



Takings International
A Comparative Perspective on Land Use Regulations and
Compensation Rights

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CHAPTER 16

ISRAEL

Israeli statutory law, based on old British legislation, intended only modest compensation rights. Case law gradually interpreted the legislation as offering a broad basis for compensation claims, arising not only from direct injuries but also indirect injuries to adjacent plots. Skyrocketing claims in recent years create a tough policy problem.

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Tucked away in a corner of the Mediterranean is one of the world's most generous regimes of compensation rights for decline in property values due to planning decisions. This may seem counterintuitive in view of Israel's past emphasis on public land ownership and public-sector development. Nevertheless, Israel's² jurisprudence gradually developed a legal doctrine about what Americans call "regulatory takings" which, viewed through a comparative perspective, represents an extreme in "property rights friendliness".

Israeli law regarding compensation for regulatory takings evolved from an almost dormant letter of the law into a major legal doctrine. This evolution occurred without significant changes in the legislation, through a series of Supreme Court decisions that interpreted the language of the statute from an increasingly fortified property-rights perspective. The result has been the creation of a doctrine about the right to compensation for a broad range of land-use decisions. This doctrine has had an enormous impact on everyday planning practice, on the economics of real-estate development, on municipal budgets, and potentially on the macro-economy.

In this chapter, I report on the statutory law, its relationship with constitutional law, and the ways the courts have interpreted key elements in this legislation. I will offer some conjectures about the factors that possibly lie behind the steep increase in the number of claims and the impact these have had. Occasionally, I shall incorporate my own views and suggestions for partial reform, intended to bring the compensation spree back to scale.

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² The discussion here applies to Israel in its international borders, and not to the occupied areas. A different set of laws and practices applies to the latter – those areas held by Israel and those administered by the Palestinian Authority.

A brief history

The State of Israel inherited its planning law from the British Mandate over Palestine. The British introduced planning law into this quasi-colony as early as 1921³, soon after fighting subsided in World War I. That legislation was still rudimentary, but in 1936 the British administration introduced a new and comprehensive law, called the Town Planning Ordinance⁴. This legislation has molded Israel's planning law and administration and its (largely positive) legacy is apparent to this very date. The basic right to compensation dates back to that time.

The British colonial administrators brought with them the latest concepts about planning law that at that time were being introduced or debated in their homeland. The question of how planning law should treat the changes in values caused by planning decisions – both the "compensation" and the "betterment" sides - was at the time a hot issue in Britain⁵. While in Britain in subsequent years the law on these matters oscillated with the change of party in power, in Palestine (and some other colonies) the law remained constant. It granted compensation rights – probably intended to be highly limited - for injuries to property values caused by the approval of a new plan. In parallel, the legislation imposed a tax on the increase in property values⁶. This ostensibly symmetrical set of rules was never intended to be truly symmetric, nor was it ever so in practice. But the ideology of "betterment and compensation" – long dead in its motherland, Britain⁷ - still hovers today above the interpretation of Israel's compensation law.

The 1936 Town Planning Ordinance⁸ establishes the right to compensation thus:

" 30 (1) Any person whose property is injuriously affected by [a] scheme otherwise than the expropriation thereof may, within three months from the date at which the scheme comes into force by notice in writing served at the office of the Local Commission, claim compensation in respect of such injury..." (*The three months period was later extended by the British to six months.*)

After the State of Israel was established in 1948, the 1936 Town Planning Ordinance (along with most other laws enacted by the British administrators) was kept intact and recognized as Israeli domestic law. When the Knesset finally got around to enacting a new Planning and Building Law in 1965⁹ it incorporated the Ordinance's sections about compensation almost intact.

³ Laws of Palestine. In the *Official Gazette of Palestine* Issue No. 36 of february1st 1921. This preliminary act of legislation was amended several times during the 20's: (*Official Gazettes of Palestine*- Issue No. 72 of 1st august 1922; Issue No. 244 of 1st October 1929).

⁴ In the colonial structure and the absence of a parliament, these and all other laws of the time were termed "Ordinances", but they should not be confused with subsidiary legislation.

⁵ See: *Windfalls for Wipeouts: Land Value Recapture and Compensation* (1978) (Donald G. Hagman & Dean J. Miscynski eds. American Society of Planning Officials.)

⁶ See: Rachele Alterman, *Land Betterment Taxation Policy and Planning Implementation: Evaluation of the Israeli Experience*, 2 Urban Law and Policy 201-240 (1979) at: <http://alterman.technion.ac.il/admin/files/betterment1.pdf> . See also: Rachele Alterman, *Land Value Recapture: Design and Evaluation of Alternative Policies*, Occasional Paper No. 26, Center for Human Settlements, University of British Columbia (1982).

⁷ See discussion in Chapter 5 on the UK.

⁸ Laws of Palestine. In the *Official Gazette of Palestine* Issue No. 589 of 4th may 1936. The original ordinance was then amended several times in the 1930's (Official Gazettes of Palestine- Issue No. 620 of 6th august 1936; Issue No. 770 Of 24th march 1938 and Issue No. 862 of 2d February 1939).

⁹ Law of the State of Israel. Issue No. 467 of 12th August 1965, p. 301. Official (but legally non-binding) English translations of Israeli laws are available in libraries, but include laws enacted only until the early 1980s.

Constitutional law

In Israel, there is no single document called "constitution". Instead, a set of key decisions by the High Court of Justice or the Supreme Court have incrementally established most areas of civil rights and forms of governance, and are known as Israel's "unwritten constitution". In addition, a series of laws with quasi-constitutional status – called Basic Laws – have been gradually enacted, anchoring in writing some of the "unwritten constitution" decisions and adding rules and norms¹⁰.

The basic law where the protection of property rights is anchored was enacted in 1992. By that time, civil rights in general and among them property rights, had been well established through the "unwritten constitution".

H2 The "unwritten constitution" and the status of property rights

Long before the Basic Law: Human Dignity and Liberty¹¹ was enacted in 1992, the Supreme Court repeatedly recognized property rights as holding "constitutional status". One such statement dates back to 1966. Justice Agranat (the Chief Justice of the Supreme Court) said:

One can say that the right to compensation not only carries today a universal character, but stands on a pedestal... of a "basic right". This is so even though there is no [written] constitutional dictum to this effect.¹²

These sentences are still cited often by judges who wish to stress that property rights preceded the enactment of the written Basic Law. Interestingly, although the quoted statement was made in connection with a physical expropriation ("eminent domain") rather than a regulatory injury, it was cited in a recent decision in the context of a regulatory–injury compensation claim¹³. This is an illustration of what I observe as an increasing tendency in Court decisions to blur the distinction between the law of expropriation and the law of "regulatory takings"¹⁴ by inserting into the latter expectations for full or nearly-full compensation that apply to the former. This is a further indication of the overly high status which the Israeli Supreme Court grants to the right to compensation for regulatory takings.

H2 The Basic Law – Human Dignity and Liberty

In the absence of a single document called "constitution", the Basic Laws hold quasi-constitutional status (of varying degrees and forms)¹⁵ and are the highest in the legislative hierarchy. The Basic Law: Human Dignity and Liberty enacted in 1992 is regarded by many

Because the planning law has been extensively amended since then, I have used here a privately published translation, with some adjustments by me. Aryeh Greenfield – A.G. Publications, Haifa, Israel.

¹⁰ Further analysis can be found in any text on Israeli constitutional law. See for example Michael Mandel, *Democracy and the new constitutionalism in Israel* Israel L.Rev. Vol. 33(2) 259 (1999) ; Amnon Rubinstein & Barak Medina *Israel's Constitutional law - Fundamental principles* (2005) p. 98-110 (in Hebrew).

¹¹ It is customary not to include the year of enactment when Basic Laws are cited.

¹² Civil Appeal 216/66 *City of Tel Aviv vs. Abu Daia* [1966] IsrSC 20 (4), 522: 546 (In Hebrew). No decisions in the planning area are available in official English translations. Author's translations.

