

# WHEN THE RIGHT TO COMPENSATION FOR “REGULATORY TAKINGS” GOES TO THE EXTREME: THE CASE OF ISRAEL

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INTRODUCTION

Tucked away in a corner of the Mediterranean is a country with one of the world’s most generous laws on compensation rights for declines in property values due to governmental planning decisions. As counterintuitive as this might seem, Israel’s<sup>1</sup> jurisprudence gradually developed a legal doctrine about “regulatory takings” (to use an American term) that, viewed from a comparative perspective, represents an extreme in “property rights friendliness.”

Israeli law regarding compensation for regulatory takings evolved from an almost dormant letter of the law into what is now a major legal doctrine. This evolution occurred without significant changes in legislation. Instead, it occurred through a series of Supreme Court decisions that interpreted the statutory language through an increasingly

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1. The discussion here applies to Israel in its international borders, and not to the occupied areas. Different sets of laws and practices apply to the regions held by Israel and those administered by the Palestinian Authority.

property rights-enhanced perspective. The result has been the creation of a doctrine that addresses the right to compensation for many types of land-use regulations. This doctrine has had an enormous impact on everyday planning practice, on the economics of real-estate development, on municipal budgets, and potentially on the macro-economy.

This Article discusses the statutory law, its relationship to constitutional law, and the ways the courts have interpreted key elements of legislation. It also offers some hypotheses about factors that may be driving the steep increase in the number of claims and the impact this has had. Occasionally, the author's views will be incorporated regarding suggestions for partial reform of what has become a runaway compensation scheme.

#### A. A Brief History

Israel inherited its planning law from the British Mandate that governed Palestine. The British introduced planning law into this quasi-colony as early as 1921,<sup>2</sup> soon after fighting subsided in World War I. That legislation was rudimentary, but in 1936 the British administration introduced a new and comprehensive law called the Town Planning Ordinance.<sup>3</sup> This legislation molded Israel's planning law and administration, and its largely positive influence is still apparent today. The right to compensation ultimately dates back to these early laws.

The British colonial administrators brought with them from England the latest concepts in planning law. The question of how planning law should treat changes in property values caused by planning decisions on both the "compensation" and "betterment" sides of the equation was, at the time, a hot issue in Britain.<sup>4</sup> Whereas in Britain, the law on these matters oscillated back and forth whenever a different party came to power, the law remained constant. The law granted compensation rights, which were probably intended to be highly limited, for injuries to property values caused by the approval of new or amended land-use plans. At the same

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2. BENTWICH, NORMAN & DE MATTOS, *LEGISLATION OF PALESTINE, 1918–1925*, at 142 (W. Morris ed. 1926).

3. *The Palestine Gazette: Official Gazette of the Government of Palestine*, 1936, Add. 1, at 153. In the colonial structure, with the absence of a parliament, these and all other laws of the time were termed "ordinances," but they should not be confused with subsidiary legislation.

4. See generally WINDFALLS FOR WIPEOUTS: LAND VALUE RECAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Misczynski eds., Am. Soc'y of Planning Officials 1978). See also Malcolm Grant, *Compensation and Betterment*, in *BRITISH PLANNING: 50 YEARS OF URBAN AND REGIONAL POLICY* (Barry Cullingworth ed., 1999).

time, the British administration imposed a tax on the increase in property values.<sup>5</sup> This ostensibly symmetrical set of rules was never intended to be truly symmetric, nor was it ever so in practice. But the ideology of “betterment and compensation,” long dead in Britain, still affects the contemporary interpretation of Israel’s compensation law.

The 1936 Town Planning Ordinance established the right to compensation.<sup>6</sup> It reads in relevant parts:

Any person whose property is injuriously affected by [a] scheme [other] than the expropriation thereof may, within three months from the date at which the scheme comes into force by notice in writing served at the office of the Local Commission, claim compensation in respect of such injury . . . .<sup>7</sup>

After the State of Israel was established in 1948, the 1936 Town Planning Ordinance (along with most other laws enacted by the British administrators) was kept intact and recognized as Israeli domestic law. When the *Knesset* (Israel legislature) finally enacted a new planning law in 1965,<sup>8</sup> it incorporated sections about compensation almost entirely.

### *B. Constitutional Law*

In Israel, there is no single document called a “constitution.” Instead, a set of key decisions by the High Court of Justice<sup>9</sup> or by the Supreme Court have incrementally established the country’s form of governance and most areas of civil rights. This set of decisions is known as Israel’s “Unwritten Constitution.”<sup>10</sup> Beginning in 1958, the *Knesset* began a process of gradual

5. See Rachele Alterman, *Land Betterment Taxation Policy and Planning Implementation: Evaluation of the Israeli Experience*, 2 URB. L. & POL’Y 201 (1979). See also Rachele Alterman, *Land Value Recapture: Design and Evaluation of Alternative Policies* (Ctr. for Human Settlements, Univ. of British Columbia, Occasional Paper No. 26, 1982) (on file with author).

6. Town Planning Ordinance, 589 Palestine Gazette (1936).

7. *Id.* § 30(1). The three months period was later extended by the British to six months.

8. The Planning and Building Law, 1965, Sefer HaHukim [SH] 307, 467 (Isr.). All Israeli laws are published in Hebrew. Official but not legally binding English translations of Israeli laws are available in the Laws of the State of Israel (LSI). However, the LSI includes laws enacted only until the early 1980s. Because the planning law has been extensively amended since the 1980s, the author has used a commercially published translation with some adjustments by the author. For an official English translation of the Law (that does not include amendments passed after 1987), see The Planning and Building Law, 5725–1965, 19 LSI 330 (1964–65) (Isr.).

9. The High Court of Justice is composed of the same justices as the Supreme Court. The former hears petitions against government and quasi-government bodies, while the latter is the highest court of appeal.

10. For an analysis of Israel’s constitutional law, see Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV.

codification of constitutional rules by means of a series of “Basic Laws”, initially intended to incrementally constitute a formal written constitution. As enacted, however, the status of each of these laws is only slightly different from a regular law.<sup>11</sup> The role of the Supreme Court and its decisions on constitutional topics therefore remain of great importance within Israel’s legal system.

Of the eleven basic laws, nine deal with the State’s principles of governances (elections, the Knesset, the court system, the government, the State Comptroller, etc.). The last two enacted, both in 1992, deal with civil rights. The more important of the two is “Basic Law: Human Dignity and Liberty.” Among its list of human rights are property rights. Some areas of civil rights still remain within the realm of the Unwritten Constitution and await future codification.<sup>12</sup>

#### I. THE “UNWRITTEN CONSTITUTION” AND THE STATUS OF PROPERTY RIGHTS

Long before the “Basic Law: Human Dignity and Liberty”<sup>13</sup> was enacted in 1992, the Supreme Court repeatedly recognized property rights as holding “constitutional status.” In 1966, Justice Agranat stated: “One can say that the right to compensation not only carries today a universal character, but stands on a pedestal . . . of a ‘basic right.’ This is so even though there is no [written] constitutional dictum to this effect.”<sup>14</sup>

This statement is still often cited by judges who wish to stress that the protection of property rights preceded the enactment of the Basic Law: Human Dignity and Liberty. Interestingly, although Justice Agranat’s statement was made in connection with a physical expropriation (eminent

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309 (1995).

11. In the absence of any special procedure or jurisdiction for enacting constitutional laws, each of the Basic Laws is enacted as a free-standing piece of legislation by the Knesset just like any other law. Apart from their subject matter and the largely-symbolic expression of the word “basic,” most of these laws are not much different from regular laws. Some do, however, call for a special majority in order to revise or abolish one or more of their clauses (the definitions of special majority vary greatly).

