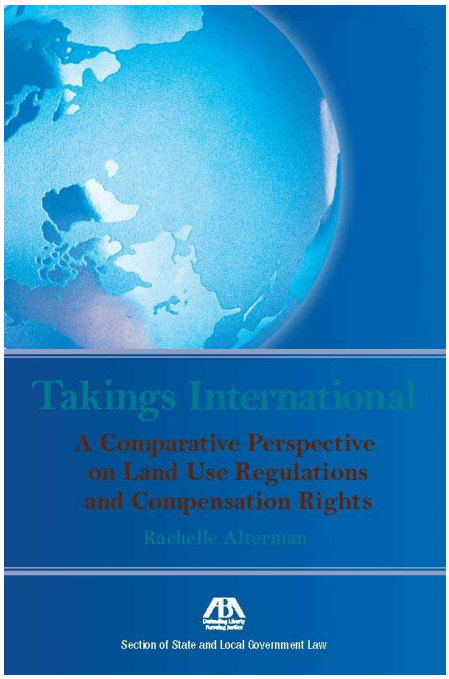

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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CHAPTER 10

AUSTRIA

In this small federal country, under the same constitutional regime, compensation rights differ significantly among the nine states: Some are extremely restrictive, others somewhat broader. Nevertheless, in practice, compensation rights are not a major legal or public issue.

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This chapter provides an overview of compensation rules pertaining to the reduction of development rights due to revised land use plans at both the state and the federal levels in Austria. The chapter first presents an overview of the constitutional aspects of the right to compensation, then proceeding to introduce the basics of the Austrian planning system. The bulk of the chapter provides a comparative description of the law in each of the states, surveying the differences among the states in both substantive and procedural rules and regulations. The chapter concludes with an analysis of the relationship between law and practice.

H1 THE AUSTRIAN CONSTITUTIONAL LAW ON THE RIGHT TO PROPERTY AND COMPENSATION RIGHTS

The Federal Constitution of 1929[2] makes Austria a democratic republic organized as a federation. It consists of nine states, the *Länder*, and about 2350 municipalities.

Article 5 of the Austrian Basic Law on the General Rights of Nationals of 1867 (equivalent to a Bill of Rights)[3] states: "Property is inviolable. Expropriation against the will of the owner can only occur in cases and in the manner determined by law." Because Austria has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols, article 1 of the First Protocol protecting property rights is also part of the Austrian Constitution. However, The Austrian Constitutional Court prefers to cite the Austrian Constitution regarding compensation for expropriation and rarely refers to the ECHR.

In addition to the federal constitution, there are also nine state constitutions. The scope of some of the state constitutions is wider than that of article 5 of the Austrian bill of rights. Some explicitly state that there is an obligation to compensate in the case of expropriation,

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- This chapter has been partially rewritten by Rachelle Alterman in consultation with the author.

[2] Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930 (Austria).

[3] Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger [STGG] [Federal Bill of Rights] Reichsgesetzblatt [RGBl] No. 142/1867 (Austria).

and under certain conditions, the state constitutions also specify a duty to return expropriated property in cases when the public use is not implemented for a long time.

For a long time, the jurisprudence of the Austrian Constitutional Court on the issue of the right to property was tilted strongly in favor of government, resulting in the denial of a right to compensation for expropriation. The Austrian academic community frequently criticized the Court's attitude over the years.[4] Finally, in 1972, the Court held that there was indeed a right to compensation for expropriation and that it came from the right to equality and the theory of special sacrifice.[5] Because of this ruling, the right to compensation for expropriation is now accepted by both the academic community as well as the Constitutional Court. The academics generally deduce this right from the right to property and the Court from the right to equality.

It is important to note that the Constitutional Court has recognized the right to compensation only for cases of expropriation, not for restrictions on development rights. Far-reaching restrictions of various types have not been recognized by the Court as constituting an expropriation. Examples are a declaration of a development ban, even a longterm one[6], an economically burdensome duty to maintain certain historic buildings[7], or revocation of a building permit[8]. These were not recognized by the Court as constituting an expropriation and therefore did not provide grounds for compensation. We shall return to those few cases where the Constitutional Court ruled on specific interpretation of statutory law. Therefore, any rights to compensation for land-use restrictions are derived not from the Constitution but from specific legislation enacted by each of the states, which we shall survey in the third section of this chapter.

H1 AN INTRODUCTION TO AUSTRIAN PLANNING SYSTEM AND ITS INFLUENCE ON LAND VALUES

Under Austrian legislation, land use plans can influence the value of property by determining whether particular types of development of property are permitted or not. At times changes in land use may cause a reduction in property values. The rights of landowners in such situations differ somewhat among Austria's nine states.

