

UPDATING OF A “BRIEF HISTORICAL BACKGROUND”

by GARCÍA-BELLIDO’S “A (R)Evolutionary Framework For Spanish Town Planning”

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(...) Since the 19th century, Spanish town planning legislation has differed from that of the rest of Europe in four major respects.

First, it has established more than mere procedures and techniques of a physical design nature: it has deeply transformed private real property rights and the right to build (*ius aedificandi*), rights which have been progressively cut back with each new law.

Second, the traditional lack of a Spanish entrepreneurial mentality has caused middle class capital and savings, attracted by the easy profits obtained from land and dwelling speculation, to be diverted to real property (Spain has one of the highest European percentages of owner-occupiers, and that real estate prices have skyrocketed in the last four years [1987-91 and again in 1999-2001!]). Taking this fact into account town planning legislation has always attempted to reduce or provide for public intervention of undeserved profits obtain from real speculation.

Thirdly, innovative, sophisticated procedures for developing and controlling new, outlying areas have been tested, although they have only been subsequently applied to existing towns timidly since they are prejudicial to longstanding speculative interests.

And fourthly, Spanish town plans, in contrast to Great Britain, are normative documents, which *create property rights* with binding legal force as an acquired right and an inviolable legal reference in the continental Napoleonic manner. For this reason, town plans are increasingly more complex and sophisticated technical documents, in order to avoid the arbitrariness of government authorities and of real estate speculator hiding within every Spaniard. Judicial intervention in the application of these plans is continuous, such that it has been said that town planning in Spain has become judicial in nature. For non-Spanish readers, a historical approach is indispensable at this point.

Brief historical background.

Since the 18th century, the right to build has been subjected to the obligation to apply for planning permission and obtain a permit from the government for any new construction (*nationalization of the right to build*). In 1846, the rule that all towns were required to have a “geometric plan for building alignments”, at a scale 1/1250, was adopted. The first general legislation governing compulsory purchase powers (the right of eminent domain), enacted in 1836 ⁽¹⁾, required streets, squares and gardens to

⁽¹⁾ For similar legislation, see the first French law governing the compulsory purchase, 1841, which Haussmann used to gut Paris; the British *Land Clauses Consolidation Act* of 1845 and the *Towns Improvement Clauses Act* of 1847; and the Prussian *Fluchtliniengesetze* of 1845-1850 and the already unified German of 1875, with compulsory acquisition powers not enacted until the *Enteignungsgesetze* of 1874.

be appropriated and compensated at market prices by the State and developed at its expense, to the benefit of the adjoining property owners ⁽²⁾. In 1854, the municipal regulations for limiting the height of a building as a function of the width of the street were adopted [Paris did it in 1859], the first nationwide geometric, sanitation and esthetic town planning regulations. These regulations *limited* “sacred” rights of urban property, and their criteria would remain in effect as the basic determination of economic urban development rights in existing urban areas until the 1990-1992 *Urban Regulatory and Land Appraisal Act*.

[Nowdays, after an appalling sentence of the Constitutional Court in 1997, dismantling the 1992 Act only due to a formal particular interpretation of the legislative competences of State and Regions, the Conservatives produced its retrograde 1998 *Land Appraisal Act*, which is the basic nationwide frame to regulate the urban development property rights: every one of the 17 Autonomous Regions has already developed that general frame with its own Town and Country Planning law adapted to every particular region and political imagination of the governing power]

The first *Town Extension Act* dates from 1864. It was the first in Europe to establish overall town and country planning, both interior and exterior, for all communities with population of over 30.000 inhabitants, and applied the previous general legislation on compulsory purchase of 1836 to new overall extension plans, which were then being approved for lands to be developed around large cities (Madrid in 1857, Barcelona in 1859, Bilbao in 1861-76, San Sebastián in 1864) ⁽³⁾.

The next Town Extensions Act were those of 1876 (economic and financial amendment of the 1864 Act), 1892 (exclusively for Madrid and Barcelona, offering tax benefits to developers who would develop and cede all streets and squares) and the 1895 *Town Extension, Sanitation and Interior Improvement Act*, [which introduced the competition among private developers to undertake new avenues with drastic urban renewal, and authorized the compulsory acquisition of the *entirety* of estates with access from new streets if their owners did not gratuitously cede one-half of the street [as the 1841 French law had done and Haussmann implemented devastatingly)].

The modern Spanish head of a set of land acts was enacted in 1956, the *Land and Urban (town & country) Planning Regulatory Act* (shortly “1956 Land Act”). This Act had four major characteristics:

⁽²⁾ This virtual donation of unearned surplus value to property owners infuriated the brilliant urban planner Idefonso Cerdá in 1859, author of the Barcelona Extension Plan (1857-1859) and the Madrid Interior Remodelling Plan (1859-1861) driving new streets through old parts. He invented the term “urbanización” for land development, which is used today all around the world. Five original manuscripts of Cerdá’s from these years have recently been discovered and are being published. Cerdá proposed the first formula for distributing costs and benefits arising from urban development among all owners throughout joint operations of *reparcelling* of land values. In 1861 a revolutionary, first global town planning bill was presented before Parliament introducing Cerdá’s proposals, but the bill was boycotted by the social economic opposition and these proposals were not adopted until a century later, in the 1956 “*Land Act*”.

⁽³⁾ The first German law similar to that was the 1875 *Fluchtliniengesetz* (alignments), with the previous experiences of the extension plan of Düsseldorf (1831 and 1854) and the huge one of Berlin (1858-1862); in Britain nothing similar was enacted until 1909 Town Planning Act, and in France until 1919.

