

JULIO TEJEDOR BIELSA\*, Professor of Administrative Law- Universidad de Zaragoza

## **SOME REFLECTIONS ON THE STATE OF URBAN PLANNING LAW AND PRACTICE IN SPAIN: ANOMALIES AND EXCEPTIONS**

*Abstract:* Urban planning law has been put under great pressure over the last years. The reason for this can be found in the complex interests involved in urban planning, which are especially intense during phases of economic expansion. It is therefore not surprising that the legislator has carried out a process of legislative reform and that the European Institutions have paid attention to the practice of urban planning in Spain. Against this background, urban planning seems to be undergoing a deconstruction process and a deep revision that affects some of its most essential institutions, such as the land property regime, the classification and valuation of land, the legal regime of urban planning agreements or the legal regime of infrastructure-development works. This revision does not only affect the instruments of urban planning; it aims at changing its content, placing in a central position environmental considerations and the requirements stemming from the principle of sustainable development.

*Keywords:* Urban planning; land valuation; public procurement law; land property

### **I. THE COMPLEX SET OF INTERESTS AND PERCEPTIONS RELATED WITH URBAN PLANNING LAW AND PRACTICE**

We are at a critical juncture in the evolution of urban planning law in Spain. The bursting of the housing market bubble<sup>1</sup>, which is to a great extent at the origin of the current

---

\* Translated by Fernando Pastor Merchante (Instituto de Derecho Local, UAM, Madrid)

financial crisis, has shown that the traditional patterns of Spain's urban planning law – which were reinforced by the legislation adopted by the State between 1996 and 2003<sup>2</sup> – are unsustainable from an economic, environmental and urban point of view. Furthermore, the European institutions have dealt with this issue in several resolutions, amongst which two stand out: the position adopted by the European Commission and by the European Court of Justice with regard to the need to subject the urban-development process to public procurement rules, and the position adopted by the European Parliament with regard to the harmful effects that the bad urban design practices followed – specially, although not exclusively – along the Spanish east coast has had. However, the path towards a new urban planning policy and, especially, towards a new urban planning practice, is not going to be an easy one. Resistance from many actors will have to be met, and it may not always be possible to overcome it.

Not in vain, urban planning is one of these fields of human activity where very different interests are at stake, so that conflict is unavoidable. Urban planning law and practice are shaped by the pressure put upon them by the confluence of social, media,

---

<sup>1</sup> CAMPOS ECHEVARRÍA, J.L. (2008) *La burbuja inmobiliaria española*, Marcial Pons, Madrid, pp. 107-143. On the same issue, from an international perspective and arguing in favour of introducing new financial products to prevent future housing bubbles SCHILLER, R.J. (2008) *El estallido de la burbuja. Cómo se llegó a la crisis y cómo salir de ella*, Gestión 2000, pp. 43-62 and 132.

<sup>2</sup> This was probably not the efficient cause of the current situation, which is the result of the combination of several, more complex factors – all of which are analysed in the two books mentioned in the previous note –. However, this legislation seems to have acted as a catalyser of a situation which now receives harsh criticism from very different scientific backgrounds. FERNÁNDEZ DURÁN, R. (2006) *El tsunami urbanizador español y mundial. Sobre sus causas y repercusiones devastadoras y la necesidad de prepararse para el previsible estallido de la burbuja inmobiliaria*, Virus editorial, Barcelona, pp. 63-70 (also available under a Creative Commons Licence in [http://www.nodo50.org/ramonfd/tsunami\\_urbanizador.pdf](http://www.nodo50.org/ramonfd/tsunami_urbanizador.pdf)), speaks of 'mafiosi capitalism' (p. 44-51), considers that Spain has been hit by a 'cement spill' (p. 23) and refers to the 'large projects made with public funds' as a 'city-show' (p. 32). Irony is also present in the title of MARTÍN MATEO, R. (2007) *La gallina de los huevos de cemento*, Civitas, Madrid – i.e., 'The goose that laid eggs made of concrete' –, where the pathology of the said bird is analysed (pp. 220-223), where examples of an 'ethically inadmissible urban planning' are put forward (pp. 112-116) and where mention is made of a 'pathological building fever' (p. 119).

technical, political, legal, economic and environmental considerations. The relevant actors and, in particular, the Administration, are forced to manage the tensions arising from such a wide range of interests and to find the right balance between them. In this sense, urban planning law, first, and urban planning instruments, then, incorporate several legal institutions and techniques aimed at reducing the tensions generated by the adoption of land-use decisions<sup>3</sup>. Our current urban planning is the result of all these tensions, and it is clearly undergoing an important transformation. The way in which cities and towns are actually designed is also the result of this conflict. It is therefore worth devoting some attention to these forces, which act sometimes in the opposite and sometimes in the same direction, and which are, ultimately, the fundamental object of urban planning law and practice.

The social implications of urban planning are very clear. Urban planning decisions have a very important social impact, because they are concerned with the way in which cities are designed and built and, more generally, with the way in which the territory is organised; they are therefore concerned with the human habitat, that is to say, with the environment in which all human activities are performed. The social dimension of urban planning is illustrated by the permanent difficulties which affect access to housing, by the conflicts generated in small towns by the redistribution of wealth through urban planning, the reversion of the agrarian reform as a result of the reconstruction of large estates– which are now urban rather than agrarian –, and by the activism of social and ecological groups. It

---

<sup>3</sup> FERNÁNDEZ RODRÍGUEZ, T.R. (1973) *El urbanismo concertado y la Ley del Suelo*, IEA, Madrid, p. 49, said it with the following words: 'The law in force may not have reached its objectives, but I think it is legitimate to doubt whether a new Law will be able to reach them. In my opinion, a change in the formal, legal techniques is far from being the solution for the current situation. The ultimate causes of this situation are undoubtedly much deeper, and they can be found in the unhealthy atmosphere in which urban planning problems evolve, an atmosphere to which the public entities with responsibilities in this field are not alien either; in the abundant organisational defects; in the lack of management capacity of the urban planning Administration, etc. They are all structural causes, upon which no action has been taken; should they continue to operate, they will lead to the failure of any reform or innovation undertaken in the future. Without a capable and well-equipped Administration, with better support and better social controls, little will be achieved'. Almost forty years have elapsed and four State laws have been passed, and the structural causes continue to exist.

is also illustrated by the surprising position adopted by certain groups with regard to the Land Use Act of 2007 (*Ley 8/2007, de 28 de mayo, de Suelo*), arguing that it harmed the interests of the farmers in possession of land which could be reclassified, and by the position adopted by the agricultural associations, which were almost the only ones which opposed the reform at the Economic and Social Council (*Consejo Económico y Social*)<sup>4</sup>.

The social debate over urban planning tends to focus on the problem of speculation and, as corollary, on the problem of housing. While some argue that the high prices of housing are due to the high prices of land, others argue that land is expensive because the prices of housing are abusive. For the former, the solution is simple: less regulation, less administrative interventionism and more land on sale are needed. The prevention of speculation is also simple for the latter: first, it is necessary to regulate urban planning in such a way that classified land is urbanised as it becomes necessary, thereby avoiding the retention of land; secondly, it is necessary to foster the construction of protected housing (i.e., housing with limited prices). It is against this framework that a process of reforms and contra-reforms has taken place in Spain; the process has been pendular, going from the maximum possible degree of regulation and administrative intervention to the opposite extreme. This process has alternatively blamed the public sphere – as a result of its restrictive character – and the private sphere – as a result of its tendency to keep land away from the market –. Yet the truth in Spain is that everybody who has something to speculate with, be it land, be it a building product, speculates with it. Individuals can thus make benefits; these benefits being privy to them, they logically escape any form of control. The Administration obtains additional resources which, in principle, it applies to its own public goals, in order to serve the citizen. But it cannot be denied that in both cases urban development channels speculation, in the sense that it is used to generate a capital gain that will be applied to achieve goals which have nothing to do with it. And the problem is that, to date, the only limit has been the economic capacity of buyers, that is to say, their immediate or deferred – by means of a mortgage– paying capacity.

---

<sup>4</sup> Dictamen 10/2006, de 26 de Junio, dissenting opinion. The Popular Group in the Spanish Parliament (*Congreso de los Diputados*) also used this argument, claiming that the farmers constituted the worst affected group (*Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente, VIII Legislatura, No 255, p. 12741*).

This mentality and this speculation culture impregnated the whole society, and not only in relation to land but also in relation to housing. Housing became for many an investment asset, and a very secure one, for its returns were considerably higher than those offered by other markets and could be more easily realised. This was so much so, that the main residence became the springboard to acquire a better house.

The public sphere strengthened this culture, offering considerable tax deductions, in particular when the amount obtained for the sale of the permanent residence was reinvested in the purchase of a new one. Housing thus acquired a speculative purpose, a financial dimension that is at the origin of some of the current problems – because, as every financial investor knows, financial markets rise but they also fall –. Housing and land became over the last years a sort of futures market in which all the society was involved, with the only exception of those who could not afford buying a first house. In the end, the futures market and the bubble have exploded, after being fuelled by the public sphere, by the banks, by developers, by real estate intermediaries and by the regulation authorities, while getting funds from other countries to which ours is now heavily indebted<sup>5</sup>. Investment became a gamble and, unfortunately, the majority lost, as always. Before anything else, housing is a commodity and the essential foundation of human life. From an urban perspective, however, housing and dwellers are the cells that make up the city. It is debatable whether these dimensions are compatible with its consideration as an investment asset, and the question is not ideologically neutral. It is certainly not compatible with the correct functioning of the market and of the real estate sector, especially in the rental market, although it is compatible with this sort of discount which has taken place lately, through the concession of mortgage loans for the purchase of land and houses on the basis of the expected value.

---

<sup>5</sup> FERNÁNDEZ DURÁN, R. (2006: 63-70), lucidly foresaw the situation we are now going through. In any event, it should be noted that financial entities, real estate businessmen and intermediate agents, all of whom fed the inflationary spiral and benefited from it, tended to deny its existence and to advocate in favour of an 'orderly deflation' [FERNÁNDEZ DURÁN, R. (2006: 63-64), from whom I take the expression quoted; and SHILLER, R.J. (2008: 136-137)].

In view of the strong social implications of urban planning, it is not surprising that it has such an important media impact. Over the last years, urban planning has been one of the topics that has attracted more attention from the media, which have not always been able to escape from the pressure of some of the sectors involved. Urban planning used to sell. The media disclosed a lot of small and big corruption cases, some of which had been concealed by bad administrative practices<sup>6</sup>. Although they were not always linked, urban planning was thus associated to obscure interests and to obscure political transactions. The resulting social discredit that affects urban planning is, together with the problem of access to housing, one of the most important problems that needs to be tackled. Because designing an urban operation, combining the public and private interests at stake and ensuring the economical and social viability of the project is far from being a vicious activity; it is on the contrary an exercise of realism. Only those projects whose economical viability is ensured, with sufficient public or private funding, will be carried out, because planning something which is not economically sound is of no use, beyond that of generating artificial capital gains.

Another complex issue is that of defining the role that has to be assigned to technical experts in the field of urban planning. The weakness of the technical advisory structures which assist the political management is very surprising; they have in fact been supplanted by private technical teams which are becoming increasingly interdisciplinary, and this has happened in a field characterized by the extremely high profits generated by public decisions. These technical decisions, adopted on the basis of the arguably obscure 'urban planning science', often overwhelm the decision-making organs, which thus end up being controlled – *de facto* – by their technical cabinets. The absence of any sort of control and supervision over external technical teams, the weakness of the Administration – which is often composed of a single civil servant in charge of several municipalities – and the occasionally deficient training of the urban planning officers form an explosive cocktail. The fact that all the external technical teams advising the Administration provide the same service to private actors is the source of frequent and difficult problems.

---

<sup>6</sup> IGLESIAS, F., AGUDO, J., SARTORIUS, N. y ZAPATERO, P., *et al.* (2007) *Urbanismo y democracia. Alternativas para evitar la corrupción*, Fundación Alternativas, pp. 42-91.

Nevertheless, it is nowadays the political management which attracts a higher degree of attention and criticism. The media attach immense importance to the adoption of the final land-use decision and to the will of the public Administration expressed in the urban administrative agreements it subscribes, thereby magnifying their relevance, to the extent that the Administration seems to be the only responsible actor. The responsibilities, whether legal or not, bore by all the other actors disappear. Furthermore, the decentralization of the system of urban-planning took place during Spain's democratic transition, and it therefore benefitted from the absence of criticism over that period. It is only recently, as a result of the numerous corruption cases disclosed by the media, that the allocation of competences in this field has been called into question, in particular with regard to the adequacy of the local level of government to be the main decision-making centre. In my opinion, this position is totally opportunistic. The local level of government is the most adequate to take urban-planning decisions; the problem is that many decisions formally taken within a local council are in fact materially taken outside from it, and this is what makes no sense. The principle of local autonomy requires that local entities be assigned with competences, human and material resources and financing. Should any of these elements be absent, excessively weak or deprived of any legal guarantee, it is the general interest which will be harmed. Consequently, it is not the level to which decision-making power is assigned that should be disputed, but rather the scant public resources with which the decision-making organs must form their opinions. Political decisions on urban matters are not so complex; what is complex is their justification and implementation.

