Privatization of planning powers and urban infrastructures

International Conference 12 &13 October 2012 Lisbon

NB: For Greece answers : see Power Point Presentation

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Case
Privatization of planning powers and urban infrastructures

Throughout history there has always been a clear distinction in the city-making process between the role of the Administration as a planner and manager of public infrastructures and spaces and the role of private entities as property developers and builders.

Following a general economic trend on privatization of public functions, in recent years we have seen private entities assuming more complex responsibilities concerning the planning and management of our cities. Not only providing services of general interest like public transportation or the supply of electricity, water and sewerage, but also drafting zoning plans, controlling property development and creating and maintaining urban infrastructures and public spaces.

The question is how far privatization of planning powers and urban infrastructures can go due to the political nature of the decisions involved. And more specifically, how can planning laws contribute to achieve a balance between economic efficiency and democratic legitimacy in city planning and management.

Questions

1. Is there legislation concerning the initiative and/or the drafting of zoning plans and other equivalent documents by private entities? What is the procedure in that legislation and does it guarantee municipal control of planning powers? How is public participation organized in this procedure?

2. Is there legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations? Are private entities only allowed to perform assessment tasks or can they issue development permits and take follow-up enforcement measures?

3. Is there legislation concerning the private management of urban infrastructures and public spaces? Is this legislation restricted to single infrastructures and spaces or does it provide a legal framework for the private management of entire neighborhoods and other urban areas? Is the management of those neighborhood and areas restricted to owners or neighbors associations or can concessionaires or other private commercial companies perform it? How does it guarantee municipal or public control of management decisions?

Lisbon, Claudio Monteiro, July 2012

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Question 1

Is there legislation concerning the initiative and/or the drafting of zoning plans and other equivalent documents by private entities? What is the procedure in that legislation and does it guarantee municipal control of planning powers? How is public participation organized in this procedure?

0. Preface

To facilitate understanding of the answer, it is necessary to briefly summarise the basic principles of German urban development law. Article 28(2)1 of the German Constitution [1] guarantees municipalities the right to regulate all local affairs within the law and in their own responsibility. An essential concern of local municipalities is urban development planning, for which they are also responsible by virtue of the planning autonomy bestowed upon them.[2] Planning autonomy affords municipalities the right to plan and regulate the use of land in their own responsibility and to generate land-use plans for this purpose. [3] The non-constitutional basis of German urban development law is the German Federal Building Code (BauGB).[4] Chapter 1 (General urban planning legislation) of the Federal Building Code regulates – among other things – land-use planning, which features two planning levels.[5] These are, firstly the preparatory land-use plan and secondly (legally) binding land-use planning. In preparatory land-use planning the proposed land-use for the entire municipality is outlined in the preparatory land-use plan.[6] The preparatory land-use plan contains e.g. general residential building areas, commercial development zones, green areas, agricultural areas and areas reserved for infrastructures.[7] The details of features outlined in the preparatory land-use plan are specified during binding land-use planning, which culminates in the adoption of a binding land-use plan. This plan is extremely detailed and provides plot-level representations of concrete specifications for the type and extent of building-use, plot areas to be built on and local

[1] Grundgesetz für die Bundesrepublik Deutschland in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, zuletzt geändert durch Artikel 1 des Gesetzes vom 11.7.2012 (BGBl. I S. 1478).

[2] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 5, Rn. 4

[3] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 5, Rn. 1

[4] Baugesetzbuch, in der Fassung der Bekanntmachung vom 23.9.2004 (BGBl. I S. 2414), zuletzt geändert durch Artikel 1 Gv. 22.7.2011 (BGBl. I S. 1509).

[5] Hendler/Koch, Baurecht, Raumordnungs- und Landesplanungsrecht, Stuttgart 2009, 5. Auflage, S. 147, Rn. 2

[6] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 5, Fn. 1.

[7] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 5, Fn. 1.

circulation areas both for entire urban areas, as well as for individual plots.[8] A local plan is therefore an instrument employed by the municipality to regulate and influence the use of plots mainly for building purposes. According to Article 30 Federal Building Code, a scheme in the area in which a (qualified) binding land-use plan applies is permissible if it does not contravene its specifications and the provision of infrastructures is ensured.[9] In addition to its contents, the Federal Building Code also regulates the procedure for preparing land-use plans (preparatory land-use plan and legally binding land-use plan).

By virtue of municipal planning autonomy, the development and process of preparing land-use plans are the distinct responsibility of the municipalities. Having said that, however, it is also possible to delegate not only the preparation, but also individual procedural steps to a private third-party. The corresponding legal regulations are given in:

- Article 4b Federal Building Code (Third Party Involvement)
- Article 11 Federal Building Code (Urban Development Contract)
- Article 12 Federal Building Code (Project and Infrastructure Plan)

These instruments will be described below in more detail.

1. Third Party Involvement

The preparation of a land-use plan can be a complicated and time-consuming undertaking that frequently exceeds the scope of the human resources available to smaller municipalities. In 1998 the Spatial Planning Law[10] was passed to enable the procedural steps involved in preparing a land-use plan to be delegated to a third-party.[11] The legal provision reads as follows:

Article 4b Involvement of a Third Party

The municipality may delegate the preparation and implementation of the steps described in Articles 2a to 4a (Federal Building Code) to a third party, in particular, in order to accelerate the land-use planning procedure.

The process of adopting a land-use plan is normaly initiated by the local council [12] in a *resolution to prepare a land-use plan*.[13] Although the resolution to prepare a land-use plan is provided for in Article 2 (1) Federal Building Code, it is not a mandatory part of the planning process.[14] It can,

[8] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 8, Rn. 28.
[9] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 5, Rn. 3.
[10] Gesetz zur Änderung des Baugesetzbuchs zur Neuregelung des Rechts der Raumordnung (Bau- und Raumordnungsgesetz 1998 – BauROG) vom 18.8.97 (BGBl. I S. 2081).
[11] Battis, § 4b, in: ders./Krautzberger/Löhr, Baugesetzbuch Kommentar, München 2009, 11. Auflage, Rn. 1
[12] Kuschnerus, Der sachgerechte Bebauungsplan, 4. Auflage, Bonn 2010, S. 438.
[13] Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 124
[14] Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 129

however, only be adopted by the local council. Third parties are not entitled to require the preparation of land-use plan. Neither can such a right be established in a contract.[15]

The decision by the municipality to adopt or amend a land-use plan is to be publicised at the earliest possible time (Article 3(1) Federal Building Code) to ensure public agencies have sufficient the opportunity to voice their opinions on the decision (Article 4(1) Federal Building Code).[16] Such participation must be at an early planning stage to allow the incorporation of any changes and suggestions into the land-use plan.[17] At the same time, the early participation of public agencies pursuant to Article 4(1) Federal Building Code also serves to determine the extent and level of detail of the environmental assessment (scoping). In accordance with Article 4b Federal Building Code, a private third party (planning office) can be charged with the tasks of implementing early participation and preparing the environmental report. The information acquired by early participation is included in the draft land-use plan. Again, a private third part (planning office) can also be charged with drawing up the draft land-use plan. The draft land-use plan is then subjected to a further participation process, which must involve the public (Article 3(2) Federal Building Code) and the public agencies (Article 4(2) Federal Building Code). A private third party can also implement the second stage of the involvement procedure. Such third party draws up plan documents and compiles them for public display in the municipality; it also dispatches them to the respective public agencies. The private third party can also catalogue the opinions and comments provided by the public and the public agencies according to subject matter and use them to prepare a proposal to be put forward for consideration.[18] However, the ultimate consideration and balancing of public and private interests remains the responsibility of the municipality.[19] The final resolution on the plan can also only be made by the municipality, as can the resolution to prepare a land-use plan.[20]

Once the resolution has been adopted, the preparatory land-use plan and certain binding land-use plans are then presented to the higher administrative authorities for approval. They check for the correctness of the preparation procedure. The approval authority is not authorised to reject any content of the plan.[21] The land-use plan becomes effective by giving public notice of the approval or ordinance decree. Prior to notice of approval, the original plan must be issued in the form of a certificate as verification that the content of the plan is consistent with the will of the municipality.[22]

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[15] § 1 Abs. 3 S. 2 BauGB

[16] Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 130

[17] Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 132

[18] Kuschnerus, Der sachgerechte Bebauungsplan, 4. Auflage, Bonn 2010, S. 504.

[19] § 1 Abs. 7 BauGB

[20] Kuschnerus, Der sachgerechte Bebauungsplan, 4. Auflage, Bonn 2010, Rn. 1011 und 1012; Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 155.

[21] Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 158.

[22] Kuschnerus, Der sachgerechte Bebauungsplan, 4. Auflage, Bonn 2010, Rn. 1027; Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 159.

With announcement of the approved plan, all those concerned or interested must also be informed where they can exercise their right of inspection.[23] These procedural steps cannot be delegated to a third party.