¹³ Additional Hearing 1333/02 *Local planning and Building Commission of Raanana vs. Yehudit Horowitz* [2004] IsrSC 58 (6) 289 (Herein after: *Additional Hearing - Horowitz* case). Like all Israel Supreme Court or High Court decisions since 1970, it is accessible in Hebrew through the web site of the Supreme Court-www.court.gov.il

¹⁴ Analysis of this trend is beyond the scope of this chapter.

¹⁵ The legal status of the various Basic Laws is not uniform. They differ one from another in the degree to which they are protected from amendment compared to a regular law. Some of the early ones may be amended or abolished like a regular law, but later laws have a variety of clauses requiring special procedures and a minimum number of parliament members' vote in order to carry out amendments.

constitutional scholars¹⁶ (though not all) as holding the highest constitutional status accorded so far to any legislation in Israel. This is where property rights are anchored – in Section 3¹⁷.

Basic Law – Human Dignity and Liberty

Section 3: "There shall be no violation of the property of a person."

Section 8. There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorization in such law.

Section 10. This Basic Law shall not affect the validity of any law (din) in force prior to the commencement of the Basic Law.

Section 11. "All governmental authorities are bound to respect the rights under this Basic Law".

The wording of Section 3 has no qualifiers, but along with all the other rights protected by the Basic Law, it is qualified by Section 8. Thus, a violation of property rights is constitutional if it passes the following four conditions: 1) Enacted in a law (or subsidiary legislation authorized by law); 2) Befits the values of the State of Israel; 3) Is for a proper purpose; 4) Is of an extent no greater than necessary.

Laws that existed prior to the enactment of the Basic Law – including the planning law - are "grandfathered" in by Section 10 and do not have to pass the tests of Section 8. But Section 11 obliges all authorities to respect the protected rights in their day to day decisions, including those under pre-existing laws (that is, when they have discretion, to apply it in the light of the Basic Law's prescriptions).

The incorporation of the right to property into a constitutional law of this stature has raised the degree of protection – already anchored in prior Supreme Court decisions – to an even higher pedestal. Where the right to compensation for regulatory takings is concerned, enactment of the Basic Law at an earlier date would, in my view, have made only marginal difference. This is because by 1992, the Supreme Court had already delivered several of the most important decisions which interpreted major aspects of compensation law with a rather generous property-rights orientation. Since its enactment, Section 3 of the Basic Law is cited in almost every opinion of the courts as an additional legal anchor for interpreting the right to compensation in yet more generous way.

¹⁶ A leading jurist is Justice Aharon Barak, past President (Chief Justice) of Israel's Supreme Court.

¹⁷ Basic Law: Human Dignity and Liberty was enacted in 1992, Sefer Hahukim [SH] 1391. English translation can be found in: http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm

Because the right to compensation as interpreted by the courts is already so broad, if the judge-made rules were to be codified in law, it would have no problem, if challenged, clearing the tests of Section 8. If, however, some of my recommendations¹⁸ to bring compensation rights for regulatory takings back to reasonable proportions were to be adopted, the legislators would have to be convinced that the proposed changes pass the tests of Section 8.

H1 Why the dramatic rise in the number of claims?

Between 1936 and 1977 section 197 rarely reached the courts. Very few claims for compensation were at that time made around the country, and those made were rejected by the local planning commissions and not appealed to the courts. Why? That's a matter of sociological conjecture. One explanation might be that the country and its people were relatively poor (Israel started off as a developing country). In less well-off societies around the world, people are generally less litigious; litigation costs a lot and requires a high degree of economic security. Another explanation might be that society – people – had been focused more on state-building than on private interests. The individualistic ideology that is dominant today in Israel as in most advanced-economy countries had not yet arrived full-force.

But these explanations cannot account for why the better off persons or corporations were not claiming more compensation before the 1990s. Possibly, the lethargy in decision making by the local planning commissions deterred them. Data that we collected in the latter 1980s showed that the local commissions were refusing all but a few claims¹⁹. In the absence – at that time – of a specialized appeals body, landowners had to appeal to the regular planning bodies – and they were not geared to handle such objections or appeal within any predictable time frame.

In the late 1980s and in the 1990, when the courts had more opportunities to hear compensation claims, they began interpreting the statutory law. As I shall demonstrate, the interpretations represented a very liberal perspective on property rights. With the more property-rights friendly interpretation of the law, came more claims. This process perseveres today.

In 1996, an amendment in the Law established 6 district-level appeal committees to hear appeals on the decisions of local commissions – among them on compensating issues. With an efficient out-sourced administrative machine and legislated time limits for reaching decisions, these committees work efficiently. Headed by an impartial lawyer, they act like tribunals, and have authority to appoint a third appraiser to resolve differences among the appraisers of the two sides. The numbers of claims that reach these committees has increased sharply. The estimate is that today, the claims for compensation amount to about \$1 billion. Not all will be awarded, but other claims will come in.

The establishment of the appeals committees cannot, however, fully explain the dramatic increase in appeals. Probably, many cumulative changes in Israeli society - more efficient

¹⁸ I have been asked to offer my recommendations to an inter-Ministerial team composed of representatives of the Ministries of Justice, Interior, Finance, and Construction and Housing. My recommendations are the basis for a major legislative amendment expected to be floored in the Knesset in the latter part of 2009. Although these recommendations are not the topic of this chapter, their general direction could probably be discerned from the discussion here.

¹⁹ Alterman, Rachelle and Orli Naim *Compensation for decline in land values due to planning controls*. The Klutznick Center for Urban and Regional Studies, Technion – Israel Institute of Technology (1992). (Hebrew).

public administration, more transparency, more lawyers, more individualistic ethics, higher GDP per person - contributed to this dramatic change in quantum that one will never be able to trace back.

H1 The 1965 Planning and Building Law and its interpretation by the courts

Sections 197-202 (Chapter 9) of the 1965 Planning and Building Law establish the right to compensation for adverse effects caused by the approval of plans and sets out the procedure for claiming it. The language is very similar to the Town Planning Ordinance. The Law adds procedural improvements (further improved in a 1995 amendment) and extends the period of time for submitting claims from 6 months to 1 year (extended to 3 years in 1995). The Law also grants the Minister of the Interior authority to extend this period – an authority that did not exist under the Ordinance.

Even though the sections granting the right to compensation remained basically the same as under the Ordinance, other changes introduced in the 1965 law indirectly created a significant expansion of compensation rights in ways that the legislators of the time may not have intended nor anticipated. Foremost among these indirect effects is the introduction by the 1965 law of two additional layers of plans – district plans and national plans.

Although anchored in the Law, the depth and breadths of the right to compensation was in fact molded by the courts. The task of interpreting the letter of the legislation has by May 2009 engaged the Supreme Court (or, on a few topics, the High Court of Justice) in about 50 decisions²⁰. To the best of my knowledge, this is a comparatively large body of jurisprudence on this issue.

The key sections in the Law are 197 and 200. Section 197 lays the grounds for claiming compensation. Section 200 deals with exemptions from the obligation to compensate. Interpretation of Section 197 was the focus of court decisions up to the 1980s and by then it has been largely clarified. Since the 1990s, the focus of the courts' attention has shifted to the conceptually more difficult and much more discretionary Section 200.

H1 Section 197: Establishing the grounds for a compensation claim

Section 197 sets out the elements for establishing compensation claim. This Section remains almost unchanged since it was enacted in 1965 and, as noted, is very similar to its original 1936 version. The first important Supreme Court decision interpreting this section (in its Ordinance form) was in 1961, and since then, most elements of this Section have been interpreted and clarified. The only major legislative change made in Section 197 dates back to 1981 and it, too, is due to a Supreme Court decision (which I shall discuss in detail). For convenience I have divided the discussion of Section 197 into two sub-parts: The pre-conditions for making a claim, and the definition of injury and cause of injury.

