

THE RIGHT TO COMPENSATION FOR DECLINES IN PROPERTY VALUES DUE TO A PLANNING OR ZONING DECISION IN AUSTRIA

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INTRODUCTION

Under Austrian legislation, land-use plans can influence the value of property by determining whether particular types of development of property are admissible or not. This is especially true when a land-use plan is revised, reducing development rights granted by the original land-use plan. This reduction in development rights usually causes a significant decline in property values.

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 provincial authorities. The Federal Constitution of 1929¹ makes Austria a democratic republic that is organized as a federation consisting of nine provinces, the *Länder*, and about 2350 municipalities. Federal authorities essentially provide the framework for spatial planning by deciding such things as which infrastructure projects to pursue and which areas to designate as woodlands. The responsibility to legislate and execute spatial plans rests mainly with the provinces. The responsibilities for spatial planning at the local level and for revising land-use and development plans are divided between the provinces and the municipalities. Specifically, provinces are responsible for supra-local planning at the provincial and regional level while municipalities are responsible for spatial planning at the local level.

Municipalities rely on two main instruments for spatial 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

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

framework for land-use plans, which are the most important instruments of spatial planning at the municipal level.

Land-use plans are approved by municipal councils and have compulsory effects upon 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 categories for different kinds of uses of land. The main categories include building land, green land, traffic area, special use category, and reserved area. These main classification categories are further subdivided into different types of land use.

To issue 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 issued. 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 classifications. As a result, the possibilities of utilization of the real estate by its owner are influenced by the classification of the land. If a land-use plan is approved, landowners are not required to adapt the current uses of their properties to conform to the land-use classifications specified in the new land-use plan. However, if landowners desire to change the use of their property, they must ensure that the proposed land use conforms to the land-use plan.

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. Municipalities have tried to remedy this problem by reducing development rights and reclassifying building land as green land. All nine provincial 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 provincial laws share. The rules on compensation rights for such reductions vary considerably from province to province.

This Article provides a comparative overview of compensation rules pertaining to the reduction of development rights due to revised land-use plans at both the provincial and the federal level. The Article will first focus on the constitutional aspects of the right to compensation. Afterward, the Article will provide a comparative description of the law in each of the provinces, and will discuss both substantive and procedural rules and regulations.

I. THE AUSTRIAN CONSTITUTIONAL LAW ON THE RIGHT TO PROPERTY AND COMPENSATION RIGHTS

Article 5 of the Austrian Constitution's civil rights catalogue² states that property is inviolable and that expropriation shall only take place according to the rule of 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 is also part of the Austrian Constitution.³

In addition to the federal constitution, there are also nine provincial constitutions. The scope of some of the provincial constitutions is wider than that of article 5 of the Austrian Constitution's civil rights catalogue. Some explicitly state that there is an obligation to compensate in the case of expropriation, and under certain conditions, the provincial constitutions also specify a duty to return expropriated property in cases when the public use is not implemented for a long time.

A. *The Austrian Constitutional Court and Its Jurisdiction Regarding Expropriation*

For a long time, the jurisprudence of the Austrian Constitutional Court on the issue of the right to property was cautious, 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 scientific community as well as the Constitutional Court, with the former deducing this right from the right to property and the latter 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, such as the economically

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

3. The Austrian Constitutional Court prefers to cite the Austrian Constitution regarding compensation for expropriation and rarely refers to the ECHR.

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).

burdensome duty of maintaining certain historic buildings, have not been recognized by the Court as constituting an expropriation.⁶ Furthermore, even the revocation of a building permit⁷ and declaration of a development ban⁸ have not been recognized by the Court as constituting an expropriation. We shall return to those few cases where the Constitutional Court ruled on specific interpretations 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 provinces.

This Article explores whether a duty to pay compensation exists under specific Austrian legislation or Constitutional Court jurisprudence when development rights are reduced by a revised development plan.

II. THE MATERIAL LAW ON COMPENSATION FOR REDUCTION OF DEVELOPMENT RIGHTS IN THE AUSTRIAN PROVINCES

Each of the nine provinces has its own planning law, and each provides the rules regarding the rights to compensation for reduced development rights. Some of the differences are minor; others are major.

What applies to all provinces is the fact that *the* prerequisite for eligibility for compensation for the reduction of development possibilities is that the plot in question is generally suitable for development according to the provincial planning law, relating to size, topography, access to infrastructure, etc. This means that if a plot loses its development rights due to a planning or zoning decision because the plot no longer fulfills the legal requirements for building land, no compensation is paid.