Figure 1: Procedural steps involved in the preparation of a land-use plan and their possible delegation to a private third party

Procedural step	**Delegation to third party**
Resolution to prepare a land-use plan (Article 2(2) Federal Building Code	Can only be made by the municipality!
Early public involvement (Article 3(1) Federal Building Code)	Realisation of participation
Early involvement of public agencies (Article 4(1) Federal Building Code) and co-ordination with adjoining municipalities (Article 2(2) Federal Building Code) Notification and extent of environmental assessment (scoping)	Realisation of involvement and co-operation with adjoining municipalities
Drafting explanatory statement for land-use plan (including environmental report)	Drafting land-use plan by third party (planning office)
Public display of draft land-use plan (Article 3(2) Federal Building Code)	Realisation of participation
Involvement of public agencies (Article 4(2) Federal Building Code)	Realisation of participation
Preparatory land-use plan Declaratory resolution Land-use plan: ordinance decree (Article 10(1) Federal Building Code)	May be prepared: but resolution can only be adopted by the municipality!
Approval by higher administrative authority or notification procedure (Article 6(1) and 10(2) Federal Building Code)	-
Issuance, advertisement (Sections 6(5) and 10(3) Federal Building Code)	Preparation by third party Announcement must be via official channels (e.g. official journal, notice)
Entry into force (Articles 6 and 10 Federal Building Code)	-
Monitoring (Article 4c Federal Building Code)	No delegation to third party Monitoring must be through the municipality!

Own representation

For the most part, the tasks delegated to private third parties are limited to drafting the plan and preparing and enabling participation of the public and the public agencies.[24] This partial privatisation of procedural steps contributes to improving the interaction between private enterprise and the

[23] Kuschnerus, Der sachgerechte Bebauungsplan, 4. Auflage, Bonn 2010, Rn. 1035; Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 159.
[24] Schmidt-Eichstaedt, Städtebaurecht, 4. Auflage, Stuttgart 2005, S. 159

municipality.[25] But the role of the third party still remains that of an administrative aide, with no form of official authority.[26] In this respect it is merely a kind of functional privatisation.[27]

The actual formal process of preparing, altering or amending a land-use plan therefore remains unchanged. This applies particularly to the two stages of public participation. The municipality remains responsible for the land-use planning process. When considering its decisions on the land-use plan it must therefore ensure it is in possession of all relevant information from the respective third party.[28] Through its presence during all stages of the process, the municipality must demonstrate firstly that it is still charge, despite enlisting the support of third parties and secondly, that it is eager to involve the public.[29]

2. The urban development contract

A versatile instrument in the interaction with private undertakings is the urban development contract in Article 11 Federal Building Code. This is a public-law cooperation agreement between a private third party and the administration[30]; it is also referred to as an 'administration contract'.[31] The Federal Building Code provides a number of examples for the subject matter of contracts, some of which are listed below.[32]

2.1 Preparation and realisation of urban development measures

In addition to adopting the procedural steps for the preparation of a land-use plan described above, in accordance with Article 11(2)1 Federal Building Code, the preparation and realisation of urban development measures by and at the expense of a third party can, for example, also be agreed in what is known as a project-planning contract.[33] These include, in particular, agreements on drawing up urban development planning concepts and land-use plans, including the environment report and any necessary experts' reports, the preparation and organisation of process steps up to and including reordering plot boundaries, restoring soil or demolishing buildings.[34] As already pointed out above, this does not affect the municipality's responsibility for the land-use plan procedure, which remains

[25] Battis, § 4b, in: ders./Krautzberger/Löhr, Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 9.
[26] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 6, Rn. 14.
[27] Mitschang, Steuerung der städtebaulichen Entwicklung durch Bauleitplanung, München 2003, S. 330.
[28] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn. 14; Gatz, § 4b, in: Schlichter/Stich (Hrsg.), Berliner Kommentar zum Baugesetzbuch, 3. Auflage, Stand: 8. Lfg./7.2007, Rn. 1.
[29] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 2.
[30] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 1.
[31] Bunzel/Coulmas/Schmidt-Eichstaedt, Städtebauliche Verträge – ein Handbuch, 3. Auflage, Berlin 2007, S. 20.
[32] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 4.
[33] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 6.
[34] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn. 5.

unchanged.[35] Neither is it possible to establish an obligation to prepare a land-use plan in a contract.[36]

2.2 Plan implementation contracts

The plan implementation contracts described in Article 11(1)2 Federal Building Code serves to promote and safeguard the purposes of land-use planning. Prior to the preparation of a land-use plan, it is possible to enter into contracts with property owners to promote realisation of the planning purpose.[37] A further objective of such agreement could be to provide compensation for any impact on the natural environment, which can thus be safeguarded.[38] In addition, agreements could also be reached on meeting the housing needs of low-income sectors of the population or the local community,[39] which exceed the regulatory possibilities of the binding land-use plan.

2.3 Further contracting options

The acceptance of costs resulting from urban development planning, such as the provision of public facilities, can be agreed in a Resultant Costs Agreement pursuant to Article 11(2)3 Federal Building Code.[40] The utilisation of combined heat-power grids and plants or solar systems on buildings can be stipulated in a climate protection agreement pursuant to Article 11(2)4 Federal Building Code.[41]

2.4 Limits of urban development contracts

An important factor when applying urban development contracts is the observance of acceptance levels and admissibility criteria. This applies, first and foremost, to the observance of established law (primacy of law), whereby a contract may not preclude legal requirements.[42] In addition, the contractually agreed performance between a private third party and a municipality must be in proportion to the overall circumstances (prohibition of disproportionate measures).[43] This ensures that the municipality, in its role of sole holder of planning autonomy, does not exploit its position to require excessive counterperformance by third parties.[44] Thirdly, all services agreed in an urban development contract must be directly materially related to the performance contracted by the

[35] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn. 5.
[36] § 1 Abs. 3 S. 2 BauGB
[37] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 10.
[38] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 12.
[39] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 13 f.
[40] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 16.
[41] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 20.
[42] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 21; Finklenburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn 10.
[43] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 20.
[44] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn. 10.

municipality (prohibition of tying). An urban development contract may not include an existing claim for performance that has already been legally established.[45] Finally, the provisions of the public procurement law must also be observed when entering into an urban development contract.[46]

Article 11(3) Federal Building Code requires urban development contracts to be in writing. Verbal agreements are irregular and therefore invalid.[47] Civil disputes arising between contracting parties can be brought before the administrative court.[48] The preparation procedure for the land-use plan – particularly public involvement – is not affected, as the formal procedure is unaltered and the municipality remains legally responsible for drawing up the plan.[49] This means that all formal resolutions must be implemented by the municipality and may not be delegated to a third party.[50]

In practice, urban development contracts have become widely accepted and complement land-use planning in a number of ways.[51]

3. Project and infrastructure plan

A further opportunity for third party involvement is what is known as the project and infrastructure plan (project-related binding land-use plan) as provided for in Article 12 Federal Building Code. This instrument was already provided in the Construction Planning and Approval Regulation (BauZVO) in the GDR in 1990. Its rationale was the provision a legal construction-planning basis to meet the urgent investment needs of the former GDR.[52] Its purpose was to facilitate cooperation with private third parties. With the 1998 spatial planning law, the project and infrastructure plan was integrated into urban planning legislation and has undergone continuous development ever since.[53]

As the project and infrastructure plan does not constitute an offer but is prepared against the background of a specific project, for which the developer is already known, it is classed as a special (sub-)type of binding land-use plan.[54] The building law is therefore created for a specific project and upon which the plan is based. It is a three-part instrument:

- the project and infrastructure plan

[45] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn. 12; Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2011, Fn. 24.
[46] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn. 14.
[47] Bunzel/Coulmas/Schmidt-Eichstaedt, Städtebauliche Verträge – ein Handbuch, 3. Auflage, Berlin 2007, S. 54.
[48] Bunzel/Coulmas/Schmidt-Eichstaedt, Städtebauliche Verträge – ein Handbuch, 3. Auflage, Berlin 2007, S. 54.
[49] BauGB § 11 Abs. 1 S. 1
[50] Battis/ Krautzberger/ Löhr, a. a. O. Fn. 9, S. 272
[51] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 11, Rn. 2.
[52] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 10, Rn. 2.
[53] Krautzberger: Durchführungsvertrag beim Vorhaben- und Erschließungsplan nach § 12 BauGB, http://www.krautzberger.info/file/page/aufsaetze_vortraege/durchfuehrungsvertrag_30062006.pdf, S. 1, Zugriff 14.08.12
[54] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 10, Rn. 3.

- an agreement of implementation (urban development contract) between the municipality and the Investor and
- the project-related binding land-use plan.

In the project and infrastructure plan the investor specifies the details of the project to be realised on his or her property. These include, in particular, the type and extent of use for building, the plot area to be built on, parking areas, circulation areas and guidelines for immission control. The project and infrastructure plan forms the basis for the agreement of implementation between the municipality and investor. The investor undertakes to carry out the project and all related measures within a specific time and to allocate planning costs.[55] The municipality then commences the preparation process for the project-related binding land-use plan. The municipality does not usually initiate the process, but rather the investor approaches the municipality with a planning wish and applies for the binding land-use plan procedure to be set in motion.[56] The municipality is obliged to decide on the investor's application. It should be noted, however, that the project-related binding land-use plan does not create the obligation to prepare a binding land-use plan.[57] When the municipality has adopted the project-related binding land-use plan it is then subjected to the standard procedure for drawing up a land-use plan (see above). This entails a two-stage process for the involvement of the public and public agencies, as well as coordination with adjoining municipalities. The justification of the binding land-use plan is also subject of the involvement process, in which all issues related to the agreement of implementation are presented.[58] As described above, this could involve the municipality delegating the preparation and realisation of procedural steps to a third party[59] and can also be included in the agreement of implementation.

