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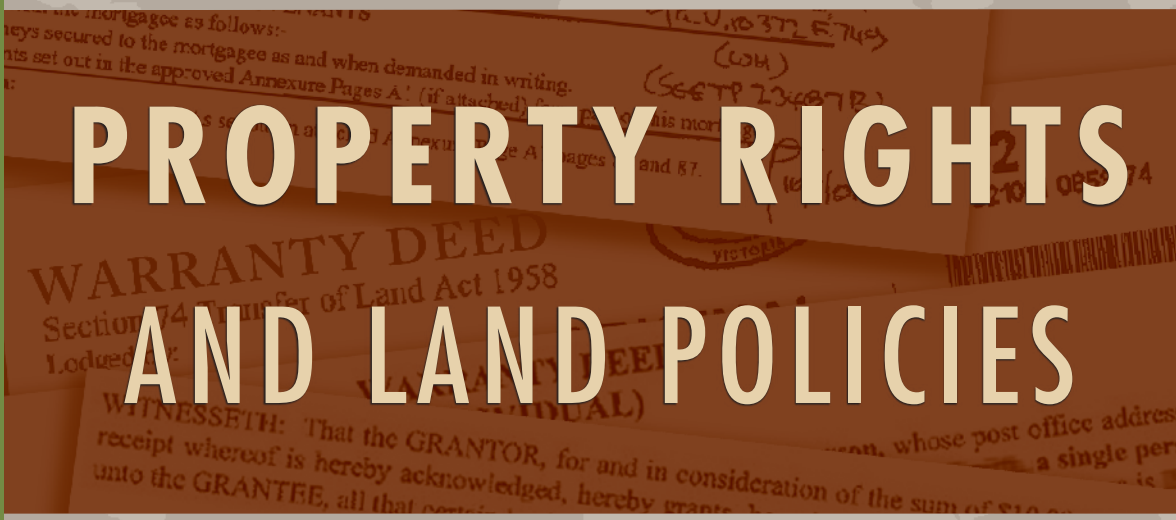

# PROPERTY RIGHTS AND LAND POLICIES

Edited by Gregory K. Ingram and Yu-Hung Hong

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# CONTENTS

# 9

# *Property Rights Protection and Spatial Planning in European Countries*

Vincent Renard

## *Property Rights in Europe After World War II*

The question of the relationship between planning and the protection of property rights has been central to the management of urban growth and urban regeneration in Western Europe since the beginning of planning in, approximately, the second half of the nineteenth century. The key problem raised by the interference between the right of property and the activity of planning and zoning became really sensitive at the beginning of the twentieth century, at least in Great Britain, Germany, and France, and to some extent in Spain and Italy.

The first element of property rights protection is the guarantee of property and the related exception in practically every country: the possibility of expropriation under strictly defined conditions. The legal definition of and the practical process for expropriation are to a large extent similar in several European countries. This topic is treated in chapters 7, 8, and 10.

The other key aspect of property rights protection relies on the impact of planning and zoning on increases or decreases in the value of property, especially the allocation of development rights by local plans. A different tradition with respect to property rights has led to a different type of relationship in northern Europe than in southern Europe. Among the 27 members of the European Union, the history, traditions, legal systems, and economic mechanisms of the Baltic countries, Great Britain, Portugal, Bulgaria, and Austria do not have much in common. This chapter mostly focuses on key features of some of the main countries of continental Europe—France, Germany, Spain, and Italy—with some

comments on other countries, notably Sweden and The Netherlands. It also takes into account the recent development of European law with respect to property.

## *The Origins of Property Rights in Europe*

Property rights have different origins in different parts of Europe. The main differences appear in northern European countries, southern Europe, and Germany, which have specific histories of the emergence of property rights (Needham 2006). One such difference results from the definitions of property rights in the constitutions of the countries. In most original constitutions, the definition is close to the strong statement about the guarantee of property in the U.S. Constitution. In the French civil code, property is considered "*un droit inviolable et sacré,*" with the possible exception of the right to expropriate when an evident public interest requires it ("*nécessité publique*" in the French Declaration of Human Rights).

