

# Part V: International Perspectives

## Chapter 11: Israel

### Land Use Law in the Face of a Rapid-Growth Crisis: The Case of Mass-Immigration to Israel in the 1990s

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#### INTRODUCTION

Traditionally, land use law in most countries rarely distinguishes among planning contexts in terms of the rate of growth that is to be managed. The same legislation presumably is expected to apply to situations where a town, city, region, or country is relatively stable or stagnant, and to situations where these are undergoing accelerated growth. That was true for the traditional United States zoning-based system, which has been criticized for not being well suited to managing rapid growth.<sup>1</sup> “Growth management” is ostensibly better suited for managing growth.

Growth management in American planning lingo refers to planning-based policies adopted by cities and towns to control the extent, type, and most importantly, the rate and timing of development. Most of the tools usually classified under this category are growth limiting, not growth promoting, and include means such as service boundaries, phases, moratoria, freezes, and infrastructure

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1. DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 653 (4th ed. 1995).

concurrency conditions.<sup>2</sup>

In the USA, as in many other advanced-economy countries, rapid urban or regional growth is often seen as a negative process, a recipe for social conflict. Growth management is all too often a cover for a policy of social exclusion.<sup>3</sup> Such a policy is justified by some voters and decision-makers as intended to protect the property values of existing residents, or to restrict the entry of poorer people who might become a burden on social services and strain the town's financial base (Downs, 1973; Stein, 1993; Nelson 1996; Haar, 1996; Danielsen, Lang, and Fulton, 1999)<sup>4</sup>. Where accelerated growth is due not to "regular" inter-city migration but rather to an influx of mass immigration, one might expect even greater problems of social exclusion.

The purpose of this Article is to investigate the effect of an extremely accelerated growth rate—a crisis—on land use legislation and decision-making structure. I report on the mass immigration to Israel in the 1990s and its aftermath, and analyze the lessons that scholars of land use law and planning might draw from this case. How did political leaders, legislators, planners, and the courts perceive the suitability of the existing land use legislation for handling the crisis of accelerated growth? Did they feel it necessary to introduce changes in the legislation and decision-making institutions so as to meet the demands of accelerated growth and prevent social exclusion? Were these changes effective in handling the crisis and what was the price paid? And how did the courts reflect, or react to, the crisis?

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2. *Id.* at 653-704.

3. *Id.*

4. Karen A. Danielson et al., *Retracting Suburbia: Smart Growth and the Future of Housing*, 10 HOUSING POL'Y DEBATE 513 (1999); ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973); CHARLES M. HAAR, *SUBURBS UNDER SEIGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996); Arthur C. Nelson, *Inclusionary Mandates for Plans in Growth Management States* (1996) (unpublished paper presented at the 1996 annual conference of the Association of Collegiate Schools of Planning jointly held with the Association of European Schools of Planning in Toronto); GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF 1990S (Jay M. Stein ed., 1993). In order to mitigate such exclusionary trends, several U.S. states have adopted a promising antidote—"inclusionary housing" policies. Nico Calavito et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109 (1997); Alan Mallach, *Inclusionary Housing Programs: Policies and Practices* (1984); Nelson, *supra*.

After introducing the Israeli mass-immigration case study, I shall introduce Israel's "vital statistics," the key urban and regional policies, and the major land and housing policies. The general constitutional and institutional setting at the national and local-government levels is then presented to provide the context for understanding land use legislation. Next, I shall present the pre-crisis statutory land use planning system and the reasons for its failure during the crisis. A major part of this Article is then devoted to the crisis-time legislative process, to analysis of the special law enacted, and to several High Court decisions that have provided judicial interpretation. Due to the need to handle rapid growth, the new legislation was used very intensively within a relatively short period of time, and I am able to provide a concise description of its application and impacts. Last, the readers will wish to know whether after the crisis tapered down, there was a return to the pre-crisis legislation or, perhaps, whether the exposure to rapid growth has stimulated revisions in planning legislation and practice. I conclude with some possible "take away" lessons from the case study concerning the capacity of land use law to manage accelerated growth.

## I. BACKGROUND TO ISRAEL ON THE EVE OF THE CRISIS

In order to assess the degree of growth brought by mass immigration, I should first establish the "base line" from which change diverted.

### A. *The "Base-Line" and the Growth-Management Challenge*

Despite its general exposure to crises derived from its geopolitical and security context, on the eve of the immigration wave, Israel was in a relatively placid period. By the 1980s Israel had successfully extracted itself from the turbulent developing-country mode of the 1950 and 1960.<sup>5</sup> Its Gross Domestic Product (GDP) per person was gradually approaching a South-European level. Since the mid-1980s the

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5. Rachele Alterman & Morris Hill, *Land Use Planning in Israel*, in INTERNATIONAL HANDBOOK ON LAND USE PLANNING (Nicholas N. Patricios ed., 1986).

immigration rate had been at an all-time low averaging some twelve thousand annually, thus barely offsetting outward migration by Israelis. This was a new situation with which the country had to come to grips not only demographically but also ideologically. Against this backdrop, the crisis-time rate of immigration of one hundred fifty thousand and two hundred thousand in 1990 and 1991 respectively represented a thirteen to fifteen-fold growth. The post-crisis rates since 1993 of fifty to eighty thousand annually, though low compared with the crisis-time rates, were still some four to seven times higher than in the years just prior to the crisis.

Israel's population is ninety-two percent urban—among the highest urban population in the world<sup>6</sup>—while Israel's land area is approximately 20,500 square kilometers (8000 square miles), not much larger than New Jersey. In 1999 the population density was seven hundred fifty persons per square mile (293 per square km), among the highest in the world.<sup>7</sup>

The 1980s in Israel were a period of inward focus: urban-revitalization projects rather than massive new developments; accelerated social integration among ethnic groups; and steps toward greater economic and political equality between Israel's Jewish majority and its Arab minority. There were also initial steps toward government decentralization in a previously highly-centralized and government-heavy country,<sup>8</sup> growing public participation and interest-group influence,<sup>9</sup> and initial steps to privatize government-owned corporations and outsource public services. That decade also witnessed the gradual dismantling of some of the country's most venerated symbols. Among these were the world-renowned cooperative rural communities (*kibbutzim and moshavim*), which had begun a process of economic and

6. Seventy-four percent of the population in the United States is urban, seventy-seven percent in Canada, eighty-nine percent in Britain, eighty-four percent in Sweden, and eighty-nine percent in the Netherlands. UNITED NATIONS, DEMOGRAPHIC YEARBOOK (1996).

7. Since over fifty percent of Israel's land area is in the inhospitable southern desert, the effective density is much higher.

8. Rachele Alterman, *Implementing Decentralization for Neighborhood Regeneration: Factors Promoting or Inhibiting Success*, 54 J. AM. PLANNING ASS'N 454 (1988); Gabriel Shefer, *Society, Politics, Government and National Level Planning in Israel*, in TOWARDS THE IMPLEMENTATION OF THE "ISRAEL 2020" PLAN: NATIONAL-LEVEL PLANNING INSTITUTIONS AND DECISIONS IN TEN COUNTRIES (Rachele Alterman ed., 1996).

9. YAEL YISHAI, LAND OF PARADOXES: INTEREST POLITICS IN ISRAEL (1991).

social restructuring.

As international conditions changed, the doors of the USSR were opened for emigration to Israel of Soviet Jews and their non-Jewish family members. The first trickle started in November 1989, becoming an avalanche in 1990-1992. By 1993, when the crisis subsided, five hundred thousand immigrants had been added to Israel's 1989 population of four and a half million, and by the year 2000, one million had arrived, and the total population was six million (including over one million Israeli Arab citizens). Projections in 1990 oscillated widely. Hindsight shows that at first these projections were gross underestimates, and then they swung to the other extreme, expecting one to two million within three years. Uncertainty was the name of the game. The impacts on almost every aspect of society and the economy were expected to be considerable. A special challenge was faced by land use, urban and regional planners. They were expected to prevent a housing shortage by enabling the construction of hundreds of thousands of additional dwelling units, alongside the physical infrastructure and public services made necessary by the sudden influx of immigrants.

### *B. Israel as a Case-Study*

Israel is an especially appropriate country for studying the effect of a rapid-growth crisis on planning legislation because its "normal" planning system may seem to land use law scholars as the ideal growth-management system. Americans would recognize the elements of the Israeli statutory planning system as a combination among the statewide zoning powers of Hawaii,<sup>10</sup> the hierarchical oversight of Florida and some other states,<sup>11</sup> alongside the tough farmland preservation controls of Oregon.<sup>12</sup> Compared not only to the United States but also to most other Western countries, Israeli

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10. DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATIONS WON'T WORK (1994); DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII (1984).

11. John M. DeGrove & Patricia M. Metzger, *Growth Management and the Integrated Roles of State, Regional, and Local Governments*, in GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990S (Jay M. Stein ed., 1993).

12. Deborah A. Howe, *Growth Management in Oregon*, in GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990S (Jay M. Stein ed., 1993).

planning legislation ostensibly contains almost every conceivable growth-management tool. There is considerable national-level oversight and ample powers of control and implementation.

Israel's national goals have ideologically always been pro-growth and pro-immigration.<sup>13</sup> This is one country that one would expect to have national-level planning powers that can ensure, when necessary, an efficient process of approval of plans and permits to accommodate growth. One would expect that under such a system, national interests would be able to override local interests without much difficulty. For example, if there is local resistance to the absorption of a large number of immigrant households or to public-program housing, one would expect the regular planning system to have the powers to overcome such resistance. Yet, as this Article will show, Israel's centralized planning system, despite its considerable planning-control powers and intergovernmental coordinating tools, turned out to be unsuited to accommodating rapid growth. It had to be drastically restructured in order to be able to accommodate the crisis.

The absorption of a large number of immigrants in Israel in the 1990s presents one of the more distinct large-scale "laboratories" for studying the challenge of handling accelerated growth in a democratic polity and developed economy—a crisis that is not a product of war or of a natural disaster. It is an especially convenient case study because it enables one to observe the decision-makers' and legislators' responses before, during, and after the crisis—vantagepoints that other major national crises rarely offer. The relatively short and well-bounded period of time when the crisis was at its peak enabled me to examine how it unfolded in real-time, as well as some of its outputs and likely outcomes as they appeared by 2001.<sup>14</sup>

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13. The Law of the Return grants all Jews or non-Jewish family members to the third generation, the right to immigrate to Israel and to automatic citizenship, regardless of socioeconomic, health, or education status.

14. For the full story of the crisis and how planners handled it, see RACHELLE ALTERMAN, *PLANNING IN THE FACE OF CRISIS: HOUSING AND URBAN POLICYMAKING IN RESPONSE TO MASS IMMIGRATION TO ISRAEL IN THE 1990S* (forthcoming 2001).

### *C. A Brief Introduction to National Land and Housing Policies*

Israel presents an interesting, probably unique, mix of public and private-sector action in land development and housing.<sup>15</sup> An estimated ninety-three percent of Israel's total land area is publicly owned. However, private land has always played a much more significant role than its numeric size implies. With municipal land banking almost unheard of in Israel, reflecting the legal and financial weakness of local authorities, almost all the public land is owned by state or quasi-state authorities and is administered by the Israel Lands Administration—a statutory agency established in 1960. The Administration, in releasing land for development, must usually use leasehold tenure. The 1960 Basic Law: Israel Lands and its complementary 1960 Israel Lands Law strictly limit the legal authority to transfer public land to private freehold tenure. The substitute is short or, usually, longterm leaseholds and these govern about two-thirds of the housing and a high proportion of businesses and industry in Israel. But, due to several decades of what I call “crawling-privatization,”<sup>16</sup> however, the longterm leasehold contracts in urban areas place virtually no restrictions on open-market transactions.<sup>17</sup>

Most agricultural land, too, is publicly owned and under leases that place strict use limits. Unlike the urban sector, privatization trends in the rural sector were minimal before the crisis. On the eve of the mass immigration, most land reserves in Israel were classified as agricultural, so it will not be surprising that the land use and contractual status of such land became a major issue during the crisis.

Privatization trends also typified the housing sector on the eve of the crisis. During the state's first twenty or twenty-five years, until the mid-1970s, the majority of housing starts was either built directly by the state or was state-supported. This second type of housing—what Europeans call “social housing”—Israelis call “public-program

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15. Barrie Needham & Roelof Verhage, *Housing and Land Israel and the Netherlands*, 69 TOWN PLANNING REV. 397 (1998).

16. RACHELLE ALTERMAN, ISRAEL'S FUTURE LAND POLICY (1999) (Hebrew).

17. For a full exposition of Israel's land policy and the quasi-privatization trends it has been undergoing, see ALTERMAN, *supra* note 16. An English-language concise description is available in Alterman, *supra* note 14.

housing.” Most of these housing units are condominiums built on public land with private capital and risk. The residents own a longterm leasehold drawn out by the Lands Administration. The share of public-program housing nose-dived, so that by the latter 1980s it was only seventeen percent. State-built housing was totally phased out. Any resumption of state intervention in housing construction to meet the mass immigration would constitute a major change of course.

Israeli cities and towns are relatively compact, and resemble cities and towns in Europe. Most Israelis live in medium-density condominiums (by American standards most would be regarded as high-density). Until the 1980s, land-consuming single or double-family low-rise houses were reserved for ex-urban communities only. However, since the mid-1980s, consumer demand for such housing on the up-market side led many towns and cities to promote more low-rise housing (but at a higher density than its U.S. parallels).<sup>18</sup> The 1980s also saw Israel’s first sprawling shopping malls on the outskirts of urban areas that have since proliferated. Despite the country’s small size and high population density, planners and the general public were still locked into the mind-set of maximum population distribution in order to establish national presence throughout the country. Awareness of the scarcity of land and the urgency to conserve it came only as a result of the crisis.

#### *D. The Parliament And The Central Government*<sup>19</sup>

Israel is a unitary state with a parliamentary political system. The parliament—the Knesset—is composed of one hundred twenty members in a single chamber. Aside from its legislative role, the

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18. To present the full picture one should remember, though, that cumulatively the vast majority of Israelis were (and still are) living in apartment buildings. Furthermore, the new ground-attached housing, though regarded as very low-density for Israeli urban areas, was typically planned at twelve units to the net acre, which in the United States and Canada would be regarded as rather high densities.

19. The following two sub-sections also appear in a somewhat different version in Rachele Alterman, *National-Level Planning in Israel: Walking the Tightrope Between Government Control and Privatization*, in NATIONAL-LEVEL SPATIAL PLANNING IN DEMOCRATIC COUNTRIES: TIME FOR A REEXAMINATION (Rachele Alterman ed., forthcoming 2000).



parliament has no direct involvement in approving land use plans. During most of Israel's history, the Knesset has shown little interest in urban and regional matters since much of Israel's political agenda has been pre-occupied with issues of war, peace, the future of the occupied territories, and religious controversies. Until the early 1990s only a handful of Knesset members would show up to meetings of the Knesset Committee for Interior and Environmental Affairs where bills related to land use or environmental planning are prepared for legislation.<sup>20</sup> This has changed only modestly in the 1990s, and even that change is partially attributable to the crisis. Knesset committees have become more open to interest groups, and a few more members of the Knesset have become somewhat more interested in planning affairs.

Although the country is divided into six statutory districts, national government has not devolved any major powers to them. Headed by an officer of the Ministry of the Interior, they are in charge of oversight of local government and land use planning. Other ministries also have administrative districts, but these are not statutory, they only reflect administrative convenience (often their boundaries do not even coincide with each other). Israel's constitutional structure vests within the central government all residual executive powers not specifically assigned by law to local government or to a specific agency.

Given the highly centralized structure of decisions, the high involvement of central government in many aspects of land use planning comes as no surprise. Some experts argue that Israel's geopolitical and internal needs justify a high degree of centralization in policymaking.<sup>21</sup> Yet, despite the absence of formal decentralization, the national-level policymaking process and the content of policies have de facto changed significantly. These changes reflect the growing local-government assertiveness discussed below, the accelerating trends of privatization of public services, and the pullback of government involvement in housing supply.

Many national-level agencies make decisions that have a direct

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20. As a pro-bono advisor to the Knesset Committee for Interior and Environmental Affairs on major amendments to planning legislation, I can testify to this first-hand.

21. YEHEZKEL DROV, *A GRAND STRATEGY FOR ISRAEL* (1989) (Hebrew).

bearing on urban and regional development. These include the cabinet itself, most government ministries, several statutory bodies directly entrusted with specific land use issues, and non-governmental bodies that are unique to Israel's historic context (such as the Jewish Agency and the Jewish National Fund).

*E. Local Governments and Their Relations with the Central Government*

There are approximately two hundred fifty local governments, of which more than seventy are in the Arab sector. Local governments are of three types: cities (approximately sixty), towns (approximately one hundred thirty-five), and regional authorities (fifty-six). In densely built-up Israel, the latter include not only agricultural land but also an increasing number of ex-urban neighborhoods, commercial, and industrial sites. The central government regards the number of local authorities as too large and fiscally wasteful. Despite the recommendations of several public commissions that the government has set up over the past twenty years, however, few mergers have yet been successfully completed because of local-government resistance.<sup>22</sup>

Israel may be of the only advanced-economy country where no major decentralization and devolution of powers have officially taken place. The central government legally still retains most of the powers it possessed when Israel was in its formative stages. Yet, since the 1980s, various incremental trends of decentralization have been occurring without a legislative stamp.

On paper the legal powers of local authorities are weak and their financial powers are severely constrained by the central government. Israeli local governments are burdened by a whole gamut of responsibilities. Legally and financially they are weaker than their counterparts in most Western countries and much weaker than in the

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22. Eran Razin, *The Local-Governments Map in Israel for the Year 2020*, in SPATIAL, ECONOMIC AND MUNICIPAL ASPECTS (1997) (Hebrew); Eran Razin, *Municipal Reform in the Tel Aviv Metropolis: Metropolitan Government or Metropolitan Cooperation?*, 14 ENV'T AND PLANNING: GOV'T & POL'Y 39 (1996); Eran Razin & A. Hazan, *Industrial Development and Municipal Organization: Conflict, Cooperation and Regional Effects*, 13 ENV'T & PLANNING: GOV'T & POL'Y 297 (1995).

United States. Most major budgetary decisions and spending require central-government approval. All but the most prosperous local authorities have a weak tax base, and are dependent on hefty central-government transfers. In addition, land-use and development control powers are highly centralized.<sup>23</sup>

This picture is, however, somewhat misleading; despite the rather heavy central-government presence in many sectors, much of the day-to-day development policy and initiatives—the things that affect consumers most—are vested at the local level. Some local authorities have learned all too well how to negotiate with the central government to stave off “locally unwanted land uses” and to increase their de facto autonomy despite central-government oversight powers. Since the 1980s mayors have been elected directly rather than as heads of a party slate. There is nothing like political competition among candidates to bring out the best of initiatives and creative action. Proactive mayors have taken two main routes to increase their resources. They lobby the central government and their own political party for more resources, and they use creative ways of getting developers to participate in the upgrading of public services to the dismay of the central government.<sup>24</sup>

One may see below how crisis-time legislation tried to roll the clock back to a more centralized structure—and what were the results.

## II. THE PRE-CRISIS STATUTORY PLANNING SYSTEM

Even before the crisis, Israel’s planning and development control system was highly centralized, encompassing most of the *powers* any planner might wish for, in order to implement central-government policy and coordinate the actions of the various government

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23. For an international comparison of levels of centralization regarding land use planning, see Rachelle Alterman, *National-Level Planning in Democratic Countries: A Comparative Perspective*, in NATIONAL-LEVEL SPATIAL PLANNING IN DEMOCRATIC COUNTRIES: TIME FOR A REEXAMINATION (Rachelle Alterman ed., forthcoming 2000).

24. LIRIT MARGALIT & RACHELLE ALTERMAN, FROM FEES TO CONTRACTS: METHODS FOR ENCOURAGING DEVELOPERS TO PARTICIPATE IN THE SUPPLY OF PUBLIC BUILDINGS AND SERVICES (1998) (Hebrew).

bureaus.<sup>25</sup> Yet, when the mass-immigration crisis began, there was little forward planning for accelerated growth. There were few land reserves with approved plans for development in major urban areas. Those outlying development towns that did have such reserves were the targets of the population distribution ideology but had few employment opportunities. There was no comprehensive national development planning but rather a series of sectoral national plans.

To understand how this situation came about in a country that still viewed itself as a nation being built and that had ample legal planning powers, one must take a deeper look at the statutory planning system and the decision modes related to it.<sup>26</sup>

#### A. *The 1965 Planning and Building Law*<sup>27</sup>

The 1965 Planning and Building Law replaced the legislation introduced by the British in 1922 and 1936 during their Mandate over Palestine, which had remained in force after the establishment of Israel in 1948.<sup>28</sup> The 1965 law kept intact most of the local-planning attributes of the pre-state legislation and added several important changes. Until 1965 planning controls did not apply to government bodies. The 1965 law required all government jurisdictions—central, district, or local—as well as defense-related land uses (which have special procedures in the law) to abide by its regulations and procedures. Thus, since 1966 government construction—say, by the Ministry of Construction and Housing—has had to follow the same procedure as the private developer. The story of the unsuccessful attempt to change that norm at the height of the crisis is told below.

The 1965 legislation along with its (minor) amendments, controls all

25. Ernest R. Alexander et al., *Evaluating Plan Implementation: The National Statutory Planning System in Israel*, in 20 PROGRESS IN PLANNING (1983).

26. For more detail on the statutory planning system and its operation prior to the crisis see Ernest R. Alexander et al., *Evaluating Plan Implementation: The National Statutory Planning System in Israel*, in 26 PROGRESS IN PLANNING MONOGRAPH SERIES (1983); RACHELLE ALTERMAN & MIRIAM ROSENSTEIN, *ISRAEL'S AGRICULTURAL LAND PROTECTION POLICY: THE LAW AND ITS IMPLEMENTATION* (1992) (Hebrew). For an updated view see Alterman, *supra* note 19.

27. This section, in somewhat different forms, also appears in Alterman, *supra* note 19.

28. Laws of the State of Israel (1965). (Official translations are available in English only until the early 1980s, thus not covering many later amendments.)

planning and development in Israel until today.<sup>29</sup> Figure 1 presents the institutional format. Almost every significant planning decision at the local level, big or small, requires the approval of the District Planning and Building Commission composed of fifteen members (since 1995, sixteen). Nine (since 1995, ten) are representatives of central-government ministries, five are representatives of local authorities in the district, and one is a non-government professional. The Minister of the Interior has extensive oversight powers regarding the appointment of the local-government representatives to the National Board and the District Commission and his representative chairs both the National Board and the District Commissions. The minister also has specific powers regarding the approval of local plans—he can call-in any such plan for his further review.

In 1965 the Planning and Building Law established national planning and placed it above the two existing tiers—the local level and the district level. The result is a three-tier edifice of planning institutions and a parallel set of plans, in a system that combines centralized, top-down planning with bottom-up initiative. This system calls for a coordinated hierarchy of plans, from the national, through the district, down to the local levels. Every lower-order plan is legally bound to adhere to higher-order plans, and any deviation (unless pre-authorized in the higher plan) is illegal. In Floridian planning terms, full consistency is required. Every action of construction or demolition, small or big, requires a building permit (see Figure 2).

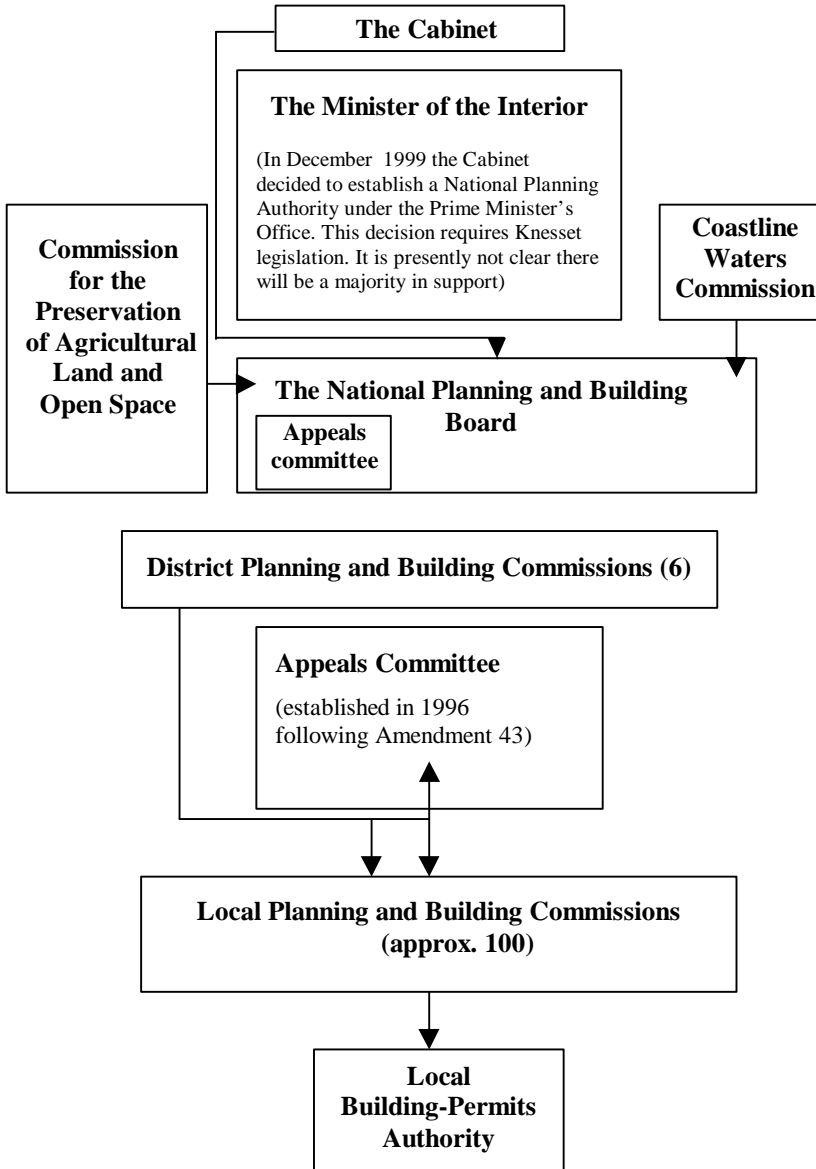
### *B. National Statutory Plans*

The top tier consists of national plans prepared by the National Planning Board and approved by the Cabinet. The language of the law speaks about “*the* national plan,” indicating that the legislators probably expected that the entire country would be covered by a single, comprehensive national plan. In practice, no such comprehensive plan was initiated until 1990, and it is my assessment that no such plan would have been prepared for many years, or generations, were it not

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29. Note that according to international law, this law, like all domestic legislation, applies to Israel in its pre-1967 borders and has no jurisdiction over areas in the West Bank or the Gaza Strip still held in occupation.

**Figure 1: Institutional structure under the Israel Planning and Building Law of 1965**



for the mass-immigration crisis. (The well-known exception—the Population Distribution Plan described below—was comprehensive only in the geographic sense.) Instead, the National Board concentrated on sectoral plans—ones initiated by sectoral agencies. Most of these plans have proven to be extremely important instruments for shaping development according to national policy, but together, have not added up to a comprehensive policy.

Unlike the lower types of plans, the public has no right to submit objections to national plans and there is no requirement for a public hearing (although in recent years the Board sometimes does hold informal hearings at its discretion). This indicates the importance attributed to these plans by the 1965 legislators. All lower-level plans—district plans, local outline plans, and detailed plans—must be fully consistent with the national plans. Otherwise, they would be illegal and so would be any building permits issued according to them. These plans are thus binding on both public agencies and private actors. Although the rationale for some of the plans may initially have been to promote development, in practice, since these plans are statutory documents best geared to serve a regulative role, their usual effect is restrictive. Any large-scale development would likely encounter one or more national plans with which it would have to contend. It is therefore not surprising that during the crisis, the role of the existing national plans became a problem that needed overcoming.

### *C. Sectoral National Statutory Plans*

Each of the approximately thirty sectoral plans prepared to date (the consecutive list is thirty-eight but some have been aborted) deals with a subject area that is authorized in the law and that members of the Board regard as having national importance. These plans tend to be detailed traditional land use plans. The range of sectoral national land use plans is probably unique to Israel. In other countries some of these topics are dealt with by separate national legislation, while others are not handled on the national level but rather on the regional or local levels.<sup>30</sup>

The list of sectoral plans, most prepared before the crisis, includes

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30. See Alterman, *supra* note 23.

highways, airports, railroads, parks and nature reserves, surface and underground water reservoirs, tourism, coastlines, and mining and forests. It also includes a whole range of LULU's, which in a small country are viewed as national-level interests: power plants, cemeteries, garbage and hazard-waste disposal sites, prisons, sewage purification plans, oil and gas pipelines, telecommunication sites, and even gas stations (happily, the latter anachronistic has been phased-out).

These plans, though "only" sectoral, have played a major and essential role in shaping Israeli land use, in supplying services, and in protecting its environment. Were it not for the plan for roads—one of the earliest to be approved after the 1965 law came into effect—the rights of way would probably have been gnawed up, and in land-tight Israel, alternatives would not have been easily forthcoming. Similarly, water reservoirs and coastline areas would have been built up. Were it not for the plan for parks and nature reserves prepared in the 1970s, open space protection would have had to rely only on the Commission for the Preservation of Agricultural Land, which, even before the crisis, had proven only partially effective.<sup>31</sup> The few contiguous high-quality open landscapes, such as the Carmel Mountain National Park, would have probably become real-estate sites long ago and certainly would not have resisted crisis-time pressures. The plan for afforestation has managed to preserve, at the very "last moment" in 1991, some of the extant open spaces not previously declared as parks. The coastline preservation plan dated from the 1980s has attempted to protect the remaining open coastline (a gold mine in real-estate), with only partial success.

#### *D. The National Plan for Population Distribution (Number 6)*

Some analysts mistakenly regard this plan as *the* national plan.<sup>32</sup> The population distribution policy (NPG) has been the most long-standing and consistent urban and regional policy, a legacy from Israel's formative years. While the first versions of this plan were issued in the

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31. RACHELLE ALTERMAN & MIRIAM ROSENSTEIN, ISRAEL'S AGRICULTURAL LAND PROTECTION POLICY: THE LAW AND ITS IMPLEMENTATION (1992) (Hebrew).

32. See, e.g., OREN YIFTACHEL, PLANNING A MIXED REGION IN ISRAEL: THE POLITICAL GEOGRAPHY OF ARAB-JEWISH RELATIONS IN THE GALILEE 95-98 (1992).



1950s,<sup>33</sup> the first statutory version was approved in 1975 and (unofficially) updated in 1985. During the crisis, National Plan 6 came to be viewed as an obstacle to rapid growth.<sup>34</sup>

The National Plan for Population Distribution set quantitative population caps or goals for each town and village. The rationale for the caps was the desire to direct inhabitants and investments away from the center to peripheral areas, against market forces. A cap lower than the estimated demand was placed on towns and cities in the central area, while an overly optimistic growth goal was placed on towns in the peripheries.