A. *Burgenland*

According to section 27 of the Burgenland province planning law (*Burgenländisches Raumplanungsgesetz*), there is a right to compensation only if all the following conditions hold: (1) a revision of a binding plan reduces development rights; (2) this reduction prohibits any building development;⁹ (3) this causes a reduction in the value of the land; (4) the extent of reduction in value constitutes undue hardship. The Burgenland legislature added the last condition following the Constitutional Court's ruling about "undue hardship."¹⁰ The courts have specified that

6. VfGH, 1981, VfSlg 9189/1981.

7. VfSlg 9306/1981.

8. VfSlg 14.155/1955.

9. This is true for urban areas. In agricultural areas all over Austria, minimal development is usually allowed for agricultural buildings.

10. See *infra* Part IV.

compensation can only be paid for investments relating to construction that were 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 transport connections.¹¹ 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.¹²

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

B. The Tyrol

Section 71 of the Tyrol province planning law (*Tiroler Raumordnungsgesetz*) states that due compensation should be paid for investments made towards building development up to the time of the approval of a revised land-use plan that prevents any development or specific kinds of development.¹³ In this province, if the land has been downzoned and is still developable, investments can qualify as frustrated investments.¹⁴

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

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

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

13. The law in Tyrol does not specify that the injury must reach the level of "undue hardship."

14. The Tyrol is a very rural province.

C. Carinthia

Section 21 of the Carinthia province 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.¹⁵ 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 are 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-use plan 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 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.

D. Vorarlberg

Section 27 of the Vorarlberg province planning law (*Vorarlberger Raumplanungsgesetz*) states that a landowner has a right to compensation when (1) a land-use plan prohibits the development of a plot of land; (2) the result is a reduction in the value of the land; (3) this reduction causes undue hardship to the landowner.

According to the law, there are six possible situations of undue hardship:

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.

15. In Carinthia, the law does not specify that the injury must reach the level of "undue hardship."

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 for the price in an acquisition against payment or for a valuable consideration in an acquisition free of charge.
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 traffic areas.
4. A plot of land is classified as “expected building land,” but within fifteen years after that land-use plan obtained legal force, a revised land-use plan does not reclassify it either as an area with development right or as a reserved area; and 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.¹⁶
6. The value of a plot of land *was* a determining factor in an acquisition against payment or free of charge, and the revision of the plan now restricts development.

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 amount of compensation is determined by the concrete loss due to investments made towards construction. When a loss occurs without investments, the amount of compensation for cases falling under the second or sixth scenario is determined by the difference between the value of the plot before and after the revision of the plan. For cases that fall under the third scenario, compensation is determined by comparing the value of the plot to the values of the surrounding plots that are 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

16. The difference between the last two situations (five and six) and situations one and two is that the former do not necessarily entail reclassification to green land. Presumably, the “downzoning” may be less drastic. E-mail from Rachelle Alterman, Professor, Technion-Isr. Inst. of Tech., to Karin Hiltgartner (on file with author).

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.

E. Lower Austria

Section 24 of the province 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.¹⁷

According to the 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 adhere to. A landowner 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 is no possibility of appeal against this decision. If the landowner is not satisfied with the level of compensation, he or she has three months 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.

F. Upper Austria

Section 38 of the provincial planning law of Upper Austria (*Oberösterreichisches Raumordnungsgesetz*) states two situations in which municipalities are obliged to pay compensation.¹⁸ First, a landowner has the right to claim compensation for investments incurred in connection

17. In Lower Austria, there is no explicit hardship condition.

18. In Upper Austria, there is no explicit hardship condition.

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.

The second situation is as follows. A plot of land classified as green land is otherwise suitable for development under the provincial planning law. The plots that mainly or completely surround it are reclassified as building land, and this causes a decrease in the plot's value in comparison to its value before the plan's revision. In this situation, the amount of compensation due is the difference in the value of the plot of land before and after the revision of the plan.

There is also a special case in which planning decisions become relevant in the private law of contracts. In a situation where (1) a landowner has a plot of land that is classified as green land, (2) the landowner proceeds to sell the plot to a buyer, (3) the land-use plan is revised so as to grant development rights within ten years after the sale, (4) the original buyer of the plot either sells the land or obtains a building permit within this ten-year period, the former landowner (original seller) 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 been if it had been classified as building land at the time of the purchase. 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 appeal against this decision. If a landowner is unsatisfied with the value of compensation, he or she may be able to call on the competent district court, within three months of the decision, to revalue the amount of compensation.