12. The widely accepted explanation for why the Knesset has preferred not to enact a full “bill of civil rights” is the continuing absence of a national consensus (and therefore a majority in parliament) on marriage and divorce law. These remain the monopoly of religious courts (with a separate court for each religion). Most areas of civil rights have thus been left to the decisions of Israel’s rather activist Supreme Court, and to date, these have rarely been overruled by the Knesset.

13. Basic Law: Human Dignity and Liberty, 1992, Sefer HaHukim [SH] 1391, *available at* [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm).

14. CA 216/66 City of Tel Aviv v. Abu Daia [1996] Piskei Din [IsrSC] 20(4) 520 (author’s trans.). None of the decisions in the planning area are available in official English translations. The author of this Article has translated or transliterated the names of parties in all the court cases cited in this paper.

domain) rather than a regulatory injury, it is often also cited in decisions on compensation claims for regulatory injuries.<sup>15</sup> This is an illustration of an increasing tendency of the Supreme Court to blur the distinction between the law of expropriation and the law of “regulatory takings”<sup>16</sup> by inserting the law of expropriation’s expectations for full or nearly full compensation into the law of regulatory takings. This is a further indication of the high regard in which the Israeli Supreme Court holds the right to compensation for regulatory takings.

## II. THE BASIC LAW: HUMAN DIGNITY AND LIBERTY

Of all the Basic Laws, Human Dignity and Liberty, enacted in 1992 (the “Basic Law”), is regarded by many constitutional scholars<sup>17</sup> as holding the highest constitutional status accorded so far to any Basic Laws in Israel. Property rights are contained in section 3 of this legislation, which states: “There shall be no violation of the property of a person.”

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

Existing laws, including the Planning Law, are “grandfathered in” by section 10 and do not have to pass the tests of section 8 anew. However, section 11 of the Basic Law obliges all government authorities, when they exercise their powers, to respect the protected rights. This means that the Basic Law applies not only to laws enacted since 1992, but also to those grandfathered in, including the Planning Law. Whenever the authorities have discretion over which avenue to choose, they should do their best to

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15. See, e.g., Additional Hearing 1333/02 Local Planning and Bldg. Comm’n of Raanana v. Yehudit Horwitz [2004] SCIs 58(6) 289 (author’s trans.). An “Additional Hearing” is a rare, second-round hearing by the Supreme Court of its own decision that is reserved for select cases that raise major legal questions.

16. An analysis of the interrelationship between the law of expropriation and the law of compensation for regulatory injury to property value is beyond the scope of this Article. The relationship between compensation for regulatory injury and the law of compulsory dedication of up to forty percent of land parcels is especially complex. See Rachelle Alterman, *Developer Obligations for Public Services in Israel: Law and Social Policy in a Comparative Perspective*, 5 J. LAND USE & ENVTL. L. 649 (1990). This topic continues to engage the courts and is still unresolved.

17. One such leading scholar is Justice Dr. Aharon Barak, who was the President of the Israel Supreme Court until 2006.

select the option that least encroaches on the rights protected by the Basic Law.

The incorporation of the right to property into a constitutional law of this stature raised the degree of protection to an even higher level than the one already achieved by past Supreme Court decisions. In my view, however (not everyone agrees), where the law regarding regulatory takings is concerned, enactment of the Basic Law at an earlier date would likely have made only a marginal difference. This is because the Israeli Supreme Court had already delivered several important decisions on this issue by 1992. These decisions interpreted major aspects of compensation law with a rather generous property-rights orientation. Since its enactment, section 3 of the Basic Law has been cited in almost every court opinion as an additional legal basis for interpreting the right to compensation in a yet more generous way.

Because the right to compensation, as interpreted by the courts, is already so broad, if the judge-made rules were to be codified in law, that legislation would have no problem surviving a section 8 challenge. If, however, the Knesset were to adopt some of the recommendations offered by this author<sup>18</sup> so as to bring compensation rights for regulatory takings back to reasonable proportions, legislators would have to be convinced that the amended law would pass the tests of section 8.

### III. WHY THE DRAMATIC RISE IN THE NUMBER OF CLAIMS?

Between 1936 and 1979, section 197 hardly troubled the courts. Very few claims for compensation were made at the time. With few exceptions, local and district planning commissions rejected those compensation claims that were actually made, and their decisions were rarely appealed to the courts.

The low number of claims may be explained from a sociological perspective. For example, one explanation might be that the country and its people were relatively poor—Israel was considered a developing-country at that time. In less-developed countries around the world, people are generally less litigious because litigation is expensive and requires a high degree of economic security. Another explanation for the small number of claims might be that Israeli society had been focused more on

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18. The author has been asked to offer her recommendations to an inter-Ministerial team composed of representatives of the Ministry of Justice, the Ministry of Interior, the Ministry of Finance, and the Ministry of Construction and Housing. The author's recommendations are not the topic of this Article, but their general direction could probably be discerned from the discussion here.

state-building than on private interests. The individualistic ideology that is so dominant today in Israel, as in most advanced-economy countries, had not yet arrived in Israel in full force.

But these explanations cannot account for why wealthy individuals and corporations did not claim more compensation before the 1990s. It is possible that the lethargy in decision-making by the local planning commissions deterred them. Data collected in the late 1980s<sup>19</sup> showed that the local commissions were refusing all but a few claims. In the absence of a specialized appeals body, landowners had to appeal to the regular planning bodies. These bodies were not geared to handle such objections or appeals within any predictable time frame.

Once claims became more prevalent, the courts had more opportunities to hear appeals, and they began interpreting the statutory law. The interpretations represented a very liberal perspective on property rights. As a result, more claims ensued.

Another boost to the number of claims came in 1996, when an amendment of the Planning Law established six district-level appeal committees to hear appeals on the decisions of the local commissions, including those concerning compensation issues. With an efficient, outsourced administrative system and legislated time limits for reaching decisions, these committees have worked efficiently. Headed by an impartial lawyer, they act like tribunals and have authority to appoint a third appraiser to resolve differences between the appraisers for the two sides. The number of claims that reach these committees has increased sharply. Today, the cumulative claims for compensation are estimated to amount to billions of dollars. Not all of that money will be awarded, but parties continue to bring claims.

The establishment of the appeals committees cannot, however, fully explain the dramatic increase in the number of claims and appeals. It is probable that the many cumulative changes in Israeli society, including more individualistic ethics, more government transparency, more lawyers, and a higher GDP per person, have all contributed to this dramatic change.

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19. For a survey of the research conducted, see RACHELLE ALTERMAN & ORLI NAIM, PITSUYIM 'AL YERIDAT 'EREKH MI-KARKE'IN 'EKEV SHINUI TOKHNIT [COMPENSATION FOR DECLINE IN LAND VALUES DUE TO PLANNING CONTROLS] (Land Use Research Inst. & Ctr. for Urban & Reg'l Studies, Technion-Isr. Inst. of Tech. 1992) (Isr.) (on file with author).

#### IV. THE 1965 PLANNING AND BUILDING LAW AND ITS INTERPRETATION BY THE COURTS

Even though the sections granting the right to compensation remained basically the same, other changes introduced in the 1965 Planning and Building Law (the “Law”) indirectly created a significant expansion of compensation rights in ways that the legislators may not have intended or anticipated. Foremost among these indirect effects is the introduction by the 1965 Law of two additional layers of plans: district plans and national plans.

Sections 197 to 202 of the 1965 Planning and Building Law<sup>20</sup> collectively establish the right to compensation for adverse effects caused by the approval of plans. These sections also set out the procedure for claiming compensation. The language in the Law is very similar to the Town Planning Ordinance (the “Ordinance”). The Law adds procedural improvements and extends the period of time for submitting claims from six months to one year.<sup>21</sup> The Law also grants the Minister of the Interior authority to extend this period. This is an authority that did not originally exist under the Ordinance.