Those are not the only problems that arise from the desirable and unavoidable relationship between politics and urban-planning. At least two further problems need to be mentioned. The first one has to do with the perception felt by the political managers who integrate the decision-making organs that the effects of their decisions will only be felt in the long run, so that it will not be for themselves to face them. It is thus easy to give in to the temptation of not questioning something for which others will probably respond. It takes at least one political mandate to adopt a general urban plan, and at least half a mandate more to approve its necessary implementing program, so that there seems to be no reason to worry too much. The second problem is structural or systemic: it arises from the very structure of the political parties and it links the municipal map with the tremendous difficulties involved in making effective the legal and opportunity controls. In Spain, the

structure of the political parties is based on municipalities. Logically, the provenance of most party leaders reflects this fact, both at the local, provincial and regional level. I do not intend to challenge from an abstract perspective this situation, which goes far beyond the scope of this article, but I want to point out that it affects urban-planning. The endemic weakness of the local Administration in many areas of Spain and the locally-based structure of the political parties make it extremely difficult to design policies capable of transcending an exclusively local vision of the territory, a vision that seeks support in the autonomy argument<sup>7</sup>. The Municipality thus becomes, with the more or less explicit consent of all the political groups, the basic and allegedly sovereign entity for the organisation and management of the territory. Everything which limits or constraints its decision-making capacity is perceived and opposed as a dubious encroachment on local autonomy. There is no territory beyond the limits of the municipality and local authorities are deemed to be the only government ruling over it. Finally, this political perception pretends to be converted into law, and local autonomy is thus advocated on the basis of arguments which, if correct, would reduce to nothing the competences that correspond to the State and to the Autonomous Communities<sup>8</sup>. The general plan pretends to pass for the sovereign instrument

---

<sup>7</sup> MARTÍN MATEO, R. (2007: 248) considers, within the framework of his proposal to 'subject local urban management to further controls', that the starting point for these controls must be the fact that 'the Municipality is an institution which serves the citizens and not the political parties, although political parties can be the channel through which a democratic system of elections focused exclusively on the approval of the basic urban plans may take place'.

<sup>8</sup> Against this idea, PARADA VÁZQUEZ, R. (2007) 'La segunda descentralización: Del Estado autonómico al municipal', *Revista de Administración Pública*, No 172, pp. 9-77. The author argues in a vehement but well-founded way against the need to revise the artificial consensus that leads to destroy what he names 'extreme mini-municipalism' and to destroy the structures of the State and of the nascent Autonomous Communities. He harshly criticises a certain conception of the decentralization process, which transforms the State and the Autonomous Communities into quasi-confederate entities, based on the Municipalities and almost ungovernable. He questions the *Carta de Vitoria*, accepted by all the political parties, because it is the expression of the 'municipal extremism' represented by the *Federación Española de Municipios y Provincias*. He also questions the virtues of the principle of proximity between the municipalities and the citizenry, on the basis of the municipal map, because 'the application of the principle of proximity to the municipal Spanish reality is complete non-sense'. And he adds that 'the European, national or regional authorities may come down from time to time to get in touch with the citizens and with the territory they govern, but it is simply ridiculous to claim that the local governments should do the



in the organisation and management of the municipal territory. Outside from the municipality, no territory and no urban-planning competences seem to exist.

This account is sufficient to explain the extreme tension to which the system of competences and the system of inter-administrative relations are subject in the field of urban-planning. However, the situation is worsened by the demographic factor. The scarce population of many municipalities and the absence of any reform directed at adjusting the municipal map make the adoption of certain decisions in this field even more difficult. In those circumstances – small municipalities with dynamic real estate markets–, the adoption or revision of the general plan typically gives rise to struggles between families or ‘houses’. These struggles do not reflect any political cleavage, but they always result in political alignments aimed at securing the re-classification of each faction’s own lands. This often brings about division within the major political parties, which in turn results in the creation of independent local parties. The judgment of the Supreme Court of 23 September 2008 will certainly not contribute to alleviate these problems, since it declares lawful the claim made by a municipality to celebrate a referendum on the content of a general plan, prior to its initial adoption.

The economy cannot ignore urban planning; conversely, urban planning cannot ignore the constraints and the criteria stemming from the economy. In fact, the economic repercussions that a very specific type of urban-planning has had are today very well-known amongst us: it has generated a development model totally dependant on the real estate sector and a socio-economically irresponsible dynamic that has impaired the solvency and the liquidity of the financial system. It was believed that the housing market and hence the land market would never be saturated. There was a tacit conviction that the

---

same, because they govern over thousands of municipalities with less than 500 or 2000 inhabitants and they are facing an unstoppable process of desertification', and he adds that 'in these municipalities and in those with more population and with a larger territory, it is necessary to avoid an excessive degree of familiarity between the authorities and the citizens in the management of public affairs. Only a certain distance between the decision making organ, which is surrounded and full of neighbouring interests, will prevent the use of subjectivity and of arbitrariness in the management of the territory and in the protection of the environment'. In the same direction, see MARTÍN MATEO, R. (2007: 240-248).

housing demand was inexhaustible and that the credit capacity of Spanish and foreign families had no limits, in a context where financial costs were being cut, which made money lose its value as a result of the combination of rates and inflation. It was believed that the credit institutions would continue financing anything and anyone. And these beliefs eventually proved to be wrong. Everything has stopped, and after the bursting of the housing bubble it seems as if the field of urban planning had become a piece of wasteland with a huge mortgage and as if nobody knew when it is going to be redeemed. 'Financial urban-planning' – the use of urban planning as a source of financing for public policies or for private business – has ceased to be workable, and it is not foreseeable that the situation will change soon.

The environmental implications of urban-planning and the tensions they generate have also been apparent over the last years. Rather than a standard to take into account, environmental considerations have become an enemy for urban-planners. The assessment and balancing of environmental considerations seem to be the enemy to beat; they seem to be an obstacle which hinders urban development and which has to be overcome for the sake of a growth rate which is unsustainable and, therefore, unreal. The need to protect the environment has been surrendered to the power of money. It has been seen, alternatively, as an emergency and as a temporary fad, and it has only recovered its importance when the power of money has been momentarily weakened by the crisis, when the urban-management model has died, after draining all its resources. Urban planning is not anymore a financial tool, and it will not be again for a long time. However, the current crisis also jeopardizes the protection of the environment, since environmental constraints risk to be seen as an obstacle that hinders longed-for economic initiatives, which means that it may once again be sacrificed with the aim of fostering the economy and of overcoming the current situation.

The trend to integrate urban-planning and environmental policies may be revitalised by the expanding competence of the EU in environmental matters, and by its emerging policy on urban planning, which is embodied in the *European Spatial*

*Development Perspective*<sup>9</sup>. The exclusive role played by Member States in the field of urban planning is being eroded by several European actions, which seem to be based on the need to manage in an environmentally sustainable way the use of the territory and, in particular, of urban land. Sustainability is the most important axis along which the European actions are designed in the field of urban planning. Urban planning calls for an integrated treatment of towns in order to achieve an adequate and sustainable urban environment<sup>10</sup>; at the same time, the urban space has to be recognised as a central element in the socioeconomic dynamism of the European Union and in its cohesion policies<sup>11</sup>. As I explain below, the urban space and its design are considered as essential elements for the balanced and sustainable development of the European territory as a whole.

As far as the urban environment is concerned, the approach of the Commission to cities, as already exposed in the Green Paper, has tended to be expansive and to go beyond the boundaries of the urban planning sector<sup>12</sup>. Although the concerns for urban planning expressed by the Commission in the Green Paper were prompted by its environmental implications (air, water and soil pollution, transports, waste management, etc.), the integrated approach advocated in that document was welcome as the announcement of a more ambitious policy, which could eventually result in the development of a global urban

---

<sup>9</sup> *European Spatial Development Perspective: Towards a balanced and sustainable development of the territory of the European Union*, agreed at the Informal Council of Ministers responsible for Spatial Planning in Potsdam, May 1999.

<sup>10</sup> *Green Paper on the urban environment*, COM (1990) 218 final, 26 June 1990; *Towards an urban agenda in the European Union*, COM (1997) 197 final, 6 May 1997; *Towards a thematic strategy on the urban environment*, COM (2004) 60 final, 11 February 2004; *Thematic Strategy on the Urban Environment*, COM (2005) 718 final, 11 January 2006.

<sup>11</sup> *Cohesion Policy and Cities: the urban contribution to growth and jobs in the regions*, COM (2006) 385 final, 13 July 2006, which responds to the *European Parliament resolution on the urban dimension in the context of enlargement*, A6 (2005) 272, 21 September 2005.

<sup>12</sup> LÓPEZ RAMÓN, F. (2004) 'Fundamentos y tendencias del urbanismo supranacional europeo', *Revista de Urbanismo y Edificación*, No 9, pp. 72-74.

regime. A fair amount of the urban-related policies developed by the European Institutions over the last years respond to the ambitious approach set out in the Green Paper. This is the case of the environmental impact assessment of the instruments of urban planning, the development of urban regeneration policies with the URBAN and INTEGRA programs, the programs for sustainable building such as CONCERTO, the development of a thematic strategy for soil protection<sup>13</sup>, the enhancement of citizen participation and information or the design of policies for the conservation of the cultural heritage.

The *Thematic Strategy on the Urban Environment* is certainly one of the essential instruments – although not the only one<sup>14</sup> – to meet the objectives of the European Union’s strategy on sustainable development<sup>15</sup>. From this perspective, it seems that Community action has focused on environmental issues in order to avoid doubts being raised about its competence to intervene in such a sensitive sector. However, in spite of the key role recognised to the local Administration in this area, the *Thematic Strategy on the Urban Environment* stresses the need ‘to act at all levels of government’, because national and regional, as well as EU authorities, have their own role to play. The main goal of the Strategy is to improve the quality of the urban environment, to make cities a healthier and more attractive place to live in, to work and to invest, and to mitigate the negative environmental effects that cities can produce, especially as regards climate change. The measures put forward by the Commission are consistent with other European initiatives, such as the Aalborg Charter adopted at the European Conference on Sustainable Cities held on 27 May 1994 and the Local Agenda 21. The development and implementation of the latter has been the object of many conferences, which have focused on the design of

---

<sup>13</sup> See COM (2006) 231 final, 22 September 2006.

<sup>14</sup> The actions of the Commission related with the urban contribution to growth and jobs, i.e., with the function played by the urban phenomenon in the economic structure and in the cohesion policies of the European Union, is a clear complement of the *Thematic Strategy on the Urban Environment* [see COM (2006) 385 final, 13 July 2006, which is clearly linked to the ideas of the document COM (1997) 197 final, 6 May 1997 and with the European aspiration to a common urban policy].

<sup>15</sup> COM (2005) 718 final, 11 January 2006, on the *Thematic Strategy on the Urban Environment*.

sustainable urban transport plans, the exchange of information on good practices and the reinforcement of the synergies with other Community policies such as waste management, air quality, energy saving, the recovery of polluted soil, sustainable building and the integrated strategies for urban regeneration. In any event, the Strategy pins high hopes on sustainable urban design. In order to be sustainable, urban design must stop cities from expanding out of control and thus reduce the loss of green space and of biodiversity, and it must comprise policies directed at promoting sustainable land reuse so as to stop urban sprawl and to reduce soil sealing, to promote urban biodiversity and to increase environmental awareness amongst citizens<sup>16</sup>.

Despite the fact that some efforts haven been made, it would be delusive to say that the foregoing circumstances have generated no victims. There are indeed many victims. The most conspicuous ones are the territory, the cities, many youths – unable to have access to their own house until they are in a position to buy it –, and an important percentage of homeless people, left aside by the system. But, in addition to those, mention should be made of the hundreds of thousands of families who bought their house on the verge of their payment capacity, and who are now enduring great difficulties to keep paying it. Month by month, these families contribute to the enrichment a minority made up of original land owners, intermediaries and developers, all of whom calculate the value of land as the value they expect to obtain from the real estate product. It is also these families who ultimately bear the cost of the development and building process, for such a cost is incorporated into the price they pay, together with the purely speculative price. Although some of these costs are legally allocated to the buyers, others should be bore in principle by the landowners and the urban development actors; instead of bearing these costs themselves, they charge them to the buyers. The legislation adopted by the Autonomous

---

<sup>16</sup> The intensity of these policies is coherent with the *European Parliament resolution on the alleged abuse of the Valencian Land Law or Ley Reguladora de la Actividad Urbanística (LRAU - law on development activities) and its effect on European citizens*, A6(2005) 382, 13 December 2005, and with the *European Parliament resolution on the results of the fact-finding mission to the regions of Andalucía, Valencia and Madrid conducted on behalf of the Committee on Petitions*, B6 (2007) 251, 21 June 2007, and especially with the harsh *Report of the European Parliament on the impact of extensive urbanisation in Spain on individual rights of European citizens, on the environment and on the application of EU law, based upon petitions received*, A6 (2009) 82, 20 February 2009.

Region of Valencia in 1994 was harshly criticised, on the ground that it allowed the development agent to better its offer at the landowners' expense. The same happens when urban agreements are used to charge urban development projects managed according to the compensation model with costs which do not legally correspond to them, and which end up being added to the price of the end product – and yet this does not usually attract the same sort of criticism –. The principle of equality in the contribution to the public expenses is thus ignored, and the costs which should be satisfied by the public budget, and financed by the ordinary mechanisms with which the public budget is funded, are thus charged to the families. It should be noted that this conduct – inflating the urban development costs and using the revenues thus obtained to finance urban infrastructures and facilities which go beyond what urban development requires –, directly benefits a minority: the public managers, who can thus sponsor urban projects that go beyond the financial capacity of the public Administration they are in charge of, and who can then exploit them as an achievement of their own or of their political party.

## II. A BODY OF PUBLIC LAW OF AN EXCEPTIONAL CHARACTER

If it is not easy to grasp all the interests at stake in urban planning, it is not easy either to understand its strictly legal dimension. Urban planning law has become, in the course of the last decades, a body of public law of an exceptional character. It is worth reflecting upon the effects produced by some of the legal institutions that are usually considered to be central to urban planning law and, in particular, the extent to which they have contributed to the current situation – to the bursting of the housing bubble and of other previous bubbles –. It would not be reasonable to think, *a priori*, that they are not related to what has happened, be it as a tool, be it as a mere channel. It is obvious, in the light of the results, that the system of weights and counterweights that should have balanced the different forces acting in the field of urban planning did not work particularly well. Regulatory problems can certainly be identified in the credit sector, where irresponsible risk assessment was allowed; but problems can also be identified in the administrative regulation of urban planning, many of which have incidentally been pointed out by the doctrine, the courts and the European institutions.

Overall, however, the regulation of urban planning has been assessed in rather positive terms by the specialized lawyers. This can be explained by the fact that it is these

very lawyers who are often in charge of managing the urban process, in the framework of the compensation model; were this public activity really in the hands of the public Administration, this would not have been possible. In any event, there have also been critical voices with regard to the model established in 1956, which is the one at the origin of the anomalies that are analysed below and that the last reform seems to address. Although formally justified by many authors, by the case law and sometimes even by legislation itself, these anomalies can be found in many different aspects of urban planning law and practice. There are many issues in which urban planning does not seem to follow the general patterns of our legal system: public procurement, organisation, competence, economic assessments, special rules on the derogation of norms (*inderogabilidad singular de los reglamentos*), not to mention the apparent ineffectiveness of some criminal offences when applied in this field.

