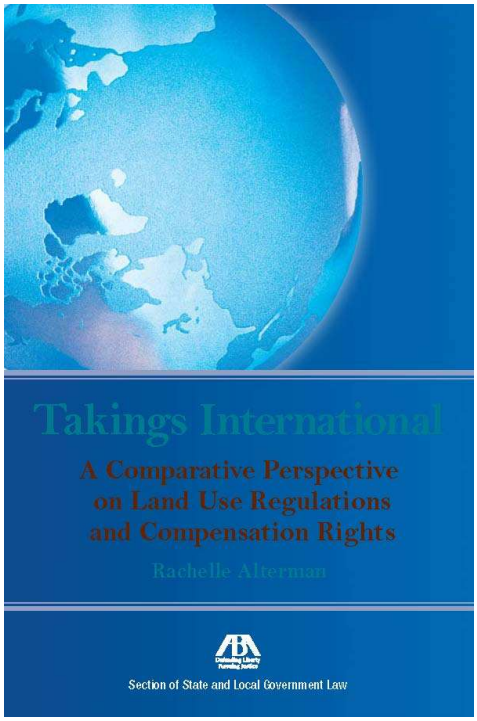


# Takings International

## A Comparative Perspective on Land Use Regulations and Compensation Rights

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**Chapter 8**

**PRE-PUBLICATION VERSION**

# CHAPTER 8

# FRANCE

**French law expresses a strong ideologically objection to compensation rights for regulatory takings except in extreme cases. However, alternative means of mitigation are increasingly being used by planning bodies.**

**VINCENT A. RENARD**[1]

*Editor's note on language: In French, the word "servitudes" refers not only to easement-type restrictions, but also to "regular" land-use and development restrictions called "servitudes d'urbanisme".* [2] *Although the author and I have done our best to distinguish between the terms, this double meaning is confusing and its vestiges may still be found in this chapter.*

Compensation for reduction in property values due to planning decisions is an old question in many countries. This question is deeply rooted in the contents of property rights, the practice of physical planning, and the implementation of other regulations. As opposed to the theory and practice of "takings" developed in the United States, the land-use system in France is built on the opposite principle: no compensation has to be paid for the restriction of development rights resulting from urban regulations.[3]This basic principle of non-compensation was introduced as early as 1935, and debates about town and country planning still refer to it to this day. This principle of non-compensation is also related to the absence of a betterment recoupment tax in

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[2] See for example: http://cfdu.free.fr/rubriques/dos/CompilADS/versements.V21.V40/v21.servitudes.urba.htm**; and** Fernand Bouyssou and Pierre Gallan (1999). "France: La non indemnisation des servitudes d'urbanisme". *Droit et Ville: Revue de l'Institut des Etudes Juridiques de l'urbanisme et de la Construction* No. 48/1999, pp. 113-133.

3. Due to language constraints, we do not always cite full references to the French-language legislation or court decisions. For references and leading discussions of the French land-use system, see JOESPH COMBY & VINCENT RENARD, LES POLITIQUES FONCIÈRES (1996); SYLVAIN PÉRIGNON, LE NOUVEL ORDRE URBANISTIQUE: URBANISME, PROPRIÉTÉ, LIBERTÉS (2004); Vincent Renard, *Droits de construire baladeurs sur le littoral: Le droit de propriété en France au regard de la jurisprudence américaine*, *in* DROITS ET PROPRIETE, ECONOMIE ET ENVIRONNEMENT: LE LITTORAL, 297, 311 (Max Falque & Henri Lamotte eds., Bruylant 2004); Vincent Renard, *Financing Public Facilities in France*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE AND ALTERNATIVE LAND POLICIES 173, 173-181 (Rachelle Alterman ed., New York Univ. Press 1988); BERNARD LAMORLETTE & DOMINIQUE MORENO, CODE DE L' URBANISME (Litec-JurisClasseur 2003).

France. The lack of economic equity resulting from this principle of non-compensation and the resistance it evokes among landowners have led to a few bypasses and some criticism.

This Chapter will describe the origins of the basic principle of non-compensation, the limits of its application, and the various ways in which landowners can receive limited compensation. The Chapter will conclude by commenting on the recent evolution of the European Court of Human Rights' jurisprudence.

## H1 ZONING DURING THE 1930S: THE REVOLT OF LANDOWNERS AGAINST ZONING

The issue of zoning was raised for the first time in France in the early 1930s when the *Préfet* of the Paris Region, M Prost, launched the first master plan of the Paris Region, which has come to be known as *Plan Prost*.

