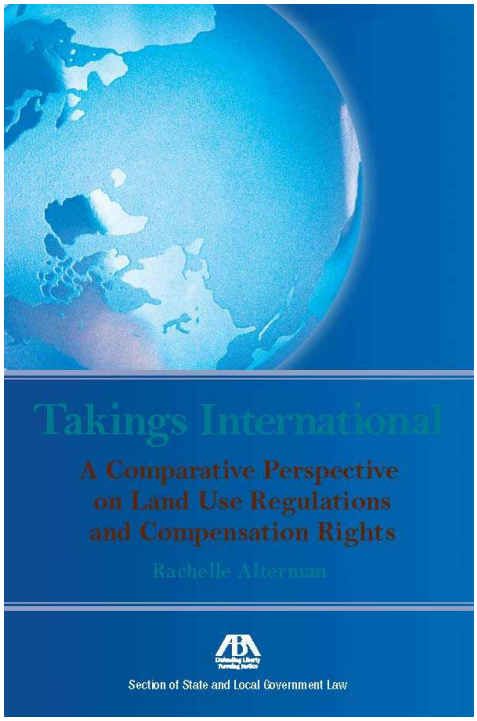

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 15

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CHAPTER 15

SWEDEN[1]

Until 1987 Swedish law did not grant compensation rights for regulatory takings. The new planning law introduced clear rules for compensation rights, including for "partial takings" even of small magnitudes, within a pre-set time limit. Injuries to adjacent plots are compensable through an environmental law. The balance created is publicly accepted.

THOMAS KALBRO[2]

In Sweden, at least twenty enactments separately address restrictions on land use in various situations; some relate to the compulsory purchase of land while others deal with regulation.[3] This Chapter focuses on rules of compensation for reduction in property values due to planning regulations. Landowners in Sweden do have rights to compensation in some cases of which Americans would call "downzoning" as well as some other types of planning decisions. In some legal situations, these rights are extensive; in other situations, they are limited or absent. This paper distinguishes among the various types of legal grounds for compensation and the rules that apply to each.

H1 THE CONSTITUTIONAL CONTEXT

Section 18 of the Swedish Constitution (1974) sets forth the basic terms of compulsory purchase and restrictions on land use, protecting citizens from arbitrary land seizures and guaranteeing compensation, in some situations, for land use restrictions. Section 18 states[4]:

> The property of every citizen is protected in such a way that no one may be compelled, by means of compulsory purchase or any other such disposition, to surrender his property to the public administration or to any private person, or to tolerate restriction by the public

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1. This chapter is based extensively on EIJE SJÖDIN, THOMAS KALBRO, PETER EKBÄCK & LEIF NORELL, MARKÅTKOMST OCH ERSÄTTNING [COMPULSORY PURCHASE AND COMPENSATION] (Norstedts Juridik, 2002).

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3. *See, e.g.*, Expropriationslagen [Expropriation Act] (Swed.); Fastighetsbildningslagen [FBL] [Real Property Formation Act] (Swed.); Ledningsrättslagen [Utility Easements Act] (Swed.); Anläggningslagen [Joint Facilities Act] (Swed.); Väglagen [Roads Act] (Swed.); Lagen om byggande av järnväg [Railway Construction Act] (Swed.); Kulturminneslagen [Cultural Monuments Act] (Swed.); Plan- och bygglagen [PBL] [Planning and Building Act] (Swed.); Miljöbalken [MB] [Environmental Code] (Swed.).

4.Regeringsformen [RF] [Constitution] 2:18 (Swed.).

> administration of the use of land or buildings, other than when necessary to satisfy urgent public interests.
> Any person who is compelled to surrender property by means of compulsory purchase or other such disposition shall be guaranteed compensation for his loss. Such compensation shall also be guaranteed to any person whose use of land or buildings is restricted by the public administration in such a way that ongoing land use in the affected part of the property is substantially impaired or injury results which is significant in relation to the value of that part of the property concerned. Compensation shall be determined according to principles laid down in law.

This section of the Swedish Constitution complies with the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, in Article 1 of Protocol 1 sets forth the fundamental right to property: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law."[5] Swedish law was, in the past, declared as violating Article 1 Protocol 1. In the famous Sporrong and Lönnroth v. Sweden[6] decided in 1982, plots of land in Stockholm were under an expropriation order for 23 and 10 years, respectively, but the titles were not taken away and compensation not paid. These government actions were ruled to be in violation of the European Convention on Human Rights. This decision triggered some changes in legislation, to be discussed later.

Some general principles relating to compensation rights will be outlined in the following section. The paper will then focus in greater detail on the rules of compensation in connection with a planning decision.

H1 THE BASICS OF COMPENSATION RIGHTS

In matters of compensation, Swedish law distinguishes between three basic situations:
(A) Surrender of the ownership of land (expropriation) or the transfer of partial property rights, such as through an easement.
(B) Regulations or restrictions on current land use.
(C) Injury caused to a property by the use of an adjacent property, such as environmental disturbances.

H2. Compensation Principles in Case of Expropriation

Sweden's Expropriation Act lays down the main principles of compensation for surrender of land (a related American term is eminent domain)[7] The basic theory of compensation is that a

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[5] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 1, Mar. 20, 1952, Europ. T.S. No. 9, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/009.htm

[6] 7151/75;7152/75 [1982] ECHR 5 (23 September 1982).