#### 1. Public procurement and urban planning

One of the problems that has attracted more attention is the absolute or partial lack of compliance with public procurement rules in certain areas of urban planning, and in particular in those cases in which the urban development process is indirectly managed – especially by compensation boards (*Juntas de compensación*) –. Pursuant to the controversy provoked by the urban planning policy of the Autonomous Community of Valencia and by the intervention of the European Commission and of the European Court of Justice, an intense debate has arisen as to the nature and legal regime of development or infrastructure works<sup>17</sup>. Traditionally, infrastructure works have been considered subject to

---

<sup>17</sup> PARADA VÁZQUEZ, R. (1998-1999) 'La privatización del urbanismo español (Reflexión de urgencia ante la Ley 6/1998 de régimen del suelo y valoraciones)', *Documentación administrativa*, No 252-253, pp. 75-93; FERNÁNDEZ RODRÍGUEZ, T. R. (2001) 'La Sentencia del Tribunal de Justicia de 12 de julio de 2001 (asunto Proyecto Scala 2001) y su impacto en el ordenamiento urbanístico español', *Actualidad Jurídica Aranzadi*, No 505/2001, also in *Revista de Urbanismo y Edificación*, No 4, 2002, and in *Documentación administrativa*, No 261–262 (2001–2002), which is the one I quote, pp. 11-26; VAQUER CABALLERÍA, M. (2001–2002), 'La fuente convencional, pero no contractual, de la relación jurídica entre el urbanizador y la Administración urbanística', *Documentación administrativa*, No 261–262, pp. 231-255; PAREJO ALFONSO, L. (2001–2002) 'La cuestión de la constitucionalidad de la figura urbanística del «urbanizador» en su concreta versión, la de la legislación valenciana', *Documentación Administrativa*, No 261–262, pp. 69-108; TEJEDOR BIELSA, J. C. (2001a) 'Contratación de la obra pública

public procurement rules and hence to the public works contract, since they clearly fall within the definition laid down by Article 1(2)(b) of Directive 2004/18/EC of the European Parliament and of the Council, of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and by Article 6 of Law 30/2007, on public procurement (*Ley de Contratos del Sector Público*).

On the contrary, the same infrastructure works are considered to be private when the execution corresponds to a compensation board – an administrative entity, the most important decisions of which need to be approved by the responsible public Administration, and Administration before which those acts can furthermore be challenged –. In that case, the works are considered to fall outside the scope of the public procurement rules, despite the fact that they have to satisfy the needs defined by the public Administration that approves the urban development project<sup>18</sup>.

---

urbanizadora y sistema de compensación. La Sentencia del Tribunal de Justicia de 12 de julio de 2001', *REDA*, No 112, pp. 597-611, and (2001c) 'Los sistemas de actuación entre la tradición y la modernidad. Su configuración como esquemas típicos de relación en la ejecución de la obra pública urbanizadora', *Revista de Urbanismo y Edificación*, No 6, pp. 77-85; GONZÁLEZ-VARAS IBÁÑEZ, S. (2002) 'Los convenios urbanísticos y el derecho comunitario europeo: La STJCE de 12 de julio de 2001, asunto C-399/98', *Revista de Derecho Urbanístico*, No 197, pp. 97-103; PARDO ÁLVAREZ, M. (2002) 'El derecho a urbanizar: ¿Sumisión a la Ley de Contratos?', *Revista de Derecho Urbanístico*, No 198, pp. 11-36; BUSTILLO BOLADO, R. (2002) 'Derecho urbanístico y concurrencia en la adjudicación de los contratos públicos de obras: La Sentencia del Tribunal de Justicia de las Comunidades Europeas de 12 de julio de 2001', *Revista de Urbanismo y Edificación*, No 5, pp. 117-134; GIMENO FELIÚ, J. M. (2006) *La nueva contratación pública europea y su incidencia en la legislación española*, Civitas, Madrid, pp. 121-125, y (2007b) 'Actividad urbanística y contratos públicos: La lógica de la publicidad y concurrencia en las infraestructuras públicas', *Revista aragonesa de Administración pública*, monographic volume on *El nuevo régimen del suelo*, Zaragoza, pp. 78-97; GÓMEZ-FERRER MORANT, R. (2001–2002) 'Gestión del planeamiento y contratos administrativos', *Documentación Administrativa*, No 261–262, pp. 48-54 y 64-67; TARDÍO PATO, J. A. (2007) *La gestión urbanística en el derecho de la Unión Europea, del Estado español y de la Comunidad Valenciana*, Aranzadi, Pamplona, pp. 361-397 y MENÉNDEZ REXACH, A. (2009) 'Contratación y urbanismo. Contratación y sistema de obra urbanizadora. Otras modalidades de ejecución de las obras de urbanización', in *Estudios sobre la Ley de Contratos del Sector Público*, Institución Fernando El Católico, Zaragoza, pp. 535-584.

<sup>18</sup> For all, see LÓPEZ RAMÓN, F. (2007) *Introducción al Derecho urbanístico*, Marcial Pons, Madrid, p. 147.



After so many years of private management, after so many years leaving aside competition, transparency and the most basic principles of public procurement, practice has turned into law and fiction into reality. It is necessary to consider whether the defining element of public works is the body in charge of their material execution or whether some weight should be given to the needs they are bound to satisfy, to whom has imposed them and to their end – especially when the result is going to join the public domain, for the use or service of the citizens –. In brief, it is necessary to determine whether the criterion to consider that a works contract is public is functionally subjective or whether it can also be functionally objective, as argued by some authors<sup>19</sup>.

In my opinion, it is not the mere presence of a contracting authority which requires competition, as proved by the Judgment of 12 July 2001 of the European Court of Justice in the *Scala* case. Competition is the result of the public needs and decisions, which in this case take the form of a development plan and project that require the execution and provide a detailed account of the works. As far as the development agent is concerned, it is settled

---

<sup>19</sup> GIMENO FELIÚ, J. M. (2007a) 'El urbanismo como actividad económica y mercado público: la aplicación de las normas de contratación pública', *Revista de administración pública*, No 173, pp. 78-97, and pp. 95-96 for an analysis of the concept of works in the *Auroux* judgment; and 2007b: 158-162. FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: p. 20), analysing the Judgment of the Court of Justice of 12 July 2001, had argued that the development works are always public, even if it is the owner wishing to build who executes them; however, he had questioned whether this implied that urban planning had to be subject to the competence of the European Union, 'the risk being to transform a system of liberties such as that of the European Union into a totalitarian monster, in the name of the very liberties the system proclaims'. The uncertainty of the author as to the scope of the *Scala* judgment is revealed by the fact that he tries to limit its impact on urban management: 'unless the Court of Justice does it in the future, it would be necessary to modify Directive 93/37, adding a new exception to the list laid down by Article 7' [FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: p. 19)]. The Judgments of 18 January 2007 (*Auroux* case) and 21 February 2008 (*Ley de Obras Públicas* case) do not modify anything. Neither does the Commission, when it sues Spain for certain alleged irregularities of the Valencian legislation. The definitive answer may come from the future ruling of the Court in this case.

case law of the Supreme Court that the infrastructure works contract is public even if the contracting authority – normally, the Municipality – does not bear its cost<sup>20</sup>.

However, there are also strong arguments in favour of the contractual freedom of the compensation boards, and against the possibility that a contractual relationship may arise between the compensation boards and the responsible Administration<sup>21</sup>. Departing from a model that links the right to promote the development of land to the ownership of a piece of land which satisfies the conditions established by the urban plan, FERNÁNDEZ

---

<sup>20</sup> Judgments of the Spanish Supreme Court of 22 November 2006 (rec. 3961/2003); 28 December 2006 (rec. 4245/2003), 27 March 2007 (rec. 6007/2003), 6 June 2007 (rec. 7376/2003), 27 December 2007 (rec. 10/2004), 22 January 2008 (rec. 687/2004), 5 February 2008 (rec. 714/2004), 27 February 2008 (rec. 6745/2005), 2, 8, 28 and 29 April 2008 (rec. 361/2005, 1231/2004, 6641/2005 and 2282/2005), and 27 January 2009 (rec. 8540/2004, the first judgment on the legislation of the Autonomous Community of Castilla-La Mancha, since all the others are concerned with the Autonomous Community of Valencia). On the case law of the Supreme Court and of the lower Courts, TARDÍO PATO, J. A. (2007: 361-367); and CORCHERO, M. (2008) 'El agente urbanizador valenciano y la legislación de contratos de las administraciones públicas: referencia a la reciente jurisprudencia del Tribunal Supremo', *Revista de Urbanismo y Edificación*, No 16, pp. 220-234.

<sup>21</sup> In this sense, FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 21); GIMENO FELIÚ, J. M. (2007: 92) y VAQUER CAVALLERÍA, M. (2001-2002) 'La fuente convencional, pero no contractual, de la relación jurídica entre el agente urbanizador y la Administración urbanística', *Documentación administrativa*, No. 161'-262, pp. 244-247. GÓMEZ-FERRER MORANT, R. (2001-2002: 49) shows more doubts when he states that 'strictly speaking, it is not possible to say that a contract is celebrated, even if the acts performed by the parties prove that there is a coincident will (the very agreement on the use of a system, when it is reached at the request of the owners, the approval of the basis, the approval of the development project, the acceptance of the development works once finished, etc.)'; similar arguments can be found in TEJEDOR BIELSA, J. C. (2001a: 608-611). LÓPEZ RAMÓN, F. (2007: 147) expresses his doubts on the relationship between the board and the Administration, which he does not consider to be contractual, and on the effect of the *Scala* Judgment on the compensation system, which is based on the entrustment made by the law of the works to the owners (although he omits that is not a direct entrustment, but one conditioned by many factor, as GÓMEZ-FERRER points out. SORIANO, J. E. and ROMERO REY, C. (2004) *El agente urbanizador*, Iustel, Madrid, pp. 195-202, also find the question doubtful. On the contrary, ASÍS ROIG, A. (2001-2002) 'Caracterización de la función de urbanización', *Documentación administrativa*, No 261-262, pp. 226-228, considers that the relationship between the Administration and the actor who assumes the performance of the development works is always be a public contract, especially 'in the case of the compensation system, given the public character of the Compensation Board, the nature of the activity that is performed in the general interest, and the control and supervision assured by the urban planning Administration over the board'.

RODRÍGUEZ argues that the public works and free competition dogma, if taken to its ultimate consequences, can lead to totally unsatisfying results<sup>22</sup>. The landowner who gets a building licence with the right and the obligation to carry out the development process, the real-state company which can carry out with its own means the development process of the lands it owns, the development projects which affect a single owner or the development company which has a seat in a compensation board, they all have the right and the obligation to finance and to carry out the infrastructure building process. In those cases, the urban planning regulations seem to define the content of the right of property over land, which would exclude the need to introduce competition in the exercise of the different faculties which form that right in the terms of the *Scala* judgment<sup>23</sup>. In this sense, the European debate does not look very different from the debate that has taken place in Spain during the last years. The right to promote the development of land can either be part of the right of property – which would take the infrastructure works out of the scope of the European competition rules –, either be alien to it – in which case it is based on a power granted by the Administration and therefore subject to competition requirements –.

Leaving aside the strictly legal arguments, the resistance met by the position of the European Commission amongst many urban managers of the compensation model is understandable. The infrastructure works create the urban space and generate infrastructures, nets, services and public facilities. The reason why the most basic principles of competition, transparency and objectivity have been ignored in their award is the interposition of an association of landowners – of an administrative nature and under the control of the Administration, which approves its more important decisions and which rules on the actions brought against them, but which surprisingly has no influence on its contractual decisions –. This is the reason why the award and the whole development

---

<sup>22</sup> FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 21).

<sup>23</sup> FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 20-24). His main argument is the 'logic line of property', to which he refers when he analyses the hypothesis of the landowner who has to complete the infrastructure works in order to start building. TARDÍO PATO, J. A. (2007: 483-487) expresses a similar opinion, criticising the position of the European Commission.

process has been controlled by the legal and technical bodies which now claim that the public works are private because of the fact that they are commissioned by a board of landowners and not by the Administration itself<sup>24</sup>. But the foregoing is not sufficient to turn something public into private: it cannot alter the nature of an infrastructure which creates the urban space and which ultimately has to be delivered to the Administration that manages the city<sup>25</sup>. In any event, the debate is open and, as it is alas too often the case, it is unlikely that the Spanish legislation will solve the problem by its own means. The solution will come from Europe, and in particular from the Court of Justice of the European Union<sup>26</sup>. As it is so often the case, the solution may not lie on the extremes. It may be convenient to set up formulas that recognise a certain priority to landowners for the execution of the infrastructure building process, while at the same time providing for the

---

<sup>24</sup> TARDÍO PATO, J. A. (2007: 539).

<sup>25</sup> The Judgment of the Spanish Supreme Court of 24 May 1994 (rec. 4739/1990), mentioned by FERNÁNDEZ RODRÍGUEZ, T. R. (2001-2002: 22), clearly states that the contract celebrated by a Compensation Board 'is a contract for the performance of infrastructure works and hence a public works contract, which binds the concerned Administration'. This Judgment quotes as authoritative the previous Judgment of 26 February 1985 (Ar. 1233/1985), which in no way questions the competence of the contentious-administrative order to resolve the issues that may arise with regard to a contract for the performance of infrastructure works between an administrative association of owners and the building company. Since then, many Judgments have declared the public character of infrastructure works in cases related with the legislation from Valencia and Castilla-La Mancha (see previous note).

This argument could be questioned with regard to private development projects. In my opinion, however, this type of projects are also the result of the public competence over urban planning, and inasmuch as they fall within the model designed by the public power, they are not completely alien to it, despite the fact that some of the resulting infrastructures, if this is allowed by the regional legislation.

<sup>26</sup> And there are some interesting precedents: Judgments of 12 July 2001, *Scala* case; 20 October 2005, *Mandato de obras* case; 18 December 2007, *Auroux* case; and 21 February 2008, *Ley de obras públicas* case.

intervention of the Administration, or of other interested third parties, in order to implement the approved urban plan if the landowners do not take the initiative<sup>27</sup>.