As with the delegation of individual procedural steps pursuant to Article 4b Federal Building Code, or the urban development contract pursuant to Article 11 Federal Building Code, the aim of the project-related binding land-use plan is to relieve the municipality of tasks associated with planning and infrastructure and promote third-party initiative.[60]

[55] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 10, Rn. 17; Krautzberger, § 12, in: Battis/Ders./Löhr, Baugesetzbuch Kommentar, 11. Auflage, München 2009, Fn. 14.
[56] § 12 Abs. 2 BauGB
[57] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 10, Rn. 25.
[58] Busse/Grziwotz, VEP – Der Vorhaben- und Erschließungsplan, 2. Auflage, Berlin 2006, Rn. 335.
[59] Busse/Grziwotz, VEP – Der Vorhaben- und Erschließungsplan, 2. Auflage, Berlin 2006, Rn. 337.
[60] Löhr, § 11, in: Battis/Krautzberger/ders., Baugesetzbuch Kommentar, 11. Auflage, München 2009, Fn. 9.

Question 2

Is there legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations? Are private entities only allowed to perform assessment tasks or can they issue development permits and take follow-up enforcement measures?

0. Preface

To answer the question a distinction must first be made between construction planning law and building regulations law. German building law encompasses all legal regulations on whether a plot can be built upon or used in any other way relevant to land law.[61] In this respect a distinction is made between public and private building law. Public building law encompasses the regulations to be observed in the public interest when a plot is built upon or otherwise utilised.[62] It is divided into construction planning law and building regulations law. Whereas the construction planning law mainly defines possible uses of the soil, the building regulations law is concerned with requirements for the design and construction of a building, building materials and the building permit procedure.[63] Building regulations law arises from municipal building inspection law and deals, in particular, with risk avoidance and construction design.[64]

Legislative powers for public building law are divided between the German government and the federal states. As the government has jurisdiction over land law, it therefore wields the most power with regard to construction planning law.[65] It has used this power to issue the Federal Building Code. An essential instrument of this code is land-use planning in the form of the preparatory and the binding land-use plan.[66] The federal states have jurisdiction over building regulations law.[67] As a result, each of the 16 German federal states has issued a different building regulations law, which only applies in the state in which it has been issued.

1. Construction planning law

Construction planning law only allows third parties to draw up draft plans and implement the procedural steps for preparing land-use plans. It is, however, a role limited to that of administrative aide, without any kind of official authority.[68] The municipality still bears responsibility for land-use

[61] Büchner/Schlotterbeck, Baurecht, 4 Auflage, Stuttgart 2011, A - Kap. 1, Rn. 2.
[62] Finkelnburg/ Ortloff/ Kment: Öffentliches Baurecht, München 2011, 6. Auflage, § 1, Rn. 1
[63] Garrelmann, Die Entwicklung des Bauordnungsrechts Frankfurt am Main 2010, S. 3.
[64] Büchner/Schlotterbeck, Baurecht, 4 Auflage, Stuttgart 2011, B - Kap. 1, Rn. 50.
[65] Finkelnburg/ Ortloff/ Kment: Öffentliches Baurecht, München 2011, 6. Auflage, § 1, Rn. 2
[66] Finkelnburg/ Ortloff/ Kment: Öffentliches Baurecht, München 2011, 6. Auflage, § 1, Rn. 5
[67] Finkelnburg/ Ortloff/ Kment: Öffentliches Baurecht, München 2011, 6. Auflage, § 1, Rn. 3
[68] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 6, Rn. 14.

planning and must make all the decisions pertaining to it. This applies, in particular, to the decision made at the end of the land-use planning process.[69]

Municipalities are also autonomous in their responsibility to monitor adherence to the provisions of the land-use plan, as well as significant environmental impacts pursuant to Article 4c Federal Building Code (introduced with the Environmental Review) and are not permitted to delegate such tasks.

Pursuant to Article 11 Federal Building Code, enforcement regulations can be included in an urban development contract. Thus, on the basis of a plan implementation contract pursuant to Article 11(1)2 Federal Building Code, a private party could undertake to:

- construct a building,
- utilise a building or a plot in a particular way[70] or
- implement measures to compensate the impact on the natural environment.[71]

The private third party, however, must first apply for any permits required to implement such measures. For example, an application must therefore be made for the building permit required to construct a building. The relevant building permit procedure is specified in the State Building Code (building regulations law) of the respective federal state.[72]

2. Building regulations law

The building regulations law encompasses the building law provisions relating to the construction, use and restructuring of individual buildings.[73] On application by the principal (building application), the public agency responsible conducts a building permit procedure to check whether the requirements for issuing a building permit are fulfilled. The building law authorities must also ensure the building application does not contravene public law regulations.[74] This applies, in particular, to the provisions of construction planning law, building regulations law and ancillary building law (other public law regulations). The inspection in connection with the construction laws must, in particular, ensure that the project conforms to the specifications of a binding land-use plan and that provision has also been made for the infrastructure.[75] Inspection with regard to building regulations law includes, in particular, ensuring the observance of legal regulations on distance spaces, as well as

[69] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, § 6, Rn. 68.
[70] Bunzel/Coulmas/Schmidt-Eichstaedt, Städtebauliche Verträge – ein Handbuch, , 3. Auflage, Berlin 2007, S. 101.
[71] Bunzel/Coulmas/Schmidt-Eichstaedt, Städtebauliche Verträge – ein Handbuch, 3. Auflage, Berlin 2007, S. 106.
[72] Büchner/Schlotterbeck, Baurecht, 4 Auflage, Stuttgart 2011, B – Kap. 2, Rn. 129.
[73] Garrelmann, Die Entwicklung des Bauordnungsrechts Frankfurt am Main 2010, S. 3.
[74] Büchner/Schlotterbeck, Baurecht, 4 Auflage, Stuttgart 2011, B – Kap. 2, Rn. 159.
[75] § 30 BauGB

local building regulations.[76] The authority to conduct such inspections and, in particular, issue the building permit lies with the respective public agency holding sole responsibility. Delegation to a third party is not possible.

There have been a number of different attempts to simplify and accelerate the administrative processes involved in the building permit procedure.[77] In addition to the normal building permit procedure, the federal states have also introduced a simplified building permit procedure, in which the building authority responsible employs a condensed version of the examination programme.[78] In this case, only those provisions relating to construction planning law are examined. As it is assumed that the provisions of the state building codes are so explicit that they will be observed by both the principal and the architect, these are no longer subjected to regular checks.[79] With the exception of special buildings (e.g. high-rises), the condensed version of the building permit procedure is now applied regularly.[80] But even with the shortened form, or the decision to waive the preventive examination, the procedure is still the responsibility of the authorities.[81] The principal's obligation to observe public law regulations has thus been increased, although the principal still does not have authorisation to issue a permit.

Question 3

Is there legislation concerning the private management of urban infrastructures and public spaces? Is this legislation restricted to single infrastructures and spaces or does it provide a legal framework for the private management of entire neighbourhoods and other urban areas? Is the management of those neighbourhood and areas restricted to owners or neighbours associations or can concessionaires or other private commercial companies perform it? How does it guarantee municipal or public control of management decisions?

0. Preface

The first part of the answer deals with the general opportunities afforded by public-private partnerships with regard to the creation and administration of urban infrastructures. The second part will take an in-depth look at the possible ways of utilising private initiatives in the urban development sector for the functional and creative improvement of urban neighbourhoods.

[76] Büchner/Schlotterbeck, Baurecht, 4. Auflage, Stuttgart 2011, B - Kap. 2, Rn. 159a.
[77] Garrelmann, Die Entwicklung des Bauordnungsrechts Frankfurt am Main 2010, S. 20.
[78] Garrelmann, Die Entwicklung des Bauordnungsrechts Frankfurt am Main 2010, S. 77.
[79] Garrelmann, Die Entwicklung des Bauordnungsrechts Frankfurt am Main 2010, S. 137.
[80] Garrelmann, Die Entwicklung des Bauordnungsrechts Frankfurt am Main 2010, S. 135.
[81] Garrelmann, Die Entwicklung des Bauordnungsrechts Frankfurt am Main 2010, S. 136.