The effectiveness of the National Plan for Population Distribution has been lower for existing urban areas and higher for areas of new development. The population caps placed on existing towns had only a marginal effect since the plan was not geared to control incremental infill. Thus while no major city halted its population intake because of this plan, it did have some effect in controlling major new urban expansions. The plan has been most effective in regulating the establishment of new towns or villages. These could not be allowed unless the site was previously indicated in the national plan, otherwise, the plan would have to be amended accordingly.

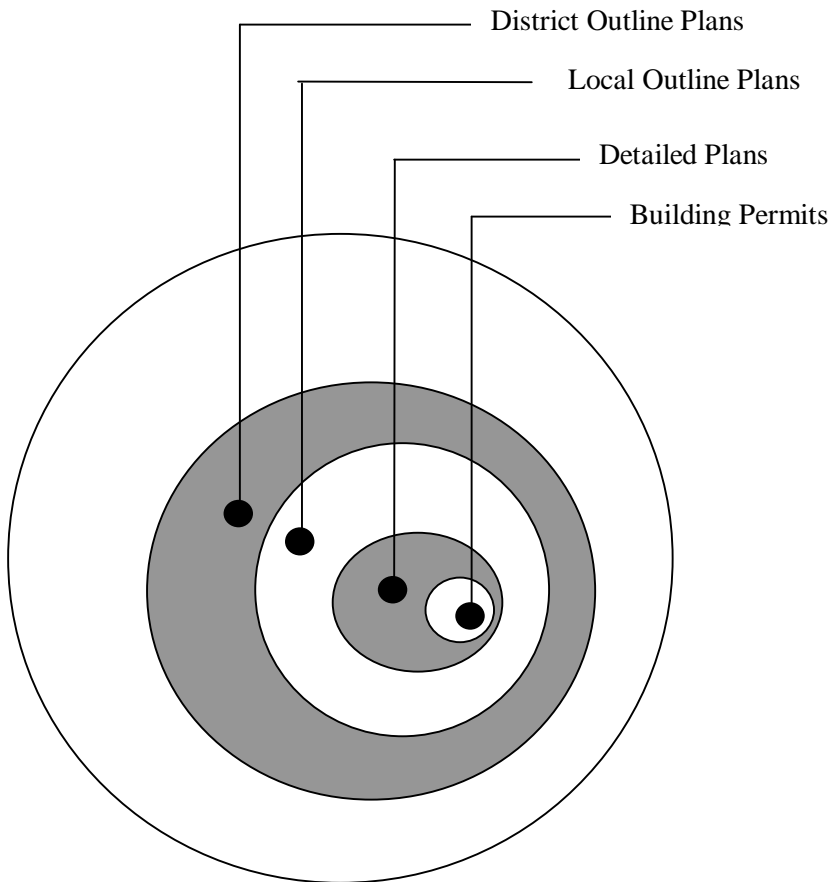
Thus, if during the crisis, government authorities such as Housing and the Lands Administration (usually in coalition with Finance, the Prime Minister's Office, Transportation, and Infrastructure) had wanted to use the growth momentum to establish new neighborhoods or whole towns beyond what had been envisaged in the national population-distribution plan, they would have had to apply to the National Planning Board for an amendment. However, there they would have had to contend with the increasing environmental awareness that developed

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33. J. DASH & E. EPHRAT, *THE ISRAEL PHYSICAL MASTER PLAN* (1964).

34. One senior-level planner, Sophia Eldor, the head of the urban-planning department in the Ministry of Housing, blames the planners of the National Plan for Population Distribution for making a "colossal error" in calculating the needs of Israeli towns. She asserts that by focusing on population-growth estimates, they were oblivious to the fact that growth in floor-area consumption per person for housing, industries, public services, and commerce was on a much steeper curve than population growth. Eldor argues that this error led to a gross underestimation of the number of housing units, public services, and land reserves necessary even in normal-growth times and has led to an abysmal failure in preparing for the crisis. It is, therefore, no surprise that during the crisis, the National Plan for Population Distribution was viewed by policymakers as an impediment that had to be pushed aside or re-formed.

Figure 2: The Hierarchy of Statutory Plans with Which a Building Permit Must Abide



during the 1980s and was increasingly promoted by other members around the table of the Board, such as the Ministry of the Environment, Agriculture, Health, the Nature Reserves and Parks Authority, the representative of the “green,” and of academia.

Those concerned with meeting crisis-time growth needs thus had two alternative paths: to introduce legislation to downgrade the status of the national-level plans themselves, so that crisis-time development initiatives would override the Population Distribution Plan and other growth-limiting plans; or to initiate a new national plan that would be more development-friendly to the country’s central district where employment opportunities for the new immigrants would be more ample. Crisis-time action took both of these paths, as I report later.

#### *E. District Plans*

On the second tier are the district plans to be prepared for each of Israel’s six statutory administrative districts. The function of these plans is to translate the national plans to the district level and to coordinate among local plans. District plans have always been of less importance than either the national plans or the local plans, perhaps because they are sandwiched in-between these two levels. During the crisis, too, they played a relatively minor role, mostly as derivatives of national plans, but that meant that they too had a growth-restraining effect. Since under the Planning and Building Law local plans must be fully consistent with the district plans, during the crisis, decision-makers also targeted district plans for downgrading in power.

#### *F. Local plans*

At the lower level are mandatory local outline plans and optional detailed plans. These are the main instruments for regulating development, and any new housing construction, private or public, must usually be anchored in them. These types of plans, which usually grant (or restrict) development rights, provide legally binding directives on land use, bulk, height, design guidelines, road and other infrastructure layout, and environmental mitigation. American

readers may view outline plans as similar to zoning regulations combined with either elements of a comprehensive plan or with elements of a PUD; but unlike the debate in American planning law on the degree to which a comprehensive plan is binding, under Israeli law outline plans are strictly binding. Detailed plans and building permits must be fully consistent with the outline plan. In American terms detailed plans are akin to a merger between subdivision regulations and site plans or planned unit developments. Continental European readers will easily recognize Israeli outline and detailed plans as similar to local plans and detailed plans common in most Continental countries; while British readers can view outline plans as similar to pre-1947 British local schemes.

The ostensibly mandatory language of the law may have led one to assume that local outline plans would be prepared for each municipal area in its entirety and updated regularly. In fact, most local authorities have not prepared a comprehensive outline plan for decades. The law has been interpreted to mean that it is necessary to have *some* approved outline or detailed plan on hand in order to grant development permits, not necessarily a comprehensive one. Therefore, instead of original plans, most urban local authorities have a quilt of countless amendments to some older partial outline plan. In pre-state cities the original plan was usually prepared under the British before 1948, while in new towns it was prepared by the Ministry of Housing in the 1950s or 1960s, when most of the new towns were established. Outline-amendment plans usually incorporated the function of the detailed plan so as to enable building permit to be issued. This means that the two-tier structure on the local level, envisaged by the 1965 legislators, has in the vast majority of cases collapsed into one tier, a site-specific, developer initiated “amendment to the outline plan”—not unlike zoning practices that have been documented by Mandelker three decades ago as prevalent in the United States.<sup>35</sup>

The result was that in the Israeli planning system, local plans could be characterized as “the tail wagging the dog.”<sup>36</sup> This was just as true on

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35. DANIEL R. MANDELKER, *THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE* (1971).

36. Rachele Alterman, *Decision-Making in Urban Plan Implementation: Does the Dog Wag the Tail or the Tail Wag the Dog?*, 3 *URB. L. & POL'Y* 41 (1980).

the eve of the crisis. Moreover, since plan-making and approval took, and still takes, a notoriously long time, the double-tier local planning process meant that, by the time a building permit was issued, both the outline and the detailed plan following it, would often be outdated. This reality left little room for long-range, comprehensive planning on the local level. Indeed, on the eve of the crisis, most Israeli cities and towns, aside from a few smaller, outlying development towns, had virtually no land reserves with approved plans for large-scale expansion; most land reserves were locked under agricultural designation.

### *G. Development Control and Agricultural Land Preservation*

On the eve of the crisis, Israel had (and de jure still has) one of the most stringent agricultural land protection policies in the world, where most of the land was classified as agricultural. Agricultural land preservation in Israel had several formidable layers, each intended to protect farmland from conversion for development. Cumulatively, these layers constituted a wall of legal-fiscal instruments unparalleled in any other country.<sup>37</sup> As might be expected, this concrete wall would be seen as an obstacle to rapid development during the mass-immigration crisis and would become a target for change.

The first and ostensibly most intransigent layer is embedded in Israel's public land ownership and long-standing policies in the rural sector. Recall that the majority (some ninety-three percent) of Israel's total land area is public. Communal and cooperative village associations (kibbutzim and moshavim), the backbone and major part of Israeli agricultural production, are all sited on public land. In each rural community a battery of three to four contracts (longterm leases or automatically renewed rental contracts) applies to each tract of land: the first sets the obligations of the individual household toward the Lands Administration; the second sets the obligations of each household to the local Agricultural Association; the third deals with the obligations of the Association to the Lands Administration. Sometimes there is also a fourth contract between the Association and the Jewish Agency, which

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37. For a cross-national analysis, see Rachelle Alterman, *The Challenge of Farmland Preservation: Lessons From a Six-Country Comparison*, 63 J. AM. PLANNING ASS'N 220 (1997).

is a quasi-government organization that provides rural planning and agricultural training support to many of Israel's agricultural villages. Most of these contracts have a clause that designates the land for agricultural or related uses only. Each contract clearly stipulates that upon change to non-agricultural use, the land must be returned to the Lands Administration. Such conversion must, of course, be done only with the approval of the planning bodies.

The second layer of agricultural land preservation is related to the annexation powers of local authorities. As in Britain and the Netherlands, and unlike many American local governments, local authorities in Israel have no independent powers of annexation or self-incorporation. These are vested with the Minister of the Interior. The minister, who is also responsible for the Commission for the Preservation of Agricultural Land (see below), may use farmland preservation as a consideration in allowing or rejecting municipal-boundary changes. In fact, before the crisis boundary expansions were infrequent, and the ministers used to drag out decisions on boundary expansion requests for many years. Local authorities did not count on boundary extension as a practical, predictable solution for growth, and in "steady state Israel" of the 1980s there was not too much need for it. However, when mass immigration began, the boundaries of urban areas and the slow process by which these were changed became a key problem.<sup>38</sup>

The third layer of control of farmland conversion potentially lies in the plan-making and development-control powers under the 1965 *Planning and Building Law*. That law singles out the protection of agricultural land as a particular objective of all plans at the local, district, and national levels, noting that designations of land uses should be determined "with regard to the use of agricultural land." However, the legislators probably foresaw that in a fast-development country with high urban-expansion pressures, it would not be enough to simply specify agricultural land as a preferred purpose. They went on to establish a fourth and ostensibly most formidable layer of protection through a special mechanism and a dedicated institution under the

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38. This point was brought out in an interview with Sophia Eldor, head of the Urban Planning Department of the Ministry of Construction and Housing, in September 1995. The interview was intended to give a crisis-retrospective view.

### Planning and Building Law.

The Planning and Building Law designates Schedule 1 as a special set of regulations for controlling farmland conversions. The schedule is a farmland conservationist's dream. It sets up an all-powerful eleven-member Commission for the Preservation of Agricultural Land (CPAL) composed of representatives of central government bureaus, such as Agriculture, Housing, the Lands Administration, as well representatives of the farmers. The representative of the Minister of the Interior serves as the chairperson. The CPAL is indeed a powerful and highly stationed committee. It is highest in the hierarchy of planning agencies, alongside the National Planning and Building Board. In fact, the CPAL is even more powerful because every decision that impinges on agricultural land requires the approval of the CPAL or its appeals board, and the National Board cannot override their decision.<sup>39</sup>

The law specifies that conversions of agricultural land can only be made in accordance with the provisions of the First Schedule,<sup>40</sup> which relates to the approval of any land use plan or building permit on agricultural land. Thus, the law covers every possible avenue for permitting development on farmland, whether privately or publicly initiated. Plans at all levels, including district plans and national plans, come under the jurisdiction of the First Schedule.

The restrictive implications of these multi-layers of controls is further magnified by the CPAL's 1968 decision to declare almost all of the country's developable land reserves as agricultural land, whether or not they were in agricultural use or even suitable for agriculture. This declaration occasionally included even areas within city boundaries.

The result of the agricultural land preservation policies was that almost all inhabitable land reserves in the country were locked into this citadel of conversion controls. Even had some policymakers entertained the thought of releasing some of the agricultural land held by the communal villages, there was little they could do about it. Until the crisis the only land conversions allowed within the

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39. Alterman, *supra* note 37.

40. Under Israeli law, as interpreted by the courts, no compensation is due for the act of declaring land agricultural. However, extensive compensation rights do exist where approval of a new plan or amendment reduces development rights. RACHELLE ALTERMAN & ORLI NAIM, COMPENSATION FOR DECLINE IN LAND VALUES DUE TO PLANNING CONTROLS (1992) (Hebrew).

boundaries of villages were restricted to small-scale industrial and commercial uses to supplement the declining income from farming. It was virtually unthinkable that any cooperative or communal villages would entertain the thought of building a new neighborhood for non-members within its boundary, and no mechanism existed for compensating the village community members for the potential development value of the land. In many cases, the development value was high because of Israel's small size and high density. Despite the clear and repeated clauses in the battery of contracts, it would have been unrealistic not to allow the villages to benefit from the potential development value of the land they had cultivated for decades.

Given this system of controls against farmland conversion, alongside the dearth of land reserves designated for development, it is no surprise that during the crisis, the farmland protection system became a target for criticism. The battery of farmland protection tools was viewed as an obstacle to the capacity to build new housing and other services for the large population influx.

#### *H. The Suitability of the "Regular" Statutory Planning System for Crisis-Time Decisions*

In summary, even before the crisis the Planning and Building Law and the planning system under it had come under severe criticism. The criticism centered on the multi-layered approval process and the rampant delays. Statutory planning was regarded as chronically lethargic, and it came to symbolize an unnecessary impediment to economic development. While the problem of perceived excessive delay in development approval is not unique to Israel,<sup>41</sup> in Israel it has been viewed as *the* major problem in the planning system. Israeli sensitivity to this issue may be due to the fact that Israel's demographic and economic growth rates are both higher than most other advanced-economy countries.

Not surprisingly; when the immigration crisis broke, the single major target for legislative change was the Planning and Building Law and the planning system. The story of how this happened and what dilemmas it created for planners is the focus of part III. The second

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41. Cf. 19 (for a ten country comparison); Callies, *supra* note 10 (for Hawaii) (1994).



major target for change was the prime status of the national statutory plans. Among the national plans that attracted most criticism was the National Plan for Population Distribution. In parts III and IV I report why the status of national plans was weakened.<sup>42</sup>

A third important target for crisis-time policy change was the system of agricultural-land control. Three needs drove the change: the need to reduce the extensive powers of the CPAL, the need to declassify some of the land reserves hitherto classified as agricultural, and the need to enable relaxation of the clauses in the leasehold or rental contracts that demand reversion of the lease in cases of farmland conversion. I report on the first two in this Article, but not on the third, which merits a separate analysis.<sup>43</sup>

### III. HOW THE CRISIS-TIME LEGISLATION CAME ABOUT

#### *A. Seeking Solutions for the Rapid-Growth Challenge*

For several critical months beginning in October-November 1989, when early conjectures about a change in USSR emigration policies became concrete, until some time in the winter of 1990, government institutions could best be characterized as being in a state of shock. Although the first Knesset debate about rumors of an imminent immigration wave took place as early as April 5, 1989, that discussion did little to assuage the feelings of helplessness and the criticism of inaction within the cabinet and government departments.<sup>44</sup> When in the fall of 1989 it became clear that a flood of immigrants was on its way and that the crisis was imminent, decision-makers scurried around for solutions.