Section 197

(a) If real estate *located in or abutting on the area of a plan** was adversely affected by that plan, otherwise than by expropriation, then the person who was the owner of or holder of

²⁰ Based on a quick computer search. In about 30 among these, the Court addressed major issues of regulatory takings law.

any right in that real estate on the day on which the plan came into effect shall be entitled to compensation from the Local Commission, subject to the provision of section 200.

- (b) Claims for compensation shall be filed with the office of the Local Commission within *three years*** after the date on which the plan came into effect; the Minister of the Interior may – *for special reasons which shall be recorded*** – grant an extension, even if the said three years already have expired.

* *The phrase in italics is a 1981 amendment* ** *1995 amendment*.

H2 The pre-conditions for making compensation claim

The discussion of the pre-conditions for making a claim is organized under 5 headings: The burden of proof, who may submit a claim, the time limit, and the issue of information.

H3 The burden of proof

Since the 1980s, the Supreme Court has repeatedly emphasized that the claimant is only required to carry the burden of establishing the basic conditions enumerated in Section 197²¹. Once these are established, if the authorities wish to argue that in the particular case, they should be exempt, the burden shifts to them. They must then show that the particular claim passes the conditions of Section 200²².

Though seemingly only procedural matter, this interpretation of the burden of proof has made it easier for landowners to win compensation claims. Because the Court's interpretations of the other pre-conditions and conditions of Section 197 are rather liberal, and its interpretation of Section 200's conditions for exemption have been rather strict, the chances for a landowner to win a compensation case are high.

H3 Who may submit a claim?

Section 197 says that the claim may be submitted by "the person who was the owner of or holder of any right in that real estate on the day on which the plan came into effect". The term "holder of any right in that real estate" has been incrementally broadened by the Supreme Court, to include long-term leaseholders, protected tenants, and even farmers on national land who hold only a 3-year automatically renewable right-of-use contracts²³.

The Supreme Court may have broadened the scope of claimants, but at the same time raised a good faith criterion. Consequently, the Court has stressed that claimants who file their lawsuits without disclosing relevant facts, may be denied compensation. Similarly, claimants who build illegally on their property may be denied compensation claimed in relation to that property²⁴.

²¹ This point is clearly explained in a 1993 decision, not for the first time. See Civil Appeal 600/89 *Gideon & Carmela Inc. vs. Local planning and Building Commission of Netanya* [1993] IsrSC 47(2) 402.

²² *Horowitz case, supra* note 13.

²³ One example that illustrates this liberal thrust is Civil Appeal 511/88 *Mandelbaum vs. Local planning and Building Commission of Rishon Lezion* [1990] IsrSC 44(3) 522. The Supreme Court ruled that the right to receive compensation is not limited to owners and leaseholders, but may also be exercised by individuals with "other" property rights, such as protected-rent tenants.

²⁴ Note for example the recent decision in Appeal Request 3903/07 *Avraham Jiyan vs. Local planning and Building Commission of Netanya* [2008] (not published). [unpublished decisions can be found either on the Supreme Court web site or in various commercially published services].

A question not yet addressed by the Supreme Court is whether the right to claim compensation can be contractually transferred with the transfer of the property rights, or whether only the original owner may claim it. (My view is that the right is transferable).

H3 What types of planning decisions are grounds for compensation?

From a comparative perspective, one of the distinctive attributes of Israeli law on regulatory takings is the broad interpretation of the types of statutory plans that may serve as grounds for compensation claims, alongside several other types of potentially injurious planning decisions that are totally excluded.

Types of plans covered:

As already noted, the enactment of the 1965 Law, introduced two new higher-level types of statutory plans beyond the local level. This change created the potential for another quantum leap in the number and size of compensation claims. There are three reasons: First, such plans often apply to much larger areas of land than the typical local amendment plans. Second, national and district plans often deal with public goods such as infrastructure and open space preservation on the other. Third, the implementation of such plans is often more long-range than local plans (this latter point is especially problematic also for landowners because of the three-year time limit).

The introduction of national and regional plans has created a major legal conundrum: Because these plans are often less detailed in scale than local plans, it is often difficult for a landowner to know whether a new national or district plan indeed applies to his or her land; yet the time-limit clock is ticking. This has been a very tough issue for the courts (as well as for a whole set of real-estate professionals and administrative quasi-judicial bodies) to resolve. To date, legal guidance on this issue is very inadequate (and I shall not attempt to survey it here). Some courts have denied compensation claims, arguing that the landowner should wait until a more detailed plan is approved at some later date and the injury becomes concrete. Other court decisions say that if a decline in value can be shown as a result of the higher-level plan, reflecting the uncertainty of the situation (rather than the certainty of injury), the landowner should submit a claim (and if the time has elapsed....) .

This basic legal uncertainty comes at a bad time: In recent years national and district planning bodies have greatly jacked-up their efforts to approve new and better national and district plans so as to make the management of land more sustainable for the future generations of Israel (and indirectly, its neighbors too).

Types of decisions not covered

Section 197 recognizes only final approval of a new or amendment plan as establishes the right to claim compensation. Israeli planning law does not recognize the right to claim compensation for injuries caused by a variety of other decisions. For example, decline in property value incurred because of decisions made in the interim stages before a plan is finally approved does not provide cause for a compensation claim... (Might this be one more reason why many local authorities tend to drag on the plan-approval process for many years?)

Similarly, non-plan decisions too cannot serve as grounds for a compensation claim. These may include approval of a subdivision plat, granting a variance, or issuing a building permit (both relevant to the property values of neighbors). Refusal to grant a building permit in itself does not provide ground for compensation because under Israeli planning law (as in most planning laws in this volume) there is a general presumption that a building permission

should be granted "as of right" if it fully accords with the plan in force²⁵ (The degree of discretion allowed is a separate and tough issue, beyond this chapter's scope).

H3 How are landowners to be informed?

Here is, in my view, is the weakest point in the otherwise generous protection of property rights in Israeli law.

At no stage in the plan-approval process are the authorities obliged to serve personal notices to potentially injured landowners, even if the injury is clearly extensive, such as where a buildable plot is rezoned for public open space (I discuss this type of situation later). Whereas in the case of physical expropriation a personal notice must be served, where an injury is caused by approval of a plan, the authorities have no additional obligation beyond the regular information requirements that apply to any plan approval process.

Approval of a plan (which is a pre-condition for submitting a compensation claim and sets off the "time clock") only requires publication of a standard notice in national and local newspapers announcing that a particular plan has been approved. Such notices are usually only slightly larger than stamp-size. The law does not add any special obligation to send notice where a potentially injurious land use is concerned. There is also no obligation to serve personal notice in the earlier deposit stage when a plan must be open for public review except in one very limited type of situation²⁶. Since 2004 there is also a requirement that a notice about every deposited plan be physically posted at or near the site in question. This is certainly an improvement, but cannot ensure that landowners likely to incur an injury will necessarily see the sign and understand its impacts.

As in any society, access to government-based information in Israel is often correlated, at least in part, with socio-economic factors. Less affluent people are less likely to hire professional consultants to monitor the enigmatic official notices²⁷ or to represent them before the authorities. While Israeli compensation law is rather generous to landowners, the social distribution of its protection may be unequal unless information is disseminated proactively.

H3 What is the time limit?

The time limit today is 3 years after approval of the injurious plan. Until 1996, when the time limit was one year, the Minister of the Interior was quite generous in granting extensions and there were few if any petitions to the High Court of Justice on this issue. When the Law was amended in 1995 and the time limit was extended to 3 years, the legislature's intent was that

²⁵ The interested party may try to petition the court to order the authorities to issue the permit.

