 with the target year of 2017. The total area is 2,174.87 hector and considering the limited funding from the New Town Development Foundation[76]. The development of Kaohsiung New Town was divided into two phases and the Detail plan of the second phase of over 1000 hector has just been passed in 2013.



First phase of Kaohsiung New Town Development

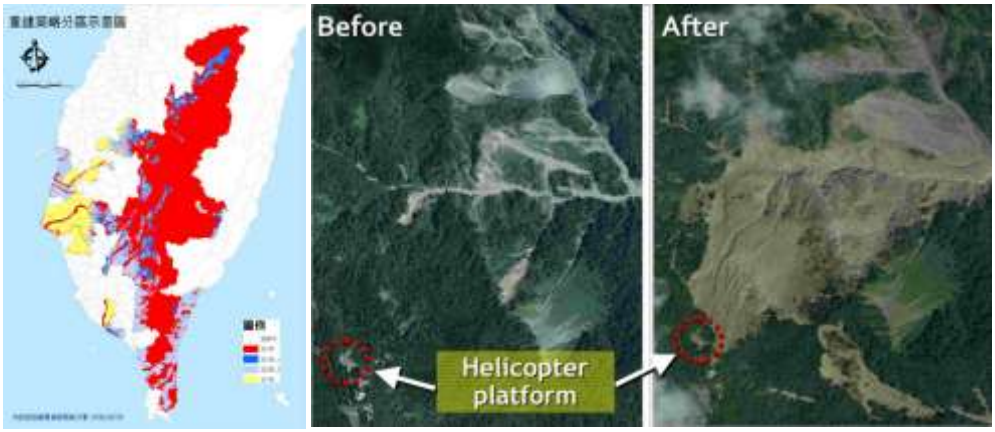
Source: Kaohsiung City Government

4. Under the Dutch Crisis and Recovery Act (see J. Verschuuren, "The Dutch Crisis and Recovery Act: Economic recovery and legal crisis?", PER/PELJ 2010 (13)) it is possible, by experiment, to derogate from existing law (like sound regulations or building regulations) to make certain (complex, innovative) projects/developments possible (or easier to develop).
a. Does the existing national legislation of your country make a similar derogation possible?

The existing legislation in Taiwan regarding crisis and recovery includes the **Disaster Prevention and Protection Act** (last amended in 2012), National Land Recovery Act (draft), and National Land Plan Act (draft). Since Taiwan is a small Island with multi and frequent disasters including typhoons, earthquakes, floods, and landsides every year, it is common case that under the circumstance of disaster the **Disaster Prevention and Protection Act** or **Special Act for reconstruction[77]** could derogate the existing law including the **Land Act** and **Urban Plan Law**. Take the **the Morakot Typhoon Post-Disaster Reconstruction Special Act (2008-2013)** for example, the Special Act was enacted as an emergency act for the compound disasters of heavy rainfalls, floods, debris and

[75] Urban Planning Law, Article 5, The urban plan shall be formulated on the basis of their present and past conditions and of an anticipated 25-year development.
[76] New Town Development Act Article 26, The authority shall prepare the budget to pay the expenses for planning and design of a new town. For expenditures on land acquisition, engineering design & construction, and operating management other than described above, the central authority shall establish a new town development foundation to cope with the payment.
[77] For instance: The Morakot Typhoon Post-Disaster Reconstruction Special Act (2008-2013)

mudflow, landslide, tributary dammed lake caused by Morakot Typhoon in 2008. This incident caused approximately 510,000 victims including 699 dead and missing. The Executive Yuan, the highest administrative department in Taiwan, soon established the task force "Morakot Post-Disaster Reconstruction Council"[78] (2008-2014) to in charge of the recovery work. In order to have better prevention of environment, the Special Act created a different set of land use control in reaction to extreme situations i.e. 15 of special restricted zones were designated to further control developments. Also, 161sites were appointed as high risk areas. However, after the special Act was abolished in 2013, it is an open-question of how the special land use control regulations comply with the current land use regulations or the other way around.



Reconstruction map under the Morakot Typhoon Post-Disaster Reconstruction Special Act (2008-2013)

Source: Morakot Post-Disaster Reconstruction Council, 2011

In other cases, yes, in order to promote developments, acts such as the **Offshore Islands Development Act** (last amended in 2014) and the **Hualien-Taitung Area Development Act** (last amended in 2011) were passed to accelerate the economic and tourism development in places with beautiful natural scenery. Certain acts granted the local government greater power in the EIA decision making process as well as in speeding up the planning permission approval procedure and the land acquisition process.[79] Of course, it results in a lot of disputes regarding the environmental protection concerns versus economic development.

b. If so, what implications does this have for the assessment framework?

In the case of Taiwan, by law, any development with environmental concerns has to pass the EIA (environmental Impact assessment). However, as mentioned in the question 1, the lack of supporting act such as **Environmental Liability Act,** once the developer passed the EIA, there are no strict monitoring/ assessment framework to keep the development and future use under supervision.

[78] http://morakotrecord.nstm.gov.tw/index.html

[79] The Offshore Islands Development Act, Article 7, *To encourage the development of industries on Offshore Islands, in the case of investment projects recognized as major construction projects by the central competent authority, the review procedure for land-use alterations, from submission of application through to the conclusion of review for land use segmentation or alteration of use, shall be completed within a timeframe not exceeding one year.*