7. 4 ch. Expropriationslagen (Svensk författningssamling [SFS] 1972:719) (Swed.). Special rules of compensation are also laid out in the Real Property Formation Act, referring to "private compulsory purchase,"

property owner forced to surrender land must be assured the same economic position as if the compulsory purchase had never happened. Thus, property owners will be compensated for the damage they suffer. Compensation for surrender of land is thus based on the principle of indemnification.

The main rule is for the compensation to correspond to the property's market value. If only part of the property is affected, the compensation must equal the resulting loss of market value due to the compulsory purchase,[8] with two exceptions. First, the effects of the compulsory purchase itself on the market value of the property – whether positive or negative - are to be disregarded. The value of the property should be assessed as though the compulsory purchase had never happened. However, if only a part of a property is purchased, compensation may nevertheless be given for any "injurious effect" resulting from the purchase. Second, the economic value of future changes in land-use - "expectation values" - need be compensated only if they accrued ten years at most before the application for the compulsory purchase permit was filed.[9]

H2 . Compensation Principles for Restrictions on Land-Use

Somewhat different rules apply to damage occurring without any surrender of land, such as a result of planning decisions. The basic principle is that only encroachment on the current land-use is taken into account.[10] Compensation is calculated on the basis of the difference in market value of the property before and after the detrimental decision or action (in some cases, less than full compensation needs to be paid).[11] No compensation is payable for loss of "expectation value".

In most cases, the decisions of planning authorities do not generate claims of compensation. It is assumed that planning authorities, when making planning decisions, will balance public and private interests and will take into consideration the damage to a property and the effects on the property's value.[12] A plan may not be adopted or a building permit may be refused if the balance between public and private interests shows that the plan or building permit would cause greater detriment to property owners than their expected contribution to the public interest.

Several cases from the Supreme Administrative Court (the court of last resort for planning questions) demonstrate how this balancing can play out. The Court has repeatedly ascribed crucial importance to private interests. For example, a proposed detailed development plan was voided because its implementation required the demolition of housing (M 91/3343/9). In another case, the Court struck down a planning decision where the new detailed development

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which requires profit-sharing between buyer and seller, i.e., a higher rate of compensation. However, those rules will not be dealt with in this paper.

8. If this compensation does not fully cover the economic injury to the property owner, compensation shall also be paid for what is termed "other damage," for example, when a property owner has to relocate or close down a business conducted on the property. 4 ch. 1 § Expropriationslagen (SFS 1972:719) (Swed.).

9. On occasion, however, the compulsory purchase involves land affected by a detailed development plan. In such cases, the cut-off point may not precede the date on which the plan became legally binding. 4 ch. 3 § Exproriationslagen.

10. This is also the case with restrictions in order to preserve land-use according to the Environmental Code. An in-depth discussion of the Environmental Code is outside the scope of this paper.

11. Plan- och bygglagen [PBL] [Planning and Building Act] 14:10 (Swed.).

12. Plan- och bygglagen [PBL] [Planning and Building Act] 1:5 (Swed.).

plan increased the noise level and entailed heavier traffic (M 93/3008/9). Similarly, a detailed development plan relating to a new industrial estate was found by the Court to be potentially detrimental to the residential environment on nearby properties (M 93/3013/9).

Before 1987, planning and building legislation[13] afforded no formal procedure for compensating landowners for injurious planning decisions.[14] However, rules were introduced as part of a 1987 reform that entitled property owners to compensation in certain cases. The reform was influenced, in part, by the Swedish case brought before the European Court of Human Right, as noted above. Following the discussion of the basic principles, the bulk of this chapter will be devoted to the 1987 rules regarding compensation for planning decisions.

H2. Compensation for "Environmental Injuries" Caused by the Use of an Adjacent Property

Properties can suffer damage due to planning decisions even when it does not come directly under compulsory purchase or land use restrictions. For example, roads, railways, utilities, and industrial activity in the vicinity can create noise, air pollution, vibrations, and loss of aesthetic value, which can cause its market value to decline.

Damage to adjacent property must be primarily taken into account as part of the balance between public and private interests. In certain cases, however, a property suffers a depreciation of such magnitude that compensation must be paid to the landowner. In these extreme situations, property owners can obtain compensation directly from the party that caused the injury under the Environmental Code.

For compensation to be payable, certain criteria have to be met. First, the effect on the market value must be of some significance (a trivial effect does not qualify for compensation). Second, the right to compensation arises only if the new land use or density is "*not a common occurrence"* that could be anticipated either in that particular locality or in general.[15] For example, if a new highway cuts through a residential area.

In cases where an adjacent property was expropriated, the effects of the compulsory purchase on the market value of the property are to be disregarded. This leads to equal treatment of property owners in the case of, say, the construction of a motorway, where environmental damages may be regarded as "uncommon". Property owners whose land is acquired by compulsory purchase are compensated for the part of the loss of value due to environmental damages as part of the compulsory purchase. Other property owners whose land has suffered the same damage, but whose land was not expropriated, may receive compensation for "environmental injury" under the Environmental Code

If these criteria are satisfied, compensation for environmental damages to adjacent properties must be paid. However, compensation is not paid for the entire damage. Property owners are obliged to accept a certain amount of damage themselves—case law shows *deductions of two to five percent* of the value of the property, depending on the situation.

To summarize, in cases where adjacent land-use causes damage, property owners are entitled to compensation, but the condition is that the disruptions are not typical of what may be

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13. 4 § Byggnadslagen (SFS 1947:385).

14. *See generally* GÖRAN ALMGREN, PLANSKADEPROBLEMET [THE PROBLEM OF INJURIOUS PLANNING DECISIONS] (1979).