Although based in the Law, the depth and breadth of the right to compensation was in fact shaped by the courts. The task of interpreting the legislation reached the Supreme Court (and occasionally the High Court of Justice) in more than thirty cases as of April 2007.<sup>22</sup> This indicates that there is a comparatively large body of jurisprudence for this issue.

The key sections in the Law are sections 197 and 200. Section 197 lays the groundwork for claiming compensation, while section 200 deals with exemptions from the obligation to compensate. Interpretation of section 197 was the focus of court decisions up to the 1980s and thus has been largely clarified. Since the 1990s, the focus of the Court’s attention has shifted to the conceptually more difficult and much more discretionary section 200.

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20. Planning and Building Law, 1965, §§ 197–202.

21. This claims period was once again extended to three years by a 1995 amendment. *See infra* note 26 and accompanying text.

22. A cursory computer search in the Supreme Court’s database revealed thirty cases. Although this database does not systematically include cases before 1977, one can safely assume that there were only a few unaccounted for cases before 1977. In about twenty of the cases, the Supreme Court addressed major issues or made significant interpretative rulings.

### A. Section 197: Establishing the Grounds for a Compensation Claim

Section 197 sets out the elements for establishing a compensation claim.<sup>23</sup> This section remains almost unchanged since it was enacted in 1965 and is very similar to its original 1936 version. The first important Supreme Court decision interpreting this section (while it was still in its ordinance form) occurred in 1961, and since then, most elements of this section have been interpreted and clarified. The only major legislative change made to section 197 dates back to 1981, and it too is the result of a Supreme Court decision.<sup>24</sup> Section 197 reads as follows:

(a) If real estate located in or abutting on the area of a plan was adversely affected by that plan,<sup>25</sup> [other] than by expropriation, then the person who was the owner of or holder of any right in that real estate on the day on which the plan came into effect shall be entitled to compensation from the Local Commission, subject to the provision of section 200.

(b) Claims for compensation shall be filed with the office of the Local Commission within three years<sup>26</sup> after the date on which the plan came into effect. The Minister of the Interior may, for special reasons which shall be recorded,<sup>27</sup> grant an extension, even if the said three years have already expired.<sup>28</sup>

The discussion of section 197 has been divided into six subparts: the preconditions for making a compensation claim, the definition of injury, the relationship between compensation and expropriation, indirect injuries to neighboring properties, who should pay the compensation, and reimbursement commitments from developers.

#### 1. The Preconditions for Making a Compensation Claim

When discussing the preconditions for making a claim, there are five relevant issues: (1) the burden of proof, (2) who may submit a claim, (3)

23. The Planning and Building Law, 1965, SH 467 (Isr.).

24. *See infra* Part IV.A.4.a.

25. The phrases “located in or abutting on the area of a plan” and “by that plan” were added to the Planning law in a 1981 amendment. 1981, SH 1071, 1074.

26. The Planning and Building Law was amended in 1995 to extend the period for filing claims to three years instead of one year. 1995, SH 1544.

27. The phrase “special reasons which shall be recorded” was added in a 1995 amendment to the Law alongside the extension from one to three years. *Id.*

28. The Planning and Building Law § 197.

the types of planning decisions that may serve as cause, (4) the issue of information, and (5) the time limit.

*a. The burden of proof*

Since the 1980s, the Supreme Court has repeatedly emphasized that the claimant is only required to carry the burden of establishing the basic conditions enumerated in section 197. Once these are established, the burden shifts to the authorities that wish to argue that they should be exempt in this particular case. The authorities must show that the particular claim passes the conditions of section 200.<sup>29</sup>

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

*b. Who may submit a claim?*

Section 197 says that a claim may be submitted by "the person who was the owner of or holder of any right in that real estate on the day on which the plan came into effect."<sup>30</sup> The phrase "holder of any right in that real estate" has been incrementally broadened by the Supreme Court to include protected tenants, long-term leaseholders, and even farmers who hold only three-year automatically renewable right-of-use contracts on national land.

A question hardly addressed by the courts is whether the right to claim compensation can be contractually transferred with the sale of the property rights, or whether only the original owner may claim it. One Supreme Court case contained dicta by two justices, who presented opposite positions on this issue.<sup>31</sup>

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29. See Additional Hearing 1333/02 Local Planning and Bldg. Comm'n of Raanana v. Yehudit Horwitz [2004] SCIs 58(6) 289 (author's trans.).

30. Planning and Building Law § 197.

31. CA 1968/00 Block 2842 Lot 10 Co. Ltd. v. Local Comm'n of Netanya [2003] SCIs 58(1) 550.

*c. What types of planning decisions are grounds for compensation?*

Another fundamental question is what types of planning decisions are grounds for compensation. Under Israeli law, only the approval of a plan, which usually means the amendment of an existing plan, may be a cause for a compensation claim. Until 1965, planning law recognized only local level plans (outline plans and detailed plans). The enactment of the 1965 Law introduced two new, higher-level types of statutory plans: district plans and national plans. The legislators at the time probably did not anticipate that these types of plans would ever serve as grounds for compensation claims. Years later, national and district plans became the cause of thousands of compensation claims.

There are three reasons why higher-level plans may entail large numbers of compensation claims. First, such plans often apply to much larger areas of land than the typical local plans (usually piecemeal amendments to previous local plans). Second, national and district plans often deal with regulations for open space preservation, or with NIMBY-type infrastructure that entail negative impacts on neighboring properties. Third, the implementation of such plans often takes many more years than the implementation of local plans.

This latter point is especially problematic because the three-year time limit applies to any type of plan. Many of the higher-level plans are not site-specific in scale. Therefore, landowners cannot prove that the injurious regulations will indeed apply to their properties once local plans are approved.

The jurisprudence on this key issue is sparse and contradictory. Some courts have denied compensation claims for national or district plans, holding that landowners should wait until the depreciation in value becomes concrete. Most courts, however, have ruled that if landowners do not claim compensation for the declines in value due to the more general or higher-level plans, they will forfeit that part of the decline.

The issue of whether compensation claims may be submitted against higher-level plans was dormant for many years. But since the approval in 2006 of a comprehensive national plan and the revision of the Central District plan (both actions were intended to conserve the last remaining open spaces in the densely inhabited regions), this issue has become a major concern for planners and environmentalists. The Supreme Court has not yet addressed this key legal question in any depth.

*d. What types of planning decisions are not compensable?*

Some types of decisions by planning bodies are not covered by section 197 and are therefore not compensable. Only final approval of a new or amended plan creates the right to claim compensation, even if the approval process takes many years. This may be one of the reasons why many local authorities tend to drag on the plan approval process for many years.

Similarly, a slate of other types of decisions is also non-compensable even when the decisions cause declines in property values either directly or to neighboring lands. These types of decisions include the approval of a subdivision plan, the granting of a variance or a nonconforming use permit, and the imposition of conditions in a building permit. Refusal to grant a building permit in and of itself does not provide grounds for compensation; if the plan in force is injurious, the claim should be made against it.<sup>32</sup>

*e. How should landowners be informed?*

The failure to directly inform landowners is the weakest point in the law's otherwise generous scheme to protect property rights. When approving injurious plans, the authorities have no additional obligation beyond the regular information requirements. There is no stage in the plan approval process where authorities are obligated to serve personal notices to potentially injured landowners. This is so even if the injury is extensive, such as where a buildable plot is rezoned for public open space (but not yet expropriated). Contrast this with physical expropriations where a personal notice must be served once the authorities have decided to take the property.