Because the structure of Austria's government is one in which political representation and policy-making decisions take place at three different levels of authority, the powers to legislate, execute, and shape planning laws are shared by the federal and state authorities. Federal authorities essentially provide the framework for land use planning by deciding such things as which infrastructure projects to pursue and which areas to designate as woodlands. The responsibility to legislate and execute land use plans rests mainly with the nine states. The responsibilities for land use planning at the local level and for revising land use and development plans are divided between the states and the municipalities. Specifically, the states are responsible for supra-local planning at the state and regional level while municipalities are responsible for land use planning at the local level.

Municipalities rely on two main instruments for land use planning: municipal development plans and land use plans (*Flächenwidmungspläne*). Municipal development plans lay out the overall goals and principles of community development. They provide the framework for land use plans, which are the most important instruments of spatial planning at the municipal level.

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[4] *See, e.g.*, Walter Berka, *Die Grundrechte Grundfreiheiten und Menschenrechte in Österreich*, 1975 JURISTISCHE BLÄTTER [JBL] 394 (Spring 1999) (Austria).

[5] Verfassungsgerichtshof [VfGH] [Austrian Constitutional Court] 1972, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] 6884/1972 (Austria).

[6] VfSlg 14.155/1955.

[7] VfGH, 1981, VfS1g 9189/1981.

[8] VfSLg 9306/1981.

Land use plans are approved by municipal councils and are binding on landowners. Their function essentially is to prescribe the most rational land use scheme for the entire area of a municipality. To this end, there is a catalogue of a set of categories for different kinds of uses of land. The main categories include building land, green land, transportation-related uses, special use category, and reserved area. These main classification categories are further subdivided into different types of land use.

To create a land use plan, authorities must adhere to a strictly regulated procedure. First, a draft plan has to be prepared and displayed in the municipality to secure public participation in the process. The municipal council then has to decide whether the plan should be approved. Finally, the supervising authority has to approve the plan, which is then formally published.

In a land use plan, each single lot is assigned one of the aforementioned land use categories. If landowners desire to change the use of their property or build upon it, they must ensure that the proposed land use conforms to the plan. However, a new or revised land use plan cannot oblige landowners to adapt the current uses of their properties to conform to the new land use classifications.

All nine state planning laws authorize planning bodies to revise land use plans even if development rights are thereby reduced. That, however, is the only common ground that the nine state laws share with respect to "downzoning" (to use an American term). The rules on compensation rights for such reductions in development rights vary considerably from state to state.

In recent years, there was a wide-scale need to revise land-use plans downwards. Over the last few decades, municipalities have classified a high percentage of land as “building land,” which has resulted in an overly large reserve of building land. Expected growth did not materialize, and municipalities have tried to remedy this problem by reducing development rights and reclassifying building land as green land. The differences among the states on this issue can potentially be significant to landowners' compensation rights. However, as we shall see, despite the large-scale need to "downzone", the right to compensation has not become a major legal or public issue.

H1 The Law on Compensation for Reduction of Development Rights in each of the Austrian states

Each of the nine states has its own planning law, and each provides the rules regarding the rights to compensation for reduced development rights due to revision of a land-use plan. Some of the differences are minor; others are major. However, because of the dearth of jurisprudence on compensation issues in Austria, some questions remain about how to interpret the extent of differences among the states.

A rule shared by all states is that compensation rights – to the extent that they apply – are granted only if the plot in question would have been suitable for development in terms of size, topography, access to infrastructure, etc. This means that if a plot loses its development rights in a revised plan because the plot no longer fulfils the legal requirements for building land, there would be no right to compensation.

Another aspect shared by most states pertains to the differences between urban areas and rural ones. In agricultural areas all over Austria, minimal development rights usually do exist, allowing some construction for agricultural buildings. By contrast, in urban areas land use plans may prohibit any development. Such situations, as we shall see, are the dominant grounds for compensation rights – though in some states, a few additional grounds also exist.

The major type of compensation rights shared by all states pertains to the indemnification of construction-related costs invested in the property when it was zoned for

development. Another type of rights, which exists only in some of the states, pertains to what Americans may call "investment-backed expectations". In addition, there are some types of rights offered in only one or two of the states.

The following subsections present the law about compensation rights in each of the nine states separately. The reader will notice many differences in specific substantive grounds as well as in procedure. The section that follows discusses the similarities and differences among the states. There we shall see that there are, alongside the striking differences, also some basic commonalities. Table 1 summarizes these shared aspects and the differences.