The first zoning plan (*plan d'occupation de sol*) was introduced in 1932, and it attracted strong opposition from several major landowners, who owned large pieces of land in the suburbs. These landowners were accustomed to subdividing in a rather primitive way, which gave rise to the expression *lotissements défectueux*, or "inadequate subdivisions." No specific permit was required at that time.

The very idea of zoning, of limiting or even canceling any development rights on a piece of land, generated strong political opposition that led to the adoption of new legislation. This legislation was a *décret-loi*, meaning that it was an executive decree rather than parliamentary legislation. It stated that no compensation should be paid for restrictions or even for total denials of development rights under the Urban Code (*Code de l' Urbanisme*), a cumulative set of laws and regulations about land use and development. Initially, this legislation was only intended to apply only to the Paris Region.

After World War II, the principle of non-compensation remained in effect. It was extended to the whole country in 1943, being viewed as a necessary measure to assist in the rebuilding of the country torn by war and as a means to overcome the inertia and resistance of landowners. This principle was later codified into French law.

The principle of non-compensation became a pillar of town and country planning in France. It was later codified in article L 160-5 of the Urban Code: "No compensation will be paid for zoning restrictions introduced by the Code, in particular . . . restrictions to land use, development rights, height of buildings, etc." However, the article also articulated two "general exceptions" to the principle of non-compensation: "[A] compensation is due if these restrictions result in a decrease in vested rights (*droits acquis*) or a modification of the previous status of the property rights resulting in a damage which is direct, material and certain."

These two general exceptions have been narrowly interpreted by the courts. However, the economic impact on landowners has been mitigated somewhat by the progressive flexibility in the implementation of zoning coupled with a series of subject-specific exceptions to the principle of non-compensation. We now turn to the exploration of the two general exceptions.

## H1 THE GENERAL EXCEPTIONS TO THE BASIC PRINCIPLE OF NON-COMPENSATION

The first general exception to the principle of non-compensation pertains to "restrictions on vested rights." This exception, however, has been interpreted by the courts in a narrow way. Courts have consistently held that landowners do not have vested rights to develop their land as

long as building permits have not been granted. In principle, a "downzoning" (as Americans may call it) does not constitute a restriction on a vested right, which means that a local plan, the French equivalent to zoning in the United States, does not grant a landowner a vested right to develop. Thus, revision or termination of a local plan does not entail the right to compensation. However, once a building permit is granted, its cancellation stemming from a new regulation is considered a restriction on a vested right and may entail a right to compensation.

In a 1977 decision, the Supreme Administrative Court (*Conseil d'Etat*) expanded the notion of vested rights.[4] In that case, a developer had originally been granted a "subdivision permit," which only authorized him to subdivide and service the land. Afterwards, the area was subjected to some restrictive regulations. The court concluded that a mere subdivision permit did create a vested right, and the developer was compensated for some of the work he had done.

More recently, in 1998, the *Conseil d' Etat* introduced a broader exception in the *Bitouzet* case.[5] The Court stated that compensation is due if the zoning restriction can be considered "abnormal and extraordinary (*special et exorbitant*), out of proportion to the public interest pursued". Although at first glance, this appears to be a major precedent that modifies the principle of non-compensation, this case has not had much impact in practice due to its restrictive language.

Another situation where the courts have recognized compensation rights is when a landowner has suffered *intention dolosive*, or "intentional injury" – for example, when a public authority severely restricts the development rights granted by the local plan and then expropriates the land at a price lower than the market price. Although these types of claims are rarely made in practice; the right to compensation likely deters municipalities from pursing this money-saving idea.

The second general exception to the principle of non-compensation is used more frequently.. It refers to a modification in the status of the property rights. resulting in some direct, material, and certain damage.. However, zoning and rezoning are not regarded by themselves as modifications of the state of the property, the rationale being that a change or revision of a regulation does not modify the character or nature of property. Therefore, the second general exception, too, does not significantly weaken the basic principle of non-compensation.

In summary, the fundamental principle of no compensation for zoning restrictions is paramount. The codified general exceptions to this principle have proven to be relatively insignificant as interpreted by the courts. However, the potential economic hardships to landowners under this principle have been assuaged to a large extent by an increasing flexibility in the application of local planning and by a series of specific exceptions that apply to a variety of practical situations. At the same time, the jurisprudence of the European Court of Human Rights and European Union legislation are progressively evolving and leaning toward greater protection of landowners, as we shall discuss towards the end.

