

The Connection between Town Planning, Public Taking (Appropriation) and Land Appraisal

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SUMMARY

It seems illogical that the state will first publish the Act of appropriation of land for public purposes before the town plan skim has been approved. The plan would usually consider the public need and the environmental effects of the plan and the justification to appropriate land later for the public purpose. Although it seems illogical, the Supreme court of Israel is divided in its opinion whether the town plan should be approved before appropriating the land. In this paper I argue that appropriating land first before the town plan is approved, would effect the appraisal of land and therefore the compensation the owner would receive.

The Israeli compensation system in public taking is a two tier system (Hamami judgment). The land owner can sue the local authority when the town plan is approved " for the harm caused by the plan". When the Act of appropriation is published, the land owner can sue the authority that will appropriate, but is not entitled to get compensation for the first 25% of the whole land (except in several situations such as appropriation of the whole parcel). The appraisal of the land in the second tier would be according to its public use (that was approved in the town plan in the first tier), and if it's a road, would be valued 10% to 0% of the previous use.

Consider a situation where a land of x square meter is valued y \$ per square meter. If the town plan is first approved than the land owner would receive in the first tier compensation of $x * 0.9y$ and when the land would be appropriated he will receive compensation of $0.75x * 0.1y$, and there for he will receive total compensation of $0.975xy$.

If the appropriation of land is first, in the first tier the land owner would receive $0.75x * y$, and in the second tier when the plan would be approved he will receive $x * 0.1y$, and therefore he will receive total compensation of $0.85xy$.

Its obvious that appropriating the land first, would effect the compensation the land owner would receive and harm the land owner.

There for appropriating the land first is not only illogical, but is unconstitutional because it would harm the land owner's property rights not proportionally and to a bigger extant.

SUMMARY

זה נראה לא הגיוני שהמדינה תפרסם תחילה צווי הפקעה למקרקעין הדרושים לצורך ציבורי ולפני שתאושר תוכנית בניין עיר שתאשר צרכים ציבוריים. תוכנית בניין עיר שוקלת את הצורך הציבורי במקרקעין, ההשפעות הסביבתיות וההצדקה להפקיע מקרקעין הדרושים לצורך ציבורי. למרות חוסר ההיגיון האמור, בית המשפט העליון בישראל חלוק בדעותיו בשאלה, אם יש לפרסם תוכנית בניין עיר תחילה או שניתן לפרסם צווי הפקעה תחילה. במסגרת מאמר זה, אטען כי הקדמת ההפקעה לאישור תוכנית בניין עיר, תשפיע על הערכת הפיזיו המגיע לבעל הקרקע ותפחית את הפיזיו.

בשיטת המשפט הישראלית, הפיזיו בגין לקיחה ציבורית הינו דו שלבי (פס"ד חממי). בעל המקרקעין יכול לתבוע את הועדה המקומית המאשרת את התוכנית במועד אישורה, בשל הפגיעה מהתוכנית. עם פרסום צו ההפקעה, בעל המקרקעין יכול לתבוע את הרשות המפקיעה, אולם לא יקבל פיזיו עבור 25% הראשונים משטח החלקה (אלא במצבים שונים כגון כאשר כלל החלקה מופקעת). הערכת שווי המקרקעין יעשה על פי ייעודם הציבורי החדש (כפי שאושר בתוכנית בנין העיר בשלב הראשון) ואם מדובר בדרך, ההערכה המקובלת הינה 10% עד 0% מהשווי הקודם.

דמינו מצב בו קרקע בשטח X מ"ר מוערכת לפי Y דולר למ"ר. אם תוכנית בנין העיר מאושרת ראשונה, בעל הקרקע יהיה זכאי לקבל בשלב הראשון פיזיו של $Y * X * 0.9$ וכאשר יגיע שלב ההפקעה בעל הקרקע יהיה זכאי לפיזיו הפקעה של $Y * X * 0.1$, ולכן יקבל פיזיו כולל בשני השלבים בסך של $XY * 0.975$. במידה ותחילה יפורסם צו להפקעת המקרקעין לפני אישור התוכנית בלשב ההפקעה יקבל בעל המקרקעין $Y * X * 0.75$ ובשלב השני כאשר התוכנית תאושר יקבל פיזיו של $Y * X * 0.1$, ולכן הפיזיו הכולל שיקבל בעל המקרקעין יעמוד על $XY * 0.85$.

ברור אם כן, שהפקעת המקרקעין לפני אישור התוכנית תפגע בבעל המקרקעין ותרע את מצבו. לכן, פירסום צו להפקעת המקרקעין לפני שאושרה תוכנית הינו לא רק בלתי הגיוני, אלא גם לא חוקתי, שכן זכויות הקניין של בעל המקרקעין יפגעו בצורה לא מדתית ובאופן העולה על הנדרש.

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1. PUBLIC TAKING BEFORE TOWN PLANNING- IS IT POSSIBLE?

Apparently appropriation of land before approving a town plan, that would define the public need, its scope and the harm it would cause the environment, is possible according to the Israeli law. There are conflicting arguments in the supreme court of Israel, but the prevailing view, is that the authorities could first appropriate land, and then approve the town plan approving the public use of the specific land. As argued in this paper such an approach is not only unreasonable but is argued to be unconstitutional.

1.1 The Supreme Court judgment of Avigdorov

The house and land of Mrs Hadasa Avigdorov and her family were on the path of a large construction of a huge road and railway. The appropriating Act was published few years before the approval of the town plan. Mrs Avigdorov argued that the appropriating Act was illegal, because it should be published after the approval of the town plan that defined the public need. The district court of Tel Aviv accepted the argument and ordered that the appropriating Act was illegal. The railway Authority appealed to the supreme court of Israel.

1.1.1 The "Planning first approach"-The judgment of the Honorable Judge Mrs. Edna Arbel.

The honorable Judge Mrs Edna Arbel concluded in her judgement that according to the Planning and Building Act, the authorities should approve the town plan first, and only then publish the appropriation Act. Although in this case she concluded that there are exceptions to the general rule, based on public interest, and this is the exception.

1.1.2 The "Administrative Law approach"- The judgment of the Honorable Chief Justice Ahron Barak.

The honorable Chief Justice Mr Aharon Barak did not agree in his judgement to the approach of Judge Mrs Arbel, and concluded that publishing the appropriating Act first, is a matter of Administrative law, and that the judge should check its reasonableness, whether it is proportionate and done in good faith for the public interest. According to the law, his judgement is the prevailing precedence.

1.1.3 The Mehadrin Judgment.

Few decades before the Avigdorov judgement, the supreme court concluded in the judgement of Mehadrin, that the authority should do what ever that in its power, to approve the town

plan first, and then publish the appropriating Act, but can appropriate first, if the public interest requires so.

2. THE TWO TIER COMPENSATION SYSTEM- HAMMAMI JUDGMENT

The compensation system for public taking in the Israeli legal system, is a two tier system. The owner of the land is first entitled to compensation for the harm caused by the town plan that was approved, changing the utility of the land to a public one. Then at the second tier, the owner of the land is entitled to compensation, when the land is appropriated to the public use (that was approved in the town plan in the first tier).

2.1 Compensation for harm caused by town planning.

2.1.1 The main factors in appraisal of compensation for land harmed by town planning.

Appraisal of compensation caused by a town plan requires a check by the land surveyor of the appraisal of the land before the approval of the town plan and after the approval of the town plan (known as the "before and after method). The land surveyor should check the previous town plans that were approved before the 'harmful' town plan. Then the town surveyor should check the harm caused to the land according to one of the accepted methods (preferably the comparative technique).

2.2 Compensation for appropriation of land that its utility was changed in a town planning.

2.2.1 The main factors in appraisal of compensation for public taking of land that changed its utility to public use in town planning.

When an appropriating act is published, the land appraisal is done according to its publication date. The surveyor should check the land's value according to its utilities and potential driven by approved and expected town plans, ignoring the publication act.

3. DOES THE CHANGE IN PUBLIC TAKING BEFORE TOWN PLANNING EFFECT THE WAY THE APPRAISAL OF LAND SHOULD BE DONE?

As shown in the summary, the appropriating act's publication prior to the approval of the town plan will result in decrease of the appraisal of land. The main factor that causes the decrease in the value of land, is due to the legal requirement that 25% of the value of the land, should not be paid; based on the wrong assumption, that the change of utility will increase value of the rest of its land, that will not be appropriated. As a result, the land surveyor should ignore the change in the normal method of appropriation (i.e first approve the town plan and then appropriate), or the courts should instruct the land surveyor to ignore the 25% reduction of compensation in the appropriation phase.

3.1 Test case- Appraisal of compensation for appropriation of land – Is the change in restriction on the range of construction allowed, on the date of publication of the appropriating act, a planning harm or appropriation harm?

Consider a situation where an appropriating act is published on August 13, 1998, regarding the construction of a new railway. The town plan that changed the land utility was approved on December 20, 2000. Just after the publication of the appropriating act, a national town plan has changed the construction boundaries for railway lines and increased the boundaries from 50 meters to 120 meters. Should it be considered as an appropriating harm or a harm caused by the town plan?

4. THE DISTINCTION BETWEEN PLANNING HARM & APPROPRIATION HARM- EZER JUDGMENT

The distinction between planning harm and appropriating harm is not always obvious. In the judgement of Ezer, the Israeli Supreme Court stated that the distinction between those harms is usually artificial. Traditionally, the town plan's approval has caused harm because of the change in the utility of the land and the new boundaries of construction, and the appropriation will cause harm because the land is appropriated for the public use. Appropriating compensation could also be granted for harm caused to the rest of the owner's remaining land. Under such circumstances the argument would concern the question whether the harm is caused by the appropriation of land or because of the change of construction boundaries in the town plan.

5. THE DECREASE OF COMPENSATION FOR LAND FIRST APPROPRIATED AND THEN CHANGED ITS UTILITY IN TOWN PLANNING

As shown in the above summary, if the town plan is approved first and then the land is appropriated, the land owner would receive 0.975xy compensation. If the appropriating act is published first and then town plan is approved, the land owner would receive 0.85xy compensation.

6. CONCLUSIONS AND QUESTIONS

Appropriating land before a town plan has been approved is not only irrational but also unconstitutional because it decreases the compensation the land owner would receive. It is irrational because before appropriating, all consequences, including environmental considerations, the extent of appropriation needed for public use, etc., should be considered in a town plan. It is unconstitutional because it harms the land owner disproportionately and beyond the needed extent. There are several alternatives to deal with this problem, such as:

- Changing the Supreme Court's precedential statement in Avigdorov's judgement and deciding that appropriating first is illegal.

- Giving the surveyor instructions by the court, according to which when the appropriating act is published first, on land appraisal, he should ignore the reduction of 25% of the compensation required by law.

REFERENCES

Civil Appeal 1528/05 Railway Authority Vs. Avigdorov & others

Civil Appeal 474/83 The local Committee for town planning in Rison Le Zion Vs. Hamamy

Bagatz 3028/94 Mehadrin Vs. The Minister of Fianance

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