H2 Burgenland

The state of Burgenland's law is among the more restrictive in Austria, providing only minimal rights to compensation. According to section 27 of the Burgenland state planning law (*Burgenländisches Raumplanungsgesetz*), there is a right to compensation only where a binding plan is revised so as to prohibit any development, where this causes a reduction in the value of the property, and where this reduction constitutes undue hardship. The Burgenland legislature added the last condition following the Constitutional Court's ruling about "undue hardship." The courts have specified that compensation rights apply only to the indemnification of construction-related investments made before the revised land use plan came into force. Such investments include expenditures towards water supply systems, waste water systems, power supply systems, and road connections.[9] By contrast, costs for planners, architects, and legal advice are not considered by the courts to be related to construction and thus do not qualify for compensation.[10]

In addition to these substantive requirements, there are procedural rules that must be followed. An aggrieved landowner must file with the municipality an application for compensation within a year after the revised land use plan came into effect. The mayor must then evaluate the application and, after consulting with an expert, assign a compensation value. Appeals against the mayor's decision can be lodged with the supervisory authority, which is either the district authority or, in the case of cities that have their own statutes, it is the state government. If an applicant is unsatisfied with the value of compensation determined by the authorities, the person may be able to have the authorized district court reassess the amount of compensation within one year after the original decision came into effect[11].

H2 The Tyrol

Tyrol is a largely rural state (thus the agricultural areas do have some minimal development rights for agriculture-related buildings). Section 71 of the Tyrol state planning law (*Tiroler Raumordnungsgesetz*) provides somewhat broader (yet still limited) compensation rights than Burgenland's. Like Burgenland's, it provides that landowners have the right to due compensation for investments made towards development up to the time of the approval of a revised land use plan that prevents any development or specific kinds of development. However, in this state, even if the rezoned land is still developable, frustrated investments can still qualify for indemnification. Furthermore: The law in Tyrol does not specify that the injury must reach the level of "undue hardship."

Procedural rules require an applicant to file an application for compensation with the municipality. If no agreement is reached within three months after the revision of the land use plan, the landowner can, within a year, call on the district authorities to decide on a

[9] Oberster Gerichtshof [OGH] [Supreme Court] Nov. 26, 1980, 1 Ob 607/80, Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen [SZ] 53/156 (Austria).

[10] Verwaltungsgerichtshof [VwGH] [administrative court] Dec. 20, 1994, Zahl 92/05/0170.

[11] When the court is called upon to reassess the compensation amount, the mayor's decision is overridden.

Table 1: Compensation Rights Granted by Planning Laws in Each of Austria's Nine States

State	Revised plan must	Undue hardship clause	Indemnification of Investments	Broader compensation rights	Repercussion on private law contracts
Burgenland	Prohibit any development	Yes	Construction related investments	No	No
The Tyrol	Reduce permitted development	No	Construction related investments	No	No
Carinthia	Reclassify plot as green land	No	Construction related investments	Compensation for decrease in the value of the plot, if value was determining factor in an acquisition within last 25 years	No
Vorarlberg	Restrict development rights	Yes: 6 situations specified by law	Construction related investments	Compensation for decrease in the value of the plot, if value was determining factor in an acquisition within last 10 years; if plot is surrounded by plots not reclassified as green land	No
Lower Austria	Rule out or considerably limit development	No	Construction related investments Fiscal charges for exploration work and infrastructure	Compensation for decrease in the value of the plot, if value was determining factor in an acquisition	No
Upper Austria	Abolish rights to intended development	No	Construction related investments	Compensation for decrease in the value of the plot, if plot is surrounded by plots not reclassified as green land	Yes: Former owner can claim annulment of contract (last 10 Years)

Salzburg	Take away development rights granted under the previous plan	No, but reclassification must occur within 10 years after classification as building land	Construction related investments	Compensation for decrease in the value of the plot, if value was determining factor in an acquisition	No
Styria	Decrease value of the plot	Yes: in comparison to owners of comparable plots	Construction related investments	Compensation for decrease in the value of the plot, if plot is surrounded by plots not reclassified as green land	Yes: Former owner can claim annulment of contract (last 15 Years)
Vienna	Decrease development rights by more than 83%	No	None	Right to redemption: owner has the right to sell plot to the municipality if plot is not already built-up; Right to compensation for injurious affection by expropriated portion to retained land.	No

compensation value. The decision of the district authorities can be appealed to the state administrative tribunal.

H2 Carinthia

The rights to compensation in Carinthia are somewhat more generous. Section 21 of the Carinthian planning law (*Kärntner Gemeindeplanungsgesetz*) provides that a landowner has the right to claim compensation for construction-related investments made while the plot of land was classified as building land. In Carinthia, the law does not specify that the injury must reach the level of "undue hardship." If a plot of land is reclassified as green land within twenty-five years from the time when it was first classified as building land, due compensation must be paid for a decrease in the value of the plot, so long as one of the following prerequisites is met: (1) the value of the plot was a determining factor for the price paid when that plot was purchased; or (2) the value of the plot was a determining factor in an acquisition free of charge.

If an acquisition took place more than three years before the revised land obtained legal force, the amount of compensation must be adjusted for inflation using the Consumer Price Index. However, if a plot of land is once again classified as building land within ten years after the time compensation was paid, the landowner must pay back the compensated amount to the authorities.