## H1 The Context of a Decentralized Planning System After the 1980s and Its Consequences on the Question of "Windfalls For Wipeouts"

Up to 1980, the planning framework in France was highly centralized. The national government was directly responsible for preparing structure and local plans as well as approving building

4. *Conseil d'Etat [CE] [highest administrative court], Mar. 4, 1977.*
5. Conseil d'Etat Section [CE Sect.] [highest administrative court section] July 3, 1998, Ministère de l' Equipement c/ Bitouzet.

permits. This changed radically with the decentralization of planning powers beginning in 1981, reflecting the international trend toward deregulation. Municipalities became responsible for planning and zoning, as well as approving building permits once local plans were approved. Although the legal format and content of structure plans, local plans, and development rights were essentially unaltered during the period of decentralization, local authorities in practice exercised greater discretion and flexibility. Decentralization has resulted in an increase in the flexibility of zoning.

Municipalities gain flexibility primarily through the use of the "modification" procedure, but also through the occasional use of the "revision" procedure. The modification procedure can be adapted to slight ad hoc changes, such as those for a single lot or development project. It has the advantage of being simpler and quicker than the revision procedure, and it can be used as long as it does not change the "general equilibrium" of the local plan (*l'économie générale du POS*). In contrast to a "revision," which is similar to an initial elaboration of a new plan, the "modification" process generally does not require the involvement of other public bodies, like the neighboring municipalities, in order to prepare the plan.

To a large extent, decentralization has changed the relationship between zoning, land prices, and impact fees. Over the years, the increased flexibility of zoning has gradually spread throughout France. This flexibility has had an impact on land values by bringing zoning decisions closer to market valuations, thereby limiting the claims for compensation. It has opened the way for more negotiations in the development process, including over compensation or over impact fees (which have greatly increased during France's boom cycles). The higher flexibility can, in one sense, be thought of as a compensation mechanism: it grants development rights in a flexible way to mitigate inequities raised by zoning. In fact, negotiations between developers and municipalities can now almost be considered an integral part of the planning and development process

Given that there are over 36,000 French municipalities, decentralization of the planning powers has made it difficult for the State to control local practices. One consequence has been the extent of the financial relationships between developers, builders, and local authorities. In some instances, these relationships have led to corruption, most notably during the boom period from 1985 to 1990.

### H1 An Ambiguous Device: Transfer of Development Rights, the French Way

In spite of what has been said before, the principle of non-compensation at times does create inequities for landowners in France whose land is differently affected by urban regulations. Such inequities posed a particularly thorny problem in the early 1970s with the passage of the Land Use Act (*Loi d'Orientation Foncière*) of December 31, 1967, which added more urban planning and zoning measures that further constrained landowners. The Land Use Act introduced, for the first time, zoning-like land use plans (*Plan d'Occupation des Sols*) for the first time as a general principle with no exemptions.

The controversy surrounding zoning lasted for many years, as landowners sought means for compensation. After a number of abortive attempts, Parliament passed the Urban Development Reform Act (*Loi sur la réforme de l'urbanisme*) of December 31, 1976, which finally made it possible in some zones for development rights to be transferred from a "transmitter" subzone to a "receiver" subzone. In French, this mechanism – akin to American Transfer of Development

Rights - is called *transfert de coefficient d' occupation des sols*. This principle is presently embodied in article L 123-2 of the Urban Development Code:

> In zones to be conserved because of the quality of the landscape . . . land-use plans may determine the conditions under which the development potential determined by the land-use coefficient set for the zone as a whole may, subject to authorization by the administrative authorities, be transferred in order to promote concentration of development on other lots in one or more sectors of the same zone.

The transfer provision has generated a great deal of debate with criticism. The first line of criticism pertains to the language ambiguity regarding the land use designation eligible for TDR. The term "quality of the landscape" seems to refer to conservancy areas in which all development is prohibited, including agricultural uses. Critics question why productive agricultural areas, which often constitute landscape of high quality, should be excluded from the transfer mechanism. Agricultural landowners may be interested to apply for transferable development rights. There is as yet no case law interpreting the terms.

The ambiguous relationship between the transfer provision and zoning has had an adverse impact on the initial attempts to apply the transfer provision in France, the two pioneering examples occurring in Lourmarin (Vaucluse) and La Cadière d' Azur (Var).

Lourmarin was a typically quaint village in the south of France. As country farmers found it more and more difficult to earn a living from agriculture, there was strong pressure for the development of single-family summer houses. This would have quickly led to urban sprawl. A group of new Lourmarin residents attempted to limit further development and maintain their property values by urging governmental authorities to compensate the farmers through the use of TDR. The transfer was unsuccessful, however, due in part to poor timing. Decentralization had not yet been implemented. At this juncture when municipalities could only apply TDR if the national government approved, the transfer mechanism could not be fully developed and refined.