Approval of a plan, which is a precondition for submitting a compensation claim<sup>33</sup> and sets off the countdown of the three-year time limit, only requires the publication of a standard notice in daily newspapers announcing that a particular plan has been approved. The same requirement applies to the pre-approval "deposit for public review" stage. The size of such notices is usually not much larger than two postage

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32. Under Israeli planning law, building permits must fully accord with the statutory plan and there is a general presumption that a building permit should usually be granted "as of right" if it fully accords with the plan in force. If a permit is denied, the interested party may try to petition the court to order the authorities to issue the permit. The degree of discretion allowed to planning authorities in refusing building permits that ostensibly accord with the plan in force is a difficult and separate issue beyond the scope of this Article.

33. See *supra* Part IV.A.1.c.

stamps. Since 2004, there is also a requirement that notice about every deposited plan be physically posted at or near the site in question. This is certainly an improvement; however, it does not ensure that the landowners who will most likely incur the injuries will see the notices and understand their impact.

The inadequate information obligation is at odds with the rather generous compensation rights granted to holders of property rights in Israeli. This disparity has social implications. As in any society, access to governmental information in Israel is often correlated, at least in part, with socio-economic factors, such as the capacity to hire professionals to monitor and understand the laconic announcements. Therefore, the authorities should be required to send personal notice where a significant, high-probability injury is anticipated. Unless information is provided proactively, the distribution of compensation claims is bound to be unequal on socioeconomic lines.

*f. The time limit*

Presently, the statutory time limit is three years after the injurious plan is approved.<sup>34</sup> Until 1996, when the time limit was one year, the Minister of the Interior was quite generous in granting extensions. There were few, if any, petitions to the High Court of Justice on this issue.

However, when the Law was amended in 1995 and the time limit was increased to three years, the legislature's intent was that the Minister's discretion be reserved for "special reasons which shall be recorded."<sup>35</sup> Since then, there has been an administrative policy to be less generous in awarding requests for extensions.<sup>36</sup> Nevertheless, the Minister still has wide discretion.

The few petitions heard by the High Court of Justice on this issue have displayed a rather strict approach. This approach is at odds with the Court's otherwise liberal interpretation of the law. A petition denied by the High Court in 2003, *Moshav (Cooperative village) Neve Yamin vs. Minister of the Interior*,<sup>37</sup> highlights the inequality that may arise from the

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34. See *supra* note 26 and accompanying statutory text.

35. The Planning and Building Law, 1965, § 197(b) (Isr.).

36. As these decisions for extension are based on the individual discretion of the Minister, the scope of the discretionary policy has changed and depends on the person who holds the Minister's office.

37. HCJ 01/156 *Moshav (Cooperative village) Neve Yamin vs. Minister of the Interior* [2003] Piskei Din [IsrSC] 57(5) 289. The Minister of the Interior rejected an extension request by the members of a cooperative village whose properties were injured by a national-level plan for high-

absence of an active notification duty in order to ensure equal information within the time limit. Despite the clearly inequitable outcome exemplified by the *Neve Yamin* decision, the village's request for an Additional Hearing was denied. However, the same justice who delivered the denial, Justice Cheshin, also expressed his strong dismay with the starkly unequal distribution of injuries that resulted in this case.<sup>38</sup> However, neither he nor the three judges who earlier decided on the petition pointed out that the reason for the inequality was the absence of an obligation to inform landowners. The Court did not call upon the Knesset to amend the law so as to require proactive notification, at least in cases (such as in the *Neve Yamin* case) where there is a certain and severe injury and where gross disparities will result among landowners if they do not all have access to the same information.

## 2. *The Definition of Injury and Its Implications*

### a. *What is an injury? The basic rule*

An injury is measured by comparing the appraised economic value of the property under the previous plan to its value under the new or amended plan. The claimant has to show a causal link between the approval of the new plan and the injury. The injury is not to be assessed "horizontally," that is, in comparison to what similar lots may have been granted.<sup>39</sup> Rather, injury is calculated only by comparing the "before" and "after" value of the specific plot in question.

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voltage electricity lines. At the time that the plan was approved, the law prescribed a one-year time limit, but soon after, the law was amended to the three-year limit. Thinking that the new time limit applied, the village representatives procrastinated in submitting the claim.

Other villages impacted by the same plan under similar circumstances were also late in submitting their claims, but they were not as late as *Neve Yamin*. The Minister did grant the other villages extension, and these villages were included in the compensation arrangement.

The Minister argued that the differentiation was a legitimate decision, not a discriminatory one. He explained to the Court that the time scale reflected two things: the fact that the Israel Electric Corporation had agreed to indemnify the local authorities (who otherwise would have had to pay the compensation) and the fact that the company had decided to include only those claims (including those of the other villages) that were submitted before a specific deadline (also well beyond the one-year time limit). Needless to say, the corporation most likely did not publicize the deadline; however, the petitioner did not make this point. The village argued that the Minister should have taken into account the discriminatory outcomes in this case. The Court accepted that financial considerations of the Electric Authority were enough to justify the differentiation made by the Minister.

38. Request for Additional Hearing 6542/03, available at <http://elyon1.court.gov.il/>.

39. One can, of course, also petition the High Court of Justice on administrative law grounds. For example, a petition may claim that a decision is discriminatory, unreasonable, or constitutionally or administratively flawed. This Article, however, will not discuss these topics.

A leading case on this point is *Birenbach v. Tel Aviv*,<sup>40</sup> which was decided in 1987. As part of Tel Aviv's pioneering attempts at historical preservation, the owner of a building known as the "Pagoda" was denied a request for additional development rights. Other plots in the area that did not have buildings warranting preservation had received approval for rezoning with additional development rights. The Supreme Court ruled on appeal that Birenbach did not have a right to receive compensation because the existing plan had not been altered. Thus, landowners do not have the right to demand that an amendment be approved.<sup>41</sup>

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

*b. Should land values reflecting expectations for "upzoning" be taken into account?*

The simple definition of injury, which compares the "before new plan" and "after new plan," is not as clear as it might seem. Recent efforts to protect the few remaining contiguous open spaces in Israel's high density, central areas have increasingly imposed challenges to this rule. Similar questions have arisen regarding planning initiatives to designate existing buildings for historical preservation. The issue is whether the value of an *anticipated* "upzoning" should be taken into account.

The most common situation is where land that was previously designated as "agricultural" is now redesignated as a "preserved open space." Even though all existing farming and related rights remain intact, land appraisers can still show that the market value of the land has suffered a decline because the likelihood of the plot being redesignated as buildable land has been greatly reduced.<sup>42</sup>

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40. CA 483/86 Birenbach v. Tel Aviv Local Comm'n [1987] IsrSC 42(3) 288.

41. The Court did not, however, rule out the possibility that there might be an injury when an amendment to an existing plan "closes the lid" on expectations for a rezoning. However, this was not the appellants' argument in the case before the Court. Had this decision been made today, the case may have been argued (and possibly also decided) differently.

42. See CA 4390/90 Eliashar v. Israel IsrSC 47(3) 872. The appellant claiming compensation held property rights in an area previously zoned for agriculture, but the new plan declared the area a national park. The agricultural and related rights remained. Furthermore, the municipality had proposed a type of "clustering," which would have enabled some development rights. The Court did not rule out the argument that declaring the area a national park would "close the lid" on possible rezoning in the future.

A 2003 Supreme Court decision<sup>43</sup> suggests that where rezoning is not a remote probability, the loss of “anticipation value” should be taken into account in determining the degree of injury. However, this issue has not yet been resolved through the case law.

The question of anticipated value sometimes coincides with the issue discussed above, regarding what level of plans may create a cause of action and what degree of certainty is required.<sup>44</sup> What should the law be when property values are allegedly diminished by a plan that requires the approval of a more detailed plan (whether on the local or a higher level) before the extent of injury becomes certain? With planning efforts being increasingly devoted to protecting scarce open spaces and with Israel’s high land prices and relatively high growth rates, the question of whether or when “anticipated value” constitutes an injury under section 197 will require clearer jurisprudence. If a broad definition is adopted, as is likely under the logic of the current jurisprudence, the fiscal and economic impacts will be enormous as the number of claims against such plans keeps on rising. Planning bodies will, in some cases, have no choice but to compromise or withdraw plans for open space preservation.

*c. Should assessment of an injury take into account site-specific circumstances?*

The Supreme Court has interpreted “injury” broadly to include special circumstances that may render a particular plot more sensitive to an injury than an otherwise identical plot.<sup>45</sup> Relevant factors might be physical or contractual.

For example, an existing plot currently designated for commercial use is redesignated in an amended plan for residential use. The existing plot currently happens to have a commercial building on it, whereas an adjacent plot that is similarly redesignated does not. Regarding the empty plot, the decline in land value is small because it is empty. However, in order for the built-up plot to be developed according to the new plan’s land use and design regulations, the commercial building would have to be demolished. The Supreme Court would likely decide that these costs should be added to the compensation claim.

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43. CA 1968/00 Block 2842 Lot 10 Co. Ltd. v. Local Comm’n of Netanya [2003] SCIs 58(1) 550.

44. *See supra* Part IV.A.1.c.

45. CA 761/85 Lifshitz v. Local Comm’n for Rishon leZion IsrSC 46(1) 342.

*d. Is there a need to demonstrate a direct loss?*

Under Israeli law there is no need to demonstrate that the landowner has incurred a direct loss; the decline in value may remain “on paper.”<sup>46</sup> Thus, it does not matter at what price the land was purchased by the person claiming compensation, nor does it matter whether that particular person will suffer a direct loss when the plot is sold.

What would be the result if a landowner had built up only part of the development rights and the plan is revised after three decades so that only the built-up rights are allowed and the “extra” development rights are abolished? In addition, suppose that the original landowner still owns the land and has not taken any action to utilize the remaining rights. Under current Israeli jurisprudence, the landowner will be eligible for compensation.<sup>47</sup> There is no statutory time limit for implementing the original development rights, nor is there a doctrine that requires proof of “investment-backed expectations” or any other direct losses.

It likely makes no difference, at least for establishing a cause of action, whether the landowner knew that an injurious amendment would soon be approved and went ahead and purchased the plot. Nor is it likely to matter if the owner has not taken any active steps to reduce the injury.

Israel’s compensation law sounds like a wonderful real estate insurance policy. As surprising as this may seem to most readers, the issues raised here have been addressed only marginally by the courts. It is likely that some of these additional tests could be developed under the types of exceptions in section 200, especially through the interpretation of the “injustice” clause.<sup>48</sup> However, the courts have not gone in this direction at this time. Thus, Israeli compensation law does act like a wonderful real estate insurance policy.

*3. The Relationship Between Compensation for a Regulation and for an Expropriation*

Those accustomed to the way in which the “takings issue” is often framed under U.S. constitutional law might be baffled by the section 197

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46. This question is clearly articulated as an *obiter dictum* in the *Block 2842 Co. Ltd.* decision; however, the two judges who discuss it take opposite positions. *See supra* note 43.

47. For a Supreme Court case similar to this hypothetical, see CA 6826/93 Local Planning Commission for Kfar Sabba v. Hayat, IsrSC 51(2) 286. The rationale of this decision is cited with approval by the Supreme Court in the *Block 2842 Co. Ltd.* decision; *see supra* note 43.

48. *See infra* Part IV.B.

clause “otherwise than by expropriation.”<sup>49</sup> Much of American takings jurisprudence concerns the need to determine when a regulation goes “too far” so as to amount to a “taking.” Does the wording of section 197 imply that in Israeli law, a bright line distinguishes the right to compensation when there is an expropriation from the right to compensation for a regulatory injury (i.e., a plan is revised)? In reality, the takings issue in Israeli compensation law manifests itself in a form that is distinct from the American example and does provide a “brighter line.” However, Israeli courts have had to perform legal acrobatics in order to decide on cases involving the complex relationships of land-use regulation (plans), expropriation, compulsory dedication of land,<sup>50</sup> developer agreements,<sup>51</sup> and land readjustment.<sup>52</sup> Only one aspect of this relationship is discussed here.

*a. The problem*

Neither planning law nor expropriation law<sup>53</sup> directly addresses the situation in which land in private hands is designated for a typically public use, such as a road, a school, or a park, long before expropriation procedures actually take place. Such a redesignation often entails a sharp decline in the value of the property, often representing a larger depreciation than will occur when the expropriation decision will finally be announced. The long wait between the time of the land-use designation and the actual expropriation is a problem for landowners in many countries. Local governments often lack the funds for compensation for the full value, or they are reluctant politically to undertake expropriation. Sometimes, government administration is simply lethargic.

Which right to compensation may a landowner invoke in the interim stage, before expropriation? Is it the right to compensation under section

49. See The Planning and Building Law, 1965, SH 467 (Isr.).

50. Rachele Alterman, *Developer Obligations for Public Services in Israel: Law and Social Policy in a Comparative Perspective*, 5 J. LAND USE & ENVTL. L. 649 (1990).

51. For an expanded version of the above paper, see Rachele Alterman, *From Expropriations to Agreements: Developer Obligations for Public Services in Israel*, 24 ISR. L. REV. 28 (1990).

52. See Rachele Alterman, *More Than Land Assembly: Land Readjustment for the Supply of Urban Public Services*, in ANALYZING LAND READJUSTMENT: ECONOMICS, LAW, AND COLLECTIVE ACTION 37 (Yu-Hung Hong and Barrie Needham eds., Lincoln Inst. of Land Policy 2007).

53. Detailed analysis of the Israel law of land expropriation (“eminent domain”) is beyond the scope of this Article. In a nutshell, jurisprudence in this area has evolved greatly since Israel’s early decades. Until the late 1990s, no land expropriation decision was ever nullified by the courts. But after a landmark decision was delivered in the late 1990s, the jurisprudence is leaning to the other extreme. If a case with facts similar to those in *Kelo v. City of New London*, 545 U.S. 469 (2005) were to come before an Israeli court today, the decision would probably take the minority’s position.

197 of the Planning Law or the right to compensation under the legislation governing expropriation? In Israel's early decades, local governments relied on this ambiguity, hoping to avoid having to pay for the loss in value due to the change in land-use designation in the first stage, which is often responsible for the bulk of the decline.<sup>54</sup> These government bodies based their position on section 197's phrase "otherwise than by expropriation."<sup>55</sup> They interpreted this phrase to mean that the entire process leading to expropriation, including land-use redesignation, is exempt from the compensation obligation in section 197. Local governments argued that at the time of expropriation, compensation should be based on a comparison of market value "on the eve of expropriation" and thereafter.<sup>56</sup> Thus, the proposed interpretation would have denied landowners the right to claim compensation under section 197 whenever property was designated for public use as the first stage towards expropriation.

*b. The two-stage compensation doctrine*

As early as 1961, the High Court of Justice came to landowners' rescue. To the chagrin of government authorities, the Court accepted a petitioner's interpretation of the "otherwise than by expropriation" clause. The Court ruled that section 197 does apply to the rezoning stage. Aware that it was providing just a "patch" to cover a major gap, the Court called upon the Knesset to amend the law. However, the Knesset has not done so.

Thus, the High Court created "the two-stage compensation" doctrine, which became entrenched in law and practice. Most real estate and planning practitioners and legislative advisors seem to have forgotten that the judges intended the ruling to be a temporary solution. One flaw is that landowners have the right to personal notice only at the second stage, which is often the least valuable stage. Because a claim for the first stage has a time limit of three years,<sup>57</sup> and before 1996 only one year,<sup>58</sup> the

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54. See Administrative Petition (Administrative Court for the Northern District) 04/001025 Local Comm'n for Afula v. Mordechai Ziv [2005] (on file with author). This case demonstrated that government bodies, like the Transportation Authority, still rely on the ambiguity between section 197 and expropriation law to attempt to reduce compensation paid out to landowners. Although this particular case involved expropriation according to a law that was more archaic than the Planning Law, the Administrative Court of Northern District in Nazareth adapted the two-stage doctrine from the Planning Law (see *infra* Part IV.A.3.b) and ruled that the landowner should be fully compensated.