The procedural rules in Carinthia require an aggrieved landowner to file an application for compensation with the municipality within one year from the time the revised land use plan gained legal force. The amount of compensation has to be valued according to an expert's appraisal. There is no possibility of administrative appeal against this decision at this tier. If no agreement is reached within one year, the landowner has an additional three months to petition the district court to make a decision.

H2 Vorarlberg

Vorarlberg compensation rights offer some broader rights than encountered so far. Section 27 of the Vorarlberg planning law (*Vorarlberger Raumplanungsgesetz*) states that a landowner has a right to compensation when a land use plan restricts development of a plot of land, thereby reducing the value of the land. An additional condition is that this reduction causes undue hardship to the landowner.

The Vorarlberg law spells out six situations constituting "undue hardship": (Some of these categories are reminiscent of what American takings law has termed "investment backed expectations".)

1. A plot of building land has been reclassified as green land; and the investments in construction occurred, at most, ten years before the revised land use plan came into force.
2. A plot of land has been reclassified as green land; and within the ten-year period before the revised plan came into force, the value of the plot was a determining factor in a the price paid for it (or for a valuable consideration in an acquisition without payment).
3. A plot of land has been reclassified as green land; and that plot is either completely or mostly surrounded by plots that have not been reclassified as green land or transportation arteries. This ground for compensation is based on the idea of "special sacrifice".
4. A plot of land is classified as "expected building land," but within fifteen years after this designation, a revised land use plan does not grant development rights nor classifies it as "reserved area". Investments towards construction took place, at most, ten years prior to the date when the revised land use plan came into force.

5. Investments towards construction were made while a plot of land was classified as building land, and a revision of the plan now restricts the plot's development. This category differs from categories 1 and 2 in that the re-classification does not have to be to "green land". Possibly, this means that not all development rights must have been taken away. Wthout jurisprudence on this point (or most other), this is my conjecture.

6. The value of a plot of land when classified for development was a determining factor in an acquisition against payment or free of charge, and the revision of the plan now restricts development. However, as in point 5, the reclassification may not have to be to "green land".

There are several procedural rules that must be followed. A landowner must file an application for compensation with the municipality within a year from the date that the revised land use plan obtained legal force, or before the expiration of the fifteen-year period (the fourth case).

The six categories of hardship pertain to three differences bases for calculating compensation rights. The first indemnifies only the value of the actual investments made towards construction (if they fall among the categories recognized for indemnification). The second basis, pertaining to categories 2 and 6, defines the level of compensation as the difference between the purchase price that the landowner paid for the plot while relying on the previous land use designation, and the value of the plot after the revision of the plan. As noted, the six category may be broader in that it may cover situations where "downzoning" does not entirely take all development rights away. Under the third basis, which applies to the third type of hardship, compensation is determined by comparing the value of the plot to the values of the surrounding plots classified as building land.

When compensation is awarded for an acquisition that took place more than three years before the revised land use plan obtained legal force, the sum must be adjusted for inflation according to the Consumer Price Index.

If no agreement is reached within a year after the application was filed, both the landowner and the municipality are free to call on the competent district court to render a decision. If a municipality once again reclassifies the plot as building land within fifteen years after it paid out compensation, the compensated landowner must pay the amount back to the municipality.

H2 Lower Austria

This state's compensation rights are broader than Burgenland and some other states; they bear some similarity in underlying rationale to the compensation rights offered in Vorarlberg, yet there are important differences as well.

Section 24 of the state planning law of Lower Austria (*Niederösterreichisches Raumordnungsgesetz*) specifies that, under certain conditions, a municipality must pay compensation for pecuniary losses when a plot's classification rules out or considerably limits development. There is no explicit hardship condition. Note also that it is not necessary that the reclassification remove *all* development rights; in this state "considerably limits" may be enough to serve as grounds for claiming compensation.

According to Lower Austrian planning law, pecuniary losses may include: (1) investments in construction made prior to the revision of the land use plan; (2) fiscal charges for exploration work and infrastructure; and (3) decreases in the value of land, but only if the value was a determining factor in an acquisition, and the price paid was within the customary local price range at the time of acquisition.

One caveat is worth mentioning. There is no right to compensation where the plan specifies a time limit for the development rights, and the reclassification takes place within the prescribed period.

There are several procedural rules to which a landowner must adhere. He or she must file an application for compensation with the municipality. If no agreement is reached within six months, the mayor has to decide on an amount. There are no right to submit an administrative appeal. If the landowner is not satisfied with the level of compensation, he or she has three month to appeal to the district court to determine the amount of compensation. When compensation is awarded, it has to be adjusted for inflation according to the Consumer Price Index.

H2 Upper Austria

Section 38 of the state planning law of Upper Austria (*Oberösterreichisches Raumordnungsgesetz*) sets out two situations in which municipalities are obliged to pay compensation. First, a landowner has the right to claim compensation for investments incurred in connection with the intended development during the time the plot had been classified as building land; and a revised land use plan abolishes the rights to such development (there is no condition regarding hardship).

