COMPENSATION RIGHTS FOR REDUCTION IN PROPERTY VALUES DUE TO PLANNING DECISIONS: THE CASE OF FRANCE

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Compensation for reduction in property values due to planning decisions is an old question in many countries. At the same time, this question is deeply rooted in the contents of property rights, the practice of physical planning, and the implementation of other regulations.

As opposed to the theory and practice of "takings" developed in the United States, the land-use system in France is built on the opposite principle: no compensation has to be paid for the restriction of development rights resulting from urban regulations.[1]

This basic principle was introduced as early as 1935, and debates about town and country planning still refer to it to this day. The lack of economic equity resulting from this principle of non-compensation and the resistance it evokes among landowners have led to some bypasses and criticism. The principle of non-compensation is also related to the parallel concept of betterment recoupment in that there is no betterment tax in France.

This Article will describe the origins of the basic principle of non-compensation, the limits of its application, and the various ways in which

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1. Due to language constraints, the Law Review was not able to fill in missing citations beyond those provided by the author. For references and leading discussions of the French land-use system, see JOESPH COMBY & VINCENT RENARD, LES POLITIQUES FONCIÈRES (1996); FRANK ENNIS, INFRASTRUCTURE PROVISION AND THE NEGOTIATING PROCESS (Frank Ennis ed., 2003); DONALD G. HAGMAN & DEAN J. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (Am. Planning Ass'n 1978); Donald A. Krueckeberg, *The Difficult Character of Property: To Whom Do Things Belong*? 61 J. AM. PLAN. ASS'N 301, 301–09 (1995); SYLVAIN PÉRIGNON, LE NOUVEL ORDRE URBANISTIQUE: URBANISME, PROPRIÉTÉ, LIBERTÉS (2004); Vincent Renard, *Droits de construire baladeurs sur le littoral: Le droit de propriété en France au regard de la jurisprudence américaine*, *in* DROITS ET PROPRIETE, ECONOMIE ET ENVIRONNEMENT: LE LITTORAL 297, 311 (Max Falque & Henri Lamotte eds., Bruylant 2004); Vincent Renard, *Financing Public Facilities in France*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE AND ALTERNATIVE LAND POLICIES 173, 173–81 (Rachelle Alterman ed., New York Univ. Press 1988); BERNARD LAMORLETTE & DOMINIQUE MORENO, CODE DE L' URBANISME (Litec-JurisClasseur 2003).

landowners can receive limited compensation. The Article will conclude by commenting on the recent evolution of the European Court of Human Rights' jurisprudence.

I. ZONING DURING THE 1930S: THE REVOLT OF LANDOWNERS AGAINST ZONING

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

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

The very idea of zoning, of limiting or even canceling any development rights on a piece of land, generated strong political opposition that led to the adoption of new legislation. This legislation was a *décret-loi*, meaning that it was an executive decree rather than parliamentary legislation. It stated that no compensation should be paid for restrictions or even for total denials of development rights under the Urban Code (*Code de l' Urbanisme*), a cumulative set of laws and regulations about land use and development. Initially, this legislation was only intended to apply to the Paris Region. However, the tough legislative measures were not immediately applied to *Plan Prost* due to the lengthy developmental process of the master plan. Eventually, the master plan was approved in 1939 after other issues of higher priority had been addressed.

After World War II, the principle of non-compensation remained in effect. It was extended to the whole country in 1943 and was later codified and officially enshrined into French law. At the time, the expansion of this principle was seen, in part, as a necessary measure to address the extremely urgent problem of rebuilding a country torn by war as well as a means to overcome the inertia and resistance of landowners.

The principle of non-compensation became a pillar of town and country planning in France. It was later codified in article L 160-5 of the Urban Code: "No compensation will be paid for zoning restrictions introduced by the Code, in particular . . . restrictions to land use, development rights, height of buildings, etc." However, the article also articulated two "general exceptions" to the principle of non-compensation:

"[A] compensation is due if these restrictions result in a decrease in vested rights (*droits acquis*) or a modification of the previous state of the area resulting in a damage which is direct, material and certain."