55. The Planning and Building Law, 1965, § 197 (Isr.).

56. *Id.*

57. See *supra* note 26 and accompanying statutory text.

58. See *supra* note 26 and accompanying statutory text.

landowner may forfeit the right to claim compensation for the period in which the most significant decline in value occurs. Furthermore, because the two-stage solution is not intuitive, even landowners who find out about the new plan on time might logically think that they should await expropriation before claiming compensation. Finally, the two-stage solution is a two-stage hassle with two sets of costs for the property owners to pay.

Given the inadequacy of the “two-stage compensation doctrine,” there are two alternative solutions: provide for full compensation at the first stage (plan amendment), or provide for full compensation at the second, physical expropriation stage. Assuming some landowners would not want to wait for the latter stage, the logical solution is to grant them the right to oblige the authorities to buy the property at an earlier stage than they had intended. This type of right, known as a “blight notice” in British and Irish law, is anchored in the laws of many other countries, including many represented in this Symposium, but not in Israel.<sup>59</sup>

#### *4. Do Owners of Neighboring Properties Have the Right to Compensation?*

In the 1979 case *Varon v. Jerusalem Local Planning Comm’n*,<sup>60</sup> the Court delivered its most dramatic decision interpreting the language of the law. *Varon* had the greatest direct impact on the expansion of compensation rights. Although it took a decade or more for the *Varon* decision to impact landowners’ behavior, the case set the legal stage for the huge leap in the number of claims. The *Varon* decision was also the only one that led to an amendment to the legislation.

##### *a. The Varon case*

In *Varon*, the appellant’s lawyer<sup>61</sup> argued that the right to compensation under section 197 is not restricted to the properties to which a plan amendment applies directly, but extends to any property affected by the change, regardless of location. *Varon* was the Supreme Court’s first decision pertaining to the geographic extent of the right to compensation;

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59. In 2006, the author made a similar proposal to an Israeli government steering committee responsible for revising the planning law.

60. CA 603/77 *Varon v. Jerusalem Local Planning Comm’n* SCIsr 33(3) 409.

61. *See id.* Naomi Wal, the lawyer who successfully presented this novel argument was regarded as a section 197 specialist after *Varon*.

before *Varon*, there were only a handful of prior decisions of any type touching on section 197.

The case involved a low-rise home in Jerusalem in a prime location with a view of the Old City Wall. An adjacent plot was rezoned from “low-rise residential” to “high-rise commercial.” Because a high-rise building would block the view and increase noise, the property suffered an immediate decline in market value. The plan with the rezoning did not apply to Varon’s parcel.

At the time the case was being heard, section 197 said, “If real estate was adversely affected . . .” without reference to whether the right to compensation applied only to the property subject to the amended plan or whether the right to compensation included adjacent or distant properties that might suffer a decline in value due to the amended use or density approved for another plot.

The three judges who composed the court for this decision<sup>62</sup> were split on this issue. The opinions were both thorough and philosophical, demonstrating that the judges were keenly aware they faced a major legal and ethical question.

The majority view held that, in the absence of any geographic stipulation in the legislative text, the right to compensation should be interpreted broadly to apply to *any and every* geographic location, as long as a causal relationship between the new or amended plan and the decline in value could be shown.

The judges in the majority offered two key arguments for this position. First, they noted the need for a just distribution of the burden. When a planning commission approves a new or amended plan for the public interest, an individual owner should not have to bear the financial brunt; the public should pay compensation.

Second, the majority reasoned that the need to pay compensation would encourage the planning authorities to be more careful when considering a plan that will likely cause negative externalities to the neighbors. Since *Varon*, these justifications have been offered in many court decisions concerning compensation rights for both direct and indirect injuries.

In *Varon*’s minority opinion, Justice Aharon Barak<sup>63</sup> found that the law grants the right to compensation only where the government alters the normative status (the plan) that directly applies to a given parcel. Justice

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62. All three justices were among Israel’s greatest judges—Haim Cohen, the Deputy President at the time, Shamgar and Barak, both of whom later became Presidents of the Supreme Court.

63. Justice Aharon Barak later became the President of the Supreme Court and retired in 2006.

Barak argued that a direct injury should be distinguished from an indirect one. He suggested that with direct injuries, the reduction in property value is caused by the change in the regulation itself, whereas, in the second case, the reduction is created not by the plan but by the anticipation that the use of the neighboring plot will harm the value of the parcel at issue. Recognizing the impact that a ruling in favor of Varon would entail, the President of the Supreme Court granted the Jerusalem Local Planning Commission's request for an Additional Hearing—a rare procedure reserved for the most important issues on which the Court is split.<sup>64</sup> An Additional Hearing is held with a greater number of judges—in this case two more judges were added to the original three.

In the Additional Hearing of *Varon*,<sup>65</sup> the Supreme Court once again split, but the majority upheld the Court's prior decision. The majority opinion meant that if landowners anywhere in the city or region could demonstrate that their land value had declined as a result of the approval of a new or amended plan, they would have cause for claiming compensation from the local planning commission.

Justice Barak, joined by a second justice, wrote the dissenting opinion. It is the more reasonable interpretation of the Israeli legislature's intent in 1965 as well as the intent of the British predecessors in the 1936 legislation.

The majority opinion, however, became an entrenched and uncontested doctrine. For twenty-five years, its rationale was not revisited by anyone from the judicial, legal practice, or academic milieus. Since 2006, however, this topic has resurfaced and is the subject of intensive professional and public discussion.<sup>66</sup>

The majority's interpretation is an out-of-context interpretation of British colonial legislation. The majority's opinion lacks grounding in the historic sources of the British legislation, and fails to inquire whether similar laws enacted by the British in other colonies were ever interpreted in the same manner. Furthermore, the majority's relentlessly broad interpretation of the right to compensation is unsupported by research into current compensation rights in other democratic countries.<sup>67</sup>

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64. This was not the last time that Additional Hearings would be granted in cases concerning regulatory takings issues.

65. See Additional Hearing [CA] 28/79 The Local Planning and Bldg. Comm'n for Jerusalem v. Varon.

66. This is a result of this author's initiative and recommendations, submitted in 2006 to a government interministerial committee, and based on this author's comparative research.

67. Such comparative research would show that most democratic countries do not allow compensation rights for indirect injuries due to planning decisions.

One can only speculate as to the majority's rationale behind extending compensation rights to landowners of neighboring plots. It should be understood against the backdrop of the collectivity focused legacy of Israeli society in the country's formative years. The judges in the majority view may have been motivated by an unarticulated quest to balance the Court's earlier orientation toward public property interests, often at the expense of private property rights. Maybe the justices felt that a broader definition of compensation rights would create a better equilibrium. The majority decision in *Varon* was the first sign of the orientation that, in later years, evolved into the property rights protectionism reported here.