15. Miljöbalken [Environmental Code] ch. 32: 1 (SFS 1998:808).

expected in that type of area. The most common environmental injuries brought before the courts concern major traffic arteries, railways, high voltage electrical power lines, and airports – land uses that cause noise or are unsightly. On the other hand, a new housing development that increases local traffic is normally considered to be a "common occurrence," so property owners must simply put up with it.

H2 . Compensatoin in cases of "Exceptional Injury"to the remainder of property

Another legal ground for compensation pertains to situation known in some countries as "injurious affection." In extreme cases, the compulsory purchase of only a part of a property, restrictions on land-use, and environmental injury can make it difficult for the remainder of the property to be used in the same way as before. To compensate property owners in such situations, several enactments contain provisions entitling the property owner to demand compulsory purchase of the entire property.[16] This entitlement is conditional on the property suffering such a loss of value that it can be characterized as "exceptional detriment."

"Exceptional injury" can mean a substantial decline in the value of the property, or, at times, the necessity to put the property to a different use.[17] An example is where a property owner is forced by disruptive noise to convert residential use to office use.

H1 INTRODUCTION TO THE SWEDISH PLANNING AND PERMIT SYSTEM

Before turning to a more in-depth discussion of compensation rights in cases of depreciation due to planning decisions, this section will provide a brief introduction to the framework of the Swedish planning system. The present legislation on planning and permits, the Planning and Building Act, came into force in 1987. That law decentralized most planning powers to the municipal level - except for subjects of national interest.[18]

The planning and permit system laid down by the Act can be summarized as follows.[19] First, the regional plan (*regionplan*) can be used for inter-municipal planning

16. *See, e.g.*, Expropriationslagen [Expropriation Act] (Swed.); Plan- och bygglagen [PBL] [Planning and Building Act] 14:5 (Swed.); Miljöbalken [MB] [Environmental Code] Part 7:11 (Swed.).

17. Lantmäteriets rättsfallsregister [National Land Survey record of court decisions] [Court of Appeals, Svea] 1987-06-10 ref 87:10 (HovR Swed.).

18. The county administrative board is authorized to "review" municipal decisions concerning detailed development plans and building permits if the plan or permit (1) does not satisfy a national interest; (2) regulates matters of the use of land and water areas affecting more than one municipality in a way that does not provide adequate coordination; (3) does not observe an environmental quality standard; or (4) leads to a built environment that is unsuitable with regard to the health of residents or accident prevention. Plan- och bygglagen [PBL] [Planning and Building Act] 12:1 (Swed.). In these cases, the government may direct the municipality to adopt, amend, or annul a detailed development plan (by issuing an injunction) within a specified time. Plan- och bygglagen [PBL] [Planning and Building Act] 12:6 (Swed.).

19. There are also two other types of plans, but these have no bearing on a description of the principles of compensation. Area regulations (*områdesbestämmelser*) can be used in limited zones which are not covered by a plan in order to legally secure the comprehensive plan or national interests. Plan- och bygglagen [PBL] [Planning and Building Act] 5:6 (Swed.).

The Property Regulation Plan (*fastighetsplanen*) may legally delineate property boundaries, easements, and joint facilities (*gemensamhetsanläggningar*) in areas covered by a detailed development plans. *Id.* 6:3.

coordination. This type of plan is not mandatory, and only a few have actually been drawn up. Second, the comprehensive plan (*översiktsplan*), covering the whole area of the municipality concerned, indicates the main outline for the use of land and water, development and infrastructure. This plan is merely advisory in relation to subsequent planning and decision-making. Third, detailed development plans (*detaljplan*) that are binding for subsequent permits. Fourth, development permits granted on the basis of these plans.

Under this system, property owners can qualify for compensation only as a result of decisions concerning detailed development plans and building permits. Depreciation of value due to the higher-level plans is not compensable.

H2 . The Detailed Development Plan

Nearly all major development projects require an approved detailed development plan. Detailed plans set the rules for land use regarding (1) public open spaces, such as streets, squares and parks; (2) Areas where development is to be allowed, and (3) water areas, such as yachting marinas and open-air baths.[20] Detailed plans may also define the intensity, location, design, and construction of housing areas. These plans may also set prohibitions on demolition and other provisions to protect historical, cultural, or environmental objectives.[21] In the latter cases, the property owner may be entitled to compensation.

A detailed development plan, then, allows for far-reaching regulation of land-use and development, but the extent of regulation is subject to a number of important restrictions. First, when preparing the plan, a municipality must always consider both public and private interests.[22] Second, the designers of a detailed development plan must give reasonable consideration to existing buildings and property rights.[23] Third, the plan shall not be more detailed than is required with "regard to its purpose."[24]

Detailed development plans are "implementation-oriented" and are normally drawn up in response to a development initiative. A detailed development plan must have an "implementation period" (*genomförandetid*) lasting between five to fifteen years within which the plan is intended to be implemented.[25] This implementation time is crucial to the property owner's entitlement to compensation, as we shall shortly see.