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

II. THE GENERAL EXCEPTIONS TO THE BASIC PRINCIPLE OF NON-COMPENSATION

The first general exception to the principle of non-compensation pertains to "restrictions on vested rights." This general exception, however, has been interpreted by the courts in a narrow way. Courts have consistently held that landowners do not have vested rights to develop their land as long as building permits have not been granted. In principle, downzoning does not constitute a restriction on a vested right, which means that a local plan, the French equivalent to zoning in the United States, does not grant a landowner a vested right to develop. Thus, a local plan's revision or abolishment does not result in compensation to the landowner. However, once a building permit is granted, a cancellation of this permit stemming from a new regulation is considered a restriction on a vested right and affords the landowner the possibility of claiming compensation.

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

More recently, in 1998, the *Conseil d'Etat* introduced a broader exception in the *Bitouzet* case.[2] The Court stated that compensation is due if the zoning restriction can be considered "abnormal and extraordinary" (*special et exorbitant*). Although at first glance, this appears to be a major

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

precedent that modifies the principle of non-compensation, the language of the decision suggests that its effect on the principle of non-compensation is very minor . Indeed, this case has not had much impact in practice.

Another situation where the courts have recognized compensation rights is when a landowner has suffered *intention dolosive*, or "intentional injury." This can be claimed by a landowner when a public authority, usually a municipality, severely restricts the development rights granted by the local plan and then expropriates the land at a price lower than the market price due to the downzoning. This claim is rarely used in practice; however, it does deter municipalities that may be attracted to the idea.

The second general exception to the principle of non-compensation, a modification in the state of the property resulting in some direct, material, and certain damage, has been used more frequently. However, like the first general exception, the second general exception does not significantly weaken the basic principle of non-compensation. Indeed, zoning and rezoning are not regarded by themselves as modifications of the state of the property, the rationale being that a change or revision of a regulation does not modify the character or nature of property. Any modification is regarded only as an indirect consequence and thus does not result in a right to compensation.

In summary, the fundamental principle of no compensation for zoning restrictions, a principle first introduced in 1935, today encompasses the entire country. The codified general exceptions to this principle have proven to be relatively insignificant as interpreted by the courts. However, the potential economic hardships to landowners under this principle have been assuaged to a large extent by an increasing flexibility in the application of local planning and by a series of specific exceptions that apply to a variety of practical situations. At the same time, European Union legislation and jurisprudence are progressively evolving and leaning toward the protection of landowners rather than enforcing the non-compensation principle.[3]

III. THE CONTEXT OF A DECENTRALIZED PLANNING SYSTEM AFTER THE 1980S AND ITS CONSEQUENCES ON THE QUESTION OF "WINDFALLS FOR WIPEOUTS"

Up to 1980, the planning framework in France was highly centralized. The national government was directly responsible for preparing structure

3. *See* discussion *infra* Part VII.

and local plans as well as approving building permits. This changed radically in the 1980s due to two developments: (1) the decentralization of planning powers starting in 1981, and (2) the international trend toward deregulation that was spreading across countries during the 1980s. Decentralization has generally resulted in an increase in the flexibility of zoning, which in turn has opened the doors to more negotiations in the development process and in compensation. In fact, negotiations between developers and municipalities can now almost be considered an integral part of the planning and development process.

As part of the decentralization reforms, municipalities in the 1980s became responsible for planning and zoning, as well as approving building permits once local plans were approved. Although the legal format and content of structure plans, local plans, and development rights were essentially unaltered during the period of decentralization, local authorities in practice exercised greater discretion and flexibility primarily through the use of the "modification" procedure, but also through the occasional use of the "revision" procedure.

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

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

Given that there are over 36,000 French municipalities, decentralization of the planning powers at the municipality level has made it difficult for the State to control local practices. One consequence has been the extent of the financial relationships between developers, builders, and local authorities, which has grown to an unprecedented level. In some instances,

these relationships have led to corruption, most notably during the boom period from 1985 to 1990.