²⁶ This limited situation was introduced in conjunction with a 1995 amendment to the planning law that, for the first time, delegated to local planning commissions the authority to approve certain limited types of plan amendments without requiring additional district level approval. One category authorizes local planning commissions to extend an existing public-use category to adjacent land. At the recommendation of the author (who was a pro-bono consultant to the Knesset Committee that prepared the law, the law was amended to require service of a personal notice in such cases. But the usual designation of land for public use – an action that often occurs years before expropriation takes place – does not require that a notice be delivered. In his seminal opinion (of 1981), Justice Landau criticized the lack of information granted to interested parties when land is designated for public use. He argued that the local planning authority should consider sending personal notices to all property owners who might be injured by approval of a plan. Civil Appeal 377/99 *Pfeizer vs. Local planning and Building Commission of Ramat Gan* [1981] IsrSC 35(3) 655.

²⁷ However, Israeli law is quite distinctive (compared with many other countries) in that it mandates that the notices be published not only in the official language but also in the language of any minority constituting more than 10% of the local planning area.

the Minister's discretion would be reserved for "special reasons which shall be recorded" (Section 197 (b)). Since then, there has been a policy to be less generous in awarding requests for extension²⁸ - but there is still wide degree of discretion left to the Minister.

In recent years, a growing line of cases has rejected time-extension requests by potential claimants. This approach is at odds with the Court's otherwise liberal interpretation of the law. For example, a petition denied by the High Court in 2003 - *Moshav [Cooperative village] Neve Yamin vs. Minister of the Interior*²⁹ highlights the inequality that may arise from the absence of an active notification duty in order to ensure equal information within the time limit. Despite the clearly inequitable outcome exemplified by the *Neve Yamin* decision, the village's request for an Additional Hearing by the Supreme Court was denied. However, the same judge who delivered the denial – Justice Cheshin - also expressed his strong dismay with the starkly unequal distribution of injuries that resulted in this case³⁰. However, neither he nor the three judges who earlier decided on the petition pointed out that the reason for the inequality is the absence of an obligation to inform landowners.³¹

In recent years the Court has provided some administrative guidelines for the Minister to decide when to allow injured parties to bring forth their claims beyond the 3 years limit³². Current established criteria include the extent of injury; the extent of the delay; faulty publication of the plan; and subjective circumstances (illness, a handicap, legal incompetence etc.). The Court also noted that the greater the delay, the more substantial must the "special reasons" be.

However, the Court has not noted that the issue of the time limit and its extension should be closely linked with question of how landowners are informed. Fair enforcement of such a time limit should take into account that until a policy of serving individual notice is adopted, access to information has social-distributive aspects. The Court has not called upon the *Knesset* to amend the law so as to require proactive notification, at least in cases (such as in the *Neve Yamin* case) where there is a certain and severe injury and where gross disparities among landowners have resulted from the absence of notification.

²⁸ Being based on discretion, this policy has varied among the various persons who have held the Minister's office.

²⁹ H.C.J. 156/01. IsrSC 57 (5) 289. The Minister of Interior rejected an extension request by the members of a cooperative village whose properties were injured by a national-level plan for high-voltage electricity lines. At the time that the plan was approved, the law prescribed a 1-year time limit, but soon after, the law was amended to the 3-year limit. Thinking that the new time limit applied, the village representatives procrastinated in submitting the claim. Other villages impacted by the same plan under similar circumstances were also late in submitting their claims, but not as late as Neve Yamin. The Minister did grant the other villages an extension and they were included in the compensation arrangement. The Minister explained to the Court that the time scale reflected the fact that the Israel Electric Corporation had agreed to indemnify the local authorities (who would otherwise have to pay the compensation). He also argued that the Corporation decided to include only those claims – including those of the other villages – that were submitted before a specific deadline (well beyond the 1-year time limit). The Corporation most likely did not publicize the deadline – however, the petitioner did not make this point. The village argued that the Minister should have taken into account the discriminatory outcomes in this case. The Court accepted that financial considerations of the Electric Corporation were enough to justify the differentiation made by the Minister

³⁰ Request for Additional Hearing 6542/03. Available in Hebrew at: <http://elyon1.court.gov.il/>

³¹ See also: High Court Petition 6817/04 *Farhi vs. The Minister of Interior* [2005] (not published).

³² High Court Petition 6133/05 *Greenberg vs. The Minister of Interior* [2009] (not published); High Court Petition 182/06 *Jarffi vs. The Minister of Interior* [2009] (not published); High Court Petition 1764/05 *Kislev vs. The Minister of Interior* [2008] (not published); High Court Petition 7250/97 *Soulimani vs. The Minister of Interior* [2000] IsrSC 54(3)783.

H2 The definition of injury and its implications

H3 What is an injury? the basic rule:

An injury is to be measured by comparing the appraised economic value of the property under the previous plan (or, theoretically, no plan) and under the new plan. The claimant has to show a causal linkage between the approval of the new or amendment plan and the injury. The injury is not to be assessed "horizontally", in comparison to what similar lots may have been granted³³, but only in comparison with the "before" and "after" value of the specific plot in question.

A leading case on this point is Birenbach vs. Tel Aviv³⁴ decided in 1988: As part of Tel Aviv's pioneering attempts at historic preservation, the owner of a building known as the "Pagoda" was denied a request for additional development rights. Other plots in the area (without buildings meriting preservation) had received approval for rezoning with additional development rights. The Supreme Court ruled on appeal, that Birenbach did not have a right to receive compensation because the regulations of the existing plan have not been altered and a landowner does not have the right to receive a rezoning. (The Court did not, however, rule out the possibility that where an amendment to an existing plan "closes the lid" on expectations for a rezoning, this might constitute an injury; but that was not the situation there.)

American readers will note that the concept of "highest and best use" is not a criterion under Israeli compensation law. That is, the right to compensation cannot be claimed simply for the denial of a "rezoning" request (to borrow an American term).

H3 Should land values reflecting expectations for "upzoning" be taken into account?

The simple definition of injury by comparing the "before new plan" and "after new plan" is not as clear and simple as it might seem. Recent efforts to protect the few remaining contiguous open spaces in Israel's high-density central areas have increasingly been posing challenges to the simplicity of this rule. Similar questions have arisen regarding planning initiatives to designate existing buildings for historic preservation. The issue is whether the value of an *anticipated* "upzoning" should be taken into account. The most common situation is where land previously designated agricultural is now redesignated, in addition, as, "preserved open space" (or similar). Even though all existing farming and related rights remain intact, land appraisers can show that the market value of that land has now suffered a decline because the likelihood of a future redesignation to buildable land has been greatly reduced³⁵.

³³ Of course, a person might argue that some decision has been discriminatory, or unreasonable, or similar flaws grounded in constitutional or administrative law, but these are not the subject of this chapter (nor are easy to argue).

³⁴ Civil Appeal 483/86 *Birenbach vs. Local planning and Building Commission of Tel Aviv* [1988] IsrSC 42 (3) 228.

³⁵ The appellant claiming compensation held property rights in an area previously zoned agricultural, that the new plan declared a national park. Agriculture and related rights remained. Furthermore: The municipality had proposed a type of "clustering" with development rights. The Court did not rule out tended to accept the argument that declaration as park would "close the lid" on possible rezoning in the future. See Civil Appeal 4390/90 *Eliashar Menashe vs. The State of Israel* [1993] IsrSC 47 (3) 872 .

A 2003 Supreme Court decision³⁶ suggests that where a rezoning is not a remote probability, the loss of "anticipation value" should be taken into account in determining the degree of injury. This issue has not yet been resolved through case law.

The question of anticipated value is often closely related to the issue discussed above, regarding the level of plan in the hierarchy that creates a cause of action. What should be the law where the plan for which an injury is claimed is general and requires approval of a more detailed plan (whether on the local or higher level) before development can be permitted?

With increasing planning efforts to protect scarce open spaces, and with Israel's high land prices and relatively high growth rates, this type of question will require clear jurisprudence on whether, or when, anticipated value constitutes an injury under Section 197. If a broad definition is adopted (as is likely under the logic of the current jurisprudence), the fiscal and economic impacts will be enormous. Planning bodies, might, in some cases, have no choice but to compromise or withdraw plans for open space preservation.