A detailed development plan gives the municipality the right to acquire land for public open spaces of which the municipality is in charge,[26] as well as sites for public buildings, such as schools.[27] The Act states: "The municipality is obliged to acquire areas within a detailed development plan meant for public spaces where the municipality is in charge or meant for other

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20. *Id.* 5:3.
21 *Id*. 5:7.
22 *Id*. 1:5.
23 *Id*. 5:2.
24 *Id*. 5:7.
25 *Id*. 5:5.
26. The plan shall indicate who is to be responsible for public spaces, which normally is a municipal responsibility. Plan- och bygglagen [PBL] [Planning and Building Act] (Swed.). However, vacation homes, roads, and green areas can be "joint facilities" managed by joint property associations according the Joint Property Management Act. In these cases, the association has the right to acquire land for public spaces in the plan. 12 § Anläggningslagen [Joint Facility Act] (Swed.).
27. Plan- och bygglagen [PBL] [Planning and Building Act] 6:17 (Swed.).

purposes than private development, if the real estate owner so demands." [28]

H2 . Permits

The Planning and Building Act contains rules on three kinds of permits: building permits,[29] demolition permits, and site improvement permits.[30] Compensation claims may in some cases arise if the municipality refuse to grant a permit application, as will be further explained later.[31]

The Act expressly enumerates the measures for which a building permit is required. Sweden's regulatory system is quite complicated, but the general rules are as follows. A building permit is needed in order to (1) erect a building, (2) make extensions to a building, (3) use or adapt buildings either wholly or partly for a purpose essentially incompatible with the building's previous purpose, or (4) make alterations to buildings, thereby providing additional dwellings or additional premises for retail, handicraft or industry.[32]

In addition, a detailed development plan may require a building permit for repainting buildings, replacing a face or roofing material, or making other alterations to buildings that "essentially change their external appearance."[33] In areas covered by detailed development plans, if a building permit was initially required for the erection of the building, a demolition permit would also be required.[34] Site Improvement Permits are required where excavation and filling would cause a substantial change in a site's height level, unless the measures comply with the plan or a granted building permit. The municipality may decide in a detailed development plan that a site improvement permit would also be required for felling or planting trees.[35]

Finally, construction, demolition, and site improvement permits will cease to be valid if the work has not started within two years and been completed within five years of the date on which the permit was granted.[36]

H1 . AN OVERVIEW OF THE VARIOUS SITUATIONS THAT MAY ENVOKE COMPNESAITON RIGHTS AND THE DIFFERENCES AMONG THEM

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28. Plan- och bygglagen [PBL] [Planning and Building Act] 14:1 (Swed.). This obligation could also apply to public services that may have remained in private ownership. The same obligation is incurred by joint property associations responsible for the maintenance of the public space. *Id.*

29. Anyone intending to apply for building permission can begin by applying for "tentative approval" (*förhandsbesked*). Plan- och bygglagen [PBL] [Planning and Building Act] 8:34 (Swed.). The tentative approval procedure serves to examine whether the intended development may be permitted, using a simpler procedure than a building permit. Tentative approval is binding for two years where processing of a building permit application is concerned. *Id.*

30. *Id.* 8:8, 8:9.

31 *Id.* 8:1.

32. Plan- och bygglagen [PBL] [Planning and Building Act] 8:1 (Swed.).

33. *Id.* 8:3.

34 Plan- och bygglagen [PBL] [Planning and Building Act] 8:8 (Swed.). There are exceptions to this rule, due to the fact that the municipality, through a detailed development plan, can relax the obligation to apply for a building permit for some kinds of buildings. In this case the municipality may, however, decide that a demolition permit shall be required for such buildings. *Id.*

35. *Id.* 8:9.

36. Plan- och bygglagen [PBL] [Planning and Building Act] 8:33 (Swed.).

The Swedish Planning and Building Act sets out several situations in which landowners do have compensation rights for depreciation in property values due to planning decisions. The law is rather complex, distinguishing among several different legal routes and factual contexts. The rules regarding the right to compensation are different from situation to situation. Different criteria may apply - both substantive and numerical.

To help the readers follow these somewhat confusing rules, we summarized the different rules in Table 1. There, we highlight the similarities and differences among the various compensable situations. The left row of the table distinguishes between the types of ground for compensation - approval or amendment of detailed plans, refusal to grant a permit, or "environmental damages" where land use decisions may affect adjacent properties. The second row in the table denotes whether there is a "qualifying threshold" – whether substantive or quantitative – for the right to compensation. The third row indicates whether, once the threshold has been exceeded and compensation is due, the sum to be paid is full, or is the threshold level to be deducted. This latter topic was discussed above and will not be discussed in greater detail.

In the parts to follow, the paper first discusses compensation rights in situations where approval or amendment of a detailed development plan reduces property rights or "downzones", then turns to situations where a building permit is refused. The latter part of the paper discusses claim procedure.

H1 .COMPENSATION RIGHTS RELATED TO THE ADOPTION, AMENDMENT, OR ANNULMENT OF DETAILED DEVELOPMENT PLANS

Swedish law distinguishes between three types of situations when a municipal detailed development planning decision can entitle a property owner to compensation: (1) adoption of a new detailed development plan where none existed earlier (in three specific situations only, noted below); (2) amendment or repeal of a plan during the "implementation period"; and (3) amendment or repeal of a plan after the implementation period.

H2 . Adoption of a New Plan

When a new plan is adopted where none existed before, there are only three types of regulations that may give rise to compensation rights: protective regulations for valuable buildings; prohibition of demolition; and special regulations regarding road access for reasons of traffic safety. All three refer to existing buildings. (These same rights also hold where a plan is amended – but in that case there are other rights as well, to be discussed later.)