IV. AN AMBIGUOUS DEVICE: TRANSFER OF DEVELOPMENT RIGHTS, THE FRENCH WAY

As indicated, French urban development law, like that of several Western European legal systems, is based on the principle of no compensation for urban development constraints. In the terminology used in North America, the "police power" takes over from "eminent domain." In spite of what has been said before, the principle of non-compensation at times does create inequities for landowners whose land is differently affected by urban regulations.

In France, such inequities posed a particularly thorny problem in the early 1970s with the passage of the Land Use Act (*Loi d'Orientation Foncière*) of December 31, 1967, which added more urban planning and zoning measures that further constrained landowners. The Land Use Act was a landmark in French urban law because it introduced zoning-like land-use plans (*Plan d'Occupation des Sols*) for the first time as a general principle with no exemptions.

The controversy surrounding zoning lasted for many years. After a number of abortive attempts, Parliament passed the Urban Development Reform Act (*Loi sur la réforme de l'urbanisme*) of December 31, 1976, which finally made it possible in some zones for development rights to be transferred from a "transmitter" subzone to a "receiver" subzone. In French, this mechanism is called *transfert de coefficient d' occupation des sols* ("TDR"). This principle is presently embodied in article L 123-2 of the Urban Development Code:

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

The language referring to zones that are "to be conserved because of the quality of the landscape" is somewhat ambiguous. One issue arising from this ambiguity is whether the intent is to exclude productive agricultural areas as well as zones available for development. This

distinction may not be possible to make because, as of right now, there is no case law on this point.

The very definition of the transfer mechanism illustrates the tension inherent in this concept. On the one hand, it appears to be an efficient market mechanism to allocate development rights among landowners, but on the other hand, it also functions as a compensation mechanism when development rights for land have been severely restricted.

The transfer provision has generated a great deal of debate with criticism concentrating on three main points: (1) the transfer provision's apparent tie to zoning, (2) the incompatibility of the transfer provision with the principle of non-compensation for zoning restrictions, and (3) the inequities that result if viewed from the perspective of distributive justice. The first point of contention with the transfer provision stems from the interpretation of the phrase "quality of the landscape" that seems to equate it with a conservancy area, in which all development is prohibited. Given this interpretation, critics question why productive agricultural areas, which often constitute landscape of high quality, can be excluded from the transfer mechanism.

Agricultural landowners may be greatly tempted to apply for transferable development rights. The ambiguous relationship between the transfer provision and zoning has had an adverse impact on the initial attempts to apply the transfer provision in France, the two leading examples occurring in Lourmarin (Vaucluse) and La Cadière d' Azur (Var).

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

Another attempt at applying TDR took place in La Cadière d' Azur, a village on the French Riviera. In contrast to the land of Lourmarin, most of the land in La Cadière d' Azur consisted of economically viable vineyards. Landowners, who were still engaged in farming, became frustrated by

their inability to reap the benefits of development pressure. They tried to use TDR as a remedy; however, their attempt was unsuccessful for the same timing reasons that plagued the residents of Lourmarin. Neither of these cases reached the courts.

Critics of the transfer mechanism have also challenged the view that a transfer of a development right is justified because it is a form of compensation for a restrictive regulation. The critics argue that protecting an area that should be "conserved because of the quality of the landscape" is clearly in the public interest. The transfer of rights as a form of compensation, it is argued, contradicts the principle that land-use regulation is not compensable.

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

At the present time, TDR has been minimally used as a substitute for compensation. The continuing robustness of the principle of non-compensation and the legal complexity of the transfer mechanism entails a high risk of litigation for a would-be transferor. Hence, TDR is seen as a tool that is best avoided if other avenues to compensation are available. We now move on to explore these avenues.

V. COMPENSATION THROUGH THE INVERSE CONDEMNATION PRINCIPLE

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

One of its most important applications pertains to local plans that classify pieces of land as "reserved areas" (*emplacement réservé*).

Reserved areas are slated for zoning for some future public use like a road, highway, public park, or some other form of infrastructure.