H3 Should site-specific circumstances be taken into account?

The Court has interpreted "injury" broadly, so as to include special circumstances that may render a particular plot more "sensitive" to an injury than an otherwise identical plot³⁷. Such factors might be physical or contractual. For example, an existing plot currently designated for commercial is redesignated in an amendment plan for residential, but currently happens to have some building on it, whereas an adjacent plot likewise affected, does not. In the empty plot, the decline in land value is small; but in the built up lot, in order to be able to develop according to the new plan's land use and design regulations, the building would have to be demolished. The court is likely to decide that these costs are to be added to the compensation claim.

H3 Person-Specific injuries and injury to commercial enterprise

However, the jurisprudence has not been willing to extend (or contract) the definition of "injury" to include *person-specific* circumstances - subjective conditions that may cause an injury to a particular person, but not to another in the same circumstances (as opposed to a particular property). An example given by the Supreme Court is where the present owner of a property is deaf and may not hear the noise anticipated from a planned adjoining highway, yet the value of the property has declined. The converse is equally valid – the fact that the present owner has a special sensitivity to highway noise will not be taken into account.³⁸

A related question pertains to loss of income from business conducted on the property rather than to the value of the property itself. For example, due to an amendment of a plan that changes the route of a major highway, a particular business no longer benefits from easy access, but the property may be used for another business and does not suffer a significant decline in value. The Court has usually declined such claims, stressing that article 197

³⁶Civil Appeal 1968/00 *Block (gush) 2842 Lot 10 Co. Ltd. vs. Local planning and Building Commission of Netanya* [2003] IsrSC 58(1) 550.

³⁷ Civil Appeal 761/85 *Lifshitz vs. Local planning and Building Commission of Rishon LeZion* [1991] IsrSC 46 (1) 342.

³⁸ Civil Appeal 1188/92 *Local planning and Building Commission of Jerusalem vs. Bar'ely* [1995] IsrSC 49 (1) 463.

compensates diminution in property value *per se* but does not mandate compensation for losses in business income due to a lower number of customers or a drop in rental fees³⁹.

H3 Is there need to demonstrate a real “out of pocket” loss?

Under Israeli law (unlike some other countries in this volume), there is no need to demonstrate that the landowner has incurred a direct loss. The decline in value may remain "on paper". Thus, it does not matter at what price the land was purchased by the particular person claiming compensation and whether that particular person will be suffering a real loss when the plot is sold.

What would be the law if a landowner had only part of the development rights and after three decades the plan is revised so that the "extra" development rights are abolished and the new plan allows only the built-up rights? Suppose too, that there have been no transactions related to that land, nor immediate plans to build. Under current Israeli jurisprudence, the landowner will likely be eligible for compensation⁴⁰. There is no time limit for implementing the original development rights, nor is there a doctrine that requires proof of "investment backed expectations" or any other real losses.

It (probably) also makes no difference – at least for establishing a cause of action – whether the landowner knew that an injurious amendment will soon be approved, yet went ahead and purchased the plot. Nor does it (probably) matter if the owner has not taken any initiative to reduce the injury.

Doesn't Israeli compensation law sound like a wonderful real-estate insurance policy? As surprising as this may seem to most readers, the issues I have raised here have not yet come up for decision by the courts (I am not even sure whether local planning commissions have argued them) . In my view, some of these additional tests could be developed under the types of exceptions in Section 200, especially by interpretation of the "injustice" clause (to be discussed below). But at present, the courts have not gone in this direction. So, at present, Israeli compensation law does sound like a wonderful real-estate insurance policy.

H2 The relationship between compensation for a regulation and for an expropriation

Those accustomed to the way in which the "takings issue" is often framed under US constitutional law might be baffled by the clause in Section 197 that says: "otherwise than by expropriation". After all, much of American takings jurisprudence revolves around the need to determine when a regulation goes "too far" so as to be tantamount to a "taking". Does the wording of the Israeli law imply that a 'bright line' does distinguish the rights to compensation where there is an expropriation from such rights when the injury is regulatory (a plan) is revised)? Under Israeli compensation law, the issue takes a different form, and in many ways, there is a "brighter line" in place. But one aspect of this issue did require 'acrobatics' by the courts in order to resolve.

³⁹ Civil Appeal Request 5514/06 *Rottman vs. Local planning and Building Commission of Haifa* [2006] (not published); Civil Appeal Request 10510/02 *Local planning and Building Commission of Hadera vs. Cohen* [2007] (not published); Civil Appeal Request 8609/08 *Dreyzin vs. Local planning and Building Commission of Jerusalem* [2009] (not published).

⁴⁰ This hypothetical is close to the Supreme Court decision in: Civil Appeal 6826/93 *Local planning and Building Commission of Kfar Sabba vs. Hayat* [1997] IsrSC 51(2) 286.

H3 The problem:

The problem is that neither the planning law nor the law that deals with expropriation⁴¹ addresses the common interim situation, where land in private hands is designated for a typically-public use (such as a road or a school or a park), long before expropriation procedures actually take place. Such a redesignation often entails a sharp decline in the value of the property. The long time gap between land-use designation and actual expropriation is a problem in many countries represented in this volume: governments may lack the funds for full compensation, may be reluctant politically to undertake expropriation, or may simply be administratively lethargic.

Which right to compensation may a landowner invoke in such "twilight zone" situations: The right under Section 197 or the right to compensation under expropriation law? In Israeli's early decades, government bodies tried to benefit from this ambiguity, thus hoping to avoid having to pay for the loss in value due to the land-use designation in the first stage (often meaning the bulk of the decline)⁴². Their argument was anchored in the phrase "otherwise than by expropriation". They proposed that it should be interpreted so as to exclude from the canopy of Section 197 the entire process leading to expropriation – that is, the land use redesignation as well. Because the legislation covering expropriation states that compensation should be based on a comparison of market value "on the eve of expropriation" and subsequently, that interpretation would have meant that landowners whose property was designated for public use and later expropriated, would not have a right to claim compensation either under Section 197 or under expropriation law.

H3 The two-stage compensation doctrine

But, as early as 1961 the High Court of Justice came to landowners' rescue. To the chagrin of government authorities, the Court interpreted Section 197 so as to cover the pre-expropriation stage as well. The Court ruled that where there is a diminution in property value due to the land use re-designation, compensation must first be paid at this stage, and then, once expropriation takes place, compensation will be paid for the remaining value. Aware that this was just a "patch" solution because it requires landowners to initiate two tedious sets of administrative actions, the Court called then (and since) to the Knesset to repair the hole, but to date the Knesset has not done so.

This is how the doctrine known as the "two stage compensation" rule came into existence. Sadly, most real-estate and planning practitioners, and even legislative advisors, seem to have forgotten the temporary intentions of the judges when they decided upon this solution and the judicial call for repair. The problem with this doctrine is that only the second stage – often the least valuable – carries with it the right to receive a personal notice. Because a claim for the first stage has a time limit of 3 years (and before 1996 only 1 year), the landowner may forfeit the right to claim compensation for what is often the major part of the decline in value. Furthermore, because the two-stage solution is, as I have shown, not an intuitive solution,

⁴¹ Analysis of the law of "eminent domain" in Israel is beyond the scope of this chapter. It will suffice if I say that the jurisprudence in this area has evolved greatly since Israel's early decades. After a landmark decision in the late 1990s, one can say that a decision such as reached by the majority in the US supreme court in *Kelo vs. City of new London*, 545 U.S. 469 (2005) would probably not be similarly decided in Israel today.

⁴² A case brought before the Administrative Court of the Northern District in 2005 shows that some government bodies still try to revive variants of this old argument in order to save on compensation money. This time it was a central-government transportation authority, but it did not succeed because the Court adapted the decades-old doctrine to this case too. See Administrative Appeal (Nazareth) 1025/04 *Local Planning and Building Commission of Afula vs. Mordechai Ziv* [2005] (Not yet published).

even if landowners do know of the new plan, they might logically think that they should await expropriation to occur. Last, the two-stage solution is also a two-stage hassle and two sets of costs for the property owners to pay.