H3 . Protection of valuable buildings or areas

Swedish law provides several instruments to ensure that buildings or built-up areas that are especially valuable from a historical, cultural, environmental, or design perspective, would be protected. [37] Buildings in this category can be the subject to “protective provisions” included in detailed development plans.[38] Such provisions may, for example, contain special regulations concerning maintenance (provisions regarding demolitions are discussed below). If protective

37. Plan- och bygglagen [PBL] [Planning and Building Act] 3:12 (Swed.).
38. *Id.* 5:7.

provisions result in the depreciation of a property's value, then in principle, the property owner is entitled to compensation. For compensation to be payable, however, the damage must be beyond a certain qualifying level. The right to compensation requires "the current land use in the affected part of the property [to be] *substantially impaired*."[39]

Table 1: Types of decisions leading to compensation rights and threshold levels

[39] *Id*. 14:8.

Type of decisions as grounds for compensation	"Qualification threshold" for compensation	Full compensation or deductable threshold
Provisions in a Detailed Development Plan		
Protective provisions for valuable buildings	Current land use is "substantially impaired" - threshold varies	Full compensation
Demolition prohibition for protected buildings	"Significant injury" - 15% +	exceeding the threshold
Order to alter access ways to public areas	None	Full compensation
Change in designated public open space	None	Full compensation
plan amendment during the implementation period	None	Full compensation
Plan amendment after the implementation period		No compensation
Refusal to grant a permit		
To replace a building accidentally destroyed	None	Full compensation
To replace a demolished building	"Significant injury" - 15%+	exceeding the threshold
To demolish a building	"Significant injury" - 15%+	exceeding the threshold
Site improvement permit	Current land use is "substantially impaired" - 10%+	Full compensation
"Environmental Damages" to adjacent properties		
Various planning decisions	"not a common occurrence" above 2-5%+	Exceeding the threshold

However, according to the history of the legislation, the property owners need only *tolerate a small level of depreciation*. It is not possible, to specify the floor value in percentage terms. If the value of the injured property is low, the minimal injury that the owner must tolerate can be as high as *ten percent* of the total depreciation; on the other hand, if the property's value

is high, the floor value may be lower in percentage terms because in absolute numbers, such an injury cannot be regarded as trivial. Thus, a precondition for the right to claim compensation is that injury exceeding the minimal floor amount. This minimal floor is not deducted from the amount of compensation so that, where compensation rights are recognized, compensation corresponds to the entire injury.

An example: An adopted detailed plan sets protective provisions for a building of historical significance. The protective provisions require that only specific materials be used for the roof and the façades. The cost of future investments and maintenance is estimated at 120,000 SEK. If the value of the property is 1,000,000 SEK, the injury is twelve percent of that value. Thus compensation will amount to 120,000 SEK.

H3 . Demolition Prohibition for Protected Buildings

A detailed development plan may contain demolition prohibitions, but only for buildings subject to historic preservation.[40] A demolition prohibition can cause economic damage for the property owner, who is compelled to accept a less profitable investment option, such as being forced to repair or rebuild a building instead of pulling it down and constructing a new one of essentially the same size and design. A right to compensation exists if this damage is "*significant* in relation to the value of that part of the property concerned," which is interpreted to mean damage in the order of *fifteen percent.*[41] In this case, compensation is only paid for injuries exceeding this fifteen percent threshold.

An example: Suppose that the value of a property would be 400,000 SEK if the existing building were demolished and replaced with a new one of the same magniture. If the building may not be demolished, the rehabilitation cost for the existing building will exceed the cost of a new building by 200,000 SEK. The damage will thus be 200,000 SEK. The 200,000 SEK damage amounts to fifty percent of the value of the property with demolition permitted. Therefore, the property owner is entitled to compensation. The compensation payable will be 200,000 SEK less 60,000 SEK (fifteen percent of 400,000 SEK), or 140,000 SEK.

H3 . Special Order Regarding Access to a public area (eg. Roads)

A detailed development plan may stipulate that an existing access to some a public area (such as a street) must be altered or closed off before a building permit can be granted. This condition may be imposed only if the building permit implies a "substantial alteration of the use of the land."[42] Similarly, a detailed development plan may require the property to be fenced off from the street. In these situations, property owners are not entitled to compensation.

This type of obligation does not, however, apply to properties that are already built up and for which no building permit is needed. Property owners in this situation retain their rights to the existing access. If, for traffic safety, the Municipal Building Committee finds that it must issue an order to the property owner to erect a fence or change the location of a driveway,[43] the

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40. *Id.* The only way to protect other buildings that ought to be preserved is by direct adjudication of the demolition issue in connection with a demolition permit application.

41. Plan- och bygglagen [PBL] [Planning and Building Act] 14:8 (Swed.). The level of this compensation limit has not been specified more exactly in the legislation. Judicial interpretation of the Act's legislative history has determined that the limit falls between ten and twenty percent of the value.

42. *Id*. 5:8.

43. *Id.* 10:17. The Building Committee may also direct an injunction to the owner to remove buildings, if the buildings can be moved without difficulty or are of little value. *Id.*

property owner is entitled to compensation from the municipality. [44] Compensation is payable for the full amount by which the order reduces the market value of the property. Often, the amount of depreciation can be determined on the basis of the cost of rectifying the damage. Any benefit accruing from the measure taken shall be deducted from the assessed damage—thus, only the net damage is compensable.

H2 . Compensation rights when a plan is amended or repealed during the Implementation Period

As noted, detailed development plans must indicate their "implementation period". This should be between five and fifteen years. During this period, a property owner who submits a request for a building permit that is in accordance with the plan can expect to receive the permit. If for some reason the municipality amends the plan, there are rights to compensation. [45] In practice, plan amendments during the implementation period are quite rare.