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

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

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

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

Under specific circumstances, a similar mechanism applies to rural areas that have steep, mountainous topography. For example, when the national government delineates a national park so that it includes private land, the landowner may require the national governmental agency in charge of the national park to purchase the land. In order for this right to apply, the landowner must "have lost, as a result of zoning in the central area of a national park, more than fifty percent of the 'total income from the land that he was [previously] obtaining.'" This is a specific instance of an application of a general principle in expropriation law, in which some additional compensation is due beyond the value of the parcel of land

directly expropriated, if the use of the expropriated part of the land negatively affects the ability to exploit a farm. Under the generic expression "*réquisition d' emprise totale*," in such a case, the landowner can require that the expropriating body buy not only the required land, but also the entire property.

VI. SOME SPECIFIC COMPENSATION DEVICES

As previously explained, the economic hardship attributed to the principle of non-compensation is to a large extent balanced by several devices concerning certain types of areas, such as mountain and coastal areas as well as certain types of servitudes, such as nuisance resulting from dangerous factories and electric power lines.

A representative example is the compensation of a landowner whose property is classified as "protected wood or forest" (*espace boisé classé*).[4] It grants landowners compensation rights when their private lands are designated "protected wood or forest" areas. It should be noted that the regulations concerning woods and forests are quite old and strict and are subject to the general principle of protection, except under specific conditions.

During the 1960s, there was strong pressure to develop the land surrounding major cities, especially those around the Paris Region. The political and social pressure to obtain some exceptions to the principle of total protection proved fruitful: some of the protected forest land was released for development.

However, a backlash ensued. In 1967 Parliament passed legislation that strengthened the protection of wooden areas by introducing a new and even more restrictive category of "listed wood area." At the same time, Parliament introduced a form of compensation that acted through an exchange mechanism: the landowner could ask a municipality to "declassify" up to ten percent of the protected area in exchange for giving the rest of the land to the municipality free of charge. The law then specified that the "betterment," the additional value arising from the development rights granted to the ten percent area retained by the landowner, must not exceed the market value of the land given to the municipality. Alternatively, the municipality or any other level of government can grant the landowner a piece of municipal land to be

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

developed in exchange for the initial wooded area, subject to the same financial condition.

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

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

A landowner also has compensation rights when land that surrounds a dangerous factory is classified as a dangerous zone. This compensation right is grounded in European Union legislation in 2003 and is called a "*Seveso directive*," or a special servitude. In France, the *Seveso directive* has been applied as follows: an area surrounding the dangerous factory must be delineated, with a general prohibition of undertaking any development. The government authorities are obligated to compensate the landowners. In reality, rather than compensating landowners, the industrial corporations that run these factories usually prefer to buy the land from the landowners. The *Seveso directive* requires that the industrial corporation, the municipality, and the national government reach an agreement about the possibility of using expropriation or inverse condemnation.

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

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

As a whole, it appears that the restrictiveness of the principle of non-compensation stated in article L 160-5 is balanced to a large extent by the emergence of specific compensation devices used for specific situations.

This process has been reinforced by the evolution of the jurisprudence of the European Court of Human Rights, which we now turn to.

VII. EVOLUTION OF EUROPEAN UNION JURISPRUDENCE

Since the mid-1990s, the jurisprudence of the European Court of Human Rights with regards to compensation rights has evolved as the Court has applied the "right to the protection of property" (*droit au respect des biens*) found in the First Protocol of the European Convention on Human Rights.[5] As a member state of the European Union, France must see to it that its domestic laws comply with the Convention and the Court's interpretation of the Convention's provisions. Thus far, the general tendency of the European Court of Human Rights is to expand compensation rights.

The French Supreme Administrative Court, the *Conseil d'Etat*, has held several times that the French principle of non-compensation is compatible with the European Convention of Human Rights. However, in the *Bitouzet* case,[6] the French Supreme Administrative Court held that a new exception to the principle of non-compensation should be introduced in France. The Court proclaimed that compensation is due when a servitude results in a "special and extraordinary burden that is disproportionate to the public interest sought by the regulation" ("*une charge spéciale et exorbitante, hors de proportion avec l' intérêt general poursuivi*"). The language of the decision indicates that that the Court wanted to avoid making a substantial modification to the principle of non-compensation.

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

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

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