In France the Civil Code of 1804 that explicated the right of property freed peasants from the feudal system, in which serfs did not have any property in the sense of "*fructus* and *abusus*." Unlike the United States, where property has been created to a large extent ex nihilo, in France peasants had a new right to the property they were cultivating through the transformation of so-called possession into property that can be sold and mortgaged, thus becoming a "*droit réel*."

The balance between the guarantee of property and the possibility that the state can expropriate it for the public interest has evolved very differently in different European countries, especially in light of the evolution of U.S. jurisprudence about takings. Some countries, such as Denmark, have introduced general legislation about takings, stating that "if a regulation goes too far, some compensation is due to the landowner." Such legislation can be compared to the well-known U.S. case of *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), introducing the concept that compensation must be paid if regulation goes too far. The notion has been applied in Denmark in a very restrictive way, thus limiting the amount of compensation. Other countries, such as France or Italy, have not introduced this possibility. Article L 160-5 of the French Code de l'Urbanisme states that "regulations and norms that result from this code, including the prohibition to build anything, do not open a right to compensation" (Renard 2007, 42–43).

There is a paradox: countries such as France and Italy that deny a general right to compensation have practices, both legal and negotiated, that allow the introduction of some form of compensation. Other countries, such as Denmark, that have legislated a general principle of compensation have applied it in a very restrictive way, only when the planning blight is long-lasting and very severe as compared to neighboring landowners. In these countries, the general principle acts as a kind of safety belt in extreme cases and is not at all a common practice.

Roughly speaking, the balance between the guarantee granted to the owner and the social obligation of property owners is probably more in favor of landowners in southern Europe than in northern Europe. Such a broad statement

should be refined. Harvey Jacobs (2006) makes an interesting comparison between the European and U.S. systems in that respect.

## *The Definition and the Contents of the Right of Property on Land —*

In most Western European countries, the right of property on land was defined or redefined after World War II. Most countries' constitutions include a solemn definition of the guarantee of the right of property, as is the case in France, Italy, and Spain. The definitions vary from country to country in terms of the balance between the interest vested in the right of the owner and the general interest, and they can also vary to a large extent from one country to another.

For example, in Germany, the basic law about land and planning (the Baugesetzbuch) limits the guarantee of property in two ways, by stating that "the content and limits of the guarantee shall be defined by the laws," and that "property entails obligations, and its use shall also serve the public good." This is clearly more balanced between the general interest and the interest of the landowner than are the French and Italian definitions.

In Sweden, as in most countries, property is guaranteed except when there is an urgent public need. But the very general principle of *allemansrätt* (the right of anybody in the territory of Sweden) makes explicit the fact that the whole territory of Sweden is in a way a public good that everyone is entitled to use freely. A series of conditions guarantees the free and exclusive use of a property by the owner, but there is an expression of the state of mind—visible in patterns of urban development—in which the balance between the public interest and the interests of landowners is differently related. The idea of "private property—no entry" is not an obsession. The notion of sustainable land use policy fits better with such a socio-legal context. It follows from this principle that the capital gains on land are mostly recouped by public authorities.

In most southern and Eastern European countries, the basic principle is that the owner receives the benefits of the valorization of his land. Devices, especially forms of taxation, allow the government to recoup part of the betterment, but the basic principle remains. Some attempts have been made in those countries to change the rules of the game. Examples from Great Britain, France, and Italy are presented in the following section.

## *Does the Landowner Own the Development Rights Attached to a Piece of Land?*

The determination of whether the landowner owns development rights evolved during the second half of the twentieth century when strong urban pressure led to soaring land prices. The specification of development rights in local plans led to sharp differentiations in land prices, thus raising the problem of equity among landowners.

According to a concept fairly widespread in northern Europe, ownership of land does not include a right to the development value that results from urban growth in general and the provision of infrastructure in particular. This is, for example, the case in Sweden and The Netherlands, but by means of different mechanisms. In Swedish towns, it is accomplished by means of long-term land reserves for towns; towns have played a key role in the development process in The Netherlands, at least until recently. In both, most of the value added by urban development is collected by the community.

The other concept, which prevails in several countries in southern Europe, allows the original landowner to keep the capital gain, subject to some form of tax collection such as a value-added tax or a tax on capital gains. In such systems, the introduction or amendment of urban development regulations is generally perceived as an additional constraint on previously held rights, the assumption being that ownership at the outset was unconditional and included development rights. There is no pure case, and the reality is not that clear. Nevertheless, zoning restrictions are seen as a loss for the landowner by reducing the value of the property.