G. Salzburg

According to section 25 of the Salzburg province planning law (*Salzburger Raumordnungsgesetz*), a municipality has to compensate for pecuniary losses when (1) a plot's development is prohibited by a reclassification of the land; (2) the reclassification is either for green land or as traffic area; (3) the reclassification occurred 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 time period for compensation can be as long as thirteen years after the plot is initially classified as building land.

The general ten-year period rule is 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, provided that it is currently not reasonably possible to make use of the development rights. To extend the original ten-year period, the landowner must fulfill two conditions: submit a declaration of intention to develop before the draft land-use plan is published; and 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 the law. The first type involves investments towards construction made up to the date when the revised land-use plan came into force. The second type consists of that portion of the value of the plot that, because of its classification as building land at the time of purchase, was the determining factor in the acquisition. This applies only to the latest transaction.

There are several procedural rules that must be followed. A landowner must file with the province 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. In addition, the amount of compensation has to be adjusted for inflation according to the Consumer Price Index. 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.

H. Steiermark

Section 34 of the Steiermark province planning law (*Steirisches Raumordnungsgesetz*) states 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.

Compensation must be paid in two different situations. The first situation is when the landowner made investments towards construction up to the time when the revised plan came into force. The second situation is where the plot in question has *not* been classified for development; however, the plots completely or mostly surrounding it have been designated for development, and their re-classification has diminished the value of that plot compared with its value before the plan was revised.

There is a special case when planning decisions become relevant in the private law of contracts. This applies to situations where a plot of land classified as green land is sold, and within fifteen years is redesignated for development and the buyer (the current 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 to claim annulment of the contract in the relevant district court.

There is one prerequisite: the price paid for the plot should be less than half the value the plot would have commanded had it already been classified as building land at the time of the purchase. 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 provincial 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.

I. Vienna

Section 59 of the Vienna province 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 traffic area. In this situation, landowners have the right to compensation only if they decide to sell their lands to the municipalities. In addition, 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 either the remainder is unsuitable for development or the size of the remainder that is suitable for development is reduced to less than fifty percent of the original area. Note that compensation is always assessed on the basis of the former designation with respect to development rights, and the provincial government decides the amount.

The right to redemption is *not* available 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; or (5) the reclassification changes the plot from building land to “park” (a subcategory of green land) and at least seventeen percent of the land is allocated for development. Note that the right to redemption applies when a plot that had development rights under the previous land-use plan is now classified as a “green-belt” area.

There are several procedural rules to follow. First, the compensation has to be assessed by an expert appraiser. The provincial government is authorized to decide whether the right to redemption applies and what amount of compensation to award. 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.

III. COMPARISON OF THE PROVINCES

The rules concerning compensation for the decline in property values due to planning decisions vary considerably between the nine Austrian provinces. In theory, this could lead to the somewhat awkward result that, under the very same circumstances, a landowner who owns plots of land in multiple provinces could be eligible for compensation in some provinces and not in others.

Generally, however, most Austrian provinces¹⁹ limit the right to compensation to cases of “almost no economic value left.” Situations involving less drastic declines in value are not compensable. This means that compensation may be claimed only where (1) a previous land-use plan granted development rights to the plot in question; (2) the plot is then reclassified as green land or a similar designation; and (3) the plot would have otherwise satisfied the conditions for being classified as building land (topography, size, access to infrastructure, etc.).²⁰ Thus, the cornerstone of the right to compensation is based on 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. However, what constitutes reliance and what type of loss is compensable vary from province to province.

In three provinces, the theory of special sacrifice provides an additional basis for compensation. Under this theory, a landowner has the right to compensation if (1) a particular plot designated “green” (or a similar land-use designation) is mostly surrounded by plots that are reclassified for development, and (2) this reclassification of the surrounding plots decreases the values of the plot in question. In such 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.

The bases for calculating compensation can be generally classified into four categories: direct investments, loss in value compared to the price that was originally paid, “special sacrifices” compared with surround plots, and the concept of redemption.²¹

A. Direct Investments

Nearly all provinces, with the exception of Vienna, provide a right to compensation for investments that the landowner has made towards

19. There are several provinces where compensation is due when a plot remains green but surrounding plots are reclassified for development.

20. This condition applies in all of Austria, whether or not the provincial legislatures explicitly mention it.

21. The laws in the provinces of Oberösterreich and Steiermark have special rules about the implications of planning decisions for private contracts. If a plot classified as green land is sold, and within ten (Oberösterreich) or fifteen years (Steiermark), a revised land-use plan grants building development rights on the plot, the former owner has the right to claim annulment of the contract in the competent district court. This action is only permitted when the original buyer of the land either sells the plot or obtains a building permit within the respective ten or fifteen year time limit. The buyer can avoid nullification of the contract by refunding the difference between the money that was actually paid for the land and the land's value had it been classified as building land.

