HIGHLIGHTS OF THE FOURTH CONFERENCE OF THE INTERNATIONAL ACADEMIC ASSOCIATION ON PLANNING, LAW, AND PROPERTY RIGHTS
PLPR 2010 Dortmund — Highlights of the Fourth Conference of the International Academic Association on Planning, Law, and Property Rights

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Title page: the Dortmund U previously was a brewery and today is one of the landmarks of the European Capital of Culture 2010.

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INTRODUCTION

Ben Davy, Thomas Hartmann, Heinz Kobs, Kathrina Schmidt, Gabi Zimmermann

For over a decade, Rachelle Alterman has pursued the vision of an academic association that brings together planners, lawyers, and others with strong research interests in planning, law, and property rights. Originating from AESOP’s law track, the International Academic Association on Planning, Law, and Property Rights (PLPR) fulfills this vision. As PLPR’s Founding President, Rachelle helped kick off the Dortmund conference on 10 February 2010. The presence and contributions of more than 120 delegates from all over the world strongly emphasized the wisdom of Rachelle’s vision.

We, the members of the Dortmund Local Host Committee, present a booklet with the Highlights of the Fourth Conference of the International Academic Association on Planning, Law, and Property Rights to acknowledge the passion of PLPR’s Founding President and the accomplishments of the growing PLPR community. We thank Walter Grünzweig and our keynote speakers—Michael Wegener, Harvey M. Jacobs, and Ali Madanipour—for their permission to publish their speeches.

At the Dortmund conference, 94 presentations were scheduled in 21 sessions. All abstracts had to pass a double-blind peer review. The delegates presented papers on a
wide variety of controversial and tough issues: land use regulation, property markets, land management, environmental protection, or land law.

Some of the topics have been under discussion for a long time: Are planning restrictions on private property legitimate, and, if so, how far may planners go when they control land uses? How can planners and landowners cooperate in the refurbishment of declining urban neighborhoods? Why must a democratic society, under the rule of law, be able to exercise eminent domain—the power of expropriation (or taking)—in order to achieve public goals? Other questions were quite new and reflect upon the variety of planning, law, and property rights: Can land policy help protect us from natural disasters such as extreme flood events or climate change? Can we preserve cultural heritage and memories as proprietary interests? How does the economic crisis affect our appreciation of land values?

The School of Spatial Planning (TU Dortmund) has a longstanding interest in planning, law, and property rights. In particular, the Chair of Land Policy, Land Management, and Municipal Geoinformation—studies the relationship between planning, property law, and real estate markets. In 2009, the Dortmund planning school, one of AESOP’s founding members, has celebrated its first 40 years. Moreover, the Ruhr is one of three European Capitals of Culture in 2010. As members of the Local Host Committee, we have been very happy to welcome the PLPR community in the Ruhr and in Dortmund—and we proudly present this booklet!
Dear PLPR members (and those, who are not yet a member, can easily join!),

we are pleased to present the *Highlights of the Fourth Conference of the International Academic Association on Planning, Law, and Property Rights* in the form of a conference booklet to you. The venue of the 2010 conference was the Ruhr, one of three European Cultural Capitals this year. The conference was hosted by the well-known School of Spatial Planning at the University of Technology (TU) Dortmund. As you will see in this booklet, a wide scope of issues, all sharing a strong interest in spatial planning, law, and property rights issues, was under discussion during the conference.

An important event during the General Assembly in Dortmund was the election of new officeholders. As new PLPR President, I’m glad we found Ben Davy, Thomas Hartmann and Michelle Oren to devote their time required to be on the executive committee and take on responsibility.
The even greater active participation at our interesting and successful fourth conference demonstrates the extent to which PLPR meets a range of growing needs in the field of planning, law and property rights. Given the level of enthusiasm amongst the members, we expect PLPR to grow and mature even further over the next decades. We look forward to meet current and new participants during upcoming activities, such as at the Fifth PLPR Conference in Edmonton, Alberta, Canada (www.law.ualberta.ca/plpr2011) in 26–28 May 2011 and in Belfast in 2012.

Enjoy reading the materials!

Kind regards, also on behalf of the other ExCo members:

Ben Davy Conference Chair 2010 and Vice President
Thomas Hartmann Secretary General
Michelle Oren PhD Coordinator
Eran Kaplinsky Conference Chair 2011
Dick Norton North America Liaison
John Sheehan Pacific Rim Liaison
President Alterman, Chairman Davy, dear conference participants, ladies and gentlemen,

in the name of the rector of TU Dortmund University, Professor Ursula Gather, I would like to welcome you here on our campus on this beautiful winter morning. As associate rector for academic affairs and international exchange, I am very happy and proud that the Fourth Conference of the International Academic Association on Planning, Law, and Property Rights convenes here in Dortmund. Many of you have come from far away places and we are very glad you are here with us this week.

The School, or in Euro-English: Faculty of Spatial Planning of our university is not only one of the largest and most highly respected in the country and internationally. It also enjoys a special position in our university linking, as it does, the engineering schools with the social sciences and cultural studies. Planners are not only uniquely equipped to me-
diate between academics and a more or less tangible extra-university reality, but also between disciplinary cultures. Planners transcend not only limitations but they use borders innovatively to create new opportunities. In a way, the planners are at the very center, the very core, of our university and we look at them and their activities with pride and appreciation. We thank them that in a very real and a very metaphorical way, they are putting us on the map.

One of the reasons why I, a professor of American Studies, am personally full of admiration for Dortmund planners, is because of their unusual way of thinking, synthesizing different approaches and questioning accepted, standard answers. Reading many of the abstracts participants in this ‘Planning, Law and Property Rights conference’ submitted, I found deep-seated sentiments of subversion which in a way were not what one would expect from a conference of that title. It was interesting to see how many of you will be questioning established truisms, criticize procedures that are carried out in the name of the law, or use legal arguments and principles against inequitable means of coercion, expropriation or environmental destruction. Many presenters here seem not only to analyze but also present, implicitly or explicitly, advocacy for improