



# How the distribution of rights and liabilities in relation to betterment and compensation links with planning and the nature of property rights: Reflections on the Polish experience



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## ABSTRACT

Many Polish cities are faced with a dilemma: to enact their local land-use plans and be exposed to the immediate financial consequences of their adoption, or to protect their budgets against these costs and give up the control of the development of cities. There are very broad compensation rights for value decline due to planning regulations and for areas designated in plans for the public roads. At the same time, current planning system policies and instruments in Poland largely neglect how the costs of providing urban infrastructure and services are socialized and how the benefits of development processes are privatized. The use of value capture instruments is very limited. This paper discusses the distribution of rights and liabilities in relation to the two main sides of the property-values effect caused by land-use planning regulations and public works in Poland, in the background of the new planning system and property rights approach adopted in the country.

## 1. Introduction

The value of land may both increase and decrease due to land-use planning regulations and public works. The legislative responses to the upward and downward effects contribute to the definition of balance between public and private rights in land (a balance between property rights and the public interest). It delineates the property rights defining the scope of possible interferences with private property.

Does the right of property include the right to the added value – specifically created by land-use planning decisions – or should the landowners share some of the increased value of their land with the public? To what extent do governments have the right to reap some of the increments in value? Continuing from the other side of the property-values effect, do governments have an obligation to always compensate private landowners for any value decline due to land-use planning regulations? Does compensation necessarily include the increase in land value due to earlier land-use regulation decisions?

This article investigates the distribution of rights and liabilities in relation to the two main sides of the property-values effect caused by land-use planning regulation and public works: the upward effects, leading to increases in property values; and the downward effects, causing reductions in current or future values, based on Poland's example. Further, this article links the balance of rights with the planning

system and the nature of property rights in Poland.

Justification for studying the balance of rights can be found in the recent developments of the property rights paradigm within the new institutional economics. The corollary formulation of the Coase theorem formulated by Lawrence Wai-Chung Lai states that “*in the real world of positive transaction costs, the choice of rights and liabilities (i.e., law, governance, institutions, contractual arrangements, coordination, the assignment of rights and liabilities, etc.) would affect the outcome and efficiency of resources*” (Lai, 2007). Distribution of the rewards and costs in relation to the property-values effect caused by land-use planning regulation and public works specifies, for example, who may benefit or who may be harmed and, therefore, to whom the financial benefits in urban land development belong. It touches therefore upon the very key question of planning, i.e. who bears the costs and benefits arising from planning. It concerns also the nature of property rights and the role that property rights should play in society.

In the academic literature, there is an absence of a strong linkage between the two sides of the property-values effect (Alterman, 2010).<sup>1</sup> The recent comparative views on the topic of the relationship between regulation and property values concerns usually either the upward side of the property-values effect (Muñoz Gielen, 2010; Alterman, 2012; Smolka, 2013) or the downward side of the property-values effect (Alterman, 2010). In addition there is no strong interest in intersection

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<sup>1</sup> The major academic work that looks at both sides of this issue comparatively is the book by Hagman and Misczynski (1978). It surveyed five English-speaking countries—the United States, Canada, Australia, New Zealand, and England.

of planning and property rights. In Western European countries ‘*planning by law and property rights*’ defined as ‘*the activities of making, implementing and enforcing legal rules about how people may use their property rights over land and buildings*’ is taken for granted (Hartmann and Needham, 2012). At the moment of changing the planning law in Poland, in Western European countries the focus and hegemony in planning theory was directed to the communicative or collaborative planning and the role of values and consensus-building in decision-settings. In addition, a shift from government to governance as one of the major elements of the recent social change redefined the state–society relation, directing attention to multi-level governance. These approaches failed to incorporate adequately the peculiar property rights nuances that existed in planning practice in countries that were undergoing the process of economic and political transition.

This paper provides an applied country case study of betterment and compensation in the background of the new planning system and the approach to property rights. In order to explore betterment and compensation the analytical framework was developed based on the international comparative research. In an international context, seminal comparative research in the field of property values versus planning regulations nexus was provided recently by Alterman, 2010. The categorization presented in Alterman’s research was adopted as an analytical framework to further explore the policies and laws in relation to the property values effect in Poland. Further the practical implementation of Polish regulation is discussed within the framework of property rights and the planning system.

The paper is structured as follows. The first section briefly presents the betterment and compensation from the perspective of property rights. It introduces the debate about property rights and its implications for policies about land-value changes. The following section presents the analytical framework, which includes the classifications of approaches to value capture and systemizes the discussion about compensation rights. The next part contains introduction to the Polish case study, including changes in the approach to property rights and an introduction to the planning system. Then, following the analytical framework, the law and policies adopted in Poland to deal with the downward and upwards effects of land-use planning regulations on land values are presented. The next part discusses the practical implementation of regulations and the degree of linkage among them taking into consideration the development of the new planning system and approach to property rights in Poland. The concluding part discusses the balance of rights as the key issue at the heart of the institutional design problem of land markets, and the need for planning by law and property rights.