H3 Do landowners have the right to oblige the authorities to expropriate?

Given the inadequacy (in my view) of the "two-stage compensation doctrine", what is the solution? One can either pull the second stage forward in time, or push the first stage down to the actual expropriation stage. Assuming that some landowners won't wish to wait for the latter stage, it would be logical to grant them the right to oblige the authorities to buy or expropriate the land earlier. This legal institution – called a "blight notice" in British and Irish law – exists in many (but not all) countries represented here, but not in Israel. I have proposed that such a legal right be enacted into Israeli law⁴³.

H1 Indirect injuries neighboring properties

The most dramatic single court decision interpreting the language of the law was delivered in 1980. It is also the one that was to have the greatest direct impact on the expansion of compensation rights. Although the great "explosion" in the number of claims started only a decade later, this decision had set the legal stage. It is also the only decision that has led to a major legislative change.

H2 The Varon case⁴⁴

In Varon, the lawyer for the appellants⁴⁵ presented an audacious argument: The right to compensation under Section 197 is not restricted to the property which is subject to the plan amendment, but extends to any property impacted by the change, regardless of where it is located. The Supreme Court faced the need to decide, for the first time, about the geographic extent of the right to compensation.

The case involved a low-rise home in Jerusalem in a prime location with a view to the Old City Wall. The adjacent plot was rezoned from a low-rise residential, to high-rise commercial. A multi-storey building would block the view (increase noise, etc.), so the property suffered immediate decline in its market value.

The wording of Section 197 at the time excluded the phrase marked in italics (see text-box). That is, the Section simply said "real property" with no reference to whether the right to compensation applies only to the property subject to the amended plan, or also to other properties – adjacent or distant - that might suffer a decline in value due to the amendment use or density approved for another plot.

Theoretically, two types of situations could be distinguished here: where the plan amendment increases the value of the parcel to which it applies but reduces the value of another parcel, or when the plan amendment reduces the values of both parcels – one through the change in regulations, the other through anticipated negative externalities. The facts in the Varon case fall in the first category.

⁴³ In 2005, as an advisor to a government steering committee about revisions to the planning law.

⁴⁴ Additional Hearing 28/79 *Local Planning and Building Commission for Jerusalem vs. Varon* [1980] IsrSC 35 (1) 561.

⁴⁵ This rather audacious argument was made by a young lawyer, Naomi Weil, who, after winning the case, was regarded as an expert on 197 claims.

The Supreme Court was split on this issue. The in-depth and philosophical opinions indicate that the judges were keenly aware that they are faced with a major legal and ethical question. The court was split, the 3 judges taking two polar sides:

The majority view was that in the absence of any geographic stipulation in the wording of the legislation, the right to compensation should be interpreted broadly so as to apply to *any and every* geographic location (so long, of course, as a causal relationship between the new or amended plan and the decline in value could be shown). The judges in the majority offered two major arguments:

- First, to achieve just distribution of burden: When a planning commission approves a new or amended plan for the public interest, the public pocket should pay compensation and an individual owner should not have to bear the brunt.
- Second, the need to pay compensation would encourage the planning authorities to be more careful when considering a plan that is likely to cause negative externalities to the neighbors.

These justifications are offered in many court decisions about compensation rights since Varon – for both direct and indirect injuries.

Justice Aharon Barak (later to become the Chief Justice of the Supreme Court), in his dissenting opinion, held that the law grants the rights to compensation only where government alters the normative status (the plan) that directly applies to a given parcel. He argued that a direct injury should be distinguished from an indirect one: In the first case, the reduction in property value is caused by the change in the regulation itself, whereas in the second case, the reduction is created by the anticipation that the use of the neighboring plot will harm the value of parcel in question.

The legal import of the decision did not escape the judges' attention. The Chief Justice decided to grant an Additional Hearing – a rare procedure reserved for the most important issues on which the Supreme Court is split. An Additional Hearing is held with an enhanced number of judges.

In the additional hearing, the Supreme Court was split once more, but the majority upheld the Court's prior decision. This meant that landowners anywhere in the city who could demonstrate that their land value has declined as a result of the approval of a new use (whether public or private) would have a cause for claiming compensation from the local planning commission. The rationale behind the majority decision became an entrenched and uncontested doctrine.

Barak's dissenting opinion is the reasonable interpretation of the intent of the Israeli legislators in 1965 and their British predecessors in the 1936. But the minority opinion did not resurface in legislative or academic discussion until it was revisited by this author in 2005 in a research report submitted to the Minister of the Interior.

The majority decision is an out-of-context interpretation of the language of old British legislation. The judges of the majority do not present an inquiry into the historic sources of the legislation in Britain and ask whether similar laws were ever similarly interpreted (they were not); nor do they undertake comparative research about whether such extensive compensation rights exist in most other democratic countries (they do not).

One can only speculate as to the majority's rationale behind extending compensation rights to landowners of neighboring plots. Perhaps it should be understood against the backdrop of the collectivity-focused legacy of Israeli society in the country's formative years. The judges in

the majority view may have been motivated by an unarticulated quest to balance the Court's earlier orientation toward public interests, often at the expense of private property rights. Maybe the justices felt that a broader definition of compensation rights would create a better equilibrium. The majority decision in *Varon* was the first sign of the orientation that, in later years, evolved into the property rights protectionism reported here.

Whatever may have been the judges' underlying rationale, surely the Court did not anticipate the far-reaching impacts that its decision would have. At the time of the *Varon* decision the number of clays throughout the country was very small. Subsequent research indicates, that a decade after the *Varon* decision, there still were no claims for indirect injuries.⁴⁶

H2 After the Varon decision: The Vitner doctrine

The Varon decision hardly received any media attention at the time; public opinion was not yet geared to such seemingly technical matters. But the national government did realize that in the future this decision might unleash a wave of compensation claims that would impose a severe financial burden not only on local authorities, but on the national budget as well. So, the government quickly drafted a bill to amend the Planning and Building Law in order to make it clear that compensation rights apply only to direct injuries. The Knesset, however, preferred a compromise between the Court's interpretation and government's wishes. The result was the language of the amendment enacted in 1981 that I have marked in italics: Compensation rights would be granted not only to directly injured parcels but also to abutting ones.

This, however, was not the end of the story. The Hebrew term "*govlim*" (here translated as *abutting*) could also mean "bordering on" or "close" or "proximate"⁴⁷. But how close is close? By the 1990s many landowners (or active lawyers) had discovered the ambiguity of this all important word, "abutting", and submitted claims to the local planning commissions. A set of district-court decisions had accumulated where different judges interpreted this word in very different ways – some taking a very narrow approach, others coming close to reinventing the original Varon interpretation. Not knowing how to assess claims or decide about them, or how to anticipate the impact of new planning proposals, many planning commissions, appeal boards, and landowners found that their day to day decision making was stalled.

The real-estate and planning communities eagerly waited for the Supreme Court to clarify this issue. In *Vitner*, the Supreme Court combined several appeals with contradictory district court decisions, and delivering its decision in September 2005: It ruled that "abutting" should, in most cases, be limited to physically bordering parcels. However, the Court left some room for case by case interpretation by noting two specific exceptions: Where a "narrow road" separates otherwise related plots of land, or where a "public footpath or narrow green strip" creates a similar separation. The Court's purpose in allowing such exception was to deter local commissions from the temptation to insert such minor separations in order to save on compensation claims. But how narrow is narrow?