The second situation is one not yet encountered in the description of the other states. It applies to the special situation when a plot of land classified as green is diminished in value because a revised plan reclassifies for development all or most of the plots surrounding it (while it remains "green"). In this situation, the amount of compensation due is the difference in the value of the plot before and after the revision of the plan. (*Editor's comment:* This presumably applies because expectations for development are frustrated for the singled-out plot and considerations of equality apply.)

Interestingly, Upper Austrian law also grants compensation rights in the realm of *private law* of contracts. This applies where a landowner of a plot of land classified as green land sells it, but within 10 year of the sale the land use plan is revised, reclassifying that land for development. If the new owner either sells the land or obtains a building permit within this ten-year period, the former landowner has the right to claim annulment of the contract by the district court. Note that there is a prerequisite: the price paid for the plot of land must be less than half of what the plot would have commanded had it been classified as building land at the time of sale. The buyer can avoid nullification of the contract by refunding the difference between the amount of money paid and the appropriate value of the plot classified as building land.

There are several procedural rules. First, a landowner must file with the municipality an application for compensation within one year after the revised land use plan has gained legal force. Second, the compensation has to be valued according to expert appraisal. There is no possibility of administrative appeal against this decision. If a landowner is unsatisfied with the value of compensation, he or she may be able to appeal to the relevant district court, within three months of the decision.

H2 Salzburg

Compensation rights in the state of Salzburg hold a "middle of the road" position relative to the other states.

According to section 25 of the Salzburg state planning law (*Salzburger Raumordnungsgesetz*), a municipality has to compensate for pecuniary losses when (1) a revision of the plan takes away development rights granted under a previous plan; (2) the land is reclassified either for green land or for transportation; (3) the reclassification occurs either within ten years after the plot was first classified as building land, or during the validity period of a building permit. As building permits in Salzburg are valid for a period of three years, the total time-period for compensation can be thirteen years after the plot is initially classified as building land. This means that if this period has expired and the landowner did not implement the development rights, there would be no compensation rights.

In Salzburg, the general ten-year period rule may be extended in three situations: 1) For the duration of time when development was not reasonably possible due to circumstances beyond the owner's control; 2). For ten more years, where the land-use designation is residential, and the dwellings are for the landowner or direct descendants - provided that the size of the plot is adequate for that purpose, and that it is at present not reasonably possible to use the building rights. 3) For ten more years, if the proposed development is intended for the extension or transfer of an existing production unit, and if it is currently not reasonably possible to make use of the development rights. To be granted the right to extend the original ten-year period, the landowner must submit a declaration of intention to develop before the draft revised land use plan is published, and must substantiate the claim that it is at present impossible to undertake the development.

There are two types of losses that qualify as pecuniary losses under Salzburg law. The first type is similar to all other states, covering investments towards construction made up to the date when the revised land use plan came into force. The second type, relating to the price paid during a transaction, exists in only some of the states. This refers to a right to compensation for that portion of the value of the plot that was a determining factor in the price paid for the land when it was classified as permitting developable. This right applies only to the latest transaction.

There are several procedural rules that must be followed. A landowner must file with the state government an application for compensation within three years after the revised land use plan gained legal force. The compensation has to be assessed by an expert appraiser. If the parties are unsatisfied with the value of compensation, both have, within three months of the decision, the right to submit a request to the relevant district court to revalue the amount of compensation[12]. Finally, the original owner must pay back the amount of compensation if, within twenty years after compensation was paid, the plot is reclassified as building land.

H2 Steiermark

The compensation rights in the state of Steiermark are, to some extent, based on a different rationale than most other states and are similar to Upper Austria.

Section 34 of the Steiermark state planning law (*Steirisches Raumordnungsgesetz*) says that a municipality is obliged to pay compensation to the owner of a plot of land if (1) the value of the plot decreased because of a revision of a land use plan, and (2) the extent of the loss constitutes an undue hardship in comparison to owners of comparable plots. These two criteria together are somewhat different from most of the other states on two counts: The reclassification need not take away all development rights; and the definition of hardship is not only individual – it refers to a comparison with the other landowners in the area.

Compensation must be paid in two different situations. Similarly to most states, the first situation applies when the landowner has made investments towards construction up to the time when the revised plan came into force. The second situation is unique, and is similar to the one in Upper Austria. It applies to the special situations when a plot of land classified as green is diminished in value because a revised plan reclassifies for development all or most of the plots surrounding it (while it remains "green"). In this situation, the compensation due is the difference in the value of the plot before and after the revision of the plan.