Another attempt at applying TDR took place in La Cadière d' Azur, a village on the French Riviera. In contrast to the land of Lourmarin, most of the land in La Cadière d' Azur consisted of economically viable vineyards. Landowners, who were still engaged in farming, became frustrated by their inability to reap the benefits of the development pressures. They tried to use TDR as a remedy, however their attempt was unsuccessful for the same timing reasons that plagued the residents of Lourmarin. Neither of these cases reached the courts.

A second line of criticism challenges TDR because it is a form of compensation for a restrictive regulation. The critics argue that protecting an area that should be "conserved because of the quality of the landscape" is clearly in the public interest. De facto compensation, it is argued, contradicts the principle that land use regulation is not compensable.

A third line of criticism is grounded in the notion of distributive justice. Critics argue that the equity of TDR depends on the original distribution of land holdings. When land is initially shared in a fairly equitable way among households, the TDR procedure is more or less neutral in terms of distributive justice. However in reality, land ownership is not distributed in an equal manner among households, and under these circumstances, TDR may exacerbate this inequality. The transfer mechanism represents a transfer of a benefit from the community as a whole, which is the legitimate beneficiary of any value added by urban development, to a particular subgroup represented by the landowners in the zone concerned. This argument is primarily philosophical in nature and difficult to articulate as a legal argument. Thus far, no case that has reached the

courts has used this argument, but in practice this third criticism has made acceptance of TDR problematic.

At present, TDR has been minimally used as a substitute for compensation. The continuing robustness of the principle of non-compensation and the legal complexity of the transfer mechanism entails a high risk of litigation for a would-be transferor. We now move on to explore other avenues to compensation.

### H1 COMPENSATION THROUGH THE INVERSE CONDEMNATION PRINCIPLE

A landowner whose property suffers a large decline in value due to a zoning decision may be able to impose on the responsible government authority an obligation to buy the property under the principle of inverse condemnation (*droit de délaissement*). In France, this practice is widely used for several types of regulations.

One of its most important applications pertains to local plans that classify pieces of land as "reserved areas" (*emplacement réservé*). Reserved areas are slated for zoning for some future public use like a road, highway, public park, or some other form of infrastructure.

As soon as a local plan is approved, the landowner of a reserved area has the right to ask the municipality to buy the land. The municipality then has the obligation to propose a purchase price within one year. If there is an agreement on the price, the municipality purchases the property without any problems. However, if the landowner and the municipality disagree on the proposed purchase price, the process is the same as in expropriation. The purchase price must be set at the price the market would have assigned if the land had not been classified as "reserved."

In practice, this instrument has two positive benefits. First, it acts as a compensation measure in a situation where a landowner does not know how long it will take before expropriation occurs. Second, it deters municipalities from abusing the "reserved area" designation because it requires authorities to take into account the possible cost of compensating landowners.

The same regulation applies where a plot of land is included in a municipality-created *zone d' aménagement concerté* ("ZAC"). A ZAC is a type of planned unit development in which a municipality decides to delineate and develop an area of land. In addition, the municipality decides who will be the developer, whether public, private, or mixed. The decision to create a ZAC automatically grants municipalities the authority to expropriate the land if it is needed.

Usually, a ZAC is created on an area that is already the property of the municipality or the future developer. However it is possible to have privately-owned land included in a ZAC. When this happens, private landowners come under the threat of an expropriation. There is no ceiling to the length of time when ZAC may apply and thereby freeze development rights. Given this situation, the mechanism of inverse condemnation becomes an important way of compensating landowners.

Under specific circumstances, a similar mechanism applies to rural areas that have steep, mountainous topography. For example, when the national government delineates a national park so that it includes private land, the landowner may require the national governmental agency in charge of the national park to purchase the land. In order for this right to apply, the landowner must "have lost, as a result of zoning in the central area of a national park, more than fifty percent of the 'total income from the land that he was [previously] obtaining.'"

The right of inverse condemnation applies also in the general cases that the English call "injurious affection". There is a general principle in expropriation law, whereby some additional compensation is due beyond the value of the parcel of land directly expropriated, if the use of the expropriated part of the land negatively affects the ability to exploit a farm. Under the generic expression "*réquisition d' emprise totale*," in such a case, the landowner can require that the expropriating body buy not only the required land, but also the entire property.