The senior planner of the Ministry of the Interior argued: “Not to worry—there are tens of thousands of potential additional housing units within approved or nearly-approved plans—some on public

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42. In this article I am not recounting the story of how planners’ timely initiative actually succeeded in using the crisis to strengthen rather than weaken comprehensive national planning for Israel’s post-crisis future. See Alterman, *supra* note 14.

43. I deal with this issue in a forthcoming paper on Israel’s public leasehold system. Rachele Alterman, *Leasehold Land: Israel’s Large-Scale System in the Era of Privatization* (2000) (paper prepared for the Lincoln Institute of Land Policy, Cambridge, Mass., for a seminar on public leaseholds, June 1-2, 2000).

44. KNESSET PROCEEDINGS 1989, 21 (Hebrew).

land, others on private land. The Ministry of Housing and the private developers should stop complaining and pull up their sleeves to begin construction!" In fact, however, most of these potential units had been on paper for years but were not implementable because of various hurdles such as complicated land tenure, inadequate accessibility or services, and controversy on environmental issues. By contrast, the chief planner of the Lands Administration stated that his agency had enough land reserves for release. If only the statutory planning and development-control process were more speedy, he said, there would be no problem in meeting the housing and urban-development needs brought about by the crisis.

While politicians and professionals were still immersed in delay, denial, and deflection of blame, immigrants were arriving in ever-increasing numbers, usually at night because Israel's only international airport could not accommodate them by day. Each passing month set a new record. In summer 1990 the more conservative estimates of expected immigration ran at one to one and one-half million within three to five years—two hundred to three hundred thousand immigrants per year. Some estimated even more. With every passing day when massive housing production could not commence brought closer the ominous threat of mass homelessness—an intolerable idea for Israeli policymakers and society.<sup>45</sup>

Almost immediately after the crisis broke out, in early 1990, senior government planners started setting up the rudimentary planning elements to meet housing needs. The idea was to locate public land reserves that were vacant and quickly developable. An informal team of the chief planners of the Lands Administration, the Ministry of Housing, the Ministry of the Interior, joined by the Ministry of Finance (as watchdog?) started meeting unofficially even before any Cabinet decisions were made. The team began to scan all available maps and plans countrywide for tracts of land available for development. Their target was to accommodate housing construction for three hundred to five hundred thousand new units quickly and on a cost-effective scale. In Israel's land-tenure pattern, as described in

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45. For a detailed discussion of the role of housing as a major element of crisis-time policy, see Alterman, *supra* note 14.

part I, these conditions effectively ruled out extensive reliance on private land.

The availability of public land thus became the leading guiding force in siting new public-program housing. Many of the specific plans for housing projects later submitted for statutory approval, followed in the footsteps of these prior decisions. The decisions reached under such pressure early in the crisis were to determine most of the large-scale development initiatives during the crisis, and thus they left a huge long-range imprint on the country's land use, environment, social structure, etc.

### *B. The Race for New Fast-Track Legislation*

In June-July 1990 a legislative race developed between the Ministry of Housing and the Ministry of the Interior. Neither wanted to be caught holding the "hot potato" of stalled construction. The major stumbling block in the eyes of the decision-makers was the lengthy approval procedures for plans and building permits. Minister Sharon—the well-known Israel politician with a "can-do" public image who was in charge of Housing—instructed his staff to develop emergency legislation that would allow his office to act with as few impediments as possible. His original intention was probably that the emergency regulations would exempt *all* state-constructed housing units from the planning agencies, proceed without a building permit, and be exempt from some of the construction, safety, and security standards.<sup>46</sup> However, Sharon's initiative was criticized, so the first batch of emergency regulations was issued for a limited number of units on a trial basis.

On July 2, 1990 Sharon issued and duly published emergency regulations according to clause 9 of the 1948 Administrative and Legal Procedures Ordinance (the formative legislation when Israel was established). On July 1 the majority of Cabinet members authorized Sharon's initiative, with the Minister of the Interior

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46. Recall that unlike the law prevalent in the United States, where federal and state governments do not need local-government permission for some of their construction initiatives, in Israel, since 1966 government-initiated construction has had to receive the same approval and permits as private construction.

objecting.<sup>47</sup> These regulations, titled Emergency Plans for the Construction of Housing Units—1990 authorized the Ministerial Committee for Immigrant Absorption to approve emergency plans for housing, not exceeding three thousand units in total, to be constructed in ten local authorities as specified. The regulations set up the following procedure: Copies of the plans would be presented to seven government agencies as specified, and these may bring their comments to the ministerial committee within seven days. Once a plan has been approved, the minister of housing is authorized to take any action in order to construct housing units, including the erection of imported mobile units, or construction of the entire infrastructure. These actions will not require any permit or approval according to any existing law or regulation. A plan once approved will override any and all plans approved according to the Planning and Building Law. Like all emergency regulations under Israeli law, these would expire after three months (unless extended).

The idea of emergency regulations was distasteful to the Minister of the Interior, Arie Derii, who was in charge of the Planning and Building Law. If Sharon were allowed to implement his emergency regulations, this would be a public acknowledgement that Ministry of Interior, in charge of planning procedures, was an impediment to the national effort. So, Derii sought to toss the “hot potato” away from his team and back into Housing’s. Derii therefore instructed the senior planners and legal advisors on his staff to speedily draw up alternative parliamentary legislation that would reflect crisis needs by drastically speeding up land use planning and building-permitting procedures. This would be a compromise, but it would still maintain the basic rationale of planning controls and of parliamentary legislation rather than emergency regulations.

In June-July 1990 the race between the two ministers reached the Knesset floor. When Sharon’s emergency regulations, only requiring “deposit” before the Knesset, were issued on July 2, Derii’s bill was already undergoing preliminary legislative procedures. Being a regular, non-emergency piece of legislation, the new bill required the

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47. Under certain circumstances government ministers have authority to legislate emergency regulations. These do not need Knesset approval and only need to be deposited for Knesset review.

regular legislative process by the Knesset that includes three readings and, after the first reading, clearance by the relevant parliamentary committee. The chair of the Knesset Committee for Interior and Environmental Affairs, Yehoshua Matza, wrote to Sharon on June 26, bringing to the minister's attention that the Ministerial Legislative Committee was already in the process of reviewing a special planning and building bill and that the legislative proceedings are expected to be especially quick. Matza stated that the bill "is intended to place in your [Sharon's] disposal means for construction without delay. The Knesset Interior Committee has asked the Minister that before he makes a decision regarding the emergency regulations, he would meet with the Committee and the Minister of the Interior."<sup>48</sup>

The emergency regulations were issued nevertheless. On July 9, 1990 while the new bill was in advanced stages of Knesset legislation, Sharon thus replied to a question posed by M.K. Poraz:

I would like to tell you all: These regulations are intended to create a sample test case—to fight bureaucracy, shorten procedures. I know there are those who are afraid of emergency regulations. If there is something that should worry us, it is not these regulations which are limited to a short time period and a small number of buildings.<sup>49</sup>

Sharon's unofficial justification for issuing the emergency regulations may have also been that the Knesset deliberations, as was their wont, would take a long time. The crisis atmosphere, however, proved so powerful that it drastically altered the pulse of parliamentary decision making.

With a sense of urgency, on July 2 1990 the Knesset approved the first reading of the proposed law titled The 1990 Planning and Building Procedures (Interim) Law and passed it on for clearance by the Committee for Interior and Environmental Affairs. However, despite the crisis atmosphere, the proposed bill drew a great deal of

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48. H.C. 2994/90, *Avraham Poraz (member of Knesset) vs. The Government of Israel, Minister of Construction and Housing, and Minister of Interior*, 44(3) P.D. 317. All translations from Hebrew are by the author. There are no official English versions.

49. H.C. 2994/90, *Avraham Poraz (member of Knesset) vs. The Government of Israel, Minister of Construction and Housing, and Minister of Interior*, 44(3) P.D. 317.

criticism, especially by the “green” groups and by academics, who argued that the proposed law goes too far in its streamlining efforts.<sup>50</sup> For a while it seemed that the legislative process would, indeed, not be quick. During the intensive subcommittee meetings, which I attended as a pro-bono advisor, Interior’s planners and legal advisors argued that the drawn-out procedures required by the existing planning law were unsuited for handling crisis-time rapid growth needs. They reminded all that their proposal was the least of two evils, and if not adopted, Sharon’s emergency regulations would likely be expanded and extended. The promoters of the new law also knew well that Knesset members disliked the emergency regulations because these circumvent the Knesset itself.

So, despite the many concerns of Knesset members and of various interest groups about the new law,<sup>51</sup> only a few minor changes were introduced into the bill. Within a single week it had gone through the committee approval process and on July 11 it sailed through second and third readings by the Knesset. The Knesset legislated the new law as an Interim Law, with a self-terminating clause after two years unless extended. The Interim Law came into force upon its official publication on July 20 1990.

Meanwhile, the Minister of Housing did not easily relinquish his proposed emergency powers. In theory, the two crisis-based legal tracks (alongside the “regular” planning law) might have existed side by side for the full three-month period of the emergency regulations, and these might even have been extended. However, a few days after the Knesset enacted the Interim Law, on July 17, 1990, the High Court of Justice heard a petition from a concerned Knesset member (Avraham Poraz).<sup>52</sup> The Court declared the emergency regulations void. Giving the Minister of Housing three weeks to phase out the Emergency Regulations, the High Court ruled that even during a

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50. Rachele Alterman, *Building for Generations*, HA’ARETZ, July 16, 1990 (Hebrew). The article criticizes the reduced local-government, public participation, and professional scrutiny in the proposed Interim Law.

51. KNESSET PROCEEDINGS, 16 (33, 34). Information for the sub-committee on Internal and Environmental Affairs is based on the author’s participant-observation of that meeting.

52. Avraham Poraz, an attorney who had formerly been a legal advisor for planning commissions can be counted among the handful of Knesset members interested in planning law and procedures.

situation of national urgency and crisis, a minister has the legal authority to resort to emergency powers only if the problem at hand is not adequately covered by Knesset laws. In this case, an appropriate legislative solution (the Interim Law) was already on the Knesset floor when the emergency regulations were issued. In Judge Levine's words (speaking for the Court):

There is no doubt that immigrant absorption is an "essential action" par excellence, especially these days, when thousands of immigrants are streaming into Israel and the entire nation aligns itself to the absorption project. Under these circumstances it is necessary to take up unconventional means, to overcome bureaucratic stumbling blocks and to recruit resources in order to organize quickly and efficiently for this important mission. Likewise, we have no reason to doubt that the Minister believes in good faith that enactment of emergency regulations is the right way to achieve the urgent goals of immigrant absorption and to solve the general housing problem. The appellants have not seriously challenged the fact that such regulations fall under the general authority in clause 9 of the Ordinance. Nevertheless, the emergency regulations do contain far-reaching statements: Bypassing Knesset legislation, obliviousness to the plans approved under the Planning and Building laws, and exemption from licenses, permits, and approvals. Any error made in such issues might become "a lamentation for generations" [a Hebrew idiom]. It may be that this is a necessity, but if there is a possibility that during the same time period the legislative arm would give its attention to the matter at hand, the executive branch should withhold the enactment of emergency regulations.<sup>53</sup>

Many policymakers and planners both within and outside government circles welcomed the High Court decision. They had been unhappy about the constitutional and practical impacts of resorting to emergency legislation in such a crisis. After all, the

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53. H.C. 2994/90, *Avraham Poraz (member of Knesset) vs. The Government of Israel, Minister of Construction and Housing, and Minister of Interior*, 44(3) P.D. 317.

immigration crisis was not like a natural disaster or a war, the kinds of situations for which emergency regulations were primarily set up.

#### IV. THE CRISIS-TIME INTERIM PLANNING AND BUILDING PROCEDURES LAW

The 1990 Planning and Building Procedures (Interim) Law (henceforth, the Interim Law) has ten rather-long clauses that establish special planning institutions and stipulate the limits of their authority. Here I survey the major elements of the legislation and some of their implications. The wording of the Interim Law and the special circumstances in which it was born have left several legal questions unanswered. Despite its relatively short life, the law did come before the High Court of Justice on several occasions, and the Court had several opportunities to interpret some of its clauses. Others will remain pending, probably never to be interpreted by Israeli courts. I shall report on the relevant decisions under each of the subheadings where I present the elements of the law.

##### *A. The Law's Major Elements and Their Interpretation by the High Court*

###### 1. Objectives

The Interim Law states its objectives in clause 1:

*"This law sets up, for an interim time, special arrangements for approval of plans for construction [i.e. development], in order to enable urgent alignment to find a solution for the housing and employment needs in the nation—for absorbing immigrants, young couples, housing-less people, and employment."*<sup>54</sup> Clause 1 obviously raises many legal questions: Should the law be interpreted as applying to housing specifically intended for the designated group (immigrants, young couples, and households that do not have adequate housing)? Or is it the law's objective to increase the general pool of housing in Israel so that, through the trickle down process, more housing would presumably become available for the designated

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54. All translations from Hebrew are by the author.



groups? The explanatory note attached to the bill spoke about increasing the general pool of housing, so it was clear that the legislators' intent was that the new law should not be restricted to public housing only or to housing designated only for the groups noted.<sup>55</sup> However, it was not clear whether the objectives should also include housing that is unlikely to reach the general pool, such as luxury or vacation units. Furthermore: Does the reference to "urgent alignment" mean that the Law's authority is limited to situations where there is a demonstrated urgency and where there is a high probability that the planned housing or industry could be implemented in the near future? Or does the new law authorize the special planning bodies to approve any plan that meets the quantitative standards set by the law (see below)?

The first time that the High Court of Justice had occasion to interpret Clause 1 was in early 1992, in a petition (submitted by M.K. Poraz and two city council members) against the Minister of Housing, the Lands Administration, and others.<sup>56</sup> The petitioners challenged the legality of the decisions to allocate public land without tender to five associations of homebuyers with a political identification. Another association, created by a group of immigrants, was not allocated land. The land had been declassified from its agricultural status to housing and ancillary services by a plan approved by the district's Housing Construction Commission established under the new law (the HCC—see below). The HCC's rationale for the reclassification was that the new housing would serve for immigrant absorption. The respondents explained that this statement meant only that any construction of housing indirectly increased the supply of housing for the immigrants as well.

The court's opinion cites and accepts this broad interpretation of Clause 1, citing the explanatory note attached to the bill, and noting that this interpretation has also been applied extensively in HCC decisions. However, the Court expresses some dismay at the misleading impression that the language of the law may have created

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55. Explanatory note, Planning and Building Procedures (Interim) Bill, 1990. As published in the official publication of bills, p. 218 [there is no official translation into English].

56. H.C. 5023/91, *M.K. Avraham Poraz et al vs. the Minister of Construction and Housing, Ariel Sharon et al.*, 46(2) P.D. 793.

and calls for the re-assessment of the law in accordance with the experience accumulated in the year and a half since it was enacted.