One possible legal technique to solve the problem of inequity is the redefinition of the contents of the right of property separating the development rights from the property of land, and thus socializing, totally or partially, the development rights. This occurred in different ways in Great Britain in 1947, France in 1975, and Italy in 1977. None of these attempts have been successful in the long run.

## THE 1947 TOWN AND COUNTRY PLANNING ACT IN GREAT BRITAIN

The priority in Great Britain after World War II, given a severe housing crisis, was to "recoup betterment," in the terminology of the "Uthwatt" report of 1942, through the full nationalization of development rights (Expert Committee on Compensation and Betterment 1942). This was a key point of the Town and Country Planning Act (TCPA) of 1947. During a transitory period, until the anticipated monopoly of local governments in the land development process, the developer had to pay a development charge—the difference between the market price of development land and the agricultural value of land—when getting the planning permission. A fund was created to provide one-time compensation to landowners for the loss of the development value of their lands.

Based on an erroneous assumption, the inelasticity of land supply, this drastic legislation first resulted in land hoarding by landowners, who did not accept the drastic reduction of their proceeds from the sale, and then resulted in their selling the land for somewhat higher prices than its agricultural value. As a result, the price of new housing increased until the act was repealed in 1951.

The same idea, to recoup betterment, has been reintroduced twice since. In particular, the 1976 Development Land Tax Act was an attempt to follow the same plan in a more limited way, but it was also soon repealed when a new government took power.

### THE 1975 LEGAL DENSITY CEILING IN FRANCE

In France the 1975 Town and Country Planning Act instituted the legal density ceiling (*plafond légal de densité*, or PLD), which set limits to a landowner's development rights independent of other constraints resulting from regulations. That is, when the developer gets a building permit with a floor area ratio greater than the legal density ceiling, he has to buy the excess development rights from the authority. Initially, the PLD for most of the country was fixed at a density of 1.0 square meters of floor area per square meter of land; in Paris it was 1.5 square meters. When regulations allow a higher floor area ratio, the developer may build at a density higher than the PLD after paying a fee equivalent to the market price of the area of extra land that would be needed in order to not exceed the PLD. The purposes are to partially recoup betterment and to finance local authorities.

The PLD was aimed at reducing the increase in land values that benefited high-density, centrally located plots. The idea was to discourage high-density schemes by fiscal means that also brought extra resources to the local councils, thus providing at the same time some recovery of windfall gains that resulted from zoning. The results were not convincing, and the proceeds were limited. The main effect was to limit density to avoid payment, thus increasing urban sprawl. The PLD was repealed in 2000.

### THE 1977 CONCESSIONE DI EDIFICARE IN ITALY

A third illustration of this type of policy is the reform of the Concessione di Edificare, which modified the legal and fiscal framework in Italy in 1977. A first legal step resulted from a 22 October 1971 statute stating that the property of land would not include the development right. Theoretically, the development right was vested in the public authority, and that became fact, albeit in a very limited way, with the passage of a 28 January 1977 statute stating that land use is sold by the state (*concessione di edificare*). The developer was supposed to purchase the development right from the public authority granting the permit.

This legal construction was rapidly destroyed by the Constitutional Court, first by a January 1980 decision declaring illegal the separation between the right of property and the right to develop and build on a piece of land, and then canceling, as a consequence, all local plans that had been approved before 1977. To an extent, this chain of decisions weakened the Italian planning system for the next decade.

The principle of equitable redistribution, or betterment recoupment, is generally accepted. However, these three experiences show that the practical implementation of the principle remains a serious challenge.

## *The Regulatory Taking Issue in Some European Countries*

Roughly speaking, a majority of countries in Western Europe, particularly in southern Europe, have adopted the principle that constraints on urban development are not liable to compensation. As expressed in the French Urban Develop-

ment Code, for example, this principle applies "to any constraint affecting the road system or prompted by health, aesthetic or any other considerations and concerned with such matters as land use, heights of buildings . . . or prohibition of development in given zones" (article 160-5). A constraint on the right to make use of a given piece of land is not considered grounds for compensation unless it infringes a vested right (for example, if it involves withdrawal of a building permit already granted) or is a change in the previous state of the site resulting in "direct, material and indisputable damage to property."