The Court of Justice has already analysed the different conditions that trigger the application of the European rules on public procurement. While some of them are unquestionable – the presence of a contracting authority<sup>28</sup>, the execution of works within the meaning of the Directive<sup>29</sup>, and the written form of the contract<sup>30</sup> –, the rest of them are more problematic – i.e., the very existence of a contract, its pecuniary interest and the presence of a contractor –. As explained above, those are precisely the issues that have given rise to doubts from the standpoint of Spain's internal law. It should be recalled, however, that the Court took the view, with regard to the existence of a contract, that the fact that the object, the goal, and the characteristics of urban planning law are different from those of the Directive does not imply that the latter should not be applied when a situation falls within its scope, as defined by its own provisions. The Court also confirmed the synalagmatic and onerous character of the contract because the 'the total or partial set-off against the amount payable in respect of the infrastructure contribution', the payment of which is linked to the permission to carry out the works, 'suggests that, in consenting to the direct execution of infrastructure works, the municipal authorities waive recovery of the amount due in respect of the contribution' established to finance the works when they are

---

<sup>27</sup> TEJEDOR BIELSA, J. C. (1998) *Propiedad, equidistribución y urbanismo. Hacia un nuevo modelo urbanístico*, Aranzadi, Pamplona, pp. 349-353, and (2008) "Urbanismo", Capítulo II, Parte IV, Volume *Derecho Administrativo. Parte Especial*, Civitas, 7th ed., Madrid, pp. 640-642; TARDÍO PATO, J. A. (2007: 539). Article 6(a) of the *Texto Refundido de la Ley del Suelo de 2008* seems to endorse this solution, since it authorises the regional legislator to establish some 'peculiarities or exceptions' for the award of the infrastructure works made with publicity and competition 'in favour of the initiative of the landowners'. It is the initiative which is therefore relevant, and not the mere fact of being the landowner. The owner decides, directly or indirectly, to become a development agent.

<sup>28</sup> Judgment of 12 July 2001, para. 57.

<sup>29</sup> Judgment of 12 July 2001, para. 58-61.

<sup>30</sup> Judgment of 12 July 2001, para. 87.

not directly executed<sup>31</sup>. Finally, the Court has made it clear that the presence of a contractor cannot be denied when the Administration signs the development agreement with the landowners and not with a construction businessman or developer, because there is always a party which assumes the responsibility for the performance of the works, even if the party in question will not carry them out directly<sup>32</sup>.

The Court of Justice therefore concluded that the domain of urban planning is not exempted from applying the rules on public procurement and, particularly, the public works regime, no matter how specific its object, its goal and its characteristics are. However, the Court is probably aware of the significant impact that this stance may have on the urban development practice of several Member States; it has thus foreseen certain mechanisms to avoid the liquidation of the legal regimes that entrust certain urban management tasks to the landowners, guaranteeing their compatibility with the public procurement rules. The Court has clarified that the fact that the Municipality is obliged to respect the public procurement rules does not mean that these rules must be directly applied by it whenever it is responsible for a given project; the application can be ensured indirectly, by whomever is in charge of the execution of the project, for example the landowner<sup>33</sup>. As a result of this construction,

---

<sup>31</sup> Judgment of 12 July 2001, para. 81.

<sup>32</sup> Judgment of 12 July 2001, para. 93-94, which confirms the ruling of the Court in the Judgment of 14 April 1994, *Ballast Nedam Groeg NV v Belgium*, where the Court held that a company which does not execute works by itself, but which has them executed by its agencies or branches or having recourse to external technical teams or to other companies, can be a works contractor for the purpose of the Directive. Incidentally, this could be the case of compensation boards when a development works company sits in them (see in that connection PERNAS GARCÍA, J. J. (2008) *Las operaciones in house y el derecho comunitario de contratos públicos*, Iustel, Madrid).

<sup>33</sup> The Court states that 'the Directive would still be given full effect if the national legislation allowed the municipal authorities to require the developer holding the building permit, under the agreements concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive so as to discharge their own obligations under the Directive. In such a case, the developer must be regarded, by virtue of the agreements concluded with the municipality exempting him from the infrastructure contribution in return for the execution of public infrastructure works, as the holder of an express mandate granted by the municipality for the construction of that work. Article 3(4) of the Directive expressly allows for the possibility of the rules

the door remains seemingly open for the landowners to be involved in the management of urban development.

The debate on the application of the European rules on public procurement to infrastructure works is thus open. The case law of the Court of Justice is abundant – to name but a few, see the Judgment of 18 January 2007, in the *Auroux* case, and the Judgment of 21 February 2008, in the *Ley de obras públicas* case –. The Commission has also partaken in this ongoing debate: it has taken a clear and strong position in relation to the urban development model of the Valencian Autonomous Community, issuing several letters of formal notice and reasoned opinions that have not prevented the matter from being brought before the Court<sup>34</sup>. The Commission has taken the view, on the basis of the *Scala* case, that 'infrastructure works (...) constitute building and civil engineering works, hence activities of the kind referred to in Annex II to the Directive 93/37/EEC, and are sufficient of itself to fulfil an economic and technical function'<sup>35</sup>. On these grounds, the Commission asserts the contractual and onerous character of the relationship between the Administration and the development agent, also in relation to the draft of the technical documents needed to carry out the urban development process, so that the public

---

concerning publicity to be applied by persons other than the contracting authority in cases where public works are contracted out' (Judgment of 12 July 2001, para. 100).

<sup>34</sup> Letter of Formal Notice SG (2005) D/201/201301, of 21 March, which was followed by Reasoned Opinion C (2005) 5320, of 13 December 2005, addressed to the Kingdom of Spain pursuant to Article 226 of the Treaty establishing the European Community, concerning the breach of Directives 93/37/EEC and 92/50/EEC with regard to the *Programas de Actuación Integrada* of Law 6/1994, of 15 November (*Ley reguladora de la Actividad Urbanística de la Comunidad Valenciana*); and Letter of Formal Notice C (2006) 1117, of 4 April 2006, which was followed by Reasoned Opinion C (2006) 4738, of 12 October 2006, addressed to the Kingdom of Spain pursuant to Article 226 of the Treaty establishing the European Community, concerning the incompatibility of Law 16/2005 (*Ley Urbanística Valenciana*) and the Decree 67/2006, of 12 May (*Reglamento de Ordenación y Gestión Territorial y Urbanística*), with Directive 2004/18/EC, of the European Parliament and of the Council, of 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and with certain general principles of Community law derived from the EC Treaty, and the public contracts awarded on the basis of Law 6/1994 between 21 March 2005 and 31 January 2006.

<sup>35</sup> Reasoned Opinion C (2005) 5320, 9 (my translation).

procurement rules must be applied. In that connection, the fact that the development agent may simultaneously be the landowner is irrelevant, even if its right stems from a statutory conception of property<sup>36</sup>. Furthermore, the contractual nature of the relationship between the Administration and the development agent is so clear, in the view of the Commission, that the latter has even called into question the use of land ownership as a criterion to choose the development agent, on the ground that it amounts to a breach of the principle of equality between tenderers<sup>37</sup>. According to the Commission, land ownership cannot be a relevant criterion for the selection of the agent that is going to draw up and execute the urban instruments required by the infrastructure works.

The Spanish legislation on urban planning has not devoted much attention to competition between economic agents, despite its being one of the core elements of the European integration process. Urban planning regulation has ignored competition issues by focusing on the right of property and on the different rights and obligations that arise from the property of land. Leaving aside the direct management hypothesis, the access to the development activity and to the private management of the development process – of the process whereby natural, green space is transformed into urban space – is only possible on the condition that the property of the land is acquired or that an agreement is reached with its owners. Together with the Administration, the landowner is traditionally the only actor who can manage the urban development process, to the exclusion of any other actor,

---

<sup>36</sup> The Commission states that everything which has been said before is equally applicable to the special award cases of Articles 50 (priority award) and 51 (connected or conditioned award) of the LRUA [Reasoned Opinion C (2005) 5320, 10]. The first provision used to regulate the priority award, which disappeared in the new Valencian legislation.

<sup>37</sup> When analysing the criteria for the selection of tenderers laid down by the Valencian legislation, the Commission states that 'the first part of this criterion, the proportion of the land which belongs to the tenderer, is contrary to the principle of equal treatment and non-discrimination and/or to Article 49 of the EC Treaty. According to the LUV, any natural or legal person fulfilling the selection criteria can act as development agent, irrespectively of whether it is the owner of the land affected by the project. This criterion runs counter to this objective, since it favours the tenderers that own all or part of the land over those who do not. This different treatment is not justified in the light of that objective and is therefore contrary to the principle of equal treatment and non-discrimination' [Reasoned Opinion C (2006) 4738, 42].



sometimes on the basis of the legal consideration of compensation boards as the beneficiaries of the expropriation. As a result, the notion of free competition as promoted by Europe has not reached urban planning law, although the case law of the European Court of Justice is steadily advancing in that direction. The European regime considers that the infrastructure works are public and as such subject to public procurement rules, and that they cannot be deprived of that condition by any agreement, even if it involves a transfer of the ownership of land. Nothing more – for the time being –, and nothing less. In the *Scala* case, the Court of Justice made it clear that the agreements reached with the landowners cannot be used to entrust them with the execution of the infrastructure works without tender: 'infrastructure works of the kind listed in Article 4 of Law No 847/64 constitute either building or civil engineering works, hence activities of the kind referred to in Annex II to the Directive, or works sufficient in themselves to fulfil an economic and technical function' (para. 59). It is only a matter of time before the Court rules on the public works regime in Spain, irrespective of whether its execution corresponds to an urbanizing agent selected following a competitive procedure, to a board of landowners, or to other bodies set up without competition.

## 2. Urban planning agreements

From the perspective of public procurement law, the legal regime of the public works contract is not the only surprising element that can be found in the field of urban planning. The traditional case law on urban planning agreements (*convenios urbanísticos*) is equally staggering, both from the standpoint of public procurement law and of the principle according to which public powers cannot be disposed of. There are many municipalities in which no project can be conducted nowadays without such an agreement. In the field of urban planning, the agreement seems to be a minor god, the lever that can move anything, the key that can open anything and the law that can decide anything. Nothing without an agreement and everything beneath it. Within this framework, the urban plan is nothing else than the administrative instrument where the agreements previously reached by the Administration are captured; these agreements are thus the maximum symbol of the process of commercialization that affects today's public power, and of the loosening of the principle of non-disposal of public powers. According to PARADA, 'the urban planning agreements are very close to the criminal offence of bribery («I offer urban use to you, local government, provided you allow me to build on this land») and are

therefore absolutely incompatible with the philosophy that should underlie urban planning: consideration should only be given to the general interests, for it is on account of them that the Law laid down aseptic and exquisite procedures for the adoption of decisions and for their modification, and it is because of the agreements that those procedures are becoming a fake rite which only serves to legitimise what has been previously agreed<sup>38</sup>.

The urban planning agreement is, in my view, the result of a certain line of case law, which can be termed as hypocrite and contradictory<sup>39</sup>. In light of the fact that the legislator has expressly declared that the public competence over planning cannot be disposed of (Article 3 of the *Texto Refundido de la Ley del Suelo de 2008*), no other adjective can be used to describe the case law which states that the agreements are compatible with the principle of non-disposal, that there is no disposal because the Administration is under no obligation to conduct the procedure leading to the adoption of the plan (although some laws adopted by the Autonomous Communities qualify the absence of such an obligation) and that the Administration is under no obligation, but simply under the responsibility to do so<sup>40</sup>. The contractual nature of the agreements always entails reciprocal obligations, which in turn give rise to contractual liabilities. The existence of liabilities implies that some rights and some expectations have arisen in the other party, and that they can be assessed and – eventually – indemnified. It is therefore not surprising that many agreements contain a clause whereby the Administration is exempted from any responsibility in some situations – and therefore not in others –. Although the power is therefore theoretically non-disposable, what happens in practice is that the agreements have as their object a certain form of exercise of that power, a specific content of the planning decisions or even the exercise of the exclusive power of the Municipality to initiate the procedure or to revise the general plan. And everything happens ignoring the most

---

<sup>38</sup> PARADA VÁZQUEZ, R. (1998-1999: 137).

<sup>39</sup> PARADA VÁZQUEZ, R. (1998-1999: 137).

<sup>40</sup> BUSTILLO BOLADO, R. O. y CUERNO LLATA, J. R. (1996) *Los convenios urbanísticos entre las Administraciones locales y los particulares*, Aranzadi, Pamplona, p. 183 or, *in extenso* with regard to the issue of misuse of power, pp. 102-110; HUERGO LORA, A. (1998) *Los convenios urbanísticos*, Civitas, Madrid, pp. 97, 110-115.

elementary procedures for the control of the contractual activity of the Administration. The urban planning agreements have a contractual nature and they generate contractual liability, but they are subject to procedural rules which are almost symbolical and which do not guarantee any sort of prior control, nor their financial viability.

Although originally designed as an instrument to encourage compliance with the law and not to facilitate its transgression, the agreements have in practice been perverted and they are nowadays used as a mechanism to put pressure on the authorities of the Autonomous Communities. How else could we assess the agreements whereby the Municipality receives in advance economic benefits in cash or in kind that it will be unable to give back should it fail to meet the agreement? How else could we assess the agreements which treat as an advance payment the execution of public works, thereby ignoring the rules on public procurement? Finally, bearing in mind the prohibition to dispose of the public power to supervise territorial and urban design, how else could we assess the agreements which describe and predetermine, almost to its last detail, the content of a new general plan or of its modifications? The settled case law according to which the agreements involve no waiver of the public planning competence only serves to hide the reality: the commercialisation of the planning competence and its sale by its only possible holder, in exchange for a number of benefits obtained in advance. The commercialisation of the public planning competence is certainly coherent with the transformation of the public works contract into a private one and, more generally, with the philosophy underlying a system which relies primarily on compensation boards. There are, however, some limits. The two most important ones are the misuse of power prohibition and the arbitrariness prohibition, as noted by the doctrine and by the courts. But it seems convenient to go further, following the path initiated by the most recent State legislation. It should be recalled, for example, that it is not possible to include in the agreements any clause excluding the application of the rules on public procurement to infrastructure works, for example awarding separate contracts to the individuals who subscribe the agreement with the Administration<sup>41</sup>. This prohibition is of particular importance when one party assumes,

---

<sup>41</sup> For all, see Judgments of the Spanish Supreme Court of 27 December 2005 (rec. 4875/2002) and 28 March 2006 (rec. 6047/2002).

by virtue of the agreement, certain obligations with regard to the development process that go beyond the duties imposed upon it by the urban planning legislation. In those cases, it will be possible to agree on the private funding of the public works, but their tender will have to respect the public procurement rules.

### 3. The flight from Administrative law. The urban-planning companies.

Urban planning also displays some peculiarities from the organisational point of view. Many Autonomous Communities have regulated the 'mixed urban-planning companies' (*sociedades urbanísticas mixtas*), formed by the Administration and by the landowners affected by a certain development project. These societies have been entrusted with very different functions: while some of them are clearly public, others are private, but still performed with no respect for the most basic rules of competition between economic actors. The obscurity surrounding the contractual practice of the private managers in charge of the compensation model of urban planning has thus been transferred to the public realm, trying to elude the rules on public procurement. At best, the surplus generated by those mixed societies, which would normally be treated as a profit by private companies, is used to finance public services and infrastructures; but in most cases those are alien to urban planning and should be directly financed by the public budget.

Some confusion also arises from the fact that those societies sometimes assume the task of managing the whole urban development process, and even the property of the Municipality, and from the fact that they respect only formally the competence of the local government, whose organs merely approve the planning and managerial decisions taken within the society. Furthermore, it is often the case that the establishment of these societies conceals the total privatisation of the urban planning activity of the Municipality, since the management of the society is entrusted to private third parties which are selected without even observing the rules on public procurement. The society thus becomes an empty carcass, a screen, a veil that hides managerial and decision-making structures which are totally alien to the municipal organisation, which are immune to public participation and which act in confrontation with the local authorities. The same happens, incidentally, with regard to publicly owned land, when the societies act as mere screens to mitigate the rigour of the regulation.

The urban planning companies (*sociedades urbanísticas*) established between several Administrations also present some peculiarities. Normally, the aim behind this joint venture is to foster certain urban actions which are of common interest to all the public shareholders and which can be of an industrial or residential character. In any event, the execution of the tasks entrusted to those societies used to be very problematic, in the light of the public procurement rules and as a result of the fact that their capital is held by different entities; however, those problems can be considered overcome, after the Judgment of 19 April 2007 in the *TRAGSA* case, where the European Court of Justice held that those societies could be regarded as an in-house service of the different Administrations that participate in its capital share, even if they have a minority stake.

#### 4. Land valuation and the expectations generated by urban-planning

The principle according to which the value of the goods that are expropriated should be assessed without taking into the account the project that is going to be executed blew up in relation to land. Both the legislator and the Supreme Court established the principle according to which account should be taken, not only of the project, but also of the mere expectations that could eventually come into being. Thus, when the value of a piece of land is assessed, the assessment looks at the market value that the land could acquire, in the long term, should certain public decisions be taken, i.e., to the value the land will have depending on the use it will be assigned in the future by the planning instruments. Not only are expectations considered: it is the most profitable expectation which counts, even if such a possibility depends on the adoption of several administrative decisions which are subject, as the Administration itself, to the general interest. CERDÁ declared as early as in 1860 that 'when the lands and the buildings where a street is going to be built are paid with public funds belonging to the State, the province, or the municipality, the administration buys to the owners of the adjacent pieces of land and buildings the right to become richer, at least doubling the value of the buildings and lands located on both sides of the new street, in an area equal in width to the normal length of the buildings'<sup>42</sup>. We

---

<sup>42</sup> I take the quote from BASSOLS COMA, M. (1973) *Génesis y evolución del Derecho urbanístico español*, Madrid, p. 257.

discuss today whether the Administration must pay to the expropriated owners the expected profit, assessed on a subjective and hypothetical basis, in order to avoid breaking the principle of equality recognised in the Constitution when exercising its expropriation powers. This is the debate underlying the Supreme Court's case law on the valuation of general systems (*sistemas generales*), which is based on the recognition of a universal profit which is equally shared by the all the owners directly affected by the urban development project designed by the plan. This leads to a universal land subdivision which seems to inspire certain of the provisions of the legislation of the Valencian Autonomous Community, inasmuch as it requires the delivery to the administration of certain protected pieces of land, depending on the dimension of the land reclassified as developable<sup>43</sup>.

The new regime for the assessment of the value of land pretends to change the evolutionary pattern that urban planning law has followed in Spain during the last sixty years. The new regulation is based on the central position assigned to land, which is simultaneously considered as the object of rights and as a limited and contingent resource which can be transformed into a business asset. The underlying philosophy of the old regulation is thus left behind, inasmuch as it was basically concerned with the regulation of the property regime applied to land. A shift has occurred in the way urban planning law is conceived: it is no longer the framework within which the property of land is defined, but rather the regulation of the use and conservation of land, which is the object upon which the non-disposable, public competence of territorial and urban organisation falls, and alongside which takes place the interaction between the rights and powers assigned to different actors, such as owners, undertakings and, in general, citizens.

From this ample perspective, the principle of sustainable development permeates all the new regulation. In effect, the public policies for the regulation, organisation, occupation, transformation and use of land have as their common goal the use of this

---

<sup>43</sup> Criticised in the last editorial he wrote before his death by GARCÍA-BELLIDO, J. (2005) 'Por una liberalización del paradigma urbanístico español (III): el tsunami urbanístico que arrasará el territorio', *Ciudad y Territorio*, No 144, pp. 273-284; and propounded as a model in the dissenting opinion of the *Dictamen del Consejo de Estado* of 26 June 2006 on the project of the *Ley del Suelo*.

resource in accordance with the general interest and with the principle of sustainable development (Article 2(1) of the *Texto Refundido de la Ley del Suelo de 2008*). These policies will therefore have to foster the rational use of natural resources, balancing the requirements stemming from factors such as the economy, employment, social cohesion, equal treatment and equal opportunities between men and women, health and security, and the protection of the environment; in particular, they will have to contribute to the prevention and reduction of pollution, trying to set up effective measures for the preservation and improvement of the nature, the flora and fauna and the protection of the cultural and landscape heritage, the protection of the rural and urban space, ensuring – with respect to the latter – that the occupation of land is efficient, that the necessary infrastructures and services are available, and that the different uses assigned to land are functionally and effectively combined when they perform a social function (Article 3(1) of the *Texto Refundido de la Ley del Suelo de 2008*). Urban and territorial organisation are, within this context, public functions which are not open to transaction and which organise and define the use of the territory and of land according to the general interest, determining the rights and obligations associated with the ownership of land, depending on its final use (Article 3(1) of the *Texto Refundido de la Ley del Suelo de 2008*).

Those are the premises upon which state legislation puts forward new principles and key ideas that are meant to inspire the regulation of urban planning as one of the fundamental matters related to the regulation of land. I cannot go any further. After the Judgment 164/2001 of the Supreme Court, the State is bound to exercise a competence which is almost impossible to exercise<sup>44</sup>, unless it decides to harmonize the regulation of urban planning, which is unlikely<sup>45</sup>. The competence for the development of the principles laid down by the state legislation corresponds to the Autonomous Communities' legislator, which is bound by its mandatory provisions, such as the new requirements concerning the

---

<sup>44</sup>TEJEDOR BIELSA, J. C. (2001b) 'Propiedad urbana y urbanismo como competencias estatales de imposible ejercicio en la STC 164/2001, de 11 de julio', *Revista Aragonesa de Administración Pública*, No 19, pp. 259-260 and (2001d) *Gobierno del territorio y Estado autonómico*, Tirant lo blanch, Valencia, p. 186.

<sup>45</sup> TEJEDOR BIELSA, J. C. (2001c: 80-84).

authorisation regime for the urbanisation of rural land – which impose a balancing assessment to ensure respect for the principle of sustainable development – and the legal regime of the urbanization activity – which must be carried out within the framework defined by Article 6(a) of the *Texto Refundido de la Ley del Suelo de 2008*<sup>46</sup>.

However thin it may be, the competence of the State in this field currently covers a crucial question: land valuation. This competence is actually claimed by the Charters of Autonomy of some Autonomous Communities. The regulation currently in force is faithful to the non-speculative conception of the new urban planning legislation, which is based on the separation of the issues of land classification and land valuation. The criteria defined by the state legislator take into account the value of land at the moment when it is assessed, and they disregard any future expectation or any possible use which goes beyond the one objectively established by the regulation in force, so that it is not possible anymore to say that the adoption of the very plan which classifies land unreasonably multiplies its value, as it used to happen under Law 6/1998, of 13 April (*Ley sobre régimen del suelo y valoraciones*). It will not be possible for valuation agencies and for the financial entities to keep on acting carelessness – as they have been doing for the past years, with the dreadful results that are now apparent –, because the value derived from the use assigned to land will only be realised once the development process has effectively taken place, so that building is actually possible. Value will only be created by investment; the value of all the uses foreseen by the plan will only increase the value of a piece of land once it has been incorporated into the productive process<sup>47</sup>.

Very concrete effects will stem from the combination of the new system of land valuation with an urban-development model which is subject to the principle of sustainable development, and which has to justify the classification of land in accordance with the

---

<sup>46</sup> PAREJO ALFONSO, L. (2007: 324-331).

<sup>47</sup> ROCA CLADERA, J. (2007) '¿Ser o devenir? La valoración del suelo en la Ley 8/2007', *Ciudad y Territorio*, No 152-153, pp. 431-439; FERNÁNDEZ FERNÁNDEZ, G. R. (2007) 'El régimen de valoraciones en la nueva Ley de Suelo. La valoración del suelo rural y urbanizado. La tasación de las actuaciones de transformación', *Ciudad y Territorio*, No 152-153, pp. 402 and 411-416.



requirements laid down by Article 47 of the Constitution. Furthermore, these effects will be amplified by the recent changes undergone by the legislation on equity capital and risks affecting financial entities<sup>48</sup>.

The transformation of the effects that the plan has on the value of land would not have been possible if the legislator had not dispensed with the classification of land as the basis for the determination of its legal status, defining instead two 'basic land situations' (*situaciones básicas del suelo*) – in other words, the two factual situations in which a piece of land can find itself, depending on whether it is urbanised or not –. Thus, rural land (*suelo rural*) is considered as not urbanised, irrespective of whether it is considered as fit to be transformed – although this has to be nuanced, as it depends on its situation and classification at the time of the entry into force of the 2007 *Ley del Suelo* –. The consideration of urban land (*suelo urbanizado*) is reserved to the land which has been legally transformed, and incorporated to the urban space in the way described by the legislation. Neither the regional legislation, nor the municipal plans specify what part of the territory is urban and what part is rural, because we are dealing with facts, with a factual situation that depends on the concurrence of certain objective factors. The classification of land therefore overlaps with its factual state without conditioning its valuation, thus strengthening the capacity of urban planning to organise the urban space, without being constrained by the effects that it used to have on the value of land under the Law of 1998 (*Ley sobre régimen del suelo y valoraciones*).

Nevertheless, as far as the valuation of land is concerned, the truth remains that urban planning law and, in particular, the treatment of land, present some peculiarities<sup>49</sup>.

---

<sup>48</sup> Law 36/2007, of 16 November (*Ley por la que se modifica la Ley 13/1985, de 25 de mayo, de coeficiente de inversión, recursos propios y obligaciones de información de los intermediarios financieros y otras normas del sistema financiero*); Royal Decree 216/2008, of 15 February (*Ley de recursos propios de las entidades financieras*); and Circular 3/2008, of 22 May, of the Spanish Central Bank (*Circular del Banco de España a entidades de crédito, sobre determinación y control de recursos propios mínimos*).

<sup>49</sup> GARCÍA BELLIDO, J. (1998-1999) 'La excepcional estructura del urbanismo español en el contexto europeo', *Documentación administrativa*, No 252-253, pp. 68-76; ROCA CLADERA, J. (2007: 431-437).

Traditionally, urban planning law has established specific rules for the assessment of the value of land when it is expropriated in order to carry out a certain development plan. In general, those rules have sought to establish objective criteria and the case law has been reluctant to accept them. Only in 1990 were the valuation criteria unified, so that they ceased to depend on the goal of the expropriation. Logic prevailed. From then on, the objective of the expropriation would not determine anymore the regime according to which the value of land would be assessed. The unification of the assessment procedures and criteria in 1990 confirmed the tendency inaugurated by the urban planning legislation of 1956; the objective criteria of urban planning law thus prevailed over the criteria traditionally used by the general legislation on expropriation. Although the latter departed from the principle of free valuation, Article 36.1 of the Expropriation Law stated that ‘the value will be determined according to the value that the expropriated goods or rights have at the time when the procedure to determine the expropriation price is initiated, without taking into account the surpluses directly generated by the works plan or project that is at the origin of the expropriation or those which are foreseeable in the future’. Urban valuations departed from the opposite principle, because it was possible since 1956, under certain circumstances, to take into account totally or partially the surpluses generated by the very plan which was at the origin of the assessment and which execution was at stake<sup>50</sup>. Precisely the opposite. Until 1998, once the urban plan had been approved, the value of urban and priority developable land (*suelo urbano* and *suelo urbanizable prioritario*) was assessed according to the scrap value of the use assigned by the plan, in other words, according to the use that would be possible if the plan was executed, and provided the market conditions would not change substantially. The value of land was therefore assessed according to an estimation of the future evolution of the real estate market. Not only was the value of land assessed taking into account the plan that justified the expropriation and that was to be executed; the assessment used to take into account the expected and estimative surplus, since the most important reference to determine the expropriation price was the scrap value of land. This was nothing else than an estimate of its market value and

---

<sup>50</sup> PARADA VÁZQUEZ, R. (1998-1999: 123-124); ROCA CLADERA, J. (2007: 435); LORA-TAMAYO VALLVÉ, M. (2001) *Urbanismo de obra pública y derecho a urbanizar*, Madrid, Marcial Pons, pp. 372-374.

hence a subjective assessment which went beyond what the Constitution required<sup>51</sup>. The value of the other types of land – i.e., non-priority developable land and non-developable land (*suelo urbanizable no prioritario* and *suelo no urbanizable*) – was assessed with the real or potential income capitalization model, therefore excluding any surplus generated by the development process, insofar as this had not been recognised by the plan, although the case law mitigated the rigour of the law<sup>52</sup>.