The question of how to interpret Clause 1 came up a second time before the High Court of Justice but was withdrawn before the court made its decision. The case did, however, stimulate the Attorney General to issue guidelines that interpreted the above objectives. The circumstances were that the Likud government then in power, through the Ministry of Housing, submitted a private planning initiative for housing to the HCC. The area concerned was highly controversial—sensitive archeologically and volatile politically—located in the seam area between East and West Jerusalem. It was clear to all that construction could not begin soon due to these complications and that this housing would not be part of the general pool that would meet the crisis-time needs, but it would cater only to a few politically-motivated and rather well-off zealots. The clear intention was to bypass the municipality of Jerusalem, which had objected to passing this plan and would have not done so, had the plan been submitted according to the regular planning and building law.

The petitioners (of whom I was one) questioned the use the authority granted by the Interim Law to approve housing proposals that were clearly unrelated to the goal of increasing the housing supply urgently to meet the crisis due to mass immigration.<sup>57</sup> That petition led the Attorney General to issue new guidelines to the Housing Construction Commissions, in which he instructed them to refrain from using the Interim Law in cases where the housing could not be built in a reasonably short time or where it was unlikely to add to the general housing pool.<sup>58</sup> However, these guidelines were issued only in 1992, when the mass immigration wave had already tapered down and hundreds of thousands of housing units had already been approved.

The need to interpret the Interim Law's goals clause came before

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57. H.C. Petitions 2819/92 and 2846/92, June 1992, *Sara Kaminker, councilwoman, City of Jerusalem et al. (including Alterman), vs. the Minister of Housing, Jerusalem district Housing Commission, et al.* Withdrawn when the Attorney General issued new guidelines.

58. Memo from the Attorney General to the chairs of the Housing Commissions, dated June 15, 1992, in response to the above-mentioned petitions to the High Court of Justice.

the High Court of Justice once again in 1994, after the Attorney General's guidelines had been issued. The *Maccabim* case concerned three local outline plans for the first two large neighborhoods to be built in the new town of Modiin, located midway between Jerusalem and Tel-Aviv.<sup>59</sup> There was no prior outline plan approved for the new town, only a non-statutory master plan. The three local outline plans were in contradiction to the Central District Outline Plan. The petitioners—residents of Maccabim, a small exurban neighborhood already existing in the area—argued that the objectives of the Interim Law do not include the approval of a new town in contravention of higher-order plans and that partial local plans should not be approved before an outline plan is prepared and approved for the new town as a whole. The majority opinion (Judge Goldberg and Judge Tal) refers in passing to the Attorney General's guidelines, but rejects the petitioners' argument:

In this case, the authorities were faced with the housing distress created during the climax in immigration toward the end of 1990 and the beginning of 1991. This necessitated the preparation of immediate plans for several thousand housing units. Therefore it was decided that out of 16 areas that will constitute the new town, when established, the plans for two of the areas with 9000 units merit approval according to the Interim law. The third judge, Dalia Dorner, disagreed and issued a minority opinion. Noting that the new law is silent about whether or not it should apply to a new town, she adds, "establishment of a new town requires long-range planning. It is not an appropriate subject for approval by streamlined procedures by a limited committee [with members] of the executive branch who are acting under a law whose purpose is immediate construction." Judge Dorner presents a detailed, well-reasoned and well-supported argument, but her opinion remained in the minority. I would conjecture that, had such a

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59. H.C. 2683/92, *Maccabim et al. v. the Housing Construction Commission for the Central District et al.*, 48(1) P.D. 535.

case come up at a date further removed from the crisis atmosphere, Judge Dorner's opinion would have been the majority's.

## 2. Substantive Authority

The Interim Law authorized the HCCs to review and decide only on local plans—outline or detailed plans. In U.S. terms these would be similar to zoning or rezoning decisions combined with site plans or PUDs and subdivision plans. In Clause 4 the Interim Law specifies several threshold conditions in the form of particular characteristics of plans. Only when the following hold cumulatively would the HCCs have authority to review the plan:

- If the proposed plan is for housing, it must include at least two hundred housing units and may also include ancillary public and commercial services. In rural townships one hundred housing units are the threshold.
- Alternatively, the proposed plan may apply to an industrial area that is *already approved* in a prior plan, and the new plan provides either an extension of the industrial site or further details.
- The plans must be detailed enough to enable direct issuance of building permits without the need to approve further, more detailed, plans.
- The law authorizes the HCCs to handle such plans, whether submitted directly to it or whether transferred to it from one of the “regular” planning bodies.

The intention of the legislation was to channel only particular types of plans to the new process, while leaving other types of plans to be approved under the regular planning law. Note, that the identity of the developer or initiator is *not* a criterion. The choice was left in the hands of each developer, public or private, whether to turn to the new law and its institutions or to continue (or begin) procedures under the regular system. Yet, the attractiveness of the streamlined process offered by the new law was such that many parties, some

quite unexpected by some of the decision-makers,<sup>60</sup> tried to have their plans approved according to the new law. At times that required some stretching of the threshold criteria.

Two cases where such “stretching” was apparent came before the High Court of Justice. The first opinion was delivered in June 1991, while the immigrants were streaming into Israel and the fear of massive homelessness was at its height.<sup>61</sup> The plan in question was an amendment to an approved outline plan in a quiet neighborhood in Rehovot, a mid-sized town south of Tel Aviv. The original land use designation was public buildings and open space, now to be designated for temporary housing in mobile homes (“caravans”). Thousands of such units had been imported by the Ministry of Housing at the height of the crisis in fear of massive homelessness. However, in order to meet the two hundred-unit threshold, the Ministry of Housing drew the plan’s boundaries so as to encompass two non-contiguous areas, one for sixty mobile homes, the other for one hundred forty. The neighbors who petitioned the Court—residents of a modest-housing neighborhood that was in the process of extracting itself from decline—were quite unhappy with the idea that mobile homes for new immigrants would be located adjacent to their homes, even if temporarily. They argued that the HCC does not have substantive authority to approve the plan because the quantitative condition is not properly met. The Court rejected the petition, thus diverting from its pre-crisis tendency to place the protection of private property in high priority. The tone of the opinion vividly reflects the fear of mass homelessness prevalent at that stage in the crisis:

During these stressful times, when the housing problem becomes more and more severe and there is danger that new immigrants will remain homeless and that longterm residents will also be homeless because of their inability to meet the increase in housing costs, the Knesset has decided to legislate a [special] law. It enables fast approval of development

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60. I recall the surprise of some politicians and planners when they first discovered that mayors of Arab-sector towns and villages were starting to use the Interim Law extensively.

61. H.C. 1125/1991, *Marco Litman et al. v. The Housing Construction Commission, Central District et al.* (Not published).

plans. . . . The limitation in the law for plans with at least 200 housing units is intended to prevent misuse of the law by frequent submission of spot plans for a limited number of units . . . . But it is unimaginable that [the authorities] should be required to do so contiguously. . . . We are sure that the petitioners are aware of the importance of creating housing for new immigrants and the homeless and that they will understand and help in the absorption of the residents of the “caravans” that will be put in place through cooperation and mutual respect.

The second decision was delivered in December 1992, when the monthly immigration rate was already declining.<sup>62</sup> The petitioner, a commercial developer, challenged the validity of a plan approved by the HCC that amended an existing plan approved under the P&B Law, adding more housing units to it. None of the housing units had yet been built. The question was whether the HCCs were authorized to approve a plan that proposes an *increment* of less than two hundred housing units but amends a previously approved plan so that the total number of units was over two hundred. The court saw no fault in this interpretation of the Clause 4 condition, so long as the units had not yet been constructed. In this decision, as in the above one, the Court refused to read into Clause 4 conditions not explicitly stated there. One cannot avoid noticing that the decision’s tone was no longer as evocative and chastising as in the previous citation.

### 3. Creation of New Statutory Planning Institutions: A Centralized “One-Stop” Decision Body

As a response to the crisis, government decision-makers and legislators designed the new law with the aim of streamlining the decision process and neutralizing possible local opposition and exclusionary tendencies. The law creates new planning bodies that would centralize decision-making powers.<sup>63</sup> The legislators’

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62. H.C. 988/1992, *Rinunim Investment Co. Ltd et al. v. the Housing Construction Commission, Central District et al.*, 47(1) P.D. 1.

63. There were some, but not many, voices of criticism, for example, Alterman, *supra* note 50.

assumption was that a higher degree of centralization would help to curtail possible local opposition to housing construction and the influx of immigrants and to speed up the decision process.

The law sets up a system that entirely bypasses the local planning commissions. Under the regular system the local commissions are the gatekeepers for almost all planning initiatives. The Interim Law establishes a new district-level planning body so as to create a “single stop” process of plan approval. These new bodies are to substitute for both the district commission and the local commissions, ostensibly combining the two. However, this combination is quite uneven in powers.

In Clause 3 the Interim Law ordered that in each of the country’s six districts, Housing Construction Commissions (HCC) be created. They were to be smaller in membership, and thus presumably more efficient, than the regular district commissions. They were usually each composed of nine members, six representatives of the key central-government ministries and three of the local government. The central agencies represented were: Interior (the District Governor or another representative of the Minister, and the District Planner or another professional appointed by the Minister of the Interior), Housing, the Lands Administration, Transportation, and the Commission for the Preservation of Agricultural Land.<sup>64</sup>

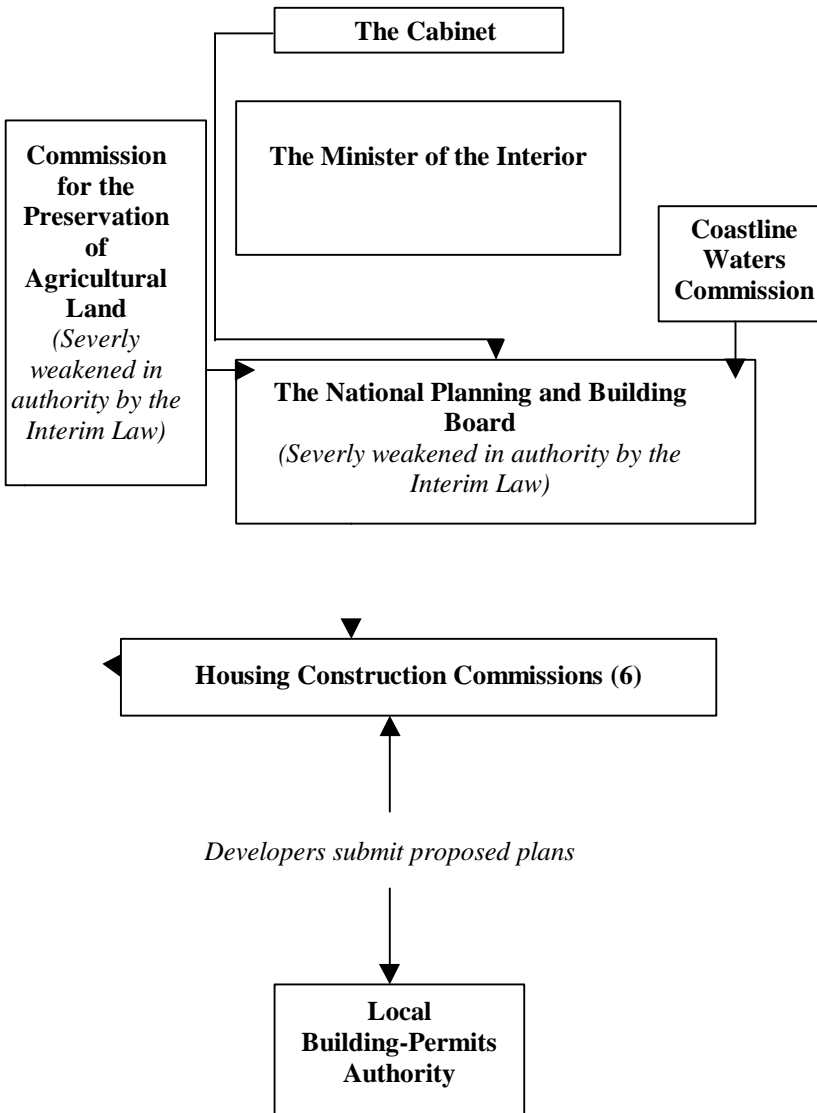
In the case of plans for industrial sites (the minority), two more central-government members would be added—Environmental Quality, and Industry.<sup>65</sup> The three representatives of the local authority were to be the mayor, the municipal engineer (planner), and one member of the elected municipal council. Thus, the Interim Law not only bypassed the local planning commissions but also granted a majority to central-government representatives on the new Housing Commissions.

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64. If an industrial-site plan were concerned, representatives of the Ministry of Commerce and Industry and of the Ministry of the Environment would also be members. However, industrial plans turned out to be a small minority of the plans submitted to the new Housing Commissions.

65. Where a plan for industry is concerned, the HCC must first submit it for review by an advisory team that includes the local-authority engineer, the district planner, a representative of the Ministry of Industry and Commerce, and a representative of the Ministry of the Environment.

**Figure 3: Institutional structure under the crisis-time Israel Planning and Building Procedure Law of 1990 (Interim)**





This minority representation of the local government was in fact even less influential than its numeric proportion. The law stipulated that the local representatives would become members of the commission only if and when a plan under the jurisdiction of that town would come up for approval and cease being members when another municipality's plan would be debated. The local level thus received a "slap in the face." Through this "warm seat" principle, the local representatives would in effect be only ad hoc members of the HCC's when plans pertaining to their town were being considered. This deprived local governments of much of the coalition-building and give-and-take potential that is part of committee work and which the central-government members of the commissions continued to enjoy.

The Interim Law had other implications for local governance that may not be visible at first reading. The third local representative, in addition to the mayor and engineer, is "another member of the local council elected by the council." Under the regular law, the Local Commission is usually composed of the local council as a whole, coalition and opposition alike. Under the Interim Law, however, one could assume that in most cases the person elected to serve on the HCC would likely be a member of the mayor's coalition. The voice of the opposition will not be heard. Many mayors soon discovered that the HCCs could serve to bypass their own elected council.

#### 4. Streamlining by Limiting Public Participation

The major rationale of the Interim Law was to cut approval time. Just as in 1988, during the previous major initiative to amend the P&B Law (Amendment 26), the legislators of the Interim Law regarded public participation rights as the major cause for delays. In both cases, I offered the legislators statistical proof that objections from the public are *not* the major cause of delays in the plan-approval process;<sup>66</sup> but due to the crisis-time atmosphere, this information was to no avail.<sup>67</sup> The Interim Law streamlined the plan-approval process

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66. My research was the first in Israel to study the planning law empirically. Ariella Vraneski & Rachelle Alterman, *Citizen Participation and Planning Laws: One Step Forward and Two in Reverse* (1990) (working paper, Klutznick Center for urban and Regional Studies, Technion [Hebrew]).

67. My own input may have been of some help during the legislation of Amendment 26,

at the expense of public-participation and public-information rights. Clause 5 does so in six ways.

First, the Interim Law exempts all plans that come under its jurisdiction from the obligation in the P&B Law to publish a notice about the “decision to prepare a local outline or detailed plan” or amendments to them (Clause 77). For various reasons, this obligation was rarely met under the regular law, and court decisions did not see such infringement as nullifying the subsequent approval process. The courts regarded the deposit, not the preparation stage as the major opportunity for citizens to exercise their rights to obtain information and submit objections. However, given the much-shortened deposit period under the Interim Law, one should not take lightly the abolition of the Clause 77 publication obligation.