Since 2005, the administrative (district) courts, as well as the Supreme Court, have continued to be continuously engaged in the interpretation task- measuring closeness, debating narrowness, characterizing types of local roads and attempting to clarify what constitutes an

46. See *supra* note 19.

47 A set of dictionary definitions is included in the key Supreme Court decision on this issue: Administrative Appeal 2775/01 *Vitner vs. Sharonim Local planning and Building Commission* [2005] IsrSC 60(2) 230.

artificial separation of plots that should not stand in the way of compensation claims⁴⁸. Thus, although the Vitner decision did provide somewhat clearer understanding of the "abutting" criterion, it left considerable uncertainty. The interpretation of "abutting" is often still left to case by case judgment.

H2 Implications for national infrastructure

Since the Varon interpretation of Section 197 as applying to neighboring plots, the local planning commissions have become the "address" for handling not only private-to private claims, such as in the facts in Varon, but also private-to public claims. Compensation claims for the adversary effects of major regional and national infrastructure such as highways, railways, waste disposal, etc, would all be placed at the doorstep of the local planning commissions (you might be wondering what the situation before the Varon decision was. The answer is that such claims were probably never compensated.)

In my opinion, the legal mechanism of section 197 was never intended for this purpose. Nor are the local planning commissions – or indeed, any planning body - appropriate for handling the numerous claimants and the enormous financial impacts that such infrastructure entails. In the Israeli context of high densities and high growth rates, a different legal and institutional format should be designed for handling such claims.

H1 Who should pay the compensation?

Section 197 places the onus for paying successful compensation claims on local governments. The problem is that Section 197 does not distinguish among the various levels of plans that may have caused the reduction in property values, nor among the types of developers who are to benefit. Because district and national plans are not exempt from compensation claims, there are many situations where there is a disparity between the public that the new plan serves (for example, all those who travel on highways) and the public expected to pay the bill (the local taxpayers where the plan in question is located).

H2 The division of responsibilities between government levels

Initially, when the number of claims nationally was small, they could be resolved through agreements negotiated case by case among the different levels of government. Over time, however, more uniform rules emerged, especially regarding national roads and railways: About 70% of each compensation claim would be covered by the relevant national government body, and the remaining 30% by local governments. In the case of highways, this practice was codified as an amendment to the planning law. In other areas the issue of the division of responsibility between the local and national levels continues to be contested. Local governments increasingly argue that central government should carry a larger load.

The most publicly visible conflict on this issue has been raging since 2005 between local government and the cellular companies (with national government caught in the middle).

⁴⁸ I shall not venture a full survey here. Partial list of (ever growing) cases following Vitner include : Administrative Appeal (Tel Aviv) 260/04 *Gonen vs. Local planning and Building Commission of Modi'in* [2006] (not published) in which the court asserted that 23 meters separating claimants' plot from the plan's boundary do not constitute an "abutting" property. See also Administrative Appeal (Tel Aviv) 129/06 *Gad vs. Local planning and Building Commission of Mitzpe Affek* [2007] (not published) in which the court maintained that the term "narrow" is not necessarily measure by meters. Instead, the manner and kind of separation between plots should be examined (thus the court adopts a wider interpretation of the Vitner criteria). Other relevant cases are: Administrative Appeal (Jerusalem) 102/00 *Halbreich vs. Local planning and Building Commission of Jerusalem* [2006] (not published); Administrative Appeal (Tel Aviv) 180/03 *Kruani vs. Local planning and Building Commission of Rosh Ha'Ayin* [2005] (not published).

Neighbors to where cellular antennas are placed have since 2005 been submitting their claims to the local authorities. This has become a hot issue for the media, for NGOs, for the Cabinet, and for the Knesset (quite a change from the 1970s).

H2 The practice of requiring reimbursement commitments from developers

The logical reaction to the Varon decision would be for the local authorities to attempt to shift the burden to the party enjoying the enhanced rights. How can they cause those who create the externalities, to "internalize" them, rather than having the entire community pay for the compensation claims?

The Varon decision gradually created a new practice that is on its way to becoming a new "institution" (a similar process occurred in the Netherlands⁴⁹). After the number of claims submitted by neighboring landowners increased dramatically in the 1990s, a new practice gradually emerged (independently within each local authority). An increasing number of local governments began to require that the developer sign a contract that would oblige her to reimburse the municipality for any compensation claims it might be required to pay. This practice is new and uneven, and one can expect many issues to arise in the future.

When a general amendment to the law was made in 1995, a clause inserted that indirectly recognized the existence of such contracts. The law now grants developers who sign such contracts third-party rights in proceedings where compensation claims are discussed. There are, however, many questions pending. While the Israeli Courts (unlike their Dutch counterparts) have not rejected the idea of mitigation commitments, they have also not "blessed" it either⁵⁰. There are no Court rulings (nor clear administrative guidelines) that set out the rules for this emerging institution. So long as compensation claims can be submitted for externalities, where one party gains and another loses, reimbursement contracts are the logical and fair solution.

H1 Section 200: Exemptions from the obligation to pay compensation

Section 200 sets out the exceptions to the right to claim compensation. Although this section was "born" alongside Section 197, and was clearly intended by the legislators to serve as an essential counterpart to the right to compensation, this clause has to date received less attention by the courts. Until the 1990s the courts did not devote much attention to Section 200, usually only mentioning its existence while citing Section 197.

This seeming anomaly likely reflects the low number of claims submitted until the 1990s. Local authorities, in defending their decision to reject a claim, would raise arguments that the grounds for submitting a claim in Section 197 have not been met. In order to decide upon these cases, the courts first had to clarify the basic elements of a compensation claim. In recent years, local authorities have been relying on the exemptions clause much more than in the past.

H2 The three conditions of Section 200

Section 200 contains three conditions for claiming exemptions. The conditions are:

⁴⁹ See Chapter 17 in this book.

⁵⁰ The court was far from declaring this practice as legal and proper *per se*, yet a thrust towards allowing it is apparent in Israeli Jurisprudence. See in High Court Petition 7250/97 *Soulimani vs. The Minister of Interior* [2000] IsrSC 54(3)783. Also in Civil Appeal 210/88 *Prie Ha'aretz* [translated : The Fruit of the Land – ra] *Distribution Company LTD. Vs. Local planning and Building Commission of Kfar Sava* [1992] IsrSC 46(4) 627.

- a) The injury is caused by one of the 11 types of "provisions" – regulations contained in the injurious plan.
- b) The harm does not exceed what is *reasonable* under the circumstances.
- c) The interests of *justice* do not require compensation.

The Supreme Court repeatedly emphasizes that the three conditions are *cumulative*.⁵¹ A local commission must therefore prove that it fulfills each one on the conditions independently. The complex syntax of this clause and the "double negative" of the third condition merits explanation: It means that even if an authority has proven that the injury is reasonable, it will still have to pay, unless it can also prove that it won't be just (perhaps one should say, "fair") to pay compensation to the injured party⁵².

Section 200: Exemption from payment of compensation

Land shall be deemed not to have been affected adversely, when it was affected by one of the following kinds of provisions of the plan, provided the harm does not exceed what is *reasonable* under the circumstances of the case, and the payment of compensation to the injured party is not required in the interests of *justice*: (*my emphasis*).

- 1) a change in the **delimitation** of zones, or in the conditions of land use in them
- 2) the determination of setbacks around and between buildings
- 3) a restriction on the number of buildings in a particular area
- 4) regulation of the sites, size and height, planned shape and external appearance of buildings
- 5) permanent or temporary prohibitions or restrictions of building in a place where the erection of buildings on the land is liable – due to its location or nature – to cause dangers of flooding, of soil erosion, of dangers to health and life, or excessive expenditure of public funds for the construction of roads, drains, water supply or other public services;
- 6) prohibition or restrictions on the use of land, otherwise than by building prohibitions or restrictions, if the use is liable to involve danger to health or life or any other serious disadvantage to the vicinity;
- 7) restrictions on the manner in which buildings are used
- (8) determination of a line, parallel to a road, beyond which no building shall project;
- (9) imposition of obligations to provide - near a building intended for any business, trade or industry - place for loading, unloading and refueling vehicles in order to avoid traffic obstructions;
- (10) imposition of obligations to provide – in or near a building intended for any business, trade or industry or for residential purposes or as a lodging house or for use by the public-a place for parking vehicles or a shelter or refuge against air raids;
- (11) provisions of a plan to which section 81 applies

H2 The relationship between the two parts of Section 200

Section 200 has posed the most difficulty for the courts. It is indeed a strange piece of legislation. It harbors two parts that are so different in "styles" that they are almost contradictory (in format, not in contents). The list of 11 items exempt from compensation is very detailed, specific, rational, and technical, whereas the preamble is very evaluative and

⁵¹ *Horowitz case, supra* note 13.