## H1 Some Specific Compensation Devices

Additional compensation devices apply to certain types of areas, such as mountain and coastal areas as well as certain types of servitudes, such as nuisance resulting from dangerous factories and electric power lines.

A representative example is forest land. [6] It should be noted that the regulations concerning woods and forests are quite old and strict and are subject to the general principle of protection, except under specific conditions. The law grants landowners compensation rights when their private lands are designated "protected wood or forest" (*espace boisé classé*) areas. In 1967 Parliament passed legislation that strengthened the protection of wooden areas by introducing a new and even more restrictive category of "listed wood area." At the same time, Parliament introduced a form of compensation that acted through an exchange mechanism: the landowner could ask a municipality to "declassify" up to ten percent of the protected area in exchange for giving the rest of the land to the municipality free of charge. The law then specified that the "betterment," the additional value arising from the development rights granted to the ten percent area retained by the landowner, must not exceed the market value of the land given to the municipality. Alternatively, the municipality or any other level of government can grant the landowner a piece of municipal land to be developed in exchange for the initial wooded area, subject to the same financial condition.

This mechanism has not been used extensively, but it has helped to make the highly restrictive nature of the regulations concerning woods and forests more palpable to landowners. Some cases of declassification according to the ten percent rule have been the subject of disputes, particularly during the initial years of its application.

Another example of compensation occurs when the French national electric corporation, *Electricité de France*, creates servitudes over lands that have high tension electric power lines hanging from above. A special agreement signed by Electricité de France and the Ministry of Ecology and Sustainable Development authorizes the company to compensate landowners who are injured by such power lines. This agreement has been so widely used in practice that a phenomenon has arisen where "compensation hunters," landowners who are probably encouraged by lawyers, anticipate compensation opportunities and eagerly submit compensation claims. This behavior can be observed in other situations.

A landowner also has compensation rights when land near a dangerous factory is classified as a dangerous zone. This compensation right is grounded in European Union legislation in 2003 and is called a "*Seveso directive*," or a special servitude. In France, the application of *Seveso directive* means that an area surrounding the dangerous factory must be delineated, and all

6. This is a special device that was introduced by the Land Use Law (*Loi d' orientation foncière*) of December 31, 1967.

development is prohibited. The government authorities are obligated to compensate the landowners. The *Seveso directive* requires that the industrial corporation, the municipality, and the national government reach an agreement about the possibility of using expropriation or inverse condemnation. In reality, rather than compensating landowners, the industrial corporations concerned usually prefer to buy the land from the landowners.

The same principle applies to protected perimeters around water catchments. In coastal areas, landowners may be required to guarantee a right of way to pedestrians along the coast. This type of servitude gives rise to a right of compensation.

The general procedure is the same in all these cases: the governmental authority responsible for imposing the servitude draws up an agreement with the landowner. If there is disagreement, the two sides go to court and then follow the procedure used in cases of expropriation.

As a whole, it appears that the restrictiveness of the principle of non-compensation stated in article L 160-5 is balanced to a large extent by the emergence of specific compensation devices used for specific situations. This process has been reinforced by the evolution of the jurisprudence of the European Court of Human Rights.

## VII. EVOLUTION OF EUROPEAN JURISPRUDENCE

Since the mid-1990s, the jurisprudence of the European Court of Human Rights with regards to compensation rights has evolved as the Court has applied the "right to the protection of property" (in French: *droit au respect des biens*) found in the First Protocol of the European Convention on Human Rights.[7] France must see to it that its domestic laws comply with the Convention and the Court's interpretation of the Convention's provisions. Thus far, the general tendency of the European Court of Human Rights is to expand compensation rights.

The French Supreme Administrative Court, the *Conseil d' Etat*, has held several times that the French principle of non-compensation is compatible with the European Convention of Human Rights. However, in the *Bitouzet* case,[8] the French Supreme Administrative Court held that a new exception to the principle of non-compensation should be introduced in France: compensation is due when a servitude or zoning result in a "special and extraordinary burden that is disproportionate to the public interest sought by the regulation" (*une charge spéciale et exorbitante, hors de proportion avec l' intérêt general poursuivi*). The language of the decision indicates that that the Court wanted to avoid making a substantial modification to the principle of non-compensation.

Some lawyers argue that today there is a growing discrepancy between the French principle of non-compensation and the principle of property rights embedded in European law. However as the chapter has shown, French practice and jurisprudence are gradually contributing to the reduction of this gap.

7. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

8. Conseil d'Etat Section [CE Sect.] [highest administrative court section] July 3, 1998, Minist&re de **P'** Equipement c/ Bitouzet.