In cases where a detailed development plan is amended during the implementation period and the development rights are reduced ("downzoning") before they were implemented, the property owner is entitled to full compensation for the reduction of property value due to this amendment.[46]

Compensation is also paid when a public area designated in a plan is altered or eliminated during the implementation period, causing the value of an adjacent property to depreciate. One example is when a designation for a park is converted into development, and as a result, the value of an adjoining property is reduced.

In such cases, there is a right to compensation for the *full* reduction in the property's market value to cover the difference between the value of the property under the original detailed plan and its value under the amended (or repealed) plan.[47] There is no threshold and the landowners are not expected to absorb any proportion of the injury. The landowner is also entitled to compensation to cover expenditures that are direct consequences of the plan amendment (charges for connection to streets, water and sewer lines).[48]

H2 . Compensation rights when a plan is amended after the implementation period (re. unbuilt development rights)

The general principle is that once the implementation period has ended, planning bodies may amend or repeal detailed plans without thereby entailing compensation claims. The rationale is that if landowners have not made full use of their development rights within the implementation period, they should not have compensation rights.

The end of the implementation period for the detailed development plan does not mean that the plan ceases to be legally binding. The plan continues to be valid unless it is amended or repealed. In practice, the vast majority of plans remain unaltered after the implementation period.

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44. *Id.* 14:3.

45. *Id.* 5:11.

46. *Id.* 14:5.

47. Plan- och bygglagen [PBL] [Planning and Building Act] 14:4 (Swed.). When calculating damages, however, any "benefit" that the property owner may derive from the planning decision must be taken into consideration. *Id.* 14:10.

48 Clarification in response to a question by Rachelle Alterman (the editor) to the author; Oct. 7 2008

Furthermore: under Swedish planning law, a planning decision cannot prevent a landowner from continuing to use the property in according with the existing land use (in American terminology, one could say that there is no concept of "nonconforming use" and its amortization). If the planning authorities wish to change the permitted land use, they must expropriate the property and pay full compensation. [49]

There are however some situations in which there compensation rights do exist even after the implementation period has expired.

H3 Exceptions when there are compensation rights

Recall the three categories discussed in Section A under the category of "new plans". These included obligations to protect valuable buildings, prevention of demolition permits, and cancellation or alteration of road access. These categories must be mentioned here again because amendments to detailed development plans are regarded as new plans.

H3 Changes in the alignment of Public Streets and Roads

If an amendment to a plan changes a road level, a property owner may have a right to compensation from the agency responsible for maintaining the road even after the implementation period has terminated.[50] Compensation must match the full reduction of the market value of the property (plus any other damages). Often, the change in street level forces the property owner to incur direct expenditures, such as to alter a garage driveway. In cases of this kind, the depreciation in market value can often be determined on the basis of a direct-cost assessment. If the new road connection also results in a rise in market value, such a benefit must be deducted from the amount of payable compensation.

When a street level is changed, this can subject adjoining properties to increased noise or pollution emissions. When the increased nuisance is a direct consequence of the change in street level, this damage too must be fully compensated. But if the increased disruption is instead due to, for example, a change in traffic not directly connected with the altered street level, the environmental damage must be assessed with reference to the provisions of the Environmental Code.

H3. Implications for compensation for land Acquisition

After the implementation period, a municipality is empowered to expropriate land at market value, disregarding the unused development rights. The condition is, however, that the plot has not been developed in substantial conformity with the plan.[51] Municipalities sometimes use this power as a basis to negotiate with landowners to acquire, for example, plots of land for schools or day-care facilities. In these cases, if the property owner has already paid charges or fees for public infrastructure or streets, the municipality is obliged to repay these costs.[52]

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[49] If land-use is “nonconforming,” the municipality has to expropriate the land whenever the municipality wants to change the land-use.

50. *Id.* 14:4. The municipality is normally the body responsible for public infrastructure where changes of this kind are concerned. *Id.* 6:26. In some detailed development plans, the National Roads Authorities or Joint Property Management Associations are responsible for the road maintenance.

51. Plan- och bygglagen [PBL] [Planning and Building Act] 6:24 (Swed.).

52. *Id.* 14:7.

H1. Compensation for Refusals to Grant Permits

For an area covered by a detailed development plan, an application for a building permit will be approved only if: (1) the proposed development complies with the plan; (2) current buildings on the property unit (and the property unit itself) comply with the plan; and (3) the proposed development is in accordance with the layout and design specifications.[53] Generally, if an applicatin coplies with these requirements, a builidng permit should be issued. In addition, if the proposed development would cause only "minor deviations" from the detailed development plan, the municipality is authorized to issue the permit, despite the minor deviation.[54]

Where an area is not covered by a detailed development plan, applications for building permits will be granted only if the proposed development meets the requirements of location, layout, and design in the Act, and does not require the prior approval of a detailed development plan.[55]

The general rule is that if a request for a building permit does not meet these requirements, compensation will not be payable. However, under some special cases, the right to compensation does exist. These special cases are described below.

H2. Replacement of Demolished Buildings

Usually, requests to rebuild a demolished building are granted. However, there are three situations in which a building permit to replace a demolished or destroyed building may be refused. The first situation occurs when the demolished building was situated in an area that was only covered by a non-binding comprehensive plan and development is no longer considered suitable in that area (for example, in an environmentally sensitive area). The second condition occurs when the building did not conform to the detailed development plan that applies to the area. The third situation occurs when the detailed development plan is amended after the implementation period, and the building will then no longer comply with the new plan.[56]

In all these cases, if a municipality refuses to grant a rebuilding permit, the landowner can claim compensation, provided that the application for the replacement permit was made within five years of the demolition.[57] The damage to be assessed is the reduction in the market value of the property caused by the refusal to grant permission to rebuild. This pertains only to the decline in the value of the land, whereas the value of the demolished building will have to be covered by insurance. The extent of compensation differs, however, depending on the cause of the demolition.