Whatever the majority's underlying reasoning was, the Court surely did not anticipate the far-reaching impact its decision would have. At the time of the *Varon* decision, the number of claims throughout the country was very small. Subsequent research indicates that there were still no claims for indirect injuries a decade after the *Varon* decision.<sup>68</sup>

*b. After Varon*

The *Varon* decision received little media attention at the time it was handed down. However, the national government realized this decision might unleash a wave of compensation claims that would impose a severe financial burden on both local authorities and the national budget. In response, the government quickly drafted a bill to amend the Planning and Building Law in order to clarify that compensation rights applied only to direct injuries.<sup>69</sup> The Knesset, however, preferred a compromise between the Court's interpretation and the government's wishes. The resulting 1981 amendment declared that compensation rights would be extended to indirectly injured parcels, but only those abutting the boundaries of the plan at issue.<sup>70</sup>

However, the Knesset's solution was ambiguously defined. The Hebrew term "*govlim*" (here translated as "abutting") could also mean "bordering on" or "close" or "proximate,"<sup>71</sup> which left open the question of exactly how close is "close." By the 1990s, many landowners had discovered the latent ambiguity in the term "abutting" and submitted claims to the local planning commissions. A set of district court decisions

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68. See *supra* note 19.

69. See *supra* note 26 and accompanying statutory text.

70. See *supra* note 26 and accompanying statutory text.

71. See Appeal to an Administrative Petition CA 2775/01 Witner v. The Sharonim Local Planning Comm'n [2005] IsrSC 36, 435 (including a set of dictionary definitions in this key Supreme Court decision).

accumulated where different judges interpreted this term in very different ways. Some took a very narrow approach, while others came close to reverting to the original *Varon* interpretation. Because of the uncertainty surrounding how claims would be decided or how new planning proposals would be affected, planning commissions, appeal boards, and landowners alike found their decision-making capacity stalled.

The real estate and planning communities eagerly waited for the Supreme Court to clarify this issue. In September 2005, the Supreme Court consolidated several appeals with contradictory district court decisions.<sup>72</sup> The Court held that “abutting” should, in most cases, be limited to physically bordering parcels.

The Court, however, left some room for case specific interpretations by noting two exceptions: (1) where a “narrow road” separates otherwise related plots of land, or (2) where a “public footpath or narrow green strip” creates a similar separation. The purpose of these exceptions was to deter local commissions from inserting such minor separations in order to defeat compensation claims by nearby landowners.

However, even the exceptions create a semantic loophole. How narrow is “narrow?” Inevitably, the issue will find its way to the courts again.

*c. Implications for national infrastructure*

Because the *Varon* interpretation extends section 197 compensation rights to neighboring plots,<sup>73</sup> local planning commissions have become the venue for handling compensation claims for the adverse effects of major regional and national infrastructure. Property owners who neighbor highways, railways, airports, or power plants now submit claims under section 197.<sup>74</sup> Prior to the *Varon* decision, landowners neighboring national infrastructure had no legal basis to claim compensation. However, the legal mechanism of section 197 was never intended for this purpose. This conclusion is supported also by the fact that claims are to be submitted to the local planning commissions.<sup>75</sup> In addition, neither the local planning commissions nor any planning body is capable of handling the numerous claimants and enormous financial burden that such

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72. *See id.*

73. *See supra* Part IV.A.4.a.

74. Prior to the *Varon* decision, such claims either went uncompensated or were negotiated case by case.

75. *See infra* Part IV.A.5.

infrastructure entails. A different legal and institutional format should have been designed for handling such claims.

##### 5. *Who Should Pay the Compensation?*

Section 197 places the onus for paying successful compensation claims on the local planning commissions. However, section 197 does not distinguish among the various levels of plans in the national-to-local hierarchy of plans<sup>76</sup> or the types of developers who stand to benefit. Because district plans and national plans are not exempt from compensation claims, a disparity arises in many situations between the public that the new plan serves (for example, all those who travel on national highways) and the public that is expected to pay the bill (the residents of a municipality where the highway happens to pass through).

Initially when the number of claims nationwide was small, such disparities could be resolved through agreements negotiated on a case-by-case basis among the different levels of government. Over time, however, more uniform rules emerged, especially those regarding national roads and railways. Approximately seventy percent of the compensation claims were to be paid by the relevant national government bodies and the remaining thirty percent was to be paid by local governments. This practice, as applied to highways, was codified by an amendment to the Planning Law; however, in other types of development, determining who pays for the compensation claims continues to be contested.

Since 2005, when a national plan regulating the installation of cellular antennas was approved, cellular providers became the targets for the most visible conflict over the question of who should fund compensation claims. Neighbors of properties sold or rented out to cellular corporations submitted thousands of claims to local planning commissions. The local planning commissions argued that the municipalities should not have to pay compensation for a national service—especially a service operated by private corporations. The corporations have pressured the national government to solve the stalemate. This controversy has become a hot issue for local politicians, environmental and neighborhood organizations, and the media. Its resolution will likely require special legislation by the Knesset.

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76. See *supra* Part IV.A.1.c.

### 6. *Indemnification Contracts Between Developers and Municipalities*

A logical reaction to the *Varon* decision<sup>77</sup> would be for local authorities to attempt to shift the burden to the party enjoying the enhanced rights. This natural reaction raises a question. How can the local authorities force the party that benefits from the new development to internalize the negative externalities rather than making the entire community pay for the compensation awards?

The *Varon* decision gradually created a new “institution.”<sup>78</sup> After the number of claims by neighboring landowners rose dramatically in the 1990s, an increasing number of local governments started requiring developers to commit themselves to reimburse the municipalities for any compensation claims.<sup>79</sup> This practice is still erratic, each municipality forming its own policies and formats. The only topic that has prompted local authorities to attempt to coordinate their policies has been the cellular antennas issue.

As part of a broad amendment to the Planning Law in 1995, the Knesset revised section 198, where procedures for handling compensation claims are determined. The revision obliges planning commissions to notify any third party whose interests might be hurt by a compensation claim submitted, and grants such parties hearing rights. This is an indirect reference to the practice of indemnification agreements.

While the Israeli Courts, unlike their Dutch counterparts,<sup>80</sup> have not rejected the idea of reimbursement commitments, neither have they endorsed it. There are no judicial or administrative guidelines that provide guidance or rules for this emerging institution. As long as compensation claims can be submitted for externalities, where one party gains and another loses, indemnification contracts remain the logical and fair solution, but they should be regularized.

#### *B. Section 200: Exemptions from the Obligation to Pay Compensation*

Section 200 sets out the exceptions to the right to claim compensation.<sup>81</sup> Even though the section was enacted at the same time as

77. See *supra* note 65 and accompanying text.

78. A similar practice has emerged in the Netherlands. See Fred Hobma & Willem Wijting, *Land-Use Planning and the Right to Compensation in the Netherlands*, 6 WASH. U. GLOBAL STUD. L. REV. 1 (2007).

79. This practice is new and uneven, and one can expect many issues to arise in the future.

80. See generally Hobma & Wijting, *supra* note 78.

81. The Planning and Building Law, 1965, § 200 (Isr.).

section 197 and was clearly intended by the legislators to serve as an essential buffer to compensation claims, section 200 has received less attention by the courts. Prior to the 1990s, the courts usually referred to section 200 only in passing while citing section 197. This likely reflected the paucity of jurisprudence submitted at that time due to the relatively small number of claims. Most Supreme Court decisions at the time focused on clarifying section 197. But once the grounds for submitting claims were clarified, appeals to the courts focused more on section 200.

### 1. *The Three Conditions of Section 200*

Section 200 contains three conditions for claiming exemptions: (1) the injury is caused by one of the eleven types of “provisions”—regulations contained in the injurious plan; (2) the harm is not reasonable; (3) the interests of fairness do not require compensation.<sup>82</sup>

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82. Planning and Building Law § 200. Section 200 reads as follows:

Exemption from payment of compensation: Land shall be deemed not to have been affected adversely, when it was affected by one of the following kinds of provisions of the plan, provided the harm does not exceed what is *reasonable* under the circumstances of the case, and provided that the interests of *fairness* do not require compensation to be paid to the injured party:

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

*Id.* (author’s trans.) (emphasis added).

The Supreme Court repeatedly emphasizes that the three conditions are *cumulative*.<sup>83</sup> Therefore, a local commission must prove that it fulfills each one of the conditions independently.