The 1998 Law (*Ley sobre régimen del suelo y valoraciones*) went even further; it fuelled the use of land to speculate and the inflation of the housing bubble, since it changed the method of valuation of non-priority developable land and of non-developable land, adopting the method of comparison, which used as a reference the actual sale price of similar pieces of land. The application of this method implied that the surpluses generated by the development activities themselves were taken into account, even if they had not been authorised yet by the planning regulation, and this led to the manipulation of some development and accounting concepts. The notion of pre-developable land (*suelo preurbanizable*) is a clear example thereof; it referred to land classified as non-developable but which had been acquired and valued, for accounting and mortgage purposes, taking into account the value it would have after being classified as developable, the future classification being sometimes previously agreed in an urban planning agreement. The value of this type of land has been drastically reduced, although the accounting of this reduction is being slow. Accounting negligence has a cost<sup>53</sup>. The same legislator that carried out the 1998 reform was compelled, only five years later, to limit the extent to which expectations could be taken into account and to do so without altering the method of

---

<sup>51</sup> BAÑO LEÓN, J. M. (2008) 'Las valoraciones del suelo', in the collective work *El nuevo régimen jurídico del suelo*, Iustel, Madrid, pp. 156-159; for the opposite view, SERRANO ALBERCA, J. M. (2008) 'Las valoraciones en la Ley del Suelo 8/2007, de 28 de mayo. Una inducción a la arbitrariedad', *Revista de Urbanismo y Edificación*, Aranzadi, No 16, pp. 100-102.

<sup>52</sup> SERRANO ALBERCA, J. M. (2008: 98-99).

<sup>53</sup> BAÑO LEÓN, J. M. (2008: 157).

assessment; the method of comparison was kept, but no account would be taken of the development expectations that could have influenced the prices used as a reference<sup>54</sup>.

The *Texto Refundido de la Ley del Suelo de 2008* has deeply transformed the legal regime on the valuation of land<sup>55</sup>. Undoubtedly, the main novelty does not lie so much on the new assessment methods – which are again the ones in force prior to the adoption of the 1998 Law (*Ley sobre régimen del suelo y valoraciones*) –, as in the criteria laid down for their application. Thus, the scrap value of the use authorised by the plan only becomes relevant when the land is actually urbanised, in other words, when the factual situation of a given piece of land is urban, irrespectively of what the plan states. The urban character of land therefore depends on its actual state, and not on what the planning instruments say. Irrespectively of their classification, the other types of land will be valued according to the real or potential income capitalization model, despite the fact that they can be recognised an income linked to their location, which can double their value, and even an additional compensation when their owner is deprived of the possibility to participate in the development process through an equitable distribution of the benefits and costs of the process – the compensation being additional and therefore independent from the value of the piece of land itself –.

Finally, the new system is also substantially different from the old one inasmuch as it does not use the classification of land as the basis upon which the method of valuation is determined – thus altering the value of an important part of urban land and of all the developable land, which is today considered rustic land (*suelo rústico*) – and as it puts an end to the consideration as sacred of the development surpluses and expectations – incorporated into property rights by the 1998 Law (*Ley sobre régimen del suelo y valoraciones*), which equated the legal value of land with its estimative future market value

---

<sup>54</sup> In fact, the Popular Group in the Spanish Parliament used the 2003 reform – which attempted to limit the use of urban planning expectations in the valuation of land – as one of its main arguments to oppose the 2007 Law. See, in that connection, *Diario de Sesiones del Congreso de los Diputados. Pleno y Diputación Permanente*, VIII Legislatura, No 216, p. 10986.

<sup>55</sup> FERNÁNDEZ FERNÁNDEZ, G. R. (2007: 401-418).

–. There is no consensus, however, on whether the Constitution requires that the legal value assigned to expropriated land should be the estimative market value<sup>56</sup>. In any event, the importance of another change should also be noted: the use of the method traditionally used to value non-developable and non-programmed developable land (*suelo urbanizable no programado*) – i.e., the income capitalization method – to value any other type of developable land which has not undergone yet the development process. This is the chore of the legislative reform, as proved by its transitory regime, which mitigates the impact of the new system by making it dependant on the deadlines for the execution of the development plans, and by allowing the application of the rates linked to the location income. The change may have been too big, even for the 2007 legislator.

#### 5. Speculation and the price of land and housing

What can finally be said about the so much despised speculation? After establishing as one of the guiding principles of the social and economic policies of the State 'the right (of all Spaniards) to enjoy decent and adequate housing'<sup>57</sup>, Article 47 of the

---

<sup>56</sup> BAÑO LEÓN, J. M. (2008: 159); FERNÁNDEZ RODRÍGUEZ, T. R. (2007) 'Valoración de la nueva Ley del Suelo', in *Observatorio joven de vivienda en España. Anuario 2006*, Consejo de la Juventud, Madrid. Also in the collective work (2008) *El nuevo régimen jurídico del suelo*, Iustel, Madrid, which is the one I quote, and under the title 'La nueva Ley 8/2007, de 28 de mayo, de suelo: valoración general', in *Revista de Administración pública*, No 174 (2007), pp. 24-31; VAQUER CABALLERÍA, M. (2007a) 'Estudio preliminar', in PAREJO ALFONSO, L. y FERNÁNDEZ G. R. (2007) *Comentarios a la Ley de Suelo (Ley 8/2007, de 28 de mayo)*, Iustel, Madrid, 2007, p. 40; SERRANO ALBERCA, 2008: 100-102; CHINCHILLA PEINADO, J. A. (2009) 'Título III. Valoraciones', in the collective work *Ley del Suelo. Comentario sistemático del Texto Refundido de 2008*, La Ley-El Consultor, Madrid, pp. 712-714.

<sup>57</sup> This right may also be at a critical juncture, given the reformulation of the concept of protected housing, the generalisation of the reserves of protected houses as an ordinary tool of the urban plans, the use of this right to justify the classification of residential land, the acknowledgment that this classification is a right of the citizenry which is protected by public action and the judicial protection of this right, although with important limitations. See the recent *Proyecto de Ley reguladora del derecho a la vivienda en Andalucía* (<http://www.juntadeandalucia.es/viviendayordenaciondelterritorio/www/layouts/banners/ProyectoLeyDerechoVivienda.pdf>) or the already abandoned *Proyecto de Ley de garantía del derecho ciudadano a una vivienda digna* of the VIII Basque Legislature. The perception of housing policies as a service of general economic interest also fosters the evolution of the right proclaimed in Article 47 of our

Spanish Constitution states that 'the public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation'. Obviously, the concept of speculation used by the Spanish constituent power is far from the Anglo-Saxon concept, and it leads to the prohibition of all norms and practices which artificially inflate the value of land or of the buildings erected thereon. Land speculation is therefore constitutionally prohibited, which is not the case of other economic goods, and the justification for this seems to lie on the peculiarities and on the exceptional importance that land has as a public and private resource<sup>58</sup>. This constitutional provision must be understood as a restriction to the free market; not in vain, competition tends to be imperfect or altogether inexistent in the land and housing market, and this is the reason why dominant abuses are so common, as a result of the concentration of land property rights in very few owners, all of which condemns the administration to a passive role. The concentration of property provokes a strong territorial partitioning of the land market, the limits of which do not usually go beyond cities or metropolitan areas. Each of these markets has its own oligopolists; these oligopolists tend to avoid competing in other neighbouring cities and areas, and only occasionally they compete with other oligopolists within their own area.

It cannot be concealed that it is urban planning regulation and the compensation model of urban planning which make those practices possible: the abuse of dominant position, the fragmentation of the market and the manifest manipulation of the urban process to alter the price of the final product. Were it not for the protection granted upon these practices by the regulation in force, which goes against the spirit and probably also the letter of the Constitution, it would be possible to subsume some of them under rarely applied criminal provisions such as Articles 281 and 284 of the Criminal Code. The former punishes 'he who detracts from the market raw materials or staples with the aim of depriving of any supply a part of it, of forcing a change in the prices or of seriously

---

Constitution (*La Comunidad Europea y la vivienda social*, Boletín informativo No 94 (2009), AVS, Valencia, esp. pp. 18-24).

<sup>58</sup> VAQUER CABALLERÍA, M. (2007a: 19-21).

harming consumers'. The latter punishes 'those who attempt to alter the prices that would result from a process of free competition between products, goods, securities, services or any other movable or immovable good capable of forming the object of a contract, using violence, threat or deception, or using insider information'.

I do not believe that the application of those criminal offences to the urban development practice should be encouraged, but it is certainly surprising that the evident manipulation of the price of a product like housing, which is essential for society, is left aside from some of the most important criminal provisions protecting the market and consumers. This anomaly – the manipulation of prices beyond any reasonable limit –, seems to be assumed as normal in the field of urban development.

Thus, one of the most fundamental acts of consumption for any family or citizen – the one that gives access to a house and which gives rise to commitments which remain in force, for the greatest part, until the end of one's life – seems to be immune to the normal guarantees and controls established by Consumer protection law. The complexity of the regulation and the slowness of the judicature discourage house buyers and tenants from asserting their rights.

### III. COMPETITION BETWEEN ADMINISTRATIONS TO THE DETRIMENT OF THE PUBLIC SPHERE

Urban planning seems to demand a deep regeneration. It is necessary, today more than ever during the last thirty years, to recover moderation and the general interest as guiding principles and as a pattern for the exercise of the public competences over the territory and, as far as urban planning is concerned, over the city. The use of economic theories purportedly based on the protection of competition – such as the ones advocated in 1994 by the Spanish Competition Authority (*Tribunal de Defensa de la Competencia*)<sup>59</sup>, which inspired the *1998 Ley del Suelo* –, has lead to results which lack solidarity. The huge

---

<sup>59</sup> FONSECA FERRANDIS, F. E. (1999) *La liberalización del suelo en España. Presupuestos y marco jurídico-constitucional*, Madrid, pp. 169-172.

benefits of the real estate sector, reinvested in the very same sector with the help of financial tricks and of abusive real estate valuations, seem to have faded away. However, their generation was possible thanks to the debts and mortgages subscribed by many citizens and families. These debts remain, and so does the debt of our financial system with foreign creditors. The housing bubble has exploded and the only thing that remains are frequently over-valued buildings, debts which are over-priced if compared to the actual value of the goods acquired with them, and an over-indebted financial sector. The economy appears today as the pre-condition to reach certain solutions, but not as the solution to the problems related to urban planning and to the problem of access to housing.

It is surprising that during the flourishing of the real estate sector, when the economic cycle was at its peak, the most intense public debates did not turn on the issue of sustainability and on the abuses brought to the fore by the well-known *Malaya* case and by other corruption cases. The most intense debates turned on the issue of the allocation of competences. Firstly, this issue gave rise to a conflict between the State and the Autonomous Communities, which resulted in three important and well-known judgments of the Constitutional Court<sup>60</sup>. The doctrine was staggered by the upheaval brought about by the Judgment 61/1997 and by the obligation it imposed upon the Autonomous Communities to exercise their urban planning competences, in order to tackle the grave problem of legal uncertainty. The Autonomous Communities, closer than the State to the reality of urban planning, were entitled to assume the full competence in this matter pursuant to Article 148(1)(3) of the Constitution; they therefore claimed and exercised their competence. It looked as if this conflict had been overcome, but the 2007 *Ley del Suelo* has prompted a similar dispute and has been challenged before the Constitutional Court on grounds of both substance and competence.

However, this was not the end of the debate related with the allocation of competences in this field. Strong tensions also arose between the Municipalities and the

---

<sup>60</sup> Judgment 61/1997 of the Spanish Constitutional Court, on the *Texto Refundido de la Ley sobre régimen del suelo y ordenación urbana de 1992*; Judgment 164/2001, on the *Ley del Suelo de 1998*; and 54/2002, where the scope of the *Ley del Suelo de 1998* and of the State competence were defined.



Autonomous Communities, the latter being aware of their strength and of their growing economic and management capacity. The tension was handled in very different ways by the different Autonomous Communities, so that we find very heterogeneous solutions in the norms that each of them adopted. Some norms reproduced the State model and assigned to the Autonomous Community the competences of the State, sometimes even extending them – the example of the Community of Madrid is paradigmatic –; others extended the competences of the Municipalities to the extent that they deprived of any content the competences of the Autonomous Community itself, making their exercise impossible. The central role claimed by the Municipalities, and theoretically recognised by the case law, was only partially recognised by the laws. The conflict between the Autonomous Communities and the Municipalities was further aggravated by the rare implementation of policies for the organisation of the territory, by the willingness of the Autonomous Communities to promote large, strategic actions within their territory without being constrained by the Municipalities, and also by the economic interests at stake and by the conflict over the power to decide on the re-classification of land.

With almost no exceptions, all the actors involved in the urban planning process backed the empowerment of the Autonomous Communities and the widening of the competences of the Municipalities. This factor, together with a radical swift in urban planning culture and, more precisely, with the adoption of classification decisions, has prompted a rapid change in the previous *status quo*, as intended by the legislator. There is today much more classified land susceptible of being transformed and the classification of land is less strict than in the past. The reason is that, in the areas where the pressure was stronger and where there was more dynamism, the old general plans and the subsidiary municipal norms were immediately revised in order to ensure that the offer of developable land increased in accordance with the pro-development ideology of the new legislation, irrespective of the political views of the future managers. The criteria that must determine the final use of this new developable land are often not defined in the legislation. This is the result of the so-called ‘land liberalisation’ of 1998<sup>61</sup>: plans which re-classify urban land

---

<sup>61</sup> PARADA VÁZQUEZ, R. (1998-1999: 134-135); VAQUER CABALLERÍA, M. (2007a: 30-32); FONSECA FERRANDIS, F. E. (1999: 188).

through norms which only affect specific areas, plans which classify as non-consolidated developable land (*suelo urbanizable no consolidado*) the maximum extension of land allowed by the legislation, plans which omit the category of demarcated developable land (*suelo urbanizable delimitado*) and which include a large stretch of non-demarcated developable land, despite the absence of all the elements which determine the traditional, general and organic structure of the territory, thus leaving its entire definition to future partial plans. After the general plans had been definitively approved, the Autonomous Communities were bound to issue their opinion against this very complex legal background; but their reports, which were not even binding in some Autonomous Communities, had little relevance and a limited impact on the urban, legal and commercial process leading to the organisation and transformation of land. This was an idyllic scenario for land traders.