1. Public-private partnership

The term public-private partnership (PPP) denotes the cooperation between public institutions and firms or institutions in the private enterprise sector.[82] The service sector provides cooperation opportunities in sewage treatment, waste management and the building and maintenance of transport routes or public buildings.[83] A common method of dealing with these fields is functional privatisation. This involves a partial privatisation or assignment of the responsibility to fulfil an official duty (e.g. building, but not administering a school).[84]

Various PPP models are available. With the *single buyer model* the public authority receives real property set up by a private operator for an agreed limited period and a set sum.[85] With the *leasing model* the public authority rents a property for an agreed sum and has a purchasing option at the end of the lease.[86] With the *contracting model* the private partner assumes certain services, such as the supply of electricity or telecommunications, for which regular payments are made. Ownership of the property on which such services are performed usually lies with the public authority.[87]

The legal basis for this type of task assignment is provided in the respective specific laws. Article 22 German Closed Substance Cycle and Waste Management Act (KrWG)[88] allows those obligated to manage waste (municipalities, communities, counties) to delegate their recycling and disposal obligation to a third party. The responsibility of the public authority for the fulfilment of this obligation remains in place until such time as the waste has been finally and properly disposed of. The third party charged with the task must be suitably reliable and trustworthy. In the water management sector, Article 57 Federal Water Act (WHG)[89] provides for the delegation of the sewage disposal obligation to a third party. The transferral of legal obligations in the infrastructural service sector generally covers the entire community. For building projects within the context of a PPP, however, this usually only applies to individual objects such as schools, hospitals, communal

[82] Kochendörfer, Public Private Partnership, in: Henckel/Kuczkowski/Lau/Pahl-Weber/et. al., Planen – Bauen – Umwelt, Wiesbaden 2010, S. 382.
[83] Kochendörfer, Public Private Partnership, in: Henckel/Kuczkowski/Lau/Pahl-Weber/et. al., Planen – Bauen – Umwelt, Wiesbaden 2010, S. 382.
[84] Bundesministerium für Verkehr, Bau und Stadtentwicklung, Gutachten „PPP und Förderrecht“, Berlin 2006, S. 17.
[85] Bundesministerium für Verkehr, Bau und Stadtentwicklung, Gutachten „PPP und Förderrecht“, Berlin 2006, S. 19.
[86] Bundesministerium für Verkehr, Bau und Stadtentwicklung, Gutachten „PPP und Förderrecht“, Berlin 2006, S. 20.
[87] Kochendörfer, Public Private Partnership, in: Henckel/Kuczkowski/Lau/Pahl-Weber/et. al., Planen – Bauen – Umwelt, Wiesbaden 2010, S. 383.
[88] Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Bewirtschaftung von Abfällen (Kreislaufwirtschaftsgesetz - KrWG), vom 24.2.2012 (BGBl. I S. 212).
[89] Gesetz zur Ordnung des Wasserhaushalts (Wasserhaushaltsgesetz – WHG), vom 31.7.2009 (BGBl. I S. 2585), zuletzt geändert durch Artikel 5 Absatz 9 des Gesetzes vom 24.2.2012 (BGBl. I S. 212).

buildings or transport infrastructures.[90] PPP projects involving the development of an entire urban area are the exception.[91]

2. Private initiative and urban development

A recent trend in the cooperation with private enterprise in town planning is the Business Improvement District (BID) or Housing Improvement District (HID). A BID is defined as "a public/private partnership in which property and business owners elect to make a collective contribution to the maintenance, development and promotion of their commercial district"[92]. A housing improvement area or district is defined as "an area in a city in which housing improvements in condominium or town home complexes may be financed with the assistance of the city"[93]. The management approach to area revitalisation originated in North America and was introduced here in 2007 with the amendment of the Federal Building Code. [94] In Germany, Article 171f Federal Building Code provides the basis for the introduction of federal state legislation aimed at the involvement of private initiatives in urban development areas.[95] Federal state legislation for setting up BIDs has so far been introduced in Bremen[96], Hamburg[97], Hesse[98], North Rhine-Westphalia[99], Saarland[100] and Schleswig-Holstein[101]. Hamburg was the first of these to introduce the BID law, which now serves as a model for BID laws in other federal states.

[90] Bundesministerium für Verkehr, Bau und Stadtentwicklung, Gutachten „PPP und Förderrecht", Berlin 2006, S. 15.
[91] vgl. Bundesverband PPP, http://www.bppp.de/bppp.php/cat/25/title/Fallbeispiele , Zugriff am 4.9.2012.
[92] DSBS – Departement of Small Business Services, Streetwise& Business Savy, Best Practices andAccomplishmentsfrom New Yorks City´s BIDs, New York 2005
[93] Baker/Dyson, House Research, Short Subjects: HousingImprovement Areas, im Internet unter: http://www.house.leg.state.mn.us/hrd/pubs/ss/sshia.pdf, Zugriff am 4.9.2012.
[94] Krautzberger, § 171f, in: Battis/ders./Löhr, Baugesetzbuch Kommentar, 11. Auflage, München 2009, Fn. 2.
[95] Roeser, § 171f, in: Schlichter/Stich (Hrsg.), Berliner Kommentar zum Baugesetzbuch, 3. Auflage, Loseblattsammlung, Stand: 17. Lfg./12.2007, Rn. 2.
[96] Gesetz zur Stärkung von Einzelhandels- und Dienstleistungszentren (BGSED) trat am 27. Juli 2006 in Kraft (Brem. GBl. Nr.41, S. 350), zuletzt geändert am 02. Juni 2009 (Brem. GBl. Nr. 26, S. 181).
[97] Gesetz zur Stärkung der Einzelhandels- und Dienstleistungszentren (GSED) trat am 01. Januar 2005 in Kraft (Hmb. GVBl. 2004, S. 525), zuletzt geändert am 27. November 2007 (Hmb. GVBl 2007, S. 405).
[98] Gesetz zur Stärkung von innerstädtischen Geschäftsquartieren (INGE) trat am 01. Januar 2006 in Kraft (Hess. GVBl. I 2005, S. 867).
[99] Gesetz über Immobilien- und Standortgemeinschaften (ISG) trat am 10. Juni 2008 in Kraft (GVBl. NRW Nr. 19 2008, S. 467**).**
[100] Gesetz zur Schaffung von Bündnissen für Investition und Dienstleistung (BIDG) trat am 07. Dezember 2007 in Kraft (Amtsblatt 2007, S. 2242).
[101] Gesetz über die Einrichtung von Partnerschaften zur Attraktivierung von City-, Dienstleistungs- und Tourismusbereichen (PACT) trat am 13. Juli 2006 in Kraft (GVOBl. Schleswig-Holstein 2006, S. 158).

Property or local communities enabled in this way are created on the rationale of private responsibility for the development and realisation of measures in a limited area.[102] According to the current literature, this could involve the partial surrender by municipalities of statutory powers of decision in the urban development sector[103]. However, it can also be argued that measures planned for a specific location in accordance with Article 171f (1) Federal Building Code, can only be implemented on the basis of a concept that is in line with the urban development aims of the municipality. Such a location concept must comply with the urban development purposes of the municipality and not adversely affect them.[104] The municipality must also consider the effects of such private measures on neighbouring areas. After all, the aim cannot be to relocate social grievances or inequalities within a city.[105] The community can object to the creation of a local community if the location concept is not in keeping with urban development aims.

Article 171f Federal Building Code lists a number of possible private initiatives. These include concepts aimed at the reinforcement or development of inner-city areas, community centres, living quarters and commercial centres, as well as other urban-development relevant areas. Possible measures in a BID could include:

- generating a development concept for the BID,
- the provision of general services in the areas of litter and street cleanliness, security or visitor relations,
- the provision of financial means and the realisation of building measures with respective authorised parties,
- plot management,
- realisation of communal advertising measures,
- the organisation of community actions (e.g. street parties, events),
- coordination of the measures to be implemented with public agencies or local enterprises or the
- submission of statements in participation procedures.

All such measures should contribute toward the functional and aesthetic improvement of urban neighbourhoods.[106] Irrespective of whether certain measures are contained in the laws of federal

[102] Krautzberger, in: Ernst/Zinkahn/Bielenberg/ders., Kommentar zum BauGB, Loseblattsammlung Stand: 09/2007, § 171 f BauGB, Rn. 11; Roeser, § 171f, in: Schlichter/Stich (Hrsg.), Berliner Kommentar zum Baugesetzbuch, 3. Auflage, Loseblattsammlung, Stand: 17. Lfg./12.2007, Rn. 3.

[103] Roeser, § 171f, in: Schlichter/Stich (Hrsg.), Berliner Kommentar zum Baugesetzbuch, 3. Auflage, Loseblattsammlung, Stand: 17. Lfg./12.2007, Rn. 3.

[104] Roeser, § 171f, in: Schlichter/Stich (Hrsg.), Berliner Kommentar zum Baugesetzbuch, 3. Auflage, Loseblattsammlung, Stand: 17. Lfg./12.2097, Rn. 7.

[105] Kersten, Business Improvement Districts in der Bundesrepublik Deutschland, UPR 04/2007, S. 121 (121 f.).