This latter comes close to taking and rarely applies, doing so only under restrictive circumstances. So the rigorous application of the principle of no compensation, which makes landowners subject to unequal treatment, has met with considerable opposition and has led to the generation of de facto and de jure loopholes. In France, for example, the introduction in 1976 of procedures for the transfer of development rights falls under this heading and was attacked as a breach of the principle of no compensation.

However, legal systems vary from one country to another. There are very few European comparative studies on this topic, and the recent "Symposium on Regulatory Takings in Land Use Law: A Comparative Perspective on Compensation Right" stresses the difficulty of summarizing such a comparison:

> The differences are significant and often unpredictable. They exist even though nine of the eleven countries under scrutiny belong to the EU. If one imagines a hypothetical scale of degrees of compensation rights, only a few of the countries take one of the two extreme positions along that scale and say either a stark "no" or a broad "yes." Most countries hold some middle-ground position along the scale and have their own matrix of specific policies, and each country's set of laws and policies differs significantly from every other's equivalent set. (Alterman 2006, 476)

This is reflected to some extent at the level of the European Union in the application of the European Convention on Human Rights, and more specifically the First Amendment to Protocol no. 1 of this convention, which states that compensation is due "in cases where the prejudice is exceptional and the servitude is disproportionate in comparison with the purpose of general interest of the servitude." On one hand, this amendment seems to introduce a general principle of compensation; on the other hand, compensation is supposed to remain an exception and, in practice, be left to national courts. This point is detailed later.

## *Restrictive Zoning Without Direct Compensation*

Most European countries apply a series of zoning devices intended to protect natural areas or buildings without direct compensation. Most include a specific zoning category in local plans, usually described as "natural areas to be protected because of the interest of landscapes, historical value, or ecological interest." Urban development is usually prohibited in these areas. In them—for instance, in

Germany, France, and The Netherlands—no direct compensation is implied as a consequence of the classification.

More restrictive and long-lasting protections have been introduced in several countries under the form of listed buildings protected for their architectural and/or historical interest. These protections do imply restrictive regulations and some form of indirect compensation. In France, for example, the restrictive regulations result from legislation enacted in 1913 and 1930 about "*sites et monuments historiques*." Any transformation or improvement of such buildings must be approved by a specific body, and there is compensation in the form of subsidies that can be as high as 50 percent of the overall cost of the work. In spite of this compensation, the maintenance cost of such buildings is often high. In countries such as France, where there are over 8,000 listed buildings, the cost of losing any right to develop the property can be high, which gave rise to a different method, the transfer of development rights.

## *An Ambiguous Answer: The Transfer of Development Rights*

A possible answer to the inequity raised by zoning relies on the separation between transferable development rights (TDRs) distributed evenly in the area on one hand, and on the other hand an effective right to develop obtained by an owner, who is not able to develop the land, by purchasing development rights. Such was the basic rationale behind the introduction of the TDR mechanism, a way to make a restriction on development rights acceptable to landowners.[1]

In comparison with other areas in which tradable permits apply, such as air and water, land has some distinct features, not the least because the many entangled legal instruments that govern it play a large part in determining its price. The TDR method has been applied in an explicit way in some European countries, mainly France and Italy, and a limited number of areas have been protected. However, the concept of tradable rights has come to the fore in recent years, particularly in the context of climate change, the greenhouse effect, and air pollution. An important threshold was crossed with the protocol adopted at the December 1997 Kyoto Conference, which envisaged trading quotas or emission credits.

There is a primary conceptual difference between a tradable permit attached to land and a tradable emission quota. In the case of pollution, the object of the trade is an entitlement to emit an ongoing level of pollution, measured, for example, in tons of nitrogen dioxide discharged into the air per year. What is involved is a continuing process, and the relevant quotas may go on being bought or sold ad infinitum. With tradable land rights, by contrast, the right is sold outright or for a very long period. Although the right is salable only in part or may be bought back at a later date, the purpose of the transaction is not to engage in an ongoing process.