Second, the legislators drastically cut the time for deposit of plans—the only stage under Israeli planning law where plans must be accessible for public scrutiny and where interested parties have the right to submit their opinion (called “objection”). This time period was cut from two or three months under the regular law, to twenty days, including weekends and holidays (a year later, after much criticism, this period was extended to thirty days). The reduction in plan deposit time should have been regarded as a drastic act in the Israeli context, where most of the plans submitted are for medium or high-density projects, and where scarcity of land reserves implies that negative impacts on neighboring land uses would be likely. Members of the public who wished to submit an effective objection would have to do considerable homework, but under the time allocated under the Interim Law, they were unlikely to have adequate time.

Third, approval was to be “automatic” if no objections were submitted during these time periods, unless the HCC decided otherwise *within the same short time period allotted to objections*. This rule was a significant curtailment in participation opportunities. Although under the regular law too, since the 1988 streamlining Amendment 26, plans that have no objections come into force automatically, the planning bodies have *another* thirty days in which to decide whether they want to debate the plan further, insert

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in that citizen input was not cut after all despite initial intentions.

changes, or reject it. Furthermore, under the regular law it is a prevalent practice that the planning commissions use their discretion to accept statements of objection from interested parties even when these are submitted late. The High Court of Justice in its decisions has not seen any flaw in this practice. The Interim Law sought to curtail such public-friendly discretion by stating that approval by default would be presumed immediately after the official objection time was over.

The automatic approval clause was the subject of a petition to the High Court of Justice.<sup>68</sup> Here, as in another decision to be cited below, the High Court interpreted the Interim Law in ways that minimize the infringement on the right to be heard. In the case concerned the HCC for the Tel Aviv District mistakenly published erroneous information in a notice about the deposit of a plan that was submitted by the petitioner. No objection was submitted within the twenty days. The mistake was discovered a little later, and the HCC re-published a corrected notice. Several objections were submitted, and the commission decided to accept one of them and changed the deposited plan accordingly, to the dismay of the petitioner-initiator. Furthermore, the commission decided that some third parties might see themselves as injured from the change and decided to send them a notice, as required by the regular planning law (and this requirement was not abolished by the interim law). The petitioners argued that according to the Interim Law, when twenty days have passed and no objection has been submitted, the plan comes into force. The Court decided otherwise, validating the HCC's decision to re-publish the notice and notify third parties. Clearly, the Court placed the protection of due process over the interim law's streamlining objectives.

Fourth, under the regular P&B Law interested parties whose objections have been rejected or who would like to object to the adoption or rejection of a plan have the right to request permission to submit an administrative appeal to the National Board. In the name of speed, the Interim Law totally abolished all these appeal rights, allowing no recourse to further administrative appeal. Injured parties

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68. H.C. 4816/1991, *Binyaney Gil Ltd. v. the Housing Construction Commission, Tel Aviv District*, 41(1) P.D. 44.

were thus left with only a one-shot opportunity to submit an objection and only a one-stop opportunity to be heard, without adequate checks and balances.

Fifth, the Interim Law purposely eliminated (or sought to eliminate) most of the checks and balances that exist under the regular law to limit conflicts of interests and assure procedural due process for those who submit objections. Under the regular law, a District Commission that deposits a local outline or detailed plan does not hear objections in its plenary format but rather through a special sub-committee. By contrast, under the Interim Law, the full-format HCC's—precisely the same makeup that deposited the plan—may hear objections to the plans and decide whether to accept them and insert changes in the deposited plan.

The sixth and last item concerns how potential conflicts of interests are handled and is, in many ways, most significant because it is inherent in the very structure of the new planning bodies that the Interim Law establishes. The Interim Law explicitly exempted the members of the HCCs from Clause 23 in the regular law. That clause stated that local-government representatives who act as members of another planning body (such as a district commission) must not participate in a vote concerning matters pertaining to their own local authority.<sup>69</sup> The Interim Law, as first enacted, had no other checks against conflicts of interests, except for a general clause in the regular law that protected against *private*, not public, conflicts of interests.

The notion that due process should be sacrificed was probably consciously in the minds of the legislators of the Interim Law. Once they decided to place the one-stop principle at the core of the new law and determined the composition of the HCCs accordingly, they sacrificed the separation between the local level that usually initiates or supports a plan and the more disinterested district level that decides to deposit plans and hears objections from the public. By contrast, under the Interim Law, the composition of the HCCs is based precisely on the representatives of executive agencies that are likely to initiate plans: representatives of the local government, the powerful representatives of the Ministry of Housing, the Lands

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69. After the crisis in 1995, in Amendment 43 to the P&B Law, that clause was subsumed under Clause 47A which sets out broader and stricter-yet criteria to avoid conflicts of interests.

Administration, and other central-government agencies. The legislators chose not to include in the HCCs any members who are inherently objective and disinterested parties.

In a highly significant and well-known decision in 1993, *Bregman vs. the Housing Construction Commission of the Tel Aviv District*, the High Court of Justice dealt with the issue of conflict of interests in the decision making by the HCCs.<sup>70</sup> The case concerned a plan for the highly attractive large Menshiya site in Tel Aviv, facing the beach, owned by the state and viewed as one of the last vacant real estate sites in the heart of the metropolis. For decades, that plan, in its many versions, had been back and forth on the tables of the (regular) planning commissions but had not been approved because it was highly contested by neighbors and by the elected opposition in the city council. The mayor of Tel Aviv (like many other mayors) seized the opportunity of the Interim Law and the absence of representation of the opposition to bring the plan to the HCC for approval. A neighbor, displeased with the plan's approval because it would shut-out the view from his apartment, petitioned the High Court, arguing that the decision process was faulty because the parties interested in the plan's approval—the mayor and the Lands Administration—were members of the HCC and participated in the hearing where he presented his objection.

Due to the petition, but before the High Court decided the case, the Knesset amended the Interim Law to introduce a slight improvement regarding the prevention of conflicts of interests.<sup>71</sup> The amendment specifically said, however, that it would not apply to plans deposited before the amendment. Judge Bach, in his minority opinion, came to a conclusion that in the Interim Law, the legislature explicitly preferred efficiency to due process. Yet, the majority opinion of judges Barak and Or, each using a different avenue of reasoning (and some legal acrobatics), reached a different conclusion:

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70. H.C. 3480/1991, *Uri Bregman v. The Housing Construction Commission, Tel Aviv, U*, 47(3) P.D. 716.

71. The amendment says: "Clause 23 of the P&B Law will not apply, but if a member of the commission is a representative of a local authority, office, or another body that initiated a particular plan before the commission, that member will not be allowed to vote in connection with objections submitted to that plan."

It is well rooted in our legal system, on the basis of court decisions, that the law regarding the prevention of conflicts of interests applies to members of any government body even where there is no statutory instruction in this regard. So long as there is no statement in the legislation that explicitly dismisses the application of these rules, they apply, and are viable on their own.

So, the High Court effectively re-introduced to the Interim Law precisely those rules that the legislators sought to bypass. The Court applied to the Interim Law the entire set of rules about avoiding conflict of interests that the court had developed in its judgements over decades. This decision, in fact, takes the rules of due process further than before, applying them even to legislation where the legislature clearly preferred executive efficiency to due process. The Court makes no allowances for crisis-time needs. This opinion contrasts with the Court's rather deferential attitude in the cases surveyed above regarding the interpretation of substantive due process. One can see that where questions of procedural due process are concerned, the Court made no concessions, despite the crisis-time atmosphere.

The *Bregman* decision is a far-reaching interpretation of the obligation to prevent conflicts of interests. According to it, representatives of any body, not only of private interests, would not be able to take part in any quasi-judicial procedures. This decision has been very influential on Israeli administrative law in general and planning law in particular. After the crisis was over, when the Knesset legislated a large-scale amendment to the P&B Law (Amendment 43), it incorporated the *Bregman* principles into the regular legislation.<sup>72</sup>

In summary, the Interim Law reduced public-participation opportunities in six ways, each causing a dent in the due-process rights established under the regular law. One might ask: Did the Interim Law perhaps increase participation rights in some ways, as partial "compensation"? Yes, but in a rather insignificant way. Under the regular law, the notice about deposit of a plan must be published

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72. See Part VI.

in two national dailies, at least one of which must be of high circulation; whereas under the Interim Law, the number of national dailies is increased to three, and the number of high-circulation ones to two. Yet, this is hardly compensation for the substantial reduction in participation rights, which under Israeli's regular planning law too, were then, and still are, rather skimpy in internationally comparative terms.<sup>73</sup> Israeli planning authorities are not obliged to serve personal notices even when they know that certain parties will definitely be injured by the proposed plan. In the absence of a personal notice, it would be almost as unlikely that a potentially injured party would happen to read a stamp-size notice published in three national newspapers as in two.<sup>74</sup> The reduction in time to submit an objection reduced the likelihood that information would reach an injured party much more significantly than the additional newspaper publication added to that likelihood.

##### 5. Streamlining by Limiting Planning-Staff Scrutiny

The Interim Law in Clause 4 severely reduced the time allocated for scrutiny by the planning support staff and for deliberations by the committees. In the Interim Law as originally approved, no time was specifically allocated for staff assessment, except for ten days according to internal administrative guidelines.<sup>75</sup> The law was later amended so as to allow the district and local planners, together, no more than thirty days to check the proposed plan. Where an industrial plan was concerned, a special Advisory Team had ten days in which to decide whether it was necessary that an environmental impact statement be prepared. Once these time periods were exceeded, the developer was authorized to submit the plan directly to the HCC for its decision and the HCC would not be allowed to withhold its decision for further staff input.

While the tight time schedule may not seem outrageous to an American planner who deals with routine suburban housing and

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73. *See supra* note 23.

74. Notices pertaining to all plans throughout the country are published in the national newspapers without any categorization by location, type of procedure etc.

75. Internal explanatory guidelines written by Yehezkel Levi, Chief Attorney for the Ministry of Interior, 1990.

shopping, one should recall that the Israeli context is generally much more complex. On almost every piece of land there are many contending interests and considerations to be taken into account. Furthermore, the interim law applied to large-scale projects only. Thus, in many cases, excessive reduction of time for staff assessment was bound to hamper adequate planning decisions.

In an opinion survey of planners and decision makers involved with the HCCs that Prengler-Rosmarin and I conducted in 1992-1993, many stated that in their opinion, the Interim Law did lead to a higher proportion of inadequate planning decisions than the regular law.<sup>76</sup> The major complaints were about inadequate environmental considerations (such as approval of large housing projects in sensitive-aquifer areas even though sewerage facilities were not yet adequate) and about inadequate allocation of land for public facilities.

#### 6. Eroding the Institutional Hierarchy and Abolishing the Consistency Requirements

In the name of streamlining the approval process of plans for housing and related projects, the designers of the Interim Law set out in Clause 4 to weaken the power of district and national-level plans that may have set limits for such development. They even sought to weaken the authority of the National Planning and Building Board. The Interim Law abolished the logic of the entire hierarchy of national, district, and local planning institutions so inherent to the Israeli land use planning system. The law challenged the logic of consistency among the plans in that hierarchy. The HCCs were authorized to approve development that did not accord with a district plan, without requiring the approval of the National Planning Board, which, under the regular law, is authorized to approve district plans or amendments to them.

When the law was first enacted, the HCCs were even authorized to approve plans that contradicted valid national plans, and the National Board was allowed only fifteen days in which to veto such

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76. Rachelle Alterman & Erella Prengler-Rosmarin, *The Planning and Building Procedures Law ['Valal Law']—The Good, the Bad, and the Controversial* (1997) (working paper, The Klutznick Center for Urban and Regional Studies, Technion (Hebrew)).



decisions. If no veto were received in time, the plan would come into force. The law thus placed the National Board in a straightjacket that made it almost impossible for it to undertake responsible assessments of the hundreds of plans that raced through the HCCs. In the atmosphere of crisis and national alignment that prevailed, it is not surprising that the Board rarely applied its veto, and in the few cases it thought it essential to do so, not always was it able to act in time.

In 1992, after a few highly controversial plans were approved by default even though they contradicted important national interests, the law was amended. According to the amended law, before a proposed local plan that contradicted a valid national outline plan would come into force, it would have to be approved by the National Board. Note that the requirement for “approval” by the Board was a reduced requirement than under the regular law, whereby national plans, once approved, cannot be contradicted even by the National Board itself, unless amended according to the procedures specified in the law and approved by the Cabinet. The amended interim law allowed the Board thirty days to provide its approval but left unclear what would happen if that time were exceeded. Was the intention of the legislators that the plan would then come into force automatically as before the amendment? This question has no direct answer in court decisions.<sup>77</sup>

The 1991 amendment to the Interim Law specified one interesting exception to the authority of the National Board to approve deviations from national outline plans: a “national plan for immigrant absorption” must be fully adhered to and could not be overridden even with the approval of the National Board. Interestingly, when the amendment to the Interim Law was enacted, that plan had not yet been approved, so the law was in fact referring to a future plan. The story of how this exceptional national-plan initiative came up is told elsewhere.<sup>78</sup>

The language of the legislation left unclear many questions about

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77. In the text accompanying note 68, I discuss a High Court decision where the court interpreted a similar language regarding the time limit for the decision of the HCC (not the National Board) as *not* indicating approval by default. See H.C. 4816/1991, *Binyaney Gil Ltd vs. The Housing Construction Commission, Tel Aviv District*, 41(1) P.D. 44.

78. See Alterman, *supra* note 14.

the relationship among plans in the hierarchy, especially the relationship between plans approved by the HCCs and national statutory plans. This issue came up indirectly before the High Court of Justice in the *Maccabim* case discussed above<sup>79</sup> where the petitioners argued, among other things, that the HCCs were not authorized to approve a plan for a new town because such plans would normally come under the subject-matter handled by the National Board. Judge Dorner, in her minority opinion, analyzes the Interim Law's legislative history and rationale and comes to the conclusion that the petitioners were right in their argument on this issue. However, her opinion remained in the minority and no other court case has shed much light on this issue.

### 7. Bypassing the Agricultural Land Preservation Mechanism

Seeking to remove barriers to development that were seen as unreasonable, the Interim Law in Clause 4 also severely eroded the powers of the national Commission for the Preservation of Agricultural Land (CPAL). This was the only significant change in the CPAL's powers since the Planning and Building Law (P&B Law) was enacted in 1965.<sup>80</sup>

The Interim Law reduced the powers of the CPAL dramatically. Under the regular law any proposed development on declared agricultural land required the active review and approval by the CPAL. The Interim Law brought the CPAL "down" by making its representative a regular member of each Housing Construction Commission. The law also authorized the Housing Construction Commissions to approve all and any plans that fulfill the Interim Law's substantive authority conditions, even plans that release agricultural land for development. The only privileged status allowed to the CPAL representative was that she could call in a particular plan for the CPAL's direct review within ten days after a plan has been

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79. See *supra* note 59 and accompanying text.

80. The only other change made in the legislation regarding agricultural land preservation was in 1988 through Amendment 26 to the P&B Law. That amendment restricted the CPAL's discretion regarding highway routes designated in statutory plans, to move them by only seven hundred fifty meters in either direction, if deemed necessary for farmland protection and if such a move would not constitute a substantive change to the plan.

deposited for public review. However, even under such special circumstances, the CPAL was allowed only fifteen days to assess the plan and if its decision were delayed, the plan would be approved by default. As might be expected, under the atmosphere of urgency and the dynamics of membership in the HCCs, the representatives of the CPAL used their call-in powers only in exceptional cases. For most plans the HCCs, therefore, provided single-stop decisions that bypassed not only the National Board but even the previously all-mighty CPAL.