[106] Battis/ Krautzberger/ Löhr, a. a. O. Fn. 9, S. 1218

states or not, they always constitute what are referred to as 'on top measures', which do not replace municipal duties but go beyond the scope of the municipal public services.[107] The contractor and the municipality agree the manner of implementation in a public-private agreement, in which the rights and duties of the contracting parties are also specified.[108]

The boundaries of the development area must be also agreed with the municipality and determined in a fixed-term declaration, in the same way as for projects involving the redevelopment or restructuring of urban areas.[109] In fact, boundaries usually correspond to those of a neighbourhood or quarter, whereby other boundaries are also conceivable because as no legal restrictions apply in this regard.[110] But what does become apparent is the link to inner development and structural components.[111]

Measures are financed entirely by appropriating compulsory contributions. The main actors of the scheme are the plot and property owners. The municipality acquires its legal legitimation from laws adopted to levy contributions and structure the organisation.[112] Following a public involvement procedure in which the BID or HID is presented for public scrutiny, a resolution is adopted to establish the project, whereby all financing parties are invited to express their opinions. Depending on the legally required quorum, either a 51- or a 70-percent majority is required for the municipality to adopt a resolution to set up a BID/HID.[113]

In all events, the planning autonomy of the municipality remains unaffected, as only in agreement with the municipality are private players given the authority to act on their own initiative, through their own financial means and in a specified area. In the same way as the municipality can accept a concept and its boundaries, it can also – after weighing up public and private interests – reject an application to set up a BID or HID. This is also possible even if it has been voted for by the city parliament, as formal approval by the local council is not required.[114]

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[107] Kreutz/Krüger, Urban ImprovementDistricts, in: Jahrbuch Stadterneuerung 2008, Berlin 2008, S. 267; Kersten, § 171f BauGB, in: Spannowsky/Uechtritz, BauGB Kommentar, München 2009, Rn. 53.

[108] Roeser, § 171f, in: Schlichter/Stich (Hrsg.), Berliner Kommentar zum Baugesetzbuch, 3. Auflage, Loseblattsammlung, Stand: 17. Lfg./12.2097, Rn. 12.

[109] Vgl. § 140 S. 1 Nr. 2 BauGB und § 171 b Abs. 1 S. 1 BauGB.

[110] Krautzberger, § 171f, in: Battis/ders./Löhr, Baugesetzbuch Kommentar, 11. Auflage, München 2009, Fn. 2; Schmidt-Eichstaedt, in: Brügelmann, Kommentar zum BauGB, Loseblattsammlung Stand: 06/2007, § 171 f BauGB, Rn. 11; ebenso Kersten, § 171 f, in: Spannowsky/Uechtritz, BauGB Kommentar, München 2009, Rn. 28.

[111] Finkelnburg/Ortloff/Kment, Öffentliches Baurecht, 6. Auflage, München 2011, S. 449.

[112] Wiezorek, Business ImprovementDistricts und HousingImprovementDistricts, in: Henckel/Kuczkowski/Lau/Pahl-Weber/et. al., Planen – Bauen – Umwelt, Wiesbaden 2010, S. 90.

[113] Wiezorek, Business ImprovementDistricts und HousingImprovementDistricts, in: Henckel/Kuczkowski/Lau/Pahl-Weber/et. al., Planen – Bauen – Umwelt, Wiesbaden 2010, S. 90.

[114] Schmidt-Eichstaedt, in: Brügelmann, Kommentar zum BauGB, Loseblattsammlung Stand: 06/2007, § 171 f BauGB, Rn. 12 ff.

Example: Business Improvement District '*Neuer Wall*' – Hamburg

An example of such a BID is the *Neuer Wall* project in Hamburg. The basis for the BID is a law passed in 2004 that aimed at the promotion of retail, service and commercial centres (GSED). The *Neuer Wall* project, the first Business Improvement District of its kind, was set up as early as 2005.[115] *Neuer Wall* is a business area featuring small, up-market retail businesses. The project was accomplished in cooperation with the administrative bodies and involved the complete refurbishment of public spaces, including paving, street furniture and green areas. Other measures were a joint presentation and advertising campaign, as well as security, public order and cleanliness management through private service providers.[116] All measures are financed with contribution payments by the property owners.[117] In 2010, they agreed to extend the BID to 2015.[118] A total of 10 BIDs have so far been set up in Hamburg alone.[119]

Example: Housing Improvement District '*Steilshoop*' Hamburg

One of the most significant residential projects to be realised in Germany in the 1970s was the large housing estate *Steilshoop* in the Wandsbek area of Hamburg. The estate was designed as a double row of apartment blocks with a central pedestrian area. Each of the 20 blocks covers an area of 90 x 150 metres and has up to 13 floors. On its completion in 1976 it provided housing accommodation for a total of 23,000 people.[120] It was classified as a redevelopment area in the 1990s to improve the urban development quality of the estate, which was under attack owing to the high concentration of people on a low-income in high structural density.

Plans to upgrade the area by creating an innovation quarter have been under way since 2006. Measures include restructuring the central pedestrian axis, additional street cleaning and green area care, as well as the implementation of an orientation concept and a joint district marketing strategy.[121] Players involved are the property owners and residents, neighbourhood management team and various Hamburg city authorities. The prospective ultimate unit of responsibility for implementing the measures is the Otto Wulff BID GmbH in cooperation with ProQuartier Hamburg

[115] http://www.otto-wulff.de/unternehmen/aktuelles/der-neue-wall-hat-gewonnen.html Zugriff am 4.9.2012.
[116] Welt Online, In Hamburg heißt es: Bitte ein BID!, im Internet unter: http://www.welt.de/print/die_welt/hamburg/article108520537/In-Hamburg-heisst-es-Bitte-ein-BID.html, Zugriff am 5.9.2012.
[117] http://www.bid-neuerwall.de/neuer-wall/bid-projekt/rahmenbedingungen.html Zugriff am 4.9.2012.
[118] Neuer Wall Hamburg, im Internet unter: http://www.bid-neuerwall.de, Zugriff am 5.9.2012.
[119] Business ImprovementDistricts, im Internet unter: http://www.hamburg.de/bid-projekte/, Zugriff am 5.9.2012.
[120] Reinborn, Städtebau im 19. und 20. Jahrhundert, Stuttgart 1996, S. 266.
[121] Freie und Hansestadt Hamburg, Behörde für Stadtentwicklung und Umwelt, Projektblatt HID Steilshoop, im Internet unter: http://www.hamburg.de/contentblob/2641682/data/steilshoop-projektblatt.pdf, Zugriff am 6.9.2012.

GmbH. The cost of implementing the measures proposed for the innovation neighbourhood is estimated to be around 4,112,450 euros, which will come from property owners' contributions.[122] The location concept was put on public display at the beginning of 2012 and reached the acceptance quorum required to establish a BID.

[122] InQSteilshoop, Antrag auf Errichtung eines Innovationsquartiers http://www.inq-steilshoop.de/dokumente/InQ-Steilshoop_Antragsunterlagen.pdf, Zugriff am 6.9.2012.

Denmark

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Questions and answers

1. Is there legislation concerning the initiative and/or the drafting of zoning plans and other equivalent documents by private entities? What is the procedure in that legislation and does it guarantee municipal control of planning powers? How is public participation organized in this procedure?

The Danish Planning Act allows for a municipal council to enter into a development agreement with the property owner for areas designated as urban zones, summer cottage areas or rural zones in the municipal plan. Certain cumulative initial conditions must be met such as that the agreement is voluntary for the private entity as well as the municipal council; the initiative lies with the private entity; and the private entity must be the property owner of the area for which the planning provisions are to be implemented.

The development agreement may solely aim to
1) achieve a higher quality or standard of the planned infrastructure in an area;
2) accelerate the local planning for an area designated for development through local planning by the framework provisions of the municipal plan, including urban regeneration, but for which local planning would contradict the provisions on the chronological order of development of the municipal plan; or
3) change or extend the development opportunities listed in the framework provisions of the municipal plan or the local plan for the relevant area on the condition that the property owner must only contribute to financing infrastructure that the municipality would not be required to establish.

The development agreement may solely contain provisions stipulating that the property owner in full or in part shall construct or pay the expenses for the physical infrastructural installations that are to be established inside or outside the area to implement the planning provisions. The projects that the agreement encompasses must be projects that fall within the scope of spatial planning in the Planning Act like establishing public recreational areas, establishing or enlarging grids for electricity, water etc., establishing access roads, paths, water channels etc. However, the agreement may not

involve social infrastructure that falls within the reign of municipal area of responsibility like schools and kindergartens.

The property owner and the municipal council may also agree upon the preparation of the necessary spatial plans (the municipal plan supplement and the local plan) as well as the financial side of this work.

Although the development agreement is the result of an private arrangement between the property owner and the municipal council, the Planning Act states that the report accompanying a local plan proposal associated with entering into a development agreement shall contain information on how the content and design of the provisions of the local plan proposal are related to the development agreement.

The development agreement does not exempt the municipal council from its duties as planning authority and as such it is still the municipal council that adopts the proposed and the final plan, carry out the hearings of the public (minimum eight weeks), make the necessary public announcements etc.

Information that a draft of a development agreement exists must be publicized simultaneously with the publication of the proposal for the municipal plan supplement and the local plan. The municipal council's entering into a development agreement must be adopted simultaneously with the adoption of the local plan in final form, and information on the adoption of the development agreement shall be publicized. Information on the development agreement but not its actual content has to be accessible to the public.

When publishing a proposal for the municipal plan supplement and the local plan the plan proposal must be sent to the relevant state, regional and municipal authorities, whose interests are affected by the proposal, and a written notice must also be given to 1) the owners of properties covered by the proposal and the tenants and users of these properties; 2) the owners of properties outside the area covered by the proposal and the tenants and users of these properties that would be substantially affected by the plan, in the opinion of the municipal council; and 3) the locally based associations and the like and nationwide associations and organizations having the right to appeal decisions.