As in Upper Austria, the law in Steiermark also sets a ground for compensation that applies to *private* transactions. This applies to situations where a plot of land classified as green land is sold, within 15 years it is redesignated for development, and the new owner obtains a building permit or sells the lot. If the price paid in the original transaction had been based on the initial designation prohibiting development, the original landowner has the right

[12] In addition, the amount of compensation has to be adjusted for inflation according to the Consumer Price Index.

to claim annulment of the contract in the relevant district court. The condition is that the price paid for the plot was less than half the value that the plot would have commanded had it already been classified as building land at the time of the sale. The original buyer can avoid nullification of the contract by refunding the difference between the price paid and the value of the plot classified as building land. The statute of limitations for the original owner to claim this right is one year after the reselling of the plot or one year after the building permit gained legal force.

There are several procedural rules that must be followed. The application for compensation has to be filed with the municipality. If no agreement is reached within one year, the supervisory authority must decide. The supervisory authority is the district authority or, in the case of cities with their own statutes, the state government. The level of compensation must be determined by an expert appraisal. There is no possibility of appeal against this decision. If one of the parties is unsatisfied with the amount of compensation awarded, each party has, within three months of the decision, the right to request that the district court determine the level of compensation. Finally, the landowner must repay the sum received as compensation if the plot is re-classified as building land within fifteen years from the date when the compensation was paid out.

H2 Vienna

The law of the state of Vienna is unique among Austrian states, in that it offers compensation rights largely through linkage with what Americans may call "inverse condemnation". It is also the only state where compensation grounds exist for what Americans may call "injurious affection". In other ways, however, Vienna law offers rather limited compensation rights.

Section 59 of the Vienna state planning law (*Wiener Bauordnung*) has a special provision regarding compensating landowners known as “redemption” (*Einlösung*). In Vienna, a landowner has the right to demand redemption—and thus payment of compensation—whenever a plot of land, which had been originally classified as building land, is reclassified as either green land or as a transportation artery. In this situation, landowners have the right to compensation only if they decide to sell their lands to the municipalities.

The right to claim redemption does not apply in the following situations: (1) the plot is under a building ban at the time of reclassification; (2) the plot is already built-up; (3) the landowner holds a valid building permit at the time of reclassification; (4) the plot is encumbered with a mortgage.

The final situation where redemption rights do not apply is unique to Vienna. It applies to situations where land is reclassified from development land into “park” (a subcategory of green land). If at least *seventeen percent* of the land is allocated for development, government is exempt from the duty to "redeem" the land.

In addition, in Vienna landowners have the right to compensation in cases of “injurious affection” (in American terminology), where only part of a plot is subjected to a downwards reclassification and the remainder is either unsuitable for development or the size suitable for development is reduced to less than fifty percent of the original area.

Compensation is to be assessed based on the former designation with respect to development rights, and the state government decides the amount. The amount of compensation has to be assessed by an expert appraiser. The state government is authorized to decide whether the right to redemption applies and what amount of compensation should be awarded. If the parties are unsatisfied with the sum awarded, both parties have, within three months of the decision, the possibility to request that the district court revalue the amount of compensation. Finally, compensation has to be paid within three months after the final decision has been rendered.

H1 COMPARISON ACROSS THE STATES: SHARED BASES IN LEGISLATION AND JURISPRUDENCE

A comparison among the nine states indicates both similarities and differences. This section notes the similarities; the next section highlights the differences. Some of the shared attributes arise from similarities in the specifications in the state laws, while other similarities are due to the jurisprudence of the federal courts.

H2 Shared bases for compensation claims set in the legislation

As shown in the previous part, the rules concerning compensation for the decline in property values due to planning decisions vary considerably between the nine Austrian states. This could lead to the somewhat awkward result that, under the very same circumstances, a landowner who owns plots of land in multiple states could be eligible for compensation in some states and not in others. Additionally, landowners must confront different procedural rules in each state.

Generally, however, the law in most Austrian states is based on a shared rationale. The cornerstone is the principle of reliance: owners are eligible for compensation if they can show that they suffered some economic loss because they relied on the fact that their plot had development rights, and these rights were taken away by a revision of the plan. However, what constitutes reliance and what type of loss is compensable vary from state to state.

Another shared principle is that compensation rights apply only where almost no economic value is left after land is reclassified in a revised plan. In many states, to qualify for compensation, the reclassification must be to open space or transportation-related areas. In most states (but perhaps not all), situations involving less drastic declines in value are not compensable. As noted, compensation is only due if the plot would have otherwise satisfied the conditions for receiving development permission. This latter condition applies throughout Austria, whether or not explicitly mentioned in state legislation.

H2 Interpretation by the Courts

Over time, the highest civil court, the highest administrative court, and the Constitutional Court have all ruled on what the definition of "investment" means in the context of development. For example, the Administrative Court has ruled that investments for architects and planning cannot count as investments towards development because these are not typical costs of exploration work.[13] Overall, Austria's highest courts have held that compensation can only be paid for costs involved in making a plot of land physically suitable for development. Therefore, the courts have recognized expenditures towards water supply systems, waste water systems, power supply systems, and transport connections as qualifying as investments. By contrast, costs not directly related to the building project, such as remuneration for architects, are usually not recognized.