## 2. Debates about property rights and the policies about land-value changes

Alterman (2012) argues that the property rights debate has the straightforward implications for policies about land-value changes, taking from it the arguments to discuss the appropriate degrees of land-use regulations, which the government can impose for public needs. This is visible especially in the US context. However, various property rights theories (e.g. the utilitarian property theories, the libertarian theories of property, the Hegelian property theory, the Kantian property theory, etc.) approach the concept of property rights differently (for the survey of the leading theories of private property in Western legal thought, see Alexander and Peñalver, 2012). The lenses of the property theories do not always provide an a priori position concerning the state’s redistributive policies or regulatory takings (e.g. utilitarian property theory) leaving a great deal of room for interpretation.

In the US context the debate concerning the conflicting concepts of property rights and of the public in relation to land resources is mostly influenced by the libertarian property theory. It continues between proponents of the classical liberal conception of private property rights with their roots in Locke’s and Bentham’s thinking, and the proponents

of the opposite view rooted in the teachings of Rousseau and other philosophers (Alterman, 2012). For contemporary Lockean libertarians (unlike Locke<sup>2</sup>), private property rights must be powerful enough to constrain the state—even when the state acts with the consent of the majority (Alexander and Peñalver, 2012, p. 35–56). Like the Private Property Rights movement in the US, they criticize government land-use regulation and taxation, seeing governmental laws, programs, rules and regulations as inefficient, ineffective, and even un-American (Jacobs, 2009). Arguments by twentieth-century Lockean often justify the efficiency of market forces, arguing that unfettered or only mildly regulated landownership would utilize land more efficiently (Lefcoe, 1981; Fischel, 1995; Yandle, 1995; Ellickson, 2000). This conservative conception of property rights is challenged by “the social-obligations theory” (Dagan, 2007; Alexander, 2006, 2009). This view seeks to place various socially derived obligations on private property.

This discussion is a multi-century issue. If we look at how and why the particular legal and social configuration of private property rights emerged in the United States, we see that it was a long process of tensions between ‘*conflicting concepts about the rights of the individual and the right of government (as representative of the community) vis-à-vis property rights*’ (Jacobs, 2009, p. 62). It took about 200 years from the Colonial Era when a person came to possess property rights by using it, through the recognition by The Fifth Amendment to The Constitution of 1791 of the concept of private property, and takings for public use with just compensation, and several important rulings of the Supreme Court of the United States, to define the delicate balance between public and private rights in land as it is today. As Jacobs (2009) put it: ‘*In the last 100 years the United States has appeared to move away from a view of property rights as integral and central to liberty and democracy. Instead, it appears that government has been allowed ever-increasing authority to intrude upon, reshape, and take away property without respecting the protections afforded by the Constitution*’. (Jacobs, 2009, p. 59)

In practice we have to deal with a lot of different property rights relations. There are a broad set of formal and informal rules governing rights and abilities between people, as individuals and groups, with respect to land. A system of property rights can be described as “*the set of economic and social relations defining the position of each individual with respect to the utilization of scarce resources*” (Furubotn and Pejovich, 1972, p. 1139). In addition, as explained by Davy (2012), in the real world, private and common property relations often accommodate a wide variety of demands made by the owners and users of land. Therefore different types of land use needs its own set of property rules or no single kind of property rules fits the purposes of all types of land uses. He pointed that ‘*many theories of property and land policy fail to recognize plural property relations*’ Davy (2012).

This paper discusses the significance of the delineation of property rights (see also Havel, 2014), reflecting the multidimensional nature of property rights and its complex ramifications. Delineation of property rights refers to the way the boundaries of rights over land have been drawn, or the conditions under which the right can be exercised. Delineation of property rights defines a boundary in the fundamental rights of property and the balance between public and private rights to

<sup>2</sup> Locke is better known for his “labour theory of property rights”, but his theory of consent supports the following perspective: “*Every man, by consenting with others to make one body politic under one government, puts himself under an obligation to everyone of that society, to submit to the determination of the majority, and to be concluded by it*” (Locke, cited in Alexander and Peñalver, 2012, p. 43). He appeared to view as legitimate the public’s right to create, re-create, take away, and regulate property as it best served public purposes: “*For it would be a direct contradiction for any one to enter into society with others for the securing and regulating of property, and yet to suppose his land, whose property is to be regulated by laws of society, should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is subject*” (Locke, cited in Jacobs, 2009, p. 55). However, as Alexander and Peñalver (2012, p. 56) argue, instead of a theory of limited private property rights in the service of an argument for majoritarian government, twentieth-century Lockean have offered us a theory of a limited majoritarian government in the service of private property rights.

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