When publishing a proposal for the municipal plan supplement and the local plan must be sent to the relevant state, regional and municipal authorities, whose interests are affected by the proposal, and a written notice must also be given to 1) owners of the properties governed by the plan and 2) anyone who, in due time, has submitted objections, etc. to the plan proposal.

2. Is there legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations? Are private entities only allowed to perform assessment tasks or can they issue development permits and take follow-up enforcement measures?

The municipal council may empower a landowners' association or, with the relevant landowners' consent, a tenants' association to grant exemptions from the provisions of a local plan if the exemption does not contradict the principles of the plan. The landowners' or tenants' association carry out the process of giving notice about the application.

The decisions of associations may be appealed to the municipal council. Legal proceedings to challenge decisions made by an association in accordance with authority delegated by the municipal council may not be instituted before the right to appeal to the municipal council has been exercised.

3. Is there legislation concerning the private management of urban infrastructures and public spaces? Is this legislation restricted to single infrastructures and spaces or does it provide a legal framework for the private management of entire neighbourhoods and other urban areas? Is the management of those neighbourhood and areas restricted to owners or neighbours associations or can concessionaires or other private commercial companies perform it? How does it guarantee municipal or public control of management decisions?

A local plan may contain provisions on establishing landowners' associations for new areas with detached houses, industrial or commercial areas, areas for leisure houses or urban regeneration areas. The local plan may state compulsory membership for the owners of the new area and the right and obligation of the association to take responsibility for establishing, operating and maintaining common areas and facilities. Compulsory membership may not be imposed on existing owners within and outside the area of the local plan. The municipality ensures that the bylaws of the association do not exceed the aim and the framework of the local plan for specific area.

The members of the association may within the provisions of the local plan decide on the nature of the managerial work and also the appropriate costs. However, unless specific legal steps e.g.

registration of an easement are taken by the landowners' association to secure the payment by the landowners and the actual maintenance of the common areas the municipality is left with very few effective legal remedies to enforce the management of common areas by landowners' associations.

USA

Edward J. Sullivan[1]

The three questions posed in the Case may assume there is a national law to deal with the responses to those questions. The legal system in the United States is of a federal variety, with the national and state governments each allocated certain powers. By tradition, planning powers and urban infrastructure are matters for state and local governments. Although the federal government does have a role in these matters with regard to certain issues (the District of Columbia, territories, and federal facilities), the focus of this response will be state and local governments. Even given that focus, there is a variety of ways by which the three questions raised in the case are addressed. Moreover for variety sake, the responses to the questions will select from both everyday applications of the law in this area and from extraordinary applications, such as the long-term lease of public facilities in order to generate cash for municipal operating expenses.

The three questions, and an American response to each, are as follows:

1. Is there legislation concerning the initiative and/or the drafting of zoning plans and other equivalent documents by private entities? What is the procedure in that legislation and does it guarantee municipal control of planning powers? How is public participation organized in this procedure?

a.Process for Drafting of Plans and Regulatory Documents by Private Parties – Most American local governments are small entities and may not be able to afford full-time planners or lawyers. In such cases, these entities seek to have this work done by private firms that specialize in these fields, usually through a public contracting process.

These public contracting laws differ from state to state. For purposes of discussion, the laws of Oregon are fairly typical. *See* Oregon Revised Statutes ("ORS") Chapters 279, 279A, 279B, and 279C at www.leg.state.or.us/ors/279.html, www.leg.state.or.us/ors/279a.html, www.leg.state.or.us/ors/279b.html, and www.leg.state.or.us/ors/279c.html respectively. Because the public contracting process aims to get the lowest price for the same product, that process is less effective when the product is professional services, such as the drafting of plans and regulatory provisions. Architectural, engineering, land surveying and "related services"[2] are exempted from the normal requirements for low bidding.[3] This exemption allows state and local governments to determine awards of professional services contracts without being limited to price considerations.

b. Public Participation – While exempt from strict price considerations, the Oregon public contracting process is subject to public records and public meetings requirements, so that the decision to award such a contract must be made in public and the traditional use of a scoring system provides for the

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[2] This term means:

* * * personal services, other than architectural, engineering and land surveying services, that are related to the planning, design, engineering or oversight of public improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representative services or land-use planning services. ORS 279C.100(6).

[3] ORS 279C.100 and .115.

transparency of the decision. The responsible state or local government agency is subject to public criticism if the basis for the decision appears flimsy.

2. Is there legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations? Are private entities only allowed to perform assessment tasks or can they issue development permits and take follow-up enforcement measures?

a. The Role of Private Entities in Control and Enforcement of Public Zoning and Building Regulations

Though legally possible (see above), most American local governments (states usually do not administer or enforce zoning and building codes, but may provide inspection services under contract with the local government) either have their own staff for these matters or contract with another local government to do so.[4]

b. Assessment v. Issuance of Development Permits and Enforcement

The response is the same as in (a), except that, for enforcement purposes, the local government attorney is usually the person representing the local government in a court proceeding. Many local governments have found it easier to "decriminalize" violations of planning, building and zoning codes and provide for an administrative mechanism (i.e., administrative law judge, hearings officer or hearings examiner) to hear and decide such cases, in which event a code enforcement officer, whether a local government employee or under contract, may represent the interests of the local government. It also should be noted that the local government attorney and the non-judicial adjudicator are frequently not local government employees, but rather under contract.

3. Is there legislation concerning the private management of urban infrastructures and public spaces? Is this legislation restricted to single infrastructures and spaces or does it provide a legal framework for the private management of entire neighborhoods and other urban areas? Is the management of those neighborhood and areas restricted to owners or neighbors associations or can concessionaires or other private commercial companies perform it? How does it guarantee municipal or public control of management decisions?

There are multiple questions for response. Before answering, it should again be noted that there are multiple possible responses to each of these sub-questions among the various states. No attempt has been made to survey these states on each sub-question.

Many states adhere to "Dillon's Rule," derived from the writings of Justice John Forrest Dillon of Iowa, stating:

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[4] For example in Oregon, ORS 190.010 provides as follows:

A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of a function or activity:

(1) By a consolidated department;
(2) By jointly providing for administrative officers;
(3) By means of facilities or equipment jointly constructed, owned, leased or operated;
(4) By one of the parties for any other party;
(5) By an intergovernmental entity created by the agreement and governed by a board or commission appointed by, responsible to and acting on behalf of the units of local government that are parties to the agreement; or
(6) By a combination of the methods described in this section.

"[M]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."[5]

Where Dillon's Rule prevails, local governments must be authorized to undertake a given activity by the state legislature. Many states may authorize local governments to manage urban infrastructure and public spaces.

The alternative theory of local government in the United States is "home rule," by which a state, either through a state constitutional provision or by legislation, authorizes a local government to undertake the management and structure of that local government under its own supervision, often by way of a local "charter," which acts like a mini-constitution.[6] In that event, the local government may undertake decisions relating to local concerns without reference to state legislative authorization.

a. Private Management of Urban Infrastructure and Public Spaces

Assuming the local government is authorized under either Dillon's Rule or Home Rule it is authorized to contract with private entities or other units of state or local government to manage these facilities under the terms of applicable state or local law. The scope of those management agreements is limited only by that authorization and by political considerations. It might cover a specific facility, given facilities in a particular area, or all such facilities under City ownership. While it may be possible for private neighborhood associations to manage such facilities, this is not the typical situation, as almost all such arrangements require a stable partner that is familiar with such management and can deal with such issues as liability insurance, losses, and the like.

b. Public Control over Management Decisions

State or local governments may place "sideboards" or limitations on management decisions made while a private entity, neighborhood association, or other public entity manages one or more elements of urban infrastructure or public spaces. However, several considerations limit significant intervention in those management decisions.

First, because the management is done for monetary consideration, the possibility that government intervention would affect the amount of compensation due would make potential bidders more wary about participation.

Second, another reason for contracting for management of public infrastructure and open space is relief from liability (in that the public agency is no longer managing the facility and thus cannot be liable for damages). If the government were to be able to determine significant management decisions, this reason would not be met.

Thus, the norm is that local governments normally contract to divest their management of these facilities in return for money and, while limitations on that management may be imposed, significant intervention in that management is often precluded as a practical matter.

OTHER PRIVATIZATION CONSIDERATIONS

Two articles from the September issue of *Planning and Environmental Law* are appended [7](with the permission of the publisher, the American Planning Association) and give additional perspectives to the issue of privatization.

The first article by Ellen Dannin, *Of Planning, Privatization and Accountability*, deals with evaluating prospective and existing privatization efforts and questions the use of those efforts as contrary to the public interest.

The second article by Matti Siemiatycki, *The Global Experience with Infrastructure Public-Private Partnerships*, speaks to the experience of these partnerships with regard to public facilities around the world. This article concludes that such partnerships are neither inherently positive nor

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[5] *See* the opinion of Justice Dillon in *Clinton v. Cedar Rapids and the Missouri River Railroad,* 24 Iowa 455, 1868).