The foregoing account shows that the defence of the Municipality as the exclusive decision-maker in the urban planning process was manifestly interested, and that it was to a great extent unrelated to the own interests and needs of the local entities, being the interest factor and not the material one the determining criterion<sup>62</sup>. The concentration of the urban planning competence in the municipalities presents very relevant advantages for its most important advocates. First, for the land owners and managers, because the Municipality is more accessible and more easily influenceable, especially when they have a small population and a large territory. The need to protect municipal autonomy – understood as the need to prevent other administrations from encroaching on the forum in which an agreement has been reached – is strongly advocated by these actors, who actually invoke it very often in their pleas when they bring a judicial action. Secondly, for the private technical experts, because the extent and the complexity of the competences assigned to the Municipalities widens the sphere in which they can intervene, performing functions that would otherwise be carried out by public organs and in accordance with the administrative

---

<sup>62</sup> It used to be common, amongst the advocates of a 'sovereigntist regionalism', to try to limit the competences of the Autonomous Communities, declaring them unconnected to urban planning, despite the content of the law and of the case law. On this issue, MENÉNDEZ REXACH, A. (2006) 'Autonomía municipal urbanística: Contenido y límites', *Revista española de la función consultiva*, No 5, pp. 25-27.

legislation. I must insist, coming back to ideas that have already been expressed in this article, that it is not possible to consider that an administration exists, in the functional sense of the term, when the economic and material resources are scarce and when the only available civil servant is in charge of several municipalities and works under an interim contract. And this is so irrespective of the disposition, the determination and the good will that the civil servant may have in the performance of its fundamental functions. Third and lastly, the advantages for the mayors and town council members are also obvious, because the debate over competences is linked to the financial debate, in the sense that Municipalities can obtain via urban development financial resources that are not available to them via the ordinary financing mechanisms.

Nevertheless, the limitation of the competences of the regional Administration has had a boomerang effect, as has happened with other state and regional norms. Surprisingly, the policies and the legal instruments for the organisation of the territory have not been reinforced so as impose a comprehensive and binding legal framework on the Municipalities. The general plan represented a global, integrated and comprehensive assessment of all the decisions, impacts and needs related to the territory; this global assessment has been recovered on a sector by sector basis, imposing a whole set of partial reports that approach the process from the perspective of different sectors, and implementing the environmental impact assessment introduced by the European legislation. Today, these sectorial reports have a greater weight and a greater impact on the design of a general plan than the global assessment of the plan made by the regional Administration: the reports on the water cycle (water supply, drainage, sewage, flooding), risks, defence, heritage, cattle trails, civil protection, provincial, regional or state roads, airports and ports, to name but a few. What is the point of the global assessment if concrete reports on every sectorial aspect have already been issued? What is the point of the assessment carried out by the regional Administration if the design of the urban development model corresponds exclusively to the Municipality? The dominant case law on the scope of the regional competences only worsens this situation, which is the basis upon which those who claim that the scope of the municipal decision on the general plan should be widened even more – to the point of making it exclusive and exclusionary – build their case. The answer to these questions may come from an adequate construction of the new regulation of land as a

scarce resource, from the tradition regional competence and from the environmental impact assessment imposed by the European Union.

In any event, the absence of a set of effective and resolute policies for the organisation of the territory has generated competition between the Municipalities. The problem is that the competition between Municipalities for the leadership of urban development project, together with the legal framework and with the dominant practices, have not always benefitted the general interest, and this has not necessarily happened as a result of the lack of willingness to impose, but as result of the impossibility to do so. Each Municipality legitimately sought to grow as much as possible within a deregulated context. And within such a context, it is difficult to understand and explain why they should have waived their aspirations voluntarily. Since it was possible, and since other Municipalities decided to reclassify land to carry out development projects that went far beyond their needs, why should other Municipalities avoid the same route? The problem is that competition between Municipalities can deprive of any value the decisions concerning the organisation and classification of land, and at the same time cause important territorial imbalances if the powers of the regional urban- planning organs are legally limited. The pressure bore by certain rural areas generates important environmental risks, which are described in the European Spatial Development Perspective, which concludes that 'these negative impacts can only be countered through suitable regional planning and corresponding environmental and agricultural policies for the re-establishment of biodiversity; reduction of soil contamination; and extension and diversification of agricultural use' (*European Spatial Development Perspective*, 1999, para. 94). According to the European Union, 'it will only be possible to stem the expansion of towns and cities within a regional context. For this purpose co-operation between the city and the surrounding countryside must be intensified and new forms of reconciling interests on a partnership basis must be found' (*European Spatial Development Perspective*, 1999, para. 84).

The regional administrations that renounced to implement effective policies on the organisation of the territory – whereas in Andalucía, for example, these policies were only decisively implemented after the *Malaya* corruption case, in the Basque Country the same policies had been implemented for a long time, despite the absence of corruption cases –, were bound to play an almost impossible role: the role of arbiter between Municipalities,

with no other tools than, on the one hand, the strict application of the law and, on the other, the use of reason. During these years, deregulation prevailed in a field where the rational use of the territory and the protection of the public sphere should be the axis of the regional policies and competences; it prevailed in a field where these principles should constitute the framework which conditions *a priori* the actions of all the other actors, in the form of instructions for the organisation of the territory that make room for effective competition between the economic actors with no negative territorial costs. Within this context, instead of fostering competition between private actors for the management of the development process, with the aim of lowering the price of the final product – developed land –, the competitive process took place between the public actors and this allowed the private actors to take advantage of their position as actual or potential landowners and to maximise their purely speculative benefits, in spite of the constitutional prohibition.

Urban planning is perhaps one of the fields in which the interests of the local community are more intense and where the participation of the local authorities in the decision-making process is more justified. However, this cannot result in the supra-municipal dimension of the territory and of its government being ignored, because the involvement of other authorities clearly results from the competences over large infrastructures, over economic planning and over services, which correspond to the other Administrations, be the Autonomous Community or the State. But it should not be forgotten either that the guarantee of municipal autonomy has suffered from a serious deficit in the past, which has hindered the exercise of the competences enshrined by that principle. And I do not refer only to the financing deficit, which has been the object of many studies, which is often the object of political debate, which has forced municipalities to use urban-development as an *extra-budgetary* source of financing and which, by the way, nobody seems ready or able to solve. I refer to another deficit, one which has attracted less media attention but which is also important: the insufficient availability and the insufficient training of technical staff, a problem which is aggravated by the high fragmentation of the municipal map and by the low population density. Since municipalities are bound to compete amongst themselves for the coveted development, since the private sector puts upon them great pressure and since their financial resources – and hence their material and human resources – are very limited, the result seems logical and unavoidable. Only nominally do they exercise the decision-making power stemming from their autonomy,

because substantially it only benefits those who can profit from a decision that they pretend to shield from the interference of any other Administration, going beyond the constitutional and legal requirements. This is the origin of many criticisms made to the state and regional intervention in the field of urban planning by private actors, who are especially eager to invoke municipal autonomy to attack any state or regional decision that limits the benefits they have made within the Municipality. It is therefore absolutely necessary to ensure that the municipal competences on urban planning are always exercised in the public interest and that the local interest is the principle which presides over their exercise, within a framework previously defined in the most detailed possible way by the other levels of government. The solution to the problems that have arisen in the last years cannot and must not consist in depriving Municipalities of their natural competences. Furthermore, these competences must be adequately financed to prevent unnecessary expenses. The reform of urban planning must go hand in hand with a far-reaching reform of the system of local financing and with a mandate of financial restraint, in the form of a limiting and unequivocal definition of the municipal competences. Otherwise, if the poor economic situation of Municipalities is maintained, urban planning will again be used as source of financing as soon as it recovers its past profitability.

The general urban plan – together with the preceding urban planning agreements on the reclassification of land or on the revision of a previous plan – has become a financial instrument which responds to concerns that are alien to the design of urban development. Instead of designing the city, the general plan is primarily seen as source of money. But the blame is not to put exclusively – not even especially – on the Municipalities. This is the result of the economic conception that prevailed over the years and that broke some essential consensus. It is the result of the economic conception underlying the Royal Decree 4/2000 (*Real Decreto-ley 4/2000, de 23 de junio, de medidas liberalizadoras del sector inmobiliario y de transportes, cuya exposición de motivos resultaba bien expresiva*):

With respect to the real estate sector, these measures are intended to correct the rigidities which have become apparent in the market as a result of the strong growth of demand and of the impact of real estate products in the price of land, which in turn has been conditioned by the scarcity of developable land. Consequently, the reform will increase the supply of land, eliminating the legal

provisions in force which lack flexibility and which therefore limit the supply of land, shifting this positive effect to the final price of property'.

The idea was quite simple: it was necessary to avoid the classification of land as non-developable on the basis of purely urban planning reasons and to ensure that the most important planning decisions – the design of the city model and the classification of land in accordance with it – would respond to market considerations. The facts have proven, however, that the market did not work as it had been foreseen, but rather in the opposite way. The so-called 'land liberalisation' was in reality a process of deregulation which abandoned to the market the most important urban development decisions. The current situation is the result of the relaxation of the risk assessment made by credit entities, coupled with valuations that seemed to be based on the mistaken idea that the increase of the prices and the payment capacity of buyers had no roof<sup>63</sup>.

#### IV. THE EVOLUTION OF URBAN PLANNING FROM OWNERSHIP TO BUSINESS. THE SUBORDINATION OF PLANNING TO FINANCIAL CONSIDERATIONS

Although based on other precedents, the Spanish urban planning model embodied in the state regulation of 1996-1998 dated back to 1956. It was the final phase of the late XIX century model of urban planning, which aimed at enlarging cities (*urbanismo de ensanche*), updated and transformed by the modern financial products and business practices, which have turned the land market into a speculative futures market, depending on the type of land-use foreseen, expected or negotiated in each part of the territory. This is not the place to examine in detail the evolution of urban planning in Spain – an issue which has been perfectly analysed elsewhere<sup>64</sup> –, but it should be noted that the evolution of the model resulted in the almost complete abandonment of the consolidated city, in the deterioration of full neighbourhoods – in the absence of any renovation and of any

---

<sup>63</sup> CAMPOS ECHEVERRÍA, J. L. (2008: 85-105).

<sup>64</sup> For an excellent synthesis, see LÓPEZ RAMÓN, F. (2007: 19-37).

generational substitution of the population fleeing to new suburban and metropolitan areas –, in the economic and environmental unsustainability of the city and in the destruction of the rural legacy. The problem has been pointed out by the European Union, as shown by the following:

Member States and regional authorities should pursue the concept of the “compact city” (the city of short distances) in order to have better control over further expansion of the cities. This includes, for example, minimisation of expansion within the framework of a careful locational and settlement policy, as in the suburbs and in many coastal regions.<sup>65</sup>

But another type of unsustainability has also become too common: the imposition of new norms to consolidated areas, which alter their traditional structure by replacing the single-family building model – where houses are semi-detached and have one or two floors on top of the ground-floor – with a multi-family building model – where buildings have up to four floors on top of the ground-floor –. Such a deep transformation of some urban areas has often been carried out without adapting the public services and infrastructures to serve the new population living within these renovated and crowded areas. Urban development plans do not take into account the new population densities generated by these urban tricks: they are not counted as growth because they affect areas which were already urban, despite the fact that six families may be living on the same piece of land where only one family used to live. The problem of the lack of adequate facilities and services to meet the needs of the increased population is thus aggravated, and the built heritage is sacrificed in order to increase its use.

Despite the complacency of many urban planners, the virtues of the 1956 model cannot conceal its drawbacks and the pernicious effects it has produced, in combination

---

<sup>65</sup> *European Spatial Development Perspective: Towards a balanced and sustainable development of the territory of the European Union*, May 1999, para. 84. On this issue, see PAREJO NAVAJAS, T. (2004) *La estrategia territorial europea. La percepción comunitaria del uso del territorio*, Marcial Pons, Madrid, pp. 366-376.



with other factors<sup>66</sup>. A thorough and critical revision of the traditional Spanish model of urban planning is necessary in order to recoup the value of the public sphere. It is generally acknowledged that the 1956 model, in conjunction with housing policies which fostered access to property rather than renting, was a useful tool for the socialization of the middle class which was emerging at that time, that it helped to reach social peace through to the generalization of housing property with external financing and hence to build the real estate and financial sectors. But the legal recognition that the public sphere was unable to assume on its own the management of urban planning and the involvement of private land owners also generated a new oligarchy of land owners, which was no longer characterized by the agricultural use of their lands but by their potential urban use.

The most important moment in the evolution of urban planning in Spain may have been the reform undertaken in 1975-1978, which resulted in a regulation that is still the model in which all the regional urban norms are inspired, without exception. In 1975, the redistribution philosophy (*filosofía reparcelatoria*) underlying the nineteenth century model changes, and it goes one step further in the de-materialisation of property thanks to the technique of the 'average use' (*técnica del aprovechamiento medio*). It is at that time when certain systems were fostered, for example the cooperative system, which – in its concession version – forms the basis of urban planning and which recalls the late concession of the nineteenth century reform. It is also the state legislation of the mid-seventies which introduced in our country the agreed urban planning model of the 'programs of urban action' (*programas de actuación urbanística*), thus fostering competition, an element which is nowadays demanded by part of the doctrine and by the European Institutions themselves. It may be the case that a more reasonable and less traumatic evolution of the seventies' regulation could have avoided the excesses of the last years.