1. The information in this section of the chapter is based to an extent on Renard (2007).

This obviously has a major impact on the way the instrument is employed with respect to allotting rights and the conditions for buying them back. The concept, therefore, has to do with property law as applied to geographical space, and it reveals a major difference between legal systems. Those originating in Roman law are based on the indivisibility and absolute nature of land ownership. By contrast, Anglo-Saxon law, in particular North American law, considers land ownership to be a bundle of rights, some components of which—such as development rights, air rights, and mineral rights—can be treated separately.

## CREATING A MARKET OR COMPENSATING RESTRICTED LANDOWNERS?

Central to the creation of a market in development rights is the issue of the financial and fiscal implications of land use regulations. In urban and peri-urban areas, the value of a piece of land lies in the rights attached to it, which are conditioned by zoning and other environmental regulations by which the price of land can be strongly affected.

As far as urban and especially peri-urban areas are concerned, the response has differed from country to country. Roughly speaking, most countries in Western Europe have adopted the principle that constraints on urban development are not liable to compensation unless the development infringes a vested right or contradicts investment-backed expectations.

The development of case law over time matches the gradual change that has taken place in property rights law, in which a distinction is made between private property in the strict sense of the term (that may thus be put on the market) and common property. It appears that the TDR can be more a way to compensate restricted landowners to make zoning more acceptable than a way to develop a market in development rights in which buyers meet sellers and prices adjust to supply and demand.

## WHAT IS REALLY TRADED?

Postulating the existence of transferable rights assumes that there is something to trade—in other words, that one of the parties is ready to relinquish an attribute of his property (the right to build, for example) to another owner. Whatever the circumstances, no market will operate unless the exercise is worthwhile—that is, unless there is a demand for rights. This raises the issue of initial allotment of rights. Two concepts can be distinguished, depending on the methods used to value land and real estate, which are themselves based on the way property is conceived, as absolute and unitary property or as a bundle of rights, some of them being possibly public (air rights or mineral rights).

Such is the context in which it is possible to conceive of trading a right that is assumed to be in existence but whose actual use has not been authorized. This point is essential to understanding the crucial importance of the original allotment of rights and the conventional nature of that allotment.

### SOME EVALUATION CRITERIA

The application of the TDR technique in Western Europe has led to results that are limited in their scope and controversial in their results (Renard 2007). As a whole, trials of the practice have not yet reached a critical mass that allow statistically reliable conclusions to be drawn. Even though there are a fairly large number of examples in the United States, they are in different geographical areas, have different aims, use different operating methods, and show different results. Many of them—generally in built-up areas and generally on an informal level—occur among small groups of owners and operate by consensus without formal legal or institutional frameworks. They have a long history in the form of TDRs in the United States and private law constraints in France. Nevertheless, use of the method in a vast geographical area by means of a universally applicable mechanism formally established in advance is still fairly limited, and most have specific features that make general conclusions difficult.

The aims attributed to most schemes are generally environmental and architectural. The most frequent goal is nature conservancy, preservation of sites of outstanding natural beauty and protection of agricultural land in the vicinity of built-up areas. Success is often measured in terms of surface area preserved for conservation in perpetuity. An area conserved in perpetuity means that all its development rights have been transmitted and that the area is closed to development. However, this particular aim is frequently a backdrop to the prime objective of redistribution—namely, to provide compensation for the constraints society places on the use of the property; in other words, to render acceptable the inequitable distribution of development rights created by zoning laws. The goal of nature conservancy (or the preservation of structures of architectural merit) is the prime objective of the regulatory procedure. The TDR technique is therefore more an intermediate instrument to facilitate implementation of a plan. The technique may also serve as a legal safety net for the planner. Even if the scheme is not in operation, the mere fact that it is in place enables disputes over compensation for constraints to be avoided.

## *The Legal Nature of TDRs*

In all countries that have made use of transferable development rights of one sort or another, the legal status of those rights has been a point of contention and litigation. Are they an integral part of property (even when destined to be used at another site), or are they merely financial instruments to provide compensation for value lost as a result of a constraint? This is an important point both because of its impact on the legal appreciation of the issue (in France and Germany, for example, it is unlawful for planning restrictions to be liable to compensation except in very special circumstances) and because of the way it is applied and the way compensation is assessed.