[6] Chester Antieau, *Local Government Law* (2nd ed., 2012).

[7] For the articles see e-mail Natasja van Wijk

negative, but their success is dictated by how they are structured, planned and delivered and how risk is allocated. These conclusions are equally applicable to privatization efforts generally.

The Netherlands

Fred Hobma, LL.M., Ph.D.[1]

1. Growing private sector involvement in urban development

Private sector involvement in urban development practice has grown in the past decades in the Netherlands. In his recent PhD-thesis Private Sector-led Urban Development Projects*, Heurkens brings forward several explanations pointing towards more private sector involvement in the built environment.*[2]

First, Heurkens notices an evolutionary process of increased neoliberalisation and the adoption of Anglo-Saxon principles in Dutch society. This results in a shift towards a more market-oriented development practice too. Although the Netherlands are having 'Rhineland' roots with a focus on welfare provision, several neoliberal principles (privatisation, decentralisation, deregulation) have been adopted by government and incorporated in the management of organisations.

Second, as Heurkens explains, the result of the 'Anglo-Saxon wind' is the emergence of a market-oriented type of planning practice based on the concept of *development planning*. In development planning, the government does not only make spatial plans*,* but goes further than that.[3] Purpose of development planning is accomplishing a link between spatial planning (preponderantly the domain of government) and spatial investments (preponderantly the domain of private parties). Development planning does not make a distinction between planning and implementation, but – on the contrary – combines planning and (agreements on) spatial investments. This means that there is no succession (in other words: no fixed sequence) of public planning and private investments. On the contrary, private parties are strongly involved in planning. Planning therefore shifts from being an internal governmental activity to the creation of a social coalition. Feasibility is consequently enhanced. Private parties with investment power (= money) receive access to government planning. In exchange, the government receives commitments for the implementation of plans created in coalition with those private parties. From a legal perspective, development planning goes hand in hand with an increased use of private law by government. More specifically: public-private partnership usually requires a public party to act on the basis of private law with respect to public powers.[4]

Third, Heurkens argues that the European Commission expresses concerns about the hybrid role of public actors in Dutch institutionalised public-private partnerships. Public actors in such public-private partnerships serve both commercial purposes (making money) and the public interest at the same time. EU legislation, however, favours formal public-private role divisions in realising urban projects based on Anglo- Saxon legal principles notably being: competition, transparency, equality, and public legitimacy. The European Commission's position would, in Heurkens' view, lead to a smaller role of public actors. Hence the role of the private sector in urban development projects would increase.

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[2] Erwin Heurkens, *Private Sector-led Urban Development Projects – Management, Partnerships & Effects in the Netherlands and the UK*. Doctoral dissertation, Delft University of Technology, 2012. http://abe.tudelft.nl/article/view/Heurkens/heurkens. My summary of Heurkens' description of the growing influence of the private sector on urban development is based on chapter 1 'Introduction' of his doctoral dissertation.

[3] F.A.M. Hobma and E.T. Schutte-Postma, *Planning and Development Law in the Netherlands*. Delft, (forthcoming, 2013).

[4] Hobma en Schutte-Postma, forthcoming (2013).

Fourth, Heurkens explains that the financial and economic crisis is a stimulus for private sector involvement in urban development. Indeed, financial retrenchments in the public sector and debates about the financial risks of Dutch municipalities' active land development policies point towards a lean and mean government that moves away from risk-bearing investments in urban projects and leaves this to the market.[5]

Each of the reasons stated above, implied growing private sector involvement in urban development in the Netherlands in the past decades.

2. Legislation concerning the initiative and the drafting of land-use plans

Question 1 reads:
Is there legislation concerning the initiative and/or the drafting of zoning plans and other equivalent documents by private entities? What is the procedure in that legislation and does it guarantee municipal control of planning powers? How is public participation organized in this procedure?

The answer is:
No, there is no legislation concerning initiative or drafting of land-use plans by private entities.[6] Of course, there *is* legislation regarding the initiative and drafting of land-use plans. However, this legislation does not refer to any role for private entities.

The procedure of a land-use plan has the following elements:

(1) *Preparation* of a draft of a land-use plan. The legislation does not specify who is responsible for the preparation of a draft land-use plan. In practice, a draft is prepared under the administrative responsibility of the municipal executive (Burgomaster and Aldermen). Once the draft land-use plan is ready, it will be offered to the municipal council.

(2) *Democratic legitimisation* in the form of adoption of the land-use plan by the Municipal council (which indeed are the directly chosen representatives of the people on the municipal scale). This is laid down in article 3.1 SPA, paragraph 1. Herewith it is democratically determined that the plan is for the *public good*.

(3) Legally established possibilities for affected citizens or organizations to *influence the contents* of the plan:

- *involvement* of citizens and societal organisations in the preparation of a land-use plan (art. 3.1.6 Spatial Planning Decree);

[5] The term that is used for (1) municipal acquisition of undeveloped land, followed by (b) preparing the land for construction, followed by (c) sale (or issue land under ground lease) by the municipality to developers or housing associations, is *active land policy*. 'Active land policy' is the literal English translation of the Dutch term 'actief grondbeleid'. English speaking countries usually use the term 'land banking' to describe this phenomenon. Dutch municipalities in the past decades have made huge profits from land sale to property developers. However, since the financial and economic crisis started it turned out that undeveloped land that is owned by municipalities, but cannot be sold to property developers, has become a major financial burden for municipalities.

[6] The term 'zoning plan' is not often used in the Netherlands as a translation of the Dutch 'bestemmingsplan' – which is the legally binding urban development plan. Instead, 'land-use plan' is mostly used. Therefore, in this paper, I will use the term 'land-use plan'.

- submitting *views* (Dutch: zienswijzen) against the draft land-use plan. This is laid down in article 3.8, paragraph 1, sub d, SPA: 'any person may express their views on the draft to the Municipal Council';
- interested parties have the right to *lodge appeal* against the adoption of the land-use plan by the Municipal Council. This right is granted in the General Administrative Law Act (Dutch: Algemene wet bestuursrecht).

(4) Final judicial settlement by the *independent administrative judge*. This refers to the right to lodge appeal. An important feature is that the final word about the oppositions against a land-use plan is not with an administrative body or with politicians, but with the independent administrative judge: the Administrative Jurisdiction Division of the Council of State (Dutch: Afdeling bestuursrechtspraak van de Raad van State).

As said, the legislation does not refer to any role for private entities. However, in practice they may have an import role. This role is connected to element (1) mentioned above: the preparation of a land-use plan. I will elaborate on this in the next section.

3. The role of private entities in the preparation of a land-use plan

As explained above, the draft of a land-use plan is prepared under the administrative responsibility of the municipal executive. We can distinguish between four ways of preparation of land-use plans. Two of them involve great substantial influence of private entities. Each of these four ways is used in practice.

(a) The draft of the land-use plan is made by public servants. This means that the draft land-use plan is an 'in-house' affair. Public servants like planners, urban designers and planning lawyers together draw up the draft land-use plan. In this case the municipal executive is the commissioner (or: principal) of the draft land-use plan.
This alternative (a) was widely used in the past. Nowadays only a minority of municipalities has a staff that draws up drafts of land-use plans.

(b) The draft of the land-use plan is made by a private urban planning & design consultancy firm. This means that the making of draft land-use plan is 'outsourced' to a consultant. However, in this case, the municipal executive still is the commissioner of the draft land-use plan. That is, the consultant will be paid by the municipal executive.
This alternative (b) is widely used nowadays.

(c) The draft of the land-use plan is made by a property developer. This means that a property developer hires a consultancy firm to make the draft land-use plan. Thus, the municipal executive is not the commissioner of the consultant. The property developer will offer the draft land-use plan to the municipal executive.

(d) The draft of the land-use plan is made by a public-private entity. This means that an entity in which the municipality and one or more property developers work together, produces the draft land-use plan. In practice, the ppp-entity will hire a consultancy firm for this. Once the draft land-use plan is ready, the ppp-entity will offer the plan to the municipal executive.
There are no data available regarding how many times alternative (d) occurs in practice. However, it happens on a very regular basis that a ppp-entity produces the draft land-use plan. This has to do with the high frequency of public-private partnerships for urban development in the Netherlands.

Public-private partnerships for urban development
Once specific – and often used – model for public-private partnership implies parties jointly incorporating a legal entity (a company) that will constitute the legal vehicle for (re)developing the area. This is the *joint-venture model* and entails an intensive partnership. The joint-venture model is particularly suitable if public and private parties are willing to share the risks and opportunities involved in the (land) development and in case of the long-term development of the area. (Financial) risks that are too high for one public or private party can be spread in a legal entity, as a result of which a large-scale development can be realised. Other considerations for choosing this model are of a tax and civil law nature, for the joint-venture model offers possibilities to realise tax advantages and to limit liabilities for the parties involved. A joint-venture can be seen as a link between the public and the private domains. In a joint-venture, the joint public (municipality) and private (property developer) ambitions for the area are embedded. Apart from that, joint-ventures come in many variants. One of the tasks of a joint-venture may very well be to draw up of draft land-use plans.