The Constitutional Court has issued a number of decisions that stress the importance of the principle of reliance as a basis for compensation claims, but at the same time, the Court has interpreted this principle narrowly. In one case, the Court did not see why it was necessary to pay compensation for reclassifying a plot from "expected building land" to "agricultural land."[14] The Court reasoned that classifying a plot of land as "expected building land" does not justify an owner's expectation of receiving development rights. Applying the same principle, in another case, the Court found that a landowner did not suffer undue

[13] OGH Nov. 26, 1980, 1 Ob 607/80, SZ 53/156; VwGH Dec. 20, 1994, Zahl 92/05/0170.
[14] VfSlg 11914/1988.

hardship, in light of the fact that in his transaction to buy the plot of land, that person relied on a proposed reclassification in a draft plan, not an approved one.[15]

H1 COMPARISON AMONG THE STATES: DIFFERENCES

Beyond the similarities noted above, there are some major differences in the grounds for compensation. These grounds can be classified into four categories: direct investments, loss in value compared to the price that was originally paid when relying on the original land use classification, "special sacrifices" compared with surround plots, and the concept of redemption. A fifth category relates to compensation rights granted by law but applicable through private contract law. In addition to these differences, there may also be specific situations where governments are exempt from paying compensation even where the rights are granted in the law. There are major differences in procedures.

H2 Direct Investments

Nearly all states, with the exception of Vienna, provide a right to compensation for pecuniary investments that the landowner has made towards development before the revised land use plan came into force. Such investments usually comprise the costs of water supply systems, waste water systems, power supply systems, and transport connections.

However, two states, Salzburg and Vorarlberg, set a time limit for this right (with somewhat confusing differences). In Salzburg, compensation is limited to those investments made within ten years *after* the plot was *originally classified* as building land in a land use plan. Vorarlberg, on the other hand, limits compensation to investments made during the decade that *preceded* the date when the *revised (*damaging) plan came into effect. Compensation in Vorarlberg, therefore, is independent of how long the land had been classified as building land. The rationale in these two states is, presumably, that landowners should implement the development rights granted within a reasonable time framework; beyond that, the public purse will not be responsible for indemnifying for investments made.

H2 Loss in Value Compared to Price Originally Paid

A second basis for compensation – arguably the most generous – pertains to the price paid in private transactions when relying on the original classification for development. This type of right is available in four Austrian states: Carinthia, Vorarlberg, Lower Austria, and Salzburg. In these states, this type of right to compensation applies over and above the rights for indemnification for direct investments. A landowner may claim compensation for the loss incurred if the price paid for the purchase of the plot was based on the property's original designation for development. In Carinthia, these compensation rights hold only where the acquisitions was against financial payment. In the other states, "free-of-charge" transactions may also qualify for compensation. An additional time limit is imposed by Carinthia, where compensation rights are limited to cases where the reclassification to green land occurred within twenty-five years after the original classification allowing development came into effect.

H2 "Special Sacrifice" Compared with Surrounding Plots

An additional, generous form of compensation is found in only two Austrian states: Vorarlberg, Upper Austria and Styria. These states grant additional compensation rights when the decline in a plot's value is caused by the reclassification of *neighboring* plots while the land use designation of the plot in question remains "green" (or a similar land use). In such

[15] Verwaltungsgerichtshof [VwGH] [administrative court] Dec. 22, 1983, 2756/80.

cases, even though the plot of land has not undergone reclassification, it has suffered a decline in value due to the change in the surrounding plots and thus compensation is due. Presumably, the underlying rationale (and the reason for the decline in the plot's value) is that for a single landowner, the expectation for reclassification for development has been frustrated whereas for others it has not.

H2 "Redemption Right"

Vienna applies a completely different model of compensation right that is based on the concept of "redemption" (*Einlösung*). Landowners of plots that have been reclassified downwards as "green" areas or for transportation may oblige the municipalities to buy their land. As a result, landowners can only get compensation for decreases in the value of their property if they agree to transfer ownership to the municipalities.

H2 *Compensation rights that apply through private law*

The law of two states - Upper Austria and Styria - grants special protection to landowners in the realm of *private law* of contracts. This applies where a landowner of a plot of land classified as green sells it, but within a specified time period of the sale the land use plan is revised, permitting development. The time period in Upper Austria is 10 years whereas in Styria it is 15 years. If the new owner either sells the land or obtains a building permit within this ten-year period, the former landowner has the right to claim annulment of the contract or a refund of the difference by the buyer. This special protection has a numeric threshold, similar in both states: The price paid for the plot of land must be less than half of what the plot would have commanded had it been classified as building land at the time of sale.