The 1990-1992 reform resulted in the demise of the state urban legislation as the legal reference peacefully used in almost all the country. The Judgment 61/1997 of the Constitutional Court certified the end of a normative era, despite the fact that it declared

---

<sup>66</sup> GARCÍA BELLIDO, J. (2005: 273-284).

that the derogation of the seventies' regulation had been unconstitutional since it was not possible within the competences allocated to the State at that time. The ensuing developments – the 1996-2003 reform, as interpreted by the Constitutional Court in its Judgments 61/1997 and 164/2001, and the 2007-2008 reform – reveal that the State has been relegated to a secondary role in the definition of the urban development model, with the only important exception of the land valuation model<sup>67</sup>. In order to fit within its meagre competences in the field of urban planning, the regulation issued by the State has to be so open and so flexible that the State is bound to adopt norms which will rarely meet their objectives without the collaboration of the regional legislators.

The truth is that the 1956 model drove us here: to a place where the public task in the field of urban planning seems to be subordinated to private ownership and to private undertakings, and where the public management of urban planning is constrained by the right to promote the urban transformation of land, as defined in the 1996-2003 legislation. The model reached a point where, according to the 1998 state legislator, the Administration in charge of urban planning and its decisions could only create obstacles and rigidify the functioning of the land market. This model gave birth to what could be termed as 'cadastral urban planning' (*urbanismo catastral*), a design which gives priority to the cadastral division of land and to the property of each piece of land over the orderly organisation of the city and of its growth. Logically, the ownership of land is a factor which must be taken into account when adopting urban planning decisions, but it makes no sense that the most important ones are conditioned by the concrete ownership of certain pieces of land.

The last and tumultuous years of urban planning show that the 'cadastral urban-planning model' tends to disregard the territorial model, because property and acquisition rights in general prevail over urban and territorial considerations. It is a model that consumes land massively, because it uses property to conceal densities and uses which

---

<sup>67</sup> TEJEDOR BIELSA, J. C. (2001b: 259-260); BARNÉS VÁZQUEZ, J. (2002) *Distribución de competencias en materia de urbanismo. Estados, Comunidades Autónomas, Entes locales. Análisis de la jurisprudencia constitucional*, Bosch, Barcelona, pp. 149-154; y BAÑO LEÓN, J. M. (2007) 'El objeto de la Ley y el orden de las competencias legislativas: La depuración del ordenamiento en la materia', *Ciudad y Territorio*, No 152-153, pp. 302-303.

would be very controversial if they were rationally applied to other lands. In short, this model distorts the practice of urban-planning and it conditions the normal functioning of the Administration, because its decisions are precisely the efficient cause of the execution of purchase options over those lands which are expected to be urbanized. The agreement with the owner or with the holder of the purchase option is followed by pressure being put on the Administration; this in turn is followed by the decision of the Administration on the classification of land and, finally, after the classification and, eventually, the development plan, the execution of the purchase option or the sale of the land is carried out, on the basis of a plan which can already be implemented and which could be used – until a few months ago – to borrow money from Spain’s financial entities<sup>68</sup>. It is in the light of these practices that some of the urban planning agreements reached over the last years should be assessed, in particular those which imposed or conditioned the adoption of the decision or the content or reform of the general plan, even though they did not imply the waiver of the public power of urban planning according to the case law.

This type of urban planning has generated very important malfunctions in local governance in Spain and even clashes between the inhabitants of local communities, who are logically the owners of a great deal of the land which is affected by the urban plans. Although the practice of urban planning should be inspired by the general interest, the latter was subordinated to the private interest in selling family land at prices which were much higher than what its late owners could have expected. Consequently, the owners put pressure on the Municipalities so that they would adopt the classification required to make the purchase option effective. Important governance problems also arise at the level of the Autonomous Communities. Their relationship with the Municipalities is bound to be under strain, especially when the actions of the Municipalities are conditioned by the agreements

---

<sup>68</sup> SÁNCHEZ DE MADARIAGA, I. (1999) *Introducción al urbanismo. Conceptos y métodos de planificación urbana*, Alianza editorial, Madrid, p. 99, explains how the English system works; its starting point is that the right to land development is alien to the content of property rights, since the plan does not assign building rights to the owner. These rights can only derive from a specific licence that the promoters can obtain from the Administration, which enjoys discretionary power to grant it. On top of that, and precisely because of the discretionary character of this power, the Administration enjoys disciplinary powers that are exercised by the local authorities.

reached with private actors and when these agreements foresee the provision of services in exchange for the future urban plan – should the plan not be approved as a result of the opposition of the Autonomous Community, the Municipality would be obliged but unable to return the services provided –.

Obviously, the content of the general plan and the planning culture which arose with so many difficulties in the seventies and the eighties of the last century have also undergone important transformations as a result of the foregoing. It is possible to perceive in today's urban planning that economic considerations and the value of land carry greater weight than the concern for the city itself. The general plan has been considered, above all, as the way to generate mortgage value and, from this perspective, urban decisions were perceived as an instrument to generate value and not as the tool to reach purely urban objectives. There are very effective tools to increase the price of non developed land: higher buildings, more building capacity, more profitable land-uses, more classified land with less structural urban planning – the traditional general and organic structure of the territory –, more housing density or the elimination of this limitative criterion altogether – allegedly, as a way of adapting the regulation to the market, although it represents in fact a manipulation of the market –, or more flexible and permissive local rules. Urban considerations are overshadowed and technical reports are not determining anymore; their only use is to justify *ex post*.

Surprisingly, although the new '*soft plan*' model has led to the possibility of urbanizing unlimited portions of land and hence to the possibility of multiplying the population or the residential capacity of the Municipality, the lack of land and of developable land has continued to be seen as a problem. The first of the recommendations made in the well-known and yet forgotten *Informe sobre suelo y urbanismo en España*<sup>69</sup> began by stating that 'the problem of the price and the availability of developable land is fundamentally a management problem'. The third recommendation stated that 'the forecast of the offer of classified and developable land and the planning of the needs of urban land,

---

<sup>69</sup> COMISIÓN DE EXPERTOS SOBRE URBANISMO (1996) *Informe sobre Suelo y Urbanismo en España*, MOPTMA, p. 191.

foreseeing the necessary steps well in advance, are indispensable in order to avoid the tensions generated by the peaks in the demand of land (such as the ones that will arise in the next period of economic reactivation) and the insufficient offer of land'. The proposal did not consist in filling Spain with developable land, but in managing the land which had already been classified, making it apt to initiate the building process as it becomes necessary. In order to do this, it is necessary to carry out determined public actions, to anticipate the needs and to prevent the withholding of land for speculative purposes as well as the incorporation of value to land as a result of the approval of the urban plan. The classification of land increases its value and the wealth of the owner without any investment on its part, simply as a result of an administrative decision. The withholding of land reduces its impact on the final product, but its price is not reduced. As is well known, the premises of the above mentioned *Informe* did not inspire the 1996-2003 legislation, which sought, as the preamble of the 1998 Law stated, 'to facilitate the raise of the offer of land, making it possible for any piece of land, which has not *yet* been incorporated to the development process, to be considered as apt to be urbanised, provided there are not specific reasons to preserve it'. This idea came from another well-known document of the mid-nineties – *Remedios políticos que pueden favorecer la libre competencia en los servicios y atajar el daño causado por los monopolios*<sup>70</sup> – in which it was stated that it was necessary to 'change the current views, defining the areas of the national territory which are apt to be developed in accordance with a plan that fixes public priorities taking into account environmental, landscape and ecological values'. And the document added: 'the rest of the territory must be, in principle, developable'. According to the Spanish Competition Authority, the design of the city should be the result of the application of general norms, with no discretion whatsoever on the part of the Administration, which was seen as an entity completely separated from, and even opposed to, the citizen; it was clearly established that 'the authorities cannot go so far as to decide what must be done in each space and when it must be done'.

---

<sup>70</sup> TRIBUNAL DE DEFENSA DE LA COMPETENCIA (1994), *Remedios políticos que pueden favorecer la libre competencia en los servicios y atajar el daño causado por los monopolios*, pp. 247-259; for an academic work sharing the ideas of the Report, see for SORIANO GARCÍA, J. (1995) *Hacia la tercera desamortización (Por la reforma de la Ley del Suelo)*, Marcial Pons-IDEALCO, Madrid, pp. 97-110.

From the perspective of the historically complex relationship between property and urban planning<sup>71</sup>, the 2007-2008 reform implies a clear breach with the prevailing model in Spain since 1956 and a vigorous rectification of the premises of the 1996-2003 legislation<sup>72</sup>. The very conception of urban planning seems to change, since greater importance is attached to the reduction of land consumption that results from its legal treatment as a contingent and scarce resource, and which is inspired by the principle of sustainable development<sup>73</sup>. From this perspective, it is necessary to balance the needs of land and its preservation in a natural state or, at least, as it currently stands. The last reform of the state legislation incorporates into our legal system the ideas of the European Spatial Development Perspective, inasmuch as it assumes the five aspects which are considered decisive for the sustainable development of cities: the control of urban sprawl, the mix of social functions and groups, the intelligent and resource-saving management of the urban ecosystem (in particular, water, energy and waste), better accessibility through more efficient and environmentally-friendly means of transport, and the protection and development of the natural and cultural heritage<sup>74</sup>. It is the regional legislators' responsibility to ensure that the incorporation of those aspects into the state legislation does not come down to a purely rhetorical statement<sup>75</sup>.

However, the changes are even more relevant from the perspective of the status of property and of undertakings. The state regulation breaks with the equi-distributive model

---

<sup>71</sup> TEJEDOR BIELSA, J. C. (1998: 39-187).

<sup>72</sup> BAÑO LEÓN, J. M. (2007: 304-309); VAQUER CABALLERÍA, M. (2007b) 'Los principios y derechos constitucionales inspiradores de la Ley de Suelo', *Ciudad y Territorio*, No 152-153, pp. 247-256; TEJEDOR BIELSA, J. C. (2008: 626-659).

<sup>73</sup> FARIÑA TOJO, J. (2007) 'Las nuevas bases ambientales de la sostenibilidad en la ordenación y utilización del suelo', *Ciudad y Territorio*, No 152-153, pp. 300.

<sup>74</sup> *European Spatial Development Perspective (1999: 24)*.

<sup>75</sup> LÓPEZ RAMÓN, F. (2008) 'Principios generales y urbanismo sostenible en la Ley de Suelo 8/2007, de 28 de mayo', *Revista de Urbanismo y Edificación*, No 16, pp. 15-22.

of property. This model necessarily leads to self-financed urban development, that is to say, to a city development model in which the profits arising from the classification of land can fund the cost involved in making that use effective. However, while it pays attention to the consolidated city through the so-called 'provisioning actions' (*actuaciones de dotación*) and the compulsory building regime, this model eliminates the link between development and property. In today's state legislation, land ownership does not imply anymore the right to carry out the development of land and the approval of the urban plan does not create such a right either. The right to develop land derives from an administrative decision adopted for that specific purpose, either as a result of a competitive procedure, either as a result of the 'specificities or exceptions (...) in favour of the land-owners initiative' [Article 6(a) *in fine* of the *Texto Refundido de la Ley del Suelo de 2008*]<sup>76</sup>. Incidentally, some have criticised what they consider a 'random nationalisation' of the right to develop land: some Autonomous Communities have used the competence to establish those specificities and exceptions in favour of the ownership<sup>77</sup> to eliminate every reference to the development agent.

It is striking that the successive legal reforms have all faced the same criticism with regard to their effect: the price of land has varied in accordance with the economic cycles, irrespectively of the legal reforms and of the price of housing and has been constantly rising; it has only been stable or slightly fallen during the downturn of the economic cycles. From this perspective, legislation seems to be totally ineffective and this is the reason why the housing problem remains. The truth is that this problem has been worsened during the last cycle, which has been presided by the 1996-2003 legislation:

---

<sup>76</sup> PAREJO ALFONSO, L. (2007) 'Condiciones básicas de igualdad de los ciudadanos y régimen básico del suelo', *Ciudad y Territorio*, No 152-153, pp. 329-331; TEJEDOR BIELSA, J. C. (2008: 640-642).

<sup>77</sup> PERALES MADUEÑO, F. (2008) 'Ejecución del planeamiento. Especial atención a la figura del agente urbanizador', *Revista de Urbanismo y Edificación*, No 5, p. 62. In a similar and very critical way, MARTÍNEZ LÓPEZ-MUÑOZ, J. L. (2007) 'El derecho de propiedad sobre el suelo en su nueva ley estatal de 2007', in the collective work *El derecho urbanístico del siglo XXI. Libro homenaje al profesor Martín Bassols Coma*, Tomo I (Urbanismo y Vivienda), Editorial Reus, Madrid, pp. 509-539.

whereas in 1998 families needed to invest the total income of four years and a half in order to buy a house, in 2008 they needed to invest the income of nine years<sup>78</sup>.

In any event, the dimension of the problem varies very much depending on the municipality. Thus, in many small municipalities with no exogenous real-estate pressure, houses are an accessible good; however, this raises another problem: the lack of professional promotion. In these municipalities, the housing problem is tackled through the self-consumption of land and in most cases through self-promotion. In contrast, in many equally small municipalities where the housing market is subject to strong pressures for a number of reasons – tourism, or the fact that it is located in the surroundings of big cities or in economic corridors –, access to housing is problematic for the native population and, in many cases, especially in touristic locations, the type of buildings which are built are not adequate to be used as permanent housing. Lastly, the inhabitants of large municipalities must face an expensive market that is hardly accessible for youths and for the citizens with lower incomes, who can neither buy nor rent a house.

Lastly, the deep 2007-2008 reform tries to change the pro-development stance that has characterised Spanish urban planning legislation during the last fifty years. The state legislator tries to focus again on the existing city and on policies aimed at regenerating and revitalising it. These policies go beyond the boundaries of urban planning, because they also imply social actions, facilities, new economic activities and the relocation of administrative uses. The current legislation sees as a pending problem the urban design of internal cities. In order to reduce the consumption of land, it is necessary to optimise and to clean up the land that has already been incorporated to the city. There is still a long road ahead.

---

<sup>78</sup> RODRÍGUEZ LÓPEZ, J. (2008) '2008. El mercado de la vivienda sufre el ajuste', *Ciudad y Territorio*, No 156, p. 388. If we look at the effort made by families, the result is not good either: they spent 25% of their total income in 1998 and 50% in 2008. The peak took place in 2007, according to the author, who analyses data from 1985 to 2008.