The complex syntax of this clause and the double negative of the third condition merit explanation. Even if an authority has proven that the injury is reasonable, it will still have to pay unless it can also prove that paying compensation to the injured party would not be fair or just.<sup>84</sup>

*a. The interpretation of “reasonableness” and “fairness”*

Section 200 has posed the most difficulty for the courts. It has two parts that are so different in style that they are almost contradictory in form. The preamble is very evaluative and discretionary and speaks of “reasonableness” and “justice.” In contrast the list of the eleven types of provisions in plans that are exempt from compensation is very detailed, specific, rational, and technical.

The courts have sidestepped this problem by almost ignoring the eleven-item list of exemptions. Thus, jurisprudence on the issue of compensation focuses entirely on two open-ended criteria: reasonableness and fairness. Justice Cheshin, who has written some of the Supreme Court’s most poetic judgments, has stated:

Section 200 is anomalous and special. The legislature has transformed the local commission and first and foremost, the Court into legislators . . . . The criteria that the legislature has set for us to decide upon in compensation claims are “*reasonableness*” and “*fairness*” . . . . These—needless to say—are deeper than the ocean, higher than the skies, and one can discover everything within them.<sup>85</sup>

Although the Supreme Court’s interpretation of the “reasonableness” and “fairness” concepts began only a decade ago, it has already resulted in several intense debates, split court decisions, and even a recent Additional Hearing. As one would expect, reasonableness and fairness must be applied to each compensation claim on a case-by-case basis. Court opinions often delve deep into the philosophy, ethics, and economics of the relationship between planning regulation and land values. Despite the

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83. See Additional Hearing by the Supreme Court, 1333/02 Local Planning and Bldg. Comm’n of Raanana v. Yehudit Horwitz [2004] SCIsr 58(6) 289 (author’s trans.).

84. *Id.* The explanation written by Judge Matza is especially instructive.

85. *Id.* § 5.

recent Additional Hearing, there is still no clear majority view on what criteria should be applied when judging reasonableness and fairness.

Until 2004, in most of the section 200 cases, the Court focused on the quantitative side by examining the degree of the decline in property value. Initially, a case where the decline in property value exceeded thirty percent was declared unreasonable. Over time, cases with lower percentages of decline came before the Court, and the landowners won.

*b. The Horwitz case*

This declining level caused alarm among municipalities and the central government. When a district court ruled that a decline of only ten percent is unreasonable, local governments became concerned and appealed to the Supreme Court. The Court's decision in *Raanana vs. Yehudit Horwitz*<sup>86</sup> is very rich in the discussion of the various criteria that the justices suggest. However, a close reading shows there is no discernable majority view on any specific criterion for deciding what is reasonable and what is fair.

Yehudit Horwitz and her late husband bought a plot of land in the city of Raanana in 1972. At the time, they could build five housing units on stilts. In 1983, the local planning commission reduced the number of permitted units to four and prohibited the building of houses on stilts. The appraised diminution in value was established at eleven percent. The district court found this was unreasonable, and the city appealed.

The Supreme Court unanimously rejected the appeal, agreeing that the eleven percent diminution in value should be compensated. However, the justices did not agree on the criteria that should be applied to the case. The Court's President granted an Additional Hearing with seven justices presiding.<sup>87</sup>

In the original appeal decision, Justice Tirkel, in a long and detailed opinion, concluded that the line of reasonableness should be understood as *de minimis* and passes at the one percent to three percent mark. President Barak suggested a new criterion, a balancing test between the importance of the public purpose and the degree of injury. Applying this test, he found that the degree of injury in the *Horwitz* case was not unreasonable. However, he then concluded that the "fairness" criterion was not met; therefore, the City of Raanana could not benefit from the exceptions

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86. CA 3901/96 Local Planning and Bldg. Comm'n of Raanana v. Yehudit Horwitz. SClSr 56(4) 913.

87. Additional Hearing 1333/02 Local Planning and Bldg. Comm'n of Raanana v. Yehudit Horwitz [2004] SClS 58(6) 289 (author's trans.).

clauses. Justice Zoabi joined Justice Tirkel in finding that the level of injury was not reasonable, but did not say explicitly whether he agreed with the *de minimis* rationale.

Local governments feared that Justice Tirkel's opinion would be regarded as the rationale of the *Horwitz* decision and that local authorities would have to compensate for any decline in value beyond two to three percent. Recognizing the importance of developing clearer guidance, the President authorized an Additional Hearing with seven justices.

At the Additional Hearing, the justices unanimously rejected the appeal. However, even though Justice Tirkel changed his mind about the *de minimis* criterion, a close reading of the decision shows that there still was no clear majority on the criteria for reasonableness and fairness. Nevertheless, in a 2006 Supreme Court decision, one justice summarized the rationale of the Additional Hearing in *Horwitz* as follows:

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

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

These considerations are not a closed list; additional considerations that should be taken account of are left to the future development of jurisprudence.

Fairness is an open and flexible criterion, based on a variety of considerations. These differ from case to case, according to the concrete facts that come before the court.<sup>88</sup>

In 2006, seventy years after compensation rights were first legislated, the *Horwitz* decision illustrates that there are no bright line criteria that can help guide planners, commissioners, lawyers, landowners, appraisers, or the courts as they evaluate whether a particular degree or type of injury will be judged compensable or exempted. From a comparative perspective, however, the general picture is clear: Israel has an extremely generous law

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88. CA 8736/04 Orah Cohen v. Local Comm'n for Raanana [2006] IsrSC 34(3) (Rubenstein, J.). See also *supra* note 83 and accompanying text.

that protects landowners and holders of lesser property rights from even minor reductions in property values that may be caused by planning decisions.

#### CONCLUSION

Israel represents an “extreme point” along the range of approaches to compensation rights. The steep increase in the number and sizes of compensation claims in Israel may serve as a preview for what can happen when the right to compensation for regulatory takings is too broad. While the experiences of one country may not be easily transferable to another, the Israeli experience may add to the property rights debates in other countries.

When Israeli property owners brought more claims and the number of cases increased, the courts had more opportunities to interpret the law. The sequence of cases gradually broadened the interpretation of compensation rights. In recent years, the impact of compensation claims has become a major consideration in almost every land-use planning decision. The cumulative pending claims have reached such proportions that threaten not only municipal budgets but also the national budget.

From a comparative planning law perspective, by largely focusing on two discretionary criteria, the Supreme Court has shifted Israel’s law on compensation from statutory law to judge-made, quasi-constitutional law. Israel’s compensation law, intended by the legislators to be in the same family as other statute-based compensation regimes such as those in Germany,<sup>89</sup> the Netherlands,<sup>90</sup> and Sweden,<sup>91</sup> has thus become more akin to American takings jurisprudence. In the United States, most states do not have statutory laws on compensation for regulatory takings; therefore, the courts are called upon to directly apply their interpretation of the Constitution.

The Israeli story of compensation rights exemplifies an interesting relationship between written law and judge-made law. The statutory law regarding compensation rights has existed since 1936, and the text remains largely unchanged. However, the contents of the right to compensation changed dramatically over time. Through the prism of this rich

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89. See Gerd Schmidt-Eichstaedt, *The Law on Liability for Reduced Property Values Caused by Planning Decisions in the Federal Republic of Germany*, 6 WASH. U. GLOBAL STUD. L. REV. 75 (2007).

90. See Hobma & Wijting, *supra* note 78.

91. See Thomas Kalbro, *Compensation Rights for Reduction in Property Values Due to Planning Decisions in Sweden*, 6 WASH. U. GLOBAL STUD. L. REV. 27 (2007).

jurisprudence, and the philosophical debates among the judges that characterize it, one can sense the transformation in Israel's society and economy.