Joint-ventures for urban development are mainly used for big scale developments. Some of these developments include thousands of dwellings.

Each of these four ways of preparation of a land-use plan ends with offering the draft land-use plan to the municipal executive. If the municipal executive agrees with the draft, it will offer the plan to the municipal council.

So, there is no role for private entities in legislation regarding the initiative or drafting of land-use plans. However, in practice there are ways for private entities (alternative c) or public-private entities (alternative d) to take the initiative to prepare or draft a land-use plan. Nevertheless, it is the municipal executive that will offer the draft to the municipal council.

4. Legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations

Question 2 reads:
Is there legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations? Are private entities only allowed to perform assessment tasks or can they issue development permits and take follow-up enforcement measures?

The answer is:
No, there is no legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations. Private entities cannot issue development permits. Nor can they take enforcement measures.

Control and enforcement of public zoning and building regulations is a task of the 'competent authority' (Housing Act, art. 92 and Environmental Licensing Act, art. 5.2). This means that municipal civil servants perform control and enforcement. In practice it is the responsibility of a municipal department, generally known as Local Building Control (Dutch: Bouw- en Woningtoezicht). However,

national government is considering privatisation of control and enforcement tasks. Very recently, the minister of Interior Affairs commissioned a research after the privatisation of building control and enforcement.[7]

Issuing development permits is a task of the competent authority too. Usually Burgomaster and Alderman (the municipal executive) are the competent authority (Environmental Licensing Act, art. 2.4).

However, private entities may have a role in testing permit applications. In essence, this means that a permit application is not tested by a government body, but by a private certification body, the idea being that the quality of the holders' working process allows them to test the application against the assessment framework. They ensure that criteria for granting permits are satisfied, doing away with the need for testing by a government body. In fact, this form of certification exchanges government testing for private 'self-regulation'.

An example of the kind of certification now being experimented with is the Building Decree Assessment (Dutch: Bouwbesluittoets). Traditionally, Local Building Control tested applications for development permits against the Building Decree[8]. Trials are currently being performed in which the assessment is left to private organisations that satisfy the quality requirements of a specific certificate. As long as they satisfy objective quality requirements, the certificate holder can be anything from an architect to another kind of advisor.

5. legislation concerning the private management of urban infrastructures and public spaces

Question 3 reads:
Is there legislation concerning the private management of urban infrastructures and public spaces? Is this legislation restricted to single infrastructures and spaces or does it provide a legal framework for the private management of entire neighbourhoods and other urban areas? Is the management of those neighbourhood and areas restricted to owners or neighbours associations or can concessionaires or other private commercial companies perform it? How does it guarantee municipal or public control of management decisions?

The answer is:
There is only one act relating to private management of public spaces. This act relates to Business Improvement Districts. There is no act relating to private management of urban infrastructures. The act that relates to private management of public spaces (Business Improvement Districts) is restricted to single spaces; it does not provide a legal framework for the private management of entire neighbourhoods. The management of the public spaces is restricted to the businesses who's customers use the public space. These business will hire a private company to manage the public are for them.

[7] Ira Helsloot and Arjen Schmidt, *Risicoaansprakelijkheid als vervanging van overheidstoezicht in de bouw?* (Strict liability as a substitution for governmental building control?) CrisisLab, June 2012.

[8] The Building Decree contains regulations concerning buildings (and other structures). It consists of numerous technical regulations for the construction of new buildings as well as for existing ones. The Building Decree regulations express the minimum technical level allowed, concerning such aspects as loadbearing capacity, stability, fire resistance, ventilation, acoustic insulation, energy performance standard, ramps and the minimum amount of daylight in any one room.

In the Netherlands, the *Business Improvement Districts (Experiments) Act* (Dutch: Experimentenwet BI-zones) has been in effect since 2009. Within the defined area of a business improvement district (Bedrijven Investeringszone), business owners make joint investments in an appealing and safe commercial environment. Provided there is sufficient support, all of the business owners will be asked to contribute. To this end, the municipal authority imposes a levy and pays the proceeds to the association or foundation implementing the activities on behalf of the business owners.

The activities of a BIZ are meant to complement those of the municipal authority and include, for instance:
- improving traffic infrastructure;
- signage;
- green spaces;
- waste collection;
- lighting;
- cleaning;
- maintenance;
- fire safety;
- graffiti removal;
- increasing safety by means of measures such as additional surveillance, fences and closed-circuit television (CCTV) cameras.

It must be concluded that Business Improvement Districts are not widely used in the Netherlands.

Apart from the Business Improvement Districts, there are some other examples of private management of urban public spaces in the Netherlands. The management in those cases is done by private concessionaires. The concessionaires perform their tasks on the basis of *private law agreements* with municipalities. There is no legislation that applies to this situation.

Management of public spaces by private concessionaires sometimes is a part of a *private sector-led urban development project*. This is a specific contract type for urban development. It is not the most used contract type for urban development in the Netherlands. In Dutch, private sector-led urban development is labelled as a 'concession'. A concession can be defined as follows:

"A concession in urban area development is a contract form with clear preconditioned (financial) agreements between public and private parties, in which a conscious choice from the public parties has been made to transfer risks, revenues, and responsibilities for plan development, land preparation, land and real estate development and possible operation for the entire development plan towards private parties, within the previously defined public brief in which the objective is to create an effective and efficient role and task division and a clear separation of public and private responsibilities".[9]

In fact, concessions are contracts for the *development* of an urban area – not for *management* of urban areas. However, in a minority of cases of use of such concessions, the developer also has the responsibility for the management of the area. In such cases, the developer is a concessionaire who performs management of a neighbourhood. Usually this responsibility, depending on the contract, lasts for a number of years, for instance 5 years. During this period, the developer bares the costs of the management of the urban area. After this period, the management of the area is returned to the municipality.

[9] M.H.M. Gijzen, *Zonder loslaten geen concessie: Inzicht in de recente toepassing van deze publiek-private samenwerkingsvorm in de Nederlandse gebiedsontwikkelingspraktijk met 'evidence-based' verbetervoorstellen* (Thesis). Rotterdam: Master City Developer, 2009.

As said, there is no legislation regulating private sector involvement in management of urban areas. The involvement of private concessionaires in case of private sector-led urban development ('concessions') is entirely based on private law agreements between a developer and a municipality. From this, it follows that the guarantee for municipal control of management decisions must be based in the contract between developer/concessionaire and municipality.

6. Conclusion: planning powers of local authorities in perspective

In the first section of this paper I stated that as a result of neoliberalisation and an Anglo-Saxon wind, private sector involvement in urban development practice has grown in the past decades in the Netherlands. Now at the end of this paper, I must conclude that indeed in urban development *practice* private sector involvement is strong. In terms of *legislation* however, we cannot recognise the strong private sector involvement.

Public law almost exclusively allocates planning powers, control powers and enforcement powers to governmental bodies. Nevertheless, we must realise that government is heavily dependent on private sector development initiatives. To give an example: suppose that a local land-use plan, holding a new residential area, has been adopted by the municipal council. Indeed, the municipal council has the power to do so. But if the plan neglects developer's requirements regarding (for instance) density, available parking space and dwelling types, the developer will not apply for a development permit. Thus, the municipality's will remain a piece of paper.

So, 'behind' the strong governmental powers, is a dependency on private sector development initiatives. This explains the practice of negotiations and private law agreements between municipality and developers *prior to* the start of public law land-use plan procedures. Hence, in practice almost always local authorities will only start a public law land-use plan procedure if *prior to that* a private law agreement has been concluded with the property developer(s).

The agreement shall at least relate to the developer's financial contributions to (among other things) public amenities in the development area (such as infrastructure and sewage). But it is common that the agreement goes further and for instance stretches out to the program to be realised on the land. After an agreement has been closed, the municipal executive will offer a draft land-use plan to the municipal council *that is in agreement with the previously concluded agreement*. This type of agreements have a specific name. They are called 'land-use plan agreements'. Land-use plan agreements usually constitute part of an agreement that is concluded between a municipality and developers.
This practice, in itself raises all kinds of legal questions, for instance relating to the point of *views* (Dutch: zienswijzen) against the draft land-use plan submitted to the municipal council by third parties concerned. *Formally* the municipality is free to honour views against the draft land-use plan. *Materially*, however, the situation may be altogether different. It is not inconceivable that the municipality, in view of the earlier agreement on the land-use plan with the private parties, tends to reject such views. Bregman wrote about such situations: 'In this way, the government can actually no longer objectively weigh interests if there are objections by third parties; it has already weighed the interests during the negotiation process with the private partner(s).10 This comment does not suggest that a municipal body is not supposed to have its own clear opinion on an urban area development project. The issue is whether it is (formally) still sufficiently free, or feels sufficiently

[10] A.G. Bregman and R.W.J.J. de Win, *Publiek-private samenwerking bij de ruimtelijke inrichting en haar exploitatie* ('Public private partnership in spatial planning and its development'.) *Bouwrecht Monografieën* no. 26. Deventer (Kluwer), 2005, p. 97.

free (materially), to deviate from the opinion, in view of the agreement made with the third party/parties at an earlier stage.
All in all this puts the great planning powers of local authorities in perspective.