⁵² *Ibid.* Note especially Justice Matza's explanation in the *Horowitz case. Supra* note 13.

discretionary. The courts have to date sidestepped this problem by almost ignoring the 11-item list of exemptions.

The result is that the jurisprudence on the issue of compensation revolves entirely on two open-ended criteria – reasonableness and fairness – perhaps the most evaluative and discretionary one can think of. Justice Cheshin – who has written some of the Supreme Court's most poetic judgments – has put it thus:⁵³

"... Section 200 is anomalous and special. The legislature has transformed the local commission and the Court – and first and foremost, the Court – into legislators... The criteria that the legislature has set for us to decide upon in compensation claims are "*reasonableness*" and "*fairness*". .. These – needless to say – are deeper than the ocean, higher than the skies, and one can find everything within them".

H2 The jurisprudence on "reasonableness" and "fairness"

Although the Court's interpretation of these concepts began only a decade ago, it has already produced several intensive debates, split courts, and even a recent Additional Hearing – as one would expect where reasonableness and fairness must be applied to each compensation claim case by case. The opinions often delve deep into the philosophy, ethics, and economics of the relationship between planning regulation and land values. But to date, despite the recent Additional Hearing intended to help in clarifying the criteria, there is no clear majority view on what criteria should be applied when judging reasonableness and fairness.

Until 2004, in most of the decisions on section 200, the courts had focused on the quantitative side of the degree of decline in value. The facts of the cases that came before them and were judged unreasonable went from about 30%, to 20%, to 10%. The latter level caused some alarm among local and central governments, and led to the Additional Hearing. The Horowitz decisions – on appeal and on Additional hearing- are very rich in the discussion of the various criteria that the justices suggest – but a close reading shows that there is no discernable majority view on any specific criterion.

H3 The Horowitz Case⁵⁴

Yehudit Horowitz and her late husband bought a plot of land in the city of Raanana in 1972. At the time, they could build 5 housing units on stilts. In 1983 the local planning commission reduced the number of permitted units to 4, and – based on a new policy – no longer allowed stilts. The appraised diminution in value had been established at 11%. The district court thought that this is beyond a reasonable degree, and the city appealed.

The Supreme Court unanimously decided to reject appeal, but they applied very different criteria: Justice Tirkel, in a long and detailed opinion, came to the conclusion that the line of reasonableness should be understood as "*de minimis*" – one to three percent diminution.

Chief Justice Barak suggested a new criterion – a balancing test between the importance of the public purpose and the degree of injury. Prior to this decision, the importance of the public interest did not enter the legal calculus of compensation rights. According to this new test, Chief Justice Barak concluded that the degree of injury in the Horowitz case was not unreasonable. However, in his opinion, the "justice" criterion was not met, and therefore Ms.

⁵³ *Ibid.* Paragraph 5 of judge Cheshin's opinion.

⁵⁴ Civil Appeal 8797/99 *Local planning and Building Commission of Raanana vs. Yehudit Horowitz* [2002] IsrSC 56 (4) 913. Due to the split court in this decision and the important issues raised, this appeal was granted an Additional Hearing (*supra* note 13).

Horowitz could not benefit from the exceptions clauses. The third justice joined Justice Tirkel in thinking that the level of injury was not reasonable, but he did not specify whether or not he adopts the de-minimis level.

Needless to say, the idea that the local authorities would have to compensate for any decline in value beyond two-three percent caused concern. Realizing the importance of developing clearer guidance, the Chief Justice authorized an Additional Hearing with seven justices. They agreed unanimously that the appeal should be rejected. However, once again, each justice applied different criteria.

H3 Following the Horowitz ruling

Although no single set of criteria has a majority in *Horowitz*, one of the justices (Justice Rubenstein) in a Supreme Court decision delivered in 2006 summarizes what he views as the holding in *Horowitz*. He based his opinion largely on Chief Justice Barak's interpretation⁵⁵:

"Reasonableness is to be determined by balancing property rights and the public interest. This should be done according to these three considerations:

- a) The extent of decline in the injured property's value.
- b) The degree of "distribution" of the harm.
- c) An essential public interest served by the plan.

These considerations are not a closed list; additional considerations that should be taken into account are left to future development of jurisprudence. Fairness is an open and flexible criterion, based on a variety of considerations. These differ from case to case, according to the concrete facts that come before the court".

H3 Uncertainty remains

Other decisions following *Horowitz* have adopted a similar view whereby the extent of property value should be balanced with the public interest and distributive justice considerations⁵⁶. This approach leaves even more room for discretionary judgment than earlier rulings which focused on the reasonableness criterion.

In 2009, although seventy three years have passed since the legislation about compensation rights was first enacted, neither the Knesset nor the Supreme Court have set clear criteria that can help planners, commissioners, lawyers, landowners, appraisers, or the courts as they evaluate whether a particular planning level or type of injury would be judged compensable or exempted. From a comparative perspective, however, the general picture is that Israeli law is extremely generous to landowners and to holders of lesser property rights. It protects them from even minor reduction in property value caused by planning decisions.

H1 What can be learned from the Israeli case?

The Israeli case represents an "extreme point" (or arguably next to extreme) along the range of approaches to compensation rights represented in this volume. The steep increase in the number and sizes of compensation claims in Israel may serve as a "preview" for what might happen if the rights to compensation for regulatory takings become too extensive. While the

⁵⁵ Civil Appeal 8736/04 *Orah Cohen vs. Local planning and Building Commission of Raanana* [2006] (Rubenstein, J.) (not published yet). A similar approach can be found in later rulings.

⁵⁶ For instance, in Civil Appeal Request 8282/07 *Local planning and Building Commission of Ashkelon vs. Ginossar* [2008] (not published yet).

experiences of one country (or state) may not be easily transferable to another, the conclusions from the Israeli experience may add new dimensions to the property-rights debates in various countries.

Once property owners (or lawyers) in Israel began to make more claims and the number of cases to come before the courts increased, the courts had more opportunities to interpret the language of the law. The direction of their interpretation, for the most part, recognized a broader and broader definition of compensation rights. In recent years, the compensation clause has become a "household word" among landowners and professionals, and its impact has become a major consideration in almost every land-use planning decisions.

From a comparative planning law perspective, by largely focusing on two discretionary criteria, the Supreme Court has shifted Israel's law on compensation from statutory law to judge-made quasi-constitutional law. Israel's compensation law, intended by the legislators to be in the same family as other statute-based compensation regimes such as the German⁵⁷, Swedish,⁵⁸ or Dutch,⁵⁹ has thus become more akin to American takings jurisprudence. In the United States, most states do not have statutory laws on compensation for regulatory takings; therefore, the courts are called upon to directly apply their interpretation of the Constitution.

The Israeli story of compensation rights also exemplifies an interesting relationship between written law and judge-made law. The statutory law regarding compensation rights has been "on the books" since 1936, and remains largely unchanged today. But in the meantime, the contents of the right to compensation changed dramatically. Through the prism of this rich jurisprudence – and the philosophical debates among the judges that characterize it – one can sense the transformations in Israeli society and economy.

57. *See Chapter 14 in this book.*

58. *See Chapter 15 in this book.*

59. *See Chapter 17 in this book.*

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