H2 Additional restrictions

It is important to realize that this overview does not give a comprehensive picture of how generous or ungenerous is each state in practice. In some states, there may be far-reaching exemptions from these general rules, which may leave the owner without any compensation. For example, in Vienna, an owner of a plot of land in a woodland area does not have the right to redemption if the plot is reclassified as an agricultural area. Because most reclassified plots in Vienna meet those conditions, the right to compensation is actually rather limited in practice. Some states, notably Lower Austria, deny landowners the possibility of compensation not only for temporary freezes on development, but for unlimited freezes as well.

H2 Differences in procedures

The procedural rules for claiming compensation differ considerably from one state to another. These differences are no less than confusing. There are different time limits – varying between three months and three years. The possibility of administrative appeal is not always available in some states and the time periods allowed for such appeals or to access the courts differ significantly among the states. Furthermore, the body authorized to hear appeals differs from state to state. One rule shared by all states is that only the owner of the plot of land can claim compensation, and that the right to compensation cannot be transferred to a buyer.

H1 THE ROLE OF JUDICIAL REVIEW AND COMPENSATION CLAIMS IN PRACTICE [16]

[16] The term "judicial review" is probably the closest American legal term that reflects the contents in the following paragraphs.

How can one explain the fact that the issue of the right to compensation has not drawn much public attention in Austria? And why is it that even in states where compensation rights are minimal, this issue does not engage the courts too often? Part of the answer lies in the role of constitutional judicial review in reducing the extent of injuries to land values through planning decisions.

The Constitutional Court has ruled that the necessity of reducing the amount of land designated for development in official plans is not, on its own, sufficient justification for reclassifying land as "green" and taking away the development rights. However, if the re-classification creates the best possible configuration of land use and developable land, then the planning bodies are authorized to consider it.

The right to equality has been interpreted as further requiring that the selection of plots for reclassification be based on objective criteria, even if the reclassification serves, in principle, to fulfil new and legitimate planning aims that justify revising the land use plan. The Constitutional Court considers the selection of a specific plot to be illegitimate if authorities fail to perform basic research concerning the relevant particular plot. The Court has also found a selection to be unlawful when the compulsory weighing of interests has not been performed in an objective manner.[17]

Because of these rulings, when considering a revision of a land use plan and reclassification to "green" use, the planning bodies cannot overlook the restriction on a landowner's right to development, or the landowner's economic interest. The key concept is "balancing". In a situation where there is no right to compensation, the landowner's economic interest in keeping the classification as "building land," must be weighed against the public interest in the reclassification. Only when the public interest clearly outweighs the individual's interest will the owner of the relevant plot of land be asked to give up the right to have that particular plot classified as building land.

This notion of balancing individual and public interests is applicable to situations where the relevant law does not provide full compensation for the disadvantages that result from planning decisions. Compensation should be seen as a way of balancing interests and securing the right to equality. Compensation compels the public to essentially finance and pay for reclassification, which, on the one hand, fulfils society's general interests, while on the other hand, acknowledges the fact that individual landowners bear the burden of having their development rights severely restricted.

From this argument, one can conclude that the Austrian Constitutional Court's jurisprudence means that governments should seek to balance the economic disadvantages resulting from reclassification. When the law offers either insufficient or no compensation rights, the authority responsible for the reclassification should balance the general public interest in the reclassification against the landowner's interest in retaining the development rights and thus the value of the plot. Thus, the only reclassifications that are legal under the Austrian Constitution are those where the public interest is clearly more significant than the individual interest. Judging the legality of any reclassification requires, at minimum, an analysis of the manner and the degree of the right to compensation. Therefore, governments are not quick to reclassify land and reduce development rights outright. Instead, landowners often negotiate some form of an intermediate solution, and the reclassification occurs with the landowners' consent.

As a result, it is impossible to make a general statement about the constitutional admissibility of the various compensation rules among Austria's states. Rather, the legality of compensation rules have to be examined on a case-by-case basis with a focus on the relevant planning law, its rules about compensation, and the actual amount awarded as compensation. The amount of compensation should cover all "qualifying costs," such as expenses for water

[17] VfSlg 13282/1992.

and electricity. If the awarded compensation is deemed insufficient, the Court may award a higher amount.

Since the mid-1990's, only four cases concerning reclassification have been brought before the Constitutional Court. The Court held three of these reclassifications to be unlawful because the municipal authorities had not done sufficient research and analysis. As for the fourth case, the Court found it to be lawful because the authorities did conduct adequate analysis, and the landowner had received sufficient compensation. Under these conditions, the Court found that the authorities had met the requirement to balance the interests.[18]

An additional explanation for the low number of cases is the uncertainty about the outcomes of judicial review. The Constitutional Court's case-by-case approach lacks predictability in determining whether a reclassification is lawful. This means that a government authority seeking to conducts a reclassification carries considerable risk. Thus, in practice, reclassifications are rarely done without prior negotiations with the relevant landowners, leading to consent.

[18] VfGH 2006/06/23 V 1/06.