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.

Two provinces, however, limit this right: Salzburg and Vorarlberg. In Salzburg, compensation is limited to those investments made within ten years *after* the plot was originally classified as building land. Vorarlberg, on the other hand, limits compensation to investments made during the decade that *preceded* the date when the revised land-use plan came into effect. Compensation in Vorarlberg, therefore, is independent of how long the land had been classified as building land.

B. Loss in Value Compared to Price Originally Paid

A second basis for compensation is available in four Austrian provinces: Kärnten, Vorarlberg, Niederösterreich, and Salzburg. In these provinces, this second basis is additional to the direct investments basis. In these provinces, a landowner may also claim compensation for the loss incurred if the price paid for the purchase of the plot was based on the property's designation for development. Two of these provinces, Kärnten and Vorarlberg, grant compensation rights only where the acquisition was against financial payment. The other two provinces, Salzburg and Niederösterreich, also allow "free-of-charge" transfers of ownership to qualify for compensation. An additional time limit is imposed by Kärnten, where compensation rights are limited to cases where the reclassification to green land occurred within twenty-five years after the developable property classification.

C. "Special Sacrifice" Compared with Surrounding Plots

An additional, generous form of compensation is found in only two Austrian provinces: Vorarlberg and Oberösterreich. These provinces 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."

D. "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 "traffic" areas 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.

It is important to realize that this overview does not give a comprehensive picture of how generous or ungenerous each province is in practice. Sometimes there are 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.

Other provinces do award compensation for a decline in land value due to reclassification in a revised plan; however, they do not grant any compensation or right to redemption for other types of restrictions on property. For example, Lower Austria denies landowners the possibility of compensation not only for temporary freezes on development, but for unlimited freezes as well.

In addition, the procedural rules for claiming compensation differ considerably from one province to another. Time limits for submitting compensation claims are set between three months and three years, and the possibility of appeal is not always available in some provinces. In addition, the body authorized to hear appeals differ from province to province. One procedural rule that all the provinces have in common is that only the owner of the plot of land can claim compensation, and that the right to compensation cannot be transferred on.

IV. THE JURISPRUDENCE OF THE COURTS AND ITS INFLUENCE ON PRACTICE

A. *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.²² 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

22. OGH Nov. 26, 1980, 1 Ob 607/80, SZ 53/156; VwGH Dec. 20, 1994, Zahl 92/05/0170.

qualifying as investments. By contrast, costs not directly related to the building project, such as remuneration for architects, are not recognized.

The Constitutional Court has issued a number of decisions that stress the importance of the principle of reliance in relation to the right to compensation but at the same time interpret 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.”²³ 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 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.²⁴

B. The Relationship between Constitutional Judicial Review²⁵ and Compensation Claims in Practice

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 requires that the selection of plots for reclassification be based on objective criteria, even if the reclassification serves, in principle, to fulfill 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.²⁶

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. In a situation where there is no right to compensation, the landowner’s economic interest, that is the right to keep

23. VfSlg 11914/1988.

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

25. The term “judicial review” is probably the closest American legal term that reflects the contents in the following paragraphs.

26. VfSlg 13282/1992.

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 general public to essentially finance and pay for reclassification, which, on the one hand, fulfills 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 seeks 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.

As a result, it is impossible to make a general statement about the constitutional admissibility of compensation rules for Austria. Rather, the legality of compensation rules have to be examined on a case-by-case basis with a focus on the relevant planning law, the planning law’s rules about compensation, and the actual amount awarded as compensation. The amount of compensation should cover all “qualifying costs,” such as expenses for water and electricity. If the awarded compensation is insufficient, the Court will award a higher amount.

In the past ten years, 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. As for the fourth reclassification, the Court found it to be lawful because the authorities had done adequate research, and the landowner had received sufficient compensation. Under these conditions, the Court found that the authorities had met the

requirement to balance the interests.²⁷ The apparently low number of cases is easy to explain. The Constitutional Court's case-by-case approach lacks predictability in determining whether a reclassification is lawful, which means that a government authority seeking to conduct a reclassification bears considerable risk. Thus, in practice, reclassifications are rarely done without prior negotiations with the relevant landowners, leading to consent.

27. VfGH 2006/06/23 V 1/06.