#### 8. Self-Termination of Plans as Growth-Management Timing Controls

The designers of the Interim Law attempted to fold into it some sophisticated mechanisms of timing control to avoid delays in development by the developer. The international literature on regulative planning or its ambitious American euphemism, “growth management,” is replete with various ideas about how such timing control might be achieved. Such control nevertheless remains elusive in most regulative planning systems, whether American-style zoning<sup>81</sup> or continental-European style statutory plans.<sup>82</sup> Nor was it easily implementable under the regular Israeli Planning and Building Law, either before the crisis or subsequently.

Beyond the prevalent notion that, once approved, plans or zoning convey *as of right* development privileges until they are changed, the regular Israeli Planning and Building Law has an additional impediment. Any change of a local outline or detailed plan that adversely affects the real-estate value of the site to which it applies is potential ground for a compensation claim under Clause 197 of the Planning and Building Law.<sup>83</sup> While the law regarding compensation

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81. As early as 1982, in the first edition of *LAND USE LAW*, Mandelker justified the need for “growth management” thus: “Traditional zoning is not effective as a growth management control. The zoning map indicates areas for future development but does not include timing and phasing controls.” DANIEL R. MANDELKER, *LAND USE LAW* 285 (1982) or 421 (1997).

82. SCHMIDT-EICHSTEADT, *LAND USE PLANNING AND BUILDING PERMISSION IN THE EUROPEAN UNION* (1995).

83. Unless it falls under one of the exemptions specified in Clause 200, but the explanation of this complex area of law is well beyond the scope of this article.

is well beyond the scope of this Article, I could summarize and say that by 1990 court decisions had established a rather landowner-friendly interpretation of the legislation.<sup>84</sup> So, one of the real legal impediments (beyond the major impediment that was simply lack of innovative thinking) to the emergence of effective timing-control tools before the crisis was the fear that some future court decision might regard self-termination of a plan as compensable.

Thus, the Interim Law supplied a superb opportunity to try out what seemed to its designers in the Ministry of the Interior be a growth manager's dream. Clause 6 specified a three-pronged timing-control tool: 1) A plan, once approved, is valid for only two years, unless its implementation has commenced. 2) Each plan is to specify what is to be considered commencement of implementation and the chair of the District Commission is to monitor implementation and report about it within two years. Each plan must also specify the financial and other consequences of the self-termination of the plan in the case of non-commencement (for example, refund of any betterment levy paid or compensation paid out, or return of land dedicated to public use, to its original use). 3) In case of non-commencement in time, the Commission can nullify or amend the plan without being liable for compensation claims.

After about a year of the law's operation, decision-makers felt that the need to specify particular implementation-threshold criteria for each plan was too complex. The Interim Law was amended to define a pre-set, uniform criterion: "*Commencement of construction*" was defined as "construction of the foundations for at least 20% of the housing units approved under the plan." In a subsequent amendment, the sunset timing of the plan was extended to three years.

The story of what happened to these timing controls and moratoria will be unpleasant to the ears of growth-management zealots. The main test for the effectiveness of the timing controls should have come when the law was finally terminated in mid-1995. Almost five years had passed since the law was enacted; that should have been the opportunity to implement the moratorium rules that had not been effectively implemented while the law was in effect. Here was the

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84. See Alterman & Haim, *supra* note 40.

moment of truth: Will government and the legislature allow hundreds of plans for tens of thousands of housing units to sunset and revert to the original land use (usually agriculture)?

The representatives of the Ministry of Housing, the Lands Administration, Finance, and the Prime Minister's Office, made a strong argument against the moratorium rule. After all, they said, government policy, intended to avoid further hikes in housing prices, is to encourage a reserve of approved plans for as many as fifty thousand housing units at any given time. That goal is far from being met. What advantage would there be to allow valid plans, which have already passed the planning-approval process, to sunset? This argument prevailed. The Knesset amended the Interim Law to say that that even if implementation of a plan did not commence by the time the law was terminated in April 1995, the plan will not self-terminate, but that the District Commission will be authorized to amend or void it. In that case, the owner of an interest in the land will not be eligible for compensation.

To the best of my knowledge, although the timing controls may have been of some benefit in stimulating construction during the life of the Interim Law, few, if any, plans have actually been allowed to sunset under it.

#### V. EVALUATING THE INTERIM LAW IN PRACTICE

In this part I report on the *de facto* method in which the new planning bodies (and their legal advisors) applied the law in practice and on some of the key outputs and impacts. Because the most large-scale decisions were made during the first year after the Interim Law's enactment, and the more important High Court decisions interpreting the law were given a year or two later, not always can one observe the imprints of the court's decisions.

Although the 1965 Planning and Building Law was not abolished and continued to operate side by side with the 1990 Interim Law, the latter was to dominate the Israeli land use planning scene for the next five years. It shaped much of Israel's built-up environment and served as a precedent—both positive and negative—for any new planning legislation to be proposed in the coming years.

One cannot speak of the impact of the Interim Law as monolithic.

Its application was very much influenced by the degree of urgency in the atmosphere surrounding it. Its application while the crisis was at its height in the first year after approval (1990-1991) was quite different from its application a year or two later, when the rate of mass-immigration subsided and stabilized. Its application also differed among local authorities. The particular goals and attitudes of the various players determined the manner in which the law was applied in particular locations at particular times.

I do not presume to cover all or most of the aspects whereby one might assess the application and impacts of the land use decisions made in order to handle the massive growth pressures. Instead, I have selected several aspects that are of special significance: the impacts of the large-scale agricultural-land conversions, the quantitative outputs of the HCCs under the interim law, and the degree to which the streamlining objectives of the Interim Law have been reached.

*A. The Impact of High-Pressure Decisions: The Example of Conversion of Agricultural Land*

Two eminent political scientists have characterized Israeli planning during the country's formative years—the 1950s and 1960s—as “high pressure planning.”<sup>85</sup> Public-policy decisions were made in haste. Knowledge was valued less than action. By 1990 Israel had thoroughly changed; but did the accelerated-growth crisis create a comeback of the “high pressure planning” syndrome? In this section I discuss one example: decisions regarding agricultural land conversions.

Shortly after the Interim Law came into effect, in its August 1990 meeting the Cabinet instructed the Lands Administration and the CPAL to de-classify nine thousand hectares (22500 acres) of nationally-owned agricultural land, of which six thousand hectares were to be in the central area. This was an unprecedented initiative in land-tight Israel. Since 1968, after the P&B Law came into effect and the CPAL made its major declaration of agricultural land, most of the decisions of the CPAL had been incremental. The commission usually assessed development proposals incrementally, as they came

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85. B. AKZIN & Y. DROR, ISRAEL: HIGH-PRESSURE PLANNING (1966).

up from the local and district planning commissions in the ongoing course of approval of plans. It rarely initiated conversion of farmland on its own. In an empirical study undertaken just prior to the crisis,<sup>86</sup> we found that in the years just preceding the crisis, the average annual *total* amount of land conversions in the entire country was approximately nine thousand hectares. Never was there a massive declassification resembling the crisis-time order.

One should not forget that this declassification in one shot was not intended to replace, nor did it replace, the incremental declassification requests that still came up through the regular planning bodies both on private land and on nationally-owned land. In addition, the enactment of the Interim Law probably accelerated the pace of incremental conversions of agricultural land because the HCCs were empowered to approve plans without direct CPAL approval.

In view of the cabinet's decision,<sup>87</sup> and with little time for in-depth analysis, the tiny planning staff of the CPAL was obliged to scan the maps for classified agricultural land that could be declassified and released for development. They undoubtedly did their best to minimize negative impacts on open space, but time constraints made in-depth policy assessment impossible.<sup>88</sup>

The decision to de-classify agricultural land *ahead of concrete development proposals*, especially in the country's core and high-density areas, has irreversibly changed the course of development of Israel. The decision unleashed economic energies that promoted further sprawl. Some think this has been for the better, since Israel's economy subsequently grew significantly; but others feel that this was not wise growth management. The large-scale declassification of

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86. RACHELLE ALTERMAN & MIRIAM ROSENSTEIN, ISRAEL'S AGRICULTURAL LAND PROTECTION POLICY: THE LAW AND ITS IMPLEMENTATION (1992).

87. This situation raises an interesting legal issue: What is the legal status of the Cabinet's "instructions" given to statutory bodies such as the CPAL and the Lands Administration?

88. The Comptroller General in her 1992 report (pp. 286-288) criticizes the Commission for the Preservation of Agricultural Land for not providing the Lands Administration with enough planning guidelines for determining priorities in the conversion of agricultural land. The Comptroller would have liked to see criteria to minimize the impact on viable agriculture, minimize costs to government (compensation to farmers), maximize access to infrastructure, and be attuned to socio-economic changes in certain types of rural cooperative villages that have gradually been phasing out as viable agriculture-based communities.

open-space reserves in the country's core is partially responsible for unleashing suburban and ex-urban development pressures that had been contained before the crisis. The 1990s saw the proliferation of new ex-urban neighborhoods, industrial sites, and shopping centers. The country's open-space reserves were depleted at an accelerated pace.

### *B. The Interim Law's Production Rates*

The race between Interior and Housing over the legislation continued within the new Housing Commissions. The Ministry of Housing's planners doubted that the new commissions would be set up fast enough and that they would speedily approve a large number of plans. Yet, the planning staff and members of the HCCs were eager to show that the new commissions could function effectively. In a matter of days during July 1990, the head of the National Planning Administration—the professional-administrative support for the statutory planning system at Interior—did what they had been unable to do for decades. They managed to pump vibrant life-blood into the ailing regulative planning system. Before the crisis, planning departments at all levels were grossly understaffed and under-budgeted (by any international comparative indicators). The all-powerful Ministry of Finance consistently objected to any significant increases. Now Interior's senior planners, succeeded in getting a several-fold increase in professional slots for the planning commissions—not only the six new ones, but also the six existing district commissions and the national Planning Administration.

Planners working for Housing submitted scores of plans to the new commissions and were surprised by their speed. Within a little over one year, plans for three hundred fifty thousand housing units in both the public and private sectors had been processed—an astounding number. To get a sense of scale of the numbers, note that the total housing stock in Israel on the eve of the crisis was approximately 1.25 million. Had all the units approved by the Interim Law been built (that is never the case), they would have added twenty-seven percent to the country's total housing stock accumulated over many decades (including pre-state times). The Ministry of the Interior won this race!



The large-scale housing blitz carried great impacts, but it was the local initiatives that could turn them in a negative or positive direction. Centralization was expressed not only in the procedural changes but concretely in the implementation arena. Since there was no tradition of municipal housing in Israel, the Ministry of Housing called the shots for the entire public-program housing construction. If not resisted by an astute local authority, the Ministry would specify the number of housing starts for each municipality, prepare site plans, and issue RFPs for architects and builders.

Although local authorities maintained their exclusive legal powers to issue building permits, both the Planning and Building Law and the Interim law obliged them to issue such permits if the proposed development fully accorded with the approved plan. The city engineer, however, still had the power to negotiate construction and design details as well as require the fulfillment of various conditions by the developers. The two local case studies I conducted<sup>89</sup> showed that at this juncture significant differences emerged among local planners, differences that reflected the strategy, conviction, and ingenuity of both planners and elected politicians. These differences significantly influenced the quality of the housing outputs.

### *C. Have the Streamlining Objectives of the Interim Law Been Reached?*

The rationale for the Interim Law was to set up a regulative planning system that would be able to assess and approve or reject plan proposals in a much shorter time than the regular system. Has this goal been achieved?

There is an empirical answer to this question, based on research conducted by Michelle Sofer and myself.<sup>90</sup> The research focused on the time element in planning, comparing the specifications in the law to results in practice. One section of the research analyzed the lengths of time that passed between deposit and approval of plans under the

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89. See ALTERMAN, *supra* note 14.

90. RACHELLE ALTERMAN & MICHELLE SOFER, STREAMLINING PROCEDURES? THE DEGREE OF SUCCESS OF RECENT LEGISLATIVE ATTEMPTS TO SHORTEN THE TIME FOR APPROVAL OF STATUTORY PLANS (1994) (Hebrew).

regular planning system as compared with the Interim-Law planning system. The years covered in this study were 1991 and 1992.

Table 1: Comparison of the length of time, in months, from plan deposit to final approval under the regular Planning and Building Law and the crisis-time Interim Law.

Regular or Interim Law	May 1991	Nov.-Dec. 1991	May 1992	Nov.-Dec. 1992
Under the regular P&B Law	Average: 16.4 m Median: 11.0 m	Average: 18.4 Median: 10.0	Average: 17.0 Median: 9.0	Average: 16.2 Median: 9.0
Under the Interim Law	Average: 4.5 Median: 5.0	Average: 5.9 Median: 6.0	Average: 9.0 Median: 8.0	Average: 8.6 Median: 7.5

Table 1 presents the mean and median lengths of time in a representative sample of plans. In order to avoid season-bound differences, we chose two time periods—May and November-December. The sources of information about the dates were the Israeli Official Gazette publications of the statutorily required notices regarding plan deposit and plan approval.

Four observations emerge from the table. First, the Interim Law indeed sped up the plan-approval process considerably, compared with the regular law. The differences in approval time are most striking when one compares averages: sixteen to eighteen months under the regular law versus five to nine months under the interim law. Second, the differences are much smaller when one compares medians rather than averages—nine to eleven months under the regular law, compared with five to eight months under the Interim Law. This is due to the fact that, during non-crisis times, some plans tend to drag on, not necessarily due to bureaucratic recalcitrance, but because the developer has lost interest or will not abide by the conditions set for approval. Third, the approval time under the Interim Law rose significantly between the first and second years of the crisis, while under the regular law it remained almost steady. And fourth, by the end of 1992, the differences in approval time between the two systems declined significantly. If one uses the median as an indicator, the time differences had become very small: nine months and seven and one half months respectively.

The implications of these findings are clear: At the height of the crisis, there was a general consensus, shared by decision makers and

planners alike, about the urgency of accommodating growth and accelerating housing and ancillary construction. Under that atmosphere speed was paramount. The planning staff of the HCCs were willing to cut corners in professional input and planning oversight. As the atmosphere of urgency waned, however, planning scrutiny was intensified. The planning staff and the decision-makers in the HCCs gradually resumed the level of assessment and regulation that they had applied prior to the crisis. This may explain the most striking finding from that research: within only eighteen months, by the end of 1992, the time periods for approval under the two processes had almost merged. From the vantage point of 2000, I may add my own impressions, unsubstantiated by empirical research: The differences in lengths of time between the two laws totally disappeared in later years, perhaps even reversing by the end of the decade.

One may conclude from this case study, that legislative mandates of speed, even if they include rules of automatic approval as instituted by the Interim Law, are not as effective as the engulfing decision atmosphere.

#### *D. Growing criticism of the Interim Law*

While the crisis was still going strong, the only in-government written criticism of the new law came from planners in the Ministry of the Environment. Toward the end of 1991 they were the first government officials to openly argue that the special housing commissions were no longer needed because by then an ample stock of plans for housing units had been approved. They were also the first government officials to argue what was later to become axiomatic not only among planners but also among elected politicians, journalists, and other groups. They argued that in their haste to approve public and private plans, the commissions were unduly compromising good planning and environmental quality.<sup>91</sup> Among the hundreds of thousands of housing units for which plans had been approved, several thousand lacked adequate sewerage capacity.<sup>92</sup> The report by

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91. Alterman, *supra* note 14.