The law makes a distinction between two situations in terms of the cause of demolition:

1. *The building was destroyed accidentally*

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53. *Id.* 8:11.

54 The limits on "minor deviations" are discussed in the legislative history of the legislation. *See* Proposition [Prop.] 1985/86:1 Ny plan- och bygglag [government bill] (Swed.); Proposition [Prop.] 1989/90:37 [Olovlig kontorisering] [government bill] (Swed.). Examples of minor deviations include a building being positioned a meter (approx. 3.3 feet) inside land excluded from building development, or the area or height of the building being exceeded for reasons of structural engineering to achieve a better layout. Generally, the amount of discretion that planning bodies have to authorize "minor deviations" is quite narrow.

55. Plan- och bygglagen [PBL] [Planning and Building Act] 8:12 (Swed.).

56. *Id.* 8:11.

57. *Id.* 14:8.

In cases where a building was destroyed by fire or some other accident, *full compensation* is payable regardless of the magnitude of the damage. There is no threshold level and no sum must be deducted.

2. *The building was purposely demolished*

On the other hand, if the building was demolished by the property owner, compensation will be payable only if the damage is *"significant* in relation to the value of that part of the property concerned." This generally means damage of *fifteen percent* of the value of the property, and compensation is paid only for damage exceeding this threshold.

H2 . Refusal to Grant a Demolition Permit

An application for a demolition permit shall be granted unless the building or a part of the building (1) is covered by a demolition prohibition in a detailed development plan, (2) is required for the housing supply, or (3) ought to be preserved because of the historical, cultural, environmental or aesthetic qualities of the building (or the built environment).[58]

A typical instance where a demolition permit may conceivably be refused occurs when there is a valuable building within a detailed development plan, and the plan is about to be annulled or amended (but a refusal to grant a demolition permit can also refer to buildings outside a detailed development plan). Even if the implementation period has lapsed, there is a right of compensation, founded on the right to reconstruct and building for essentially the same purpose and of essentially the same size. Thus it makes no difference if the current detailed development plan grants additional development rights or for that matter, less extensive rights. However, if a demolition prohibition were adopted during the planning implementation period, and the plan permitted more lucrative land-use than the current building, compensation must be determined with reference to the land-use permitted in the plan.

The rules of compensation for a demolition prohibition and the refusal of a demolition permit are the same. Compensation will be payable if the damage is *significant*. This generally means at least *fifteen percent* of the property value, and compensation is to be paid only for damage *exceeding this threshold*.[59]

H2. Refusal to Grant A Site Improvement Permit

An application for a site improvement permit shall be granted if the proposed measure does not contradict a detailed development plan,[60] will not obstruct the future use of the site for building, and will not disrupt the environment.[61] Similar to compensation in the context of protective provisions in detailed development plans, the right to compensation in this situation applies only if the current land use in the affected part of the property is *"substantially impaired".* This criterion has been interpreted as exceeding a threshold of about *ten percent* of the value. In this case (unlike the previous one), if this threshold is passed, compensation may be paid for the full extent of the damage.

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58. Plan- och bygglagen [PBL] [Planning and Building Act] 8:16 (Swed.).

59. *Id.* 14:8.

60. However, a site improvement permit may be granted for measures involving minor deviations from a detailed development plan, if the deviations are compatible with the purpose of the plan.

61. Plan- och bygglagen [Planning and Building Act] 8:18 (Swed.).

H1 . COMPENSATION CLAIM PROCEDURES AND NEGOTIATED PRACTICES

Procedures regarding compensation claims differ between expropriation cases, claims related to environmental damages, and those pertaining to planning decisions.

The Land Court (*fastighetsdomstolen*) is the court of first instance for deciding claims under the Expropriation Act. The expropriating authority bears procedural costs.[62] However, if the Land Court's decision is appealed to the Court of Appeal (*hovrätten*) or finally to the Supreme Court (*Högsta domstolen*), the losing party bears procedural costs.

Compensation under the Environmental Code presents a somewhat different situation. A party claiming compensation for environmental injury must file proceedings in the Environmental Court (and later in the Appeal Court and the Supreme Court) against the party causing the damage. Here, even in the court of first instance, the losing party must bear costs. This creates a fairly high risk for a property owner suing an opponent.

Let us now focus on procedures regarding planning-related compensation claims. As in expropriation cases, the Land Court decides disputes between municipalities and landowners over compensation, and the authorities bear the procedural costs.[63] Compensation claims must be made within two years of the date when the detailed development plan, or the permit decision, comes into force. However, claims may be made at a later date if the damage could not reasonably have been foreseen within the specified period.[64] The municipality must bear the costs of court proceedings.

In principle, then, it is possible for a property owner to claim compensation two years after a planning decision has been made. This makes it hard for municipalities to estimate the likely economic consequences of planning decisions. To alleviate this problem, before adopting a detailed development plan that imposes protective conditions or demolition prohibitions, a municipality may order property owners who may incur damages to give notice of their compensation claims within two months.[65] This helps to reduce uncertainty before the plan is adopted. A property owner who does not claim compensation at this juncture will have no remedy later on.