The concept of property rights itself has never been finally defined. Many commentators see them as a bundle of rights in which ownership of land is a se-

ries of autonomous, separable rights—to use, to develop, to fly over, to cross, and so on. This idea does not settle the question of transferable rights in legal terms, namely, which of the rights attached to land are by their nature part of ownership (such as the right to farm the land) and which are rights whose attribution may be determined by the social function of the property (such as the right to build).

In a different context, a similar debate has been going on in France, although from a different starting point because the basic principle there is that constraints are not liable to compensation. When the 1976 act was drafted, voices were heard denouncing the risks involved in introducing rights that could be considered imaginary (Lenôtre-Villecoin 1975). Like the decision in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), in the United States, this amounts to an attack on the principle behind the creation of the legal entity of transferable right. According to Lenôtre-Villecoin, "the capacity to transfer an imaginary development right establishes a *jus abutendi*, or a right of disposal, in a case in which the public interest, in the form of regulation of urban development, is against existence of the right to build at all" (1975, 535).

## *Zoning and Transferable Rights*

There is a clear link between zoning and transferable rights. The transferable rights procedure is in itself a zoning instrument in that it implies a division into transmitter and receiver zones. Greater precision may be introduced by stipulating that the zones must be of precisely specified dimensions; if the dimensions differ, the whole scheme will be invalidated. For the scheme to operate properly, owners in both transmitter and receiver zones need to be given the right incentives, which should help balance supply against demand with respect to development rights.

In the case of receiver zones, where conventional planning regulations operate as usual, the purpose of zoning is to ensure a high standard of urban development. The quality of urban development is thus the criterion to be taken into account. As the process proceeds, however, it becomes difficult to provide adequate incentives. Many schemes use a system of bonus zoning; in other words, the authorized density increases if transferable rights are purchased. This makes it tempting for the planner to reduce the ordinary density (where no rights have been purchased) and increase the bonus density. However, such a policy is likely to fall foul of the principle of vested rights and to lead to litigation. Incentive zoning is thus a difficult process.

Another sensitive issue is the eligibility of a zone to be designated a transmitter zone, which opens the way to a grant of transferable rights. The subject is one of endless debate with no evident way of settling it on a systematic basis. Should agricultural land be allocated TDRs and, if so, on whose behalf? Generally speaking, the price of agricultural land could be considered to reflect its productivity, the current net value of its future yield. It is paradoxical to allot development rights to land on which farming is expected to continue, even if

the rights are not to be used on that land. Arguments in France and the United States are often based on the natural beauty and biological diversity of the site. However, this takes no account of existing usage and places owners with different relationships with their land on the same footing.

Although no general conclusion on the linkage between zoning and transferable rights can be reached, the risk of distorting zone demarcations and urban planning regulations in order to make the rights market work should be noted. It is important to maintain a proper perspective; the transferable rights procedure is no more than an aid to good urban planning, not an end in itself.

## *Is the Price of Rights a Market Price?*

It would be pleasant to be able to answer the question of whether the price of rights is a market price affirmatively, taking market price to mean the price that would balance supply against demand under conditions of atomicity, transparency, and so on. Even in the most successful cases, the small number of transactions involved and the short time the scheme has been in operation do not allow statistically significant findings to be made. The only firm conclusion—reached in settings as different as Auckland, New Zealand; Turin, Italy; Montgomery County, Maryland; and the commune of Taninges in the French Alps—is that prices rise sharply when the procedure is beginning to be implemented and then level off or even decline.

To be more specific, there has to be a way to make detailed analyses of local markets in order to set the market price of a development right on a residual basis (from the market price of the end product, the building, minus the costs of the operation, deducting the highest likely level of land tax, resulting in the value of the development rights to be purchased). The actual price will probably be nowhere near this market price unless the purchase of tradable rights is mandatory and there is no nearby alternative (a development zone not subject to the transfer system). This comes back to the paradox mentioned earlier, that the system of tradable rights will work properly only when land use is subject to strict planning regulations.

## *Equity and Efficiency*

The concept of equity has to be considered from the point of view of landowners and the inhabitants of the city as a whole. For landowners, tradable rights fulfill an essential function in the absence of a fiscal system capable of recouping added value. The price of land is dependent on the development rights allowed by the zoning regulations, and tradable rights make it possible to correct inequities introduced by zoning. If the concept of equity is extended to all inhabitants, assessment of the method becomes more difficult and depends on the way property rights are conceived and the tax system allows them to be put into operation.