92. Valerie Brayha, Plans Approved by the Special Housing-Construction Commissions

the Environment planners was sharply criticized by the Director General of Housing and less vociferously by senior planners from the Interior who were not yet ready to make their growing internal self-criticism public.<sup>93</sup>

As the crisis waned and the Interim Planning Law approached its expiration date of June 1992, however, senior planners in the Ministry of the Interior, who had earlier advocated the law and invested their personal prestige to “sell” it, began to express doubts about its continued use. They joined their colleagues from the Environment in questioning the need to extend the law. However, the ministers followed the cabinet’s decision and supported the law’s extension. Ironically, planners and other officials from Housing, who in May-June 1990 had opposed the Interim Law, preferring emergency legislation, now strongly supported its extension. Under a compromise the Knesset extended the law until December 1992. In subsequent months planners in the Interior, Environment, the National Parks and Nature Reserves Authorities, as well as some planners and elected officials in local governments openly criticized the continuation of the crisis-time legislation. They argued that there was already an excess of approved housing units and that the shortcuts in procedures were causing more harm than good. But planners from Housing, the Lands Administration, and Finance continued to support the law, as did their superiors.

The growing disagreement between some planners and their superiors came to a head as the December 1992 deadline for extending the Interim Law approached. The National Planning Board, with which the government must consult before proposing any planning legislation to the Knesset, was asked to recommend the extension of the Interim Law for a second time until June 1993. The Board deadlocked in October 1992, and in December it voted against extending the law.<sup>94</sup> In a legally interesting twist, some of those voting against extension were senior planners in government bureaus

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(1992) (unpublished report of the Ministry of Environmental quality, State of Israel).

93. An internal report by one of Interior’s planners prepared in late 1991 and early 1992, which contained some similar criticisms to those in Environment’s report, was not made public.

94. Protocol of meeting no. 302 of the National Planning and Building Board, Oct. 5, 1992. Information on the December meeting from the media and notes taken by Relli Prengler-Rosmarine, a graduate student at the time.

to whom their ministers had delegated their seats on the Board and where the ministers wished the law extended. The Cabinet did not accept the Board's recommendation. A bill to extend the law for another ten months was put before the Knesset and approved.

Twice more the Knesset was asked by government to extend the law. The head of the Knesset Committee for Internal and Environmental Affairs, M.K. Eliahu Matza, expressed the Committee's dismay and noted that no more extensions would be allowed. In total the Interim Law was extended four times, for one-year periods or less each time. The Knesset indicated a growing recognition that in post-crisis times, the costs of the Interim Law outweighed its benefits. The Interim Law finally expired in mid-1995, while the extensive amendment (number 43) to the regular P&B Law was still in preparation. The government's request to extend it for just a few months more, until the amendment to the regular law would be approved, was refused by Matza and his committee.

## VI. THE IMPACTS OF THE CRISIS ON SUBSEQUENT PLANNING LEGISLATION

When the Interim Law finally expired in mid-1995, a few months before Amendment 43 to the 1965 Planning and Building Law received Knesset approval (see below), the representatives of Housing, Finance, and the Lands Administration argued that a "void" would occur, but it never did. After all, the regular law continued to be valid throughout the crisis and beyond. Furthermore, a transitional clause in Amendment 43 stated that any plans already submitted to the Housing Commissions would continue to be handled by them. In the year 2000 there were still a few plans, hearings, and court appeals being carried out under the Interim Law. Should one conclude that "crisis-time laws die hard"?

While the original Interim Law did sunset, its role as a precedent, both positive and negative, continues. Throughout the 1990s whenever the cabinet, a particular minister, or some interest group identified a planning need that it deemed to be urgent, it proposed that a special law be enacted, along the lines of the Interim Law. "Accelerated tracks" or "planning bypasses" seem to be popular

among decision-makers for whatever type of development is favored by them. The Cabinet has repeatedly decided to ask that such a bill be prepared so as to accelerate housing supply. In addition, an Interim Law-like format has been suggested for airports, industrial sites in peripheral areas, and for tourist facilities for the millions of pilgrims who were expected to arrive for the year 2000 celebrations and the Pope's visit.<sup>95</sup> Fortunately, none of these hasty initiatives, intended as instant remedies for inadequate planning, have gone forth.

The crisis has shown that it was possible to legislate and install new legal-institutional structures—the Interim Law—with virtually no transition time or major legislative costs. Hence, after the crisis government planners were able to convince the previously skeptical decision-makers that a new planning law was necessary for post-crisis times. The new law, they argued, could benefit from the lessons learned in the large-scale laboratory experiment with the Interim Law.

The National Planning Board unanimously recommended to the Cabinet that a new law be prepared, and the Cabinet adopted this recommendation in December 1992, as part of the compromise package that extended the Interim Law for another year. The Minister of the Interior was given ten months to come up with a new law.

A special team was set up in 1992 to draft the new law, headed by the chief attorney of Interior (at the time), Yehezkiel Levi, along with three representatives of the Association of Engineers and Architects. The Levi team worked intermittently, with almost no public or even broader professional exposure.<sup>96</sup> The team's proposal called for a

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95. GLOBES daily newspaper (Hebrew), April 5 1999.

96. Here is an example of a spin-off from the crisis that does not pertain directly to this article's story but might interest readers who are planners or planning educators. The existing Planning and Building Law reserved all professional posts on statutory committees to persons recommended by the Engineers and Architects' Association. Until that time the Engineers and Architects' Association had not accepted into its ranks planners who did not have an architecture degree (even though the architects' union within the Association unilaterally designated itself the "*Architects and Planners' Union*"). Though the draft legislation was written in 1993, twenty-three years after planning education had been introduced to Israel as a separate profession, its authors wanted to use this opportunity to preserve the anachronism of not recognizing the planning profession. When the bill was put before the Knesset committee, I became involved as a pro bono advisor to the Knesset. We managed to convince the Minister of Interior and finally the Knesset to open up the eligibility for appointment to "persons trained in the area of urban and regional planning." Thus, indirectly the post-crisis phase also became a

reversal of the centralization trends applied in the Interim Law. They proposed a somewhat more decentralized system than the regular P&B Law, as well as a more flexible local outline plan. The team sought to make two long-overdue changes in Israel's planning law:

- (1) In cases where there is an approved comprehensive outline plan, detailed plans could be approved directly by the municipal council, without District Commission—i.e., central government—approval.
- (2) Outline plans would be transformed from their rather detailed, blueprint style, to a more flexible style that would not be regarded as directly granting development rights.

These changes were long overdue.<sup>97</sup> However, most Israeli decision-makers, and many planners, had never recognized the intrinsic value of such proposals as a means for improving the quality of governance or of planning. The team knew full well that government politicians and the legislators still had an overriding interest in speeding up the plan-approval process and were concerned about what would happen the morning after the Interim Law would sunset. They, therefore, tried to sell its draft bill by emphasizing its effectiveness in streamlining development control.

The team was right, but too late; the window of opportunity for a new planning law created in the wake of the crisis had begun to close, and the interest of the elected officials and senior bureaucrats was waning. Many other issues in Israel's dense political environment occupied the public agenda. The Levi Team's argument in favor of a new planning law was insufficient to push the major conceptual changes through. The draft bill was watered down considerably before it was submitted to the Knesset as a government bill. The legislative process watered it down even more, and instead of a new law it was cast as an amendment to the 1965 Planning and Building

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major turning point in the institutionalization of the planning profession in Israel.

97. I had advocated such changes a decade before the crisis. Rachelle Alterman, *The Planning and Building Law and Local Plans: Rigid Regulations or a Flexible Framework*, 11 MISHPATIM 179 (1981). The Israeli Supreme Court adopted and applied my analysis of the law and ruled that flexible plans were a desirable planning format and were possible even under existing law.

Law.

The Knesset legislative process took more than a year. The bill was finally enacted into law in mid 1995 and became Amendment 43 to the P&B Law. The closed-door approach of the Levy Committee was not repeated during the official legislative process. Ironically, the very crisis where government tried to increase centralization and reduce participation can be directly credited with the relatively open, participatory approach adopted by the Knesset committee during the post-crisis legislative process. This was probably due to the heightened public-professional interest in planning legislation that the controversy about the enactment of the Interim Law had generated in 1990. The legislative process for Amendment 43 also generated much public interest, and representatives of major interest groups were invited to the weekly deliberations of the Knesset Committee for the Interior and Environmental Affairs.<sup>98</sup>

The amendment, though the most extensive ever to be made to the 1965 Planning and Building Law, turned out to be only one more attempt, albeit more thorough and extensive, to streamline the plan-approval and building permitting process by changing various procedural elements. Of the two major principles in the draft bill, only a watered-down degree of decentralization remained. For the first time, local planning commissions would have the authority to approve amendment plans for certain minor types of variations in the previous zoning and development regulations without district-commission approval.<sup>99</sup> Even this modest change should be entirely credited to the crisis; otherwise, it would probably not have arrived on the Knesset table for another decade. As modest as Amendment 43 was in the decentralization it granted, this is still the greatest step towards decentralization taken so far in Israeli planning law. Astute local authorities and developers have learned how to make the most of these new powers.

Although Amendment 43 was intended to substitute to some extent for the Interim Law, it did not reduce public-participation

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98. I served as pro bono advisor and participated in most of the meetings during the course of a year.

99. Even this small degree of autonomy would be subject to the oversight of the Minister of the Interior, as before the amendment.



rights to achieve streamlining. Interestingly, once the crisis was over, the legislative process not only reinstated all the rights for information and for voicing objections that existed in the regular law, it actually expanded them considerably to reflect the more open government and the developments in administrative due-process law that had occurred since 1965. Israel in the mid-1990s was a country no longer in the midst of a crisis of accelerated growth but was still growing more than most other advanced-economy countries. The new legislation struck a reasonable compromise between the need to manage accelerated growth and the norms of enhanced public participation and due process.

Amendment 43 introduced two major changes that enhanced public access to land use planning procedures. First, in order to handle objections submitted to the new types of plans under local-commission jurisdiction, the Amendment established a special quasi-judicial body in each district—an Appeals Commission chaired by a lawyer with experience in planning law. After four years of operation of these commissions, my assessment is they are more accessible to the public and less deferential to government decisions than the appeals process under the P&B Law before the amendment. There, the regular planning bodies, not a special quasi-judicial body, heard appeals.

The Amendment also established special planning-administration courts that would substitute for the High Court of Justice. The objective was to reduce the excessive load on the High Court—as Israel’s Supreme Court is called when it handles petitions against government or quasi-government bodies. Over the decades planning-law cases had proliferated and by the mid-1990s had come to constitute a major category. Under the Amendment the regular district court in each of Israel’s six districts would have an additional composition as Courts for Administrative Matters. These would be authorized to handle petitions against planning bodies. Only petitions that directly address the National Planning and Building Board or national outline plans would remain under the jurisdiction of the High Court. After four years since this change, one can conclude that although the goal of this change was motivated by judicial efficiency, its spinoffs have been greater access to petitioners and a large number of decisions delivered by these courts. I would hypothesize that a

silent competition is developing among the six courts over which court would deliver the most citizen-friendly decisions.

Although the impact of the crisis on post-crisis planning legislation was somewhat less than I had expected, there is no doubt that as a result of the crisis, the very status of land use planning and planning law has been elevated in the politicians' eyes. In October 1999 the Cabinet accepted Prime Minister Barak's proposal that his Office would take over the entire national and district-level planning functions from Interior (recall Figure 1).

Unlike most of the previous legislative and institutional changes in the planning system, this time the major rationale for the proposed transfer was not only to speed up planning decisions. It was mainly, to elevate land use planning to the status of a major tool of national policymaking and implementation. The expectation was that location of statutory planning in the Prime Minister's Office would enable better interministerial and intergovernmental coordination. This proposal is thus a recognition of the growing importance of land use planning—a recognition brought about to a large extent by the accelerated-growth challenge.

Although it is likely some form of crisis-like streamlining legislation would be proposed as part of this institutional realignment, I predict that this time it will go beyond a speed-all legislation and will deal with more fundamental changes in public participation and the format and contents of plans. Rather, if streamlining legislation is once more proposed, it will likely be targeted only to projects deemed to be of national importance. Internationally comparative research undertaken by this author has shown that such initiatives are prevalent among other advanced-economy democratic countries and are not crisis-dependent.<sup>100</sup>

## CONCLUSION

The challenge of handling accelerated growth—mass immigration to Israel from the former USSR—demonstrated that a regular land use law system, even one with extensive growth-management tools, was unable to handle accelerated growth efficiently. Israel's regular

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100. Alterman, *supra* note 23.

land use law would have caused unacceptable delays with major negative repercussions that decision makers and society at large could not tolerate. Massive homelessness of both immigrants and non-immigrants priced out of their housing was a risk that no responsible decision maker in Israel, neither local nor national, was willing to take. The Minister of Construction and Housing even tried to issue emergency regulations in order to provide a means of regulating large-scale construction of housing.

On the eve of the crisis, Israel's planning legislation had become a symbol of fossilized bureaucracy and a target for attack from many quarters. Yet there was not much chance that the bureaucrats and legislators, always preoccupied with Israel's major political agendas of war and peace and of ethnic and religious issues, would be willing to devote the extensive legislative time necessary to prepare a new law. Shortly before the crisis, in 1988, the Knesset enacted an extensive, but largely technical amendment (amendment 26), intended for streamlining the plan-approval process. Even this limited amendment had taken years to prepare and approve.

The crisis demonstrated the importance of speedy planning procedures in order to manage accelerated growth. The Interim Law was enacted in record speed. Under the new procedures, the planning bodies were able to handle five to ten fold the number of planning initiatives. The crisis showed that it was indeed possible to enact legislation that would shorten plan-approval procedures drastically—to about one third of what they were. The Interim Law probably did help significantly to avoid a massive housing shortage.

At the same time, the experience with the Interim Law also demonstrated the price paid for an over-emphasis on speed: extensive negative impacts of planning decisions done in haste and a reduction in citizen participation rights. However, both these negative impacts leveled down with the passage of time. As the crisis waned, professional scrutiny reasserted itself (and the decisions took longer than before). At the same time, the High Court, in a series of cases, interpreted the interim law so as to make no concessions in procedural due process. In effect, court decisions minimized the reduction in public-participation rights intended by the legislators. I would guess that, had the Interim Law continued to be in effect after 1995, court decisions would have gradually re-introduced

requirements of professional scrutiny and public input that would have almost lead to a convergence in lengths of time for planning decisions under the crisis-time and regular laws.

The crisis-time law also highlighted the impacts, both positive and negative, of the attempt to centralize planning decisions. On the positive side, the problem of social exclusion by local governments, which is so prevalent in other countries, was largely avoided by means of centralization. Some towns received an increment of fifty percent and more to their population as a result of massive immigrant absorption, yet phenomena of exclusion *within* these towns were rare. On the other hand, the crisis showed that centralization of decisions did not necessarily equalize treatment *among* towns. Some local governments were able to remain more or less exclusionary yet to wield the Interim Law and the growth momentum so as to serve the interests of the town's non-immigrant population. The crisis experience highlighted the fact that in an entrenched democracy there are limits to centralization. Astute local governments will likely be able to exert their influence even if central government ostensibly centralizes some of their formal powers. By contrast, local governments with a less effective and vociferous leadership (or with more commitment to national goals), would end up bearing more of the brunt than their fair share. Centralization does not necessarily serve as an equalizing mechanism.

The experience with the crisis-time legislation convinced the Cabinet that once the crisis was over, they must initiate a fresh new planning law. In this task, they would benefit from the lessons learned in the large-scale crisis-time experiment with the special legislation passed in order to manage the rapid-growth crisis. However, by the year 2000 no new law has as yet been enacted. Several bodies in Israel, both within government and outside, have taken the initiative to set up teams to work on draft bills. I have little doubt that the lessons learned from the crisis—the need to balance speed with the preservation of due process—will be important input to the work of these and other teams, once the legislative effort becomes serious.