Finally, one should note distinctions between the statutory rules of compensation and their practical implementation. One purpose of the compensatory provisions is to lay down rules of conduct for negotiations between "buyer" and "seller" to pave the way to voluntary agreements.[66] In practice, it is extremely uncommon for the parties not to reach an agreement about compensation for both expropriation and planning decisions. For example, in cases where compulsory purchase for highway and railways are concerned, statistics show that agreements

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62. Expropriationslagen [Expropriation Act] 7:1 (Swed.).

63. The Land Court decision can be appealed to the Court of Appeal (*hovrätten*) and finally to the Supreme Court (*Högsta domstolen*).

64. Plan- och bygglagen [PBL] [Planning and Building Act] 15:4 (Swed.).

65. *Id.* 5:28A.

66. Thus, the legislation poses a "negotiation requirement." Expropriationslagen [Expropriation Act] 2:12 (Swed.). Compulsory purchase is not permissible if "the purpose ought suitably to be provided for in another way or the inconvenience entailed by the compulsory purchase from a public and private point of view outweighs the advantages which can be derived from it." *Id*.

are reached in ninety-five percent of the cases.[67]

The compensation level paid out in these "voluntary" agreements is presumably higher than prescribed by law, otherwise selling property owners would not likely enter into such agreements. However, the authorities save on transaction costs. If the authorities fail to reach agreements with property owners, they have to pay the owners' legal and appraisers' fees. Furthermore there are "political costs" or "bad-will costs". The local newspapers may stand up for the "little person" who is fighting the authorities. In most cases (apart from large scale cases such as airport expansion), the external cost exceeds the compensation itself. Thus, it is economically rational for the authorities to pay the property owner an extra bonus. They save money and gain community good will.[68]

Consequently, there are very few Appeal Court and Supreme Court cases. The official statute book commentary and legal synopsis for the Planning and Building Act does not contain a single item of case law precedent for planning-based compensation.[69]

VIII. EVALUATIONCONCLUSION

The Swedish Planning and Building Act sets out various situations in which landowners do have compensation rights for depreciation in property values due to planning decisions. There is no uniformity among the various "qualification thresholds" and no consistency in whether compensation is payable for the entire damage or only for the extent of the damage that exceeds the threshold. The necessity of these differences has been questioned by some commentators.[70] The rules are not altogether clear, which sometimes makes it difficult to implement the law. It is worth mentioning that the Government's final proposal on these different rules of compensation to Parliament in 1986 was unsupported by the outcome of the preceding inquiry in Parliament.[71] The Supreme Court Council on Legislation advocated for a uniform threshold limit that would be set at a moderate level of ten percent.[72]

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[67] *See* Josefine Idbrant & Camilla Klarin, Markförvärv för allmänna vägar: Överens¬kommelser överklaganden [Land Acquisition for National Roads: Agreements and Appeals) (2005) (MSc-thesis, Section of Real Estate Planning and Land Law, Department of Infrastructure, Royal Institute of Technology, Stockholm); Sara Ringbom & Elin Trägårdh, Markförvärv för järnvägar: Överens¬kommelser överklaganden [Land Acquisition for Railroads: Agreements and Appeals] (2005) (MSc-thesis, Section of Real Estate Planning and Land Law, Department of Infrastructure, Royal Institute of Technology, Stockholm); LEIF NORELL, ERSÄTTNING FÖR INTRÅNG PÅ JORDBRUKSFASTIGHETER [COMPULSORY PURCHASE COMPENSATION FOR AGRICULTURAL PROPERTIES] (2001).

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69. LARS UNO DIDÓN, LARS MAGNUSSON, OLLE MILLGÅRD & STEFAN MOLANDER, PLAN- OCH BYGGLAGEN [THE PLANNING AND BUILDING ACT] (1987).

70. GERHARD LARSSON, SAMORDNING AV ERSÄTTNINGSREGLER VID MARKINLÖSEN OCH FASTIGHETSSKADA [COORDINATION OF COMPENSATION RULES] (2003); Report 4:93 from the Section of Real Estate Planning and Land Law, Department of Infrastructure, Royal Institute of Technology, Stockholm (on file with author).

71. Statens Offentliga Utredningar [SOU] 1979:66 Ny plan- och bygglag [government report series] (Swed.). In Sweden, all new major acts must be discussed or commented on in a parliamentary "subcommittee" and the Court Council.

72. Proposition [Prop.] 1985/86:1 Ny plan- och bygglag [government bill] (Swed.). The Council submitted: The Commission (SOU 1979:66 p.575) has found a reasonable balance between public and private interests to be that the individual should, without being entitled to compensation, tolerate economic injury approximately equal to ten per cent of the value of the property, or part of the property, in the event of the kind of encroachment in question. The

Yet, despite its complexity, Swedish law on compensation rights for planning decision has generally proved to be workable. This is reflected by the low level of conflicts over compensation claims, as indicated by the low number (if any) of appeals to the higher courts.

In December 2005, the Government appointed a commission to carry out a general review of the statutory rules of compensation.[73] The commission did not present any significant changes.[74]

Commission argues that minor changes in value can often be hard to prove, yet at the same time the Commission states that its proposal is not intended to imply any change in current practice. The Council for its part finds that a qualification threshold of ten per cent in the injury situations concerned cannot be considered incompatible with what has been considered acceptable in previous legislation and case law. *Id*.

73. Direktiv 2005:147.

[74] One issue that the commission did consider was whether the privatization of infrastructure (electrical power lines and telecommunication networks) legitimate higher compensation..