There are two contrasting situations. In some countries, such as the countries of North America and southwestern Europe, there is no universally applicable mechanism for recovering capital gains from urban development and/or payments for development rights. The practice of transferring development rights is thus equivalent to distributing the overall capital gain generated by urban development among the subgroup of landowners only, whereas it might be expected to be returned to the community as a whole, in particular when the public amenities that give rise to added value are funded by the taxpayers. This is a limited view of equity, which may help in particular cases at the cost of a broader notion of equity requiring a general mechanism to recoup betterment by a public authority (unless, which is unusual, land is divided up in a comprehensive and equal way among the inhabitants).

The second type of situation, which is found mainly in northern Europe, is founded on the principle that the capital gain by urban development should return, at least in large part, to the community. Using various methods (described above), the initial procedure that increases the value of land essentially benefits the community rather than the landowner. The equalization made possible by transferable rights therefore serves no purpose.

## *The Emergence of a European Law of Property*

As noted previously, some elements of law about the right of property were introduced in the European Convention on Human Rights in 1950 and completed in March 1952 by a first additional protocol stating that a compensation is due "in cases where the prejudice is exceptional and the servitude is disproportionate in comparison with the purpose of general interest of the servitude." This opened the door to a possible application of takings, but at the same time limited it.

The Convention, as a fundamental text of the European Union, can be applied directly by European courts without an intermediate step of a translation, interpretation, and adaptation in national legislation. Three basic principles thus apply directly at the European level:

1. The guarantee of property
2. The possibility of expropriation in the public interest
3. The possibility of restricting land use without compensation for general interest purposes

Up to now, European courts have followed the principle of subsidiarity, considering this part of the responsibility of national governments, as stated explicitly by a 2004 decision before the European Court of Human Rights (CEDH): "Planning and zoning are fundamentally domains of intervention of national governments, especially through regulation of land use in the general interest. In such policies, where general interest is at stake, the margin of appreciation of

national governments must be greater than when only questions related to civil courts arise" (CEDH 2004).

There have been limited exceptions to this general principle in the evolution of case law of the CEDH. A key decision, often referred to and quoted in the last 25 years, is related to the classification of a piece of land as reserved for public use and supposed to be expropriated in the future, but without indication of delay. After 23 years under this threat, the owner went to the European Court, which confirmed the legality of the classification, but also considered that the delay was "unreasonable, and that the balance between the interest of the municipality and the interest of the owner had been disrupted," thus violating article 1, since this was considered as a "special and outrageous" burden (CEDH 1982).

## *The Challenge of Land Value Assessment in Volatile Markets*

The very notion of "windfalls for wipeouts" implicitly refers to some reference price of land, some type of benchmarking, making it possible to define and measure when there is a windfall and when a wipeout. In the context of a slow and steady evolution of land and property prices, this can be considered a reasonable expectation and makes imagining an equitable treatment of gains and losses more or less possible.

Land and property markets are more and more volatile; "irrational exuberance," to quote Alan Greenspan and Robert Shiller (2000), is increasing, as exemplified by the subprime crisis, the effects of which have extended around the world. New instruments to analyze the phenomenon, as well as different tools of public policy, are needed.

## *Conclusion: Toward a Redefinition of the Right of Property on Land*

We thus return to the definition and content of property law, which is the key to the problem. Any treatment of windfall or wipeout problems resulting from planning and zoning relies basically on the assumption of an extensive definition of the right of property, including the right to the capital gain on land, even if the gain is the result of general evolution, urban growth, or the construction of infrastructure by public authorities without any activity by the landowner.

As noted by Donald Krueckeberg:

> Property is not just the object of possession or capital in isolation, but a set of relationships between the owner of a thing and everyone else's claim to the same thing. This understanding of property highlights considerations of distributive justice that are particularly important in light of the issues in the contemporary debate about property rights. Rights to personal use of property are fundamental to individual and social well-being: rights to profit from property, in contrast, have always been subject

> to reasonable constraints for the benefits of the entire community and society. Attempts to establish a contrary case by appealing to natural rights, market necessity, liberty, social utility, or just desert all fail to withstand scrutiny. . . . These concepts of use rights and profit rights in property are at the heart of the planning question. (1995, 301–309)

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