- (i) it provided for the *obligatory, gratuitous cession* to local government of streets, gardens (10% of the surface area of each new development), schools and all land indicated in development plan as necessary for local public facilities, after being fully developed (pavement, sanitation, lightning, water supply);
- (ii) all costs were paid in full by the property owners as developers, by equitably distributing costs and benefits among them in every partial development plan, in proportion to the surface area each has contributed [(the “reparcelación” or land readjustment on an *equitable redistribution* basis of *new and future land values* envisaged by Cerdá in 1860 only as distribution of costs, more than a land assembly or land readjustment, because it manages *objective property developments rights DR* created by the local plan itself, not only distributing money costs of infrastructures and reploting)];
- (iii) a minimum right to build of 0.2 m³/m², to be used as the basis for the compulsory acquisition appraisal at market values, was provided for both urban and rural land;
- (iv) the right to build (*ius aedificandi*) was, and still remains, *defined, created and given freely in advance to the landowner as acquired development right*, not “limited”, by the development plan, introducing the *privatization of planning rights and building rights* as against prior property rights.

The first revision of the 1956 Act was enacted in 1975, at the end of the Franco regime. This revision introduced four significant novelties into Spanish town planning:

- (i) the prior minimum right to build (0.2 m³/m²) in the country side was eliminated, with no right to compensation to landowners;
- (ii) the “reparcelación” (*land readjustment* or *reparceling*) was extended to all owners of new developable land as a totality, taking the *average development right [ADR]* (land use values) as defined in the general development plan, all of whose facilities are required to be developed and gratuitously ceded to the local government, including land for large general facilities (parks, urban motorways, hospitals, universities and so forth);
- (iii) in addition to the preceding, land equivalent to 10% of the **ADR** was to be ceded to the local government for social housing programs; and
- (iv) the modular standardization of such grants of land for public facilities represented (apart from streets and large equipments) approximately 60 m² of land space per 100 m² of floor space, with a legal density limitation of 75 dwellings per hectare.

These novelties were only applicable to new developable land in town extensions. The property rights and the regulations governing the height of construction in build up areas, established in 1854, were still applicable to existing urban land.

The new framework

The 1990-1992 [socialist] *Urban Regulatory and Land Appraisal Act* [and some new Planning Acts of the Autonomous Communities (the retrograde last conservative 1998 *Land Appraisal Act* says nothing about)] have substantially altered the regulation of property rights of existing urban land which had remained untouched for almost 150 years. This 1990 [and the subsequent Autonomous Acts] introduce and develop four major reforms.

First, the owners of a plot of land on which building is permitted no longer have a right to the height and land use or total value stated for the plot in the local and detailed development plan. They only have a *conditional right* to 90% (the socialist 1990 Act was 85%) of the average value of the standard development rights (**DR**) given by the plan, the so called *standard development right* [**SDR**] ⁽⁴⁾ calculated in the development plan for the particular area where the plot is located. The remaining 10% (prior 85%), plus any surplus development right, designated for that particular plot, over and above the **SDR**, must be gratuitously ceded to the local government in order to obtain the requisite building permit; and may be ceded in one of two ways:

- (a) by ceding land of an equivalent value (same **SDR** units) located in another plot of land on which building is not permitted or minor to the **SDR** (i.e. green areas, lower land uses, one-family housing); or
- (b) by paying to the local government the equivalent economic value of the units of **DR** in excess over 90% of the **SDR** in such plot.

The land and money obtained from such excess of **DR** permitted by the plan to any singular plot is used by the local government to compensate property owners who claim that they are unable to build up to the 90% **SDR** since their land is requiring any public use and consequently being compulsorily acquired or the gratuitous cession, after the plan. The remaining 10% of land/money is for social housing purposes. The operations involving the exchange of money and/or land are performed by means of the *Transfer of Developments Rights* (**TDR** similar in form to those existing in some States of the USA, but with very different legal and economic effects, mainly the gratuitous, obligatory cession of urbanised land to the local government, not dealing with rural land) [see ANEX III after].

Second, the owners of plots of existing land on which building is permitted have eight *legal obligations*: to cede freely and compulsorily land for public facilities and the percentage of **SDR**, to perform or pay the cost of development, to apply for the building permit, to build the building and to use effectively, maintain, preserve and rehabilitate the building. These obligations must be met *within the time provided* by the Act and the plans in order *to acquire four rights*: to develop the land, to the 90% **SDR**, to build and to the building built. Property owners of developable land designated by the local development plan have the **SDR** and its *potential future market value* as acquired since the very moment the plan is approved (its potential future market value minus the concomitant said legal obligations it should pay, as

⁽⁴⁾ The difference between the *average* and the *standard* development right (**ADR** and **SDR**) is crucial, because the first is the arithmetic mean or average of all the new planned developments, i.e. the sum of all the future values divided by the total land surface involved in that area, included the public land to be obtained; meanwhile the **SDR** is the typical size and volume of the majority of parcels and buildings typologies on that area, i.e. avoiding the extreme typologies or the very low and the very high, so to speak.

counterbalance to the benefit of the community within the time provided: this is the constitutional principle of the *social function of ownership*.

Third, the (...) plans prepared under the law provisions strictly define the scheduled time and dates for the commencement and termination of all programmed land development including cessions and construction of the buildings. (...).

Finally, land value appraisal is now in direct relation to the actual land improvements made by owners in meeting their obligations as broadly described above. In the event of compulsory purchase or public auction by local authorities, the value given to the land is determined by the total amount of the rights actually acquired as a result of the investments made in performance of the concomitant obligations, in accordance to the values which could be obtained on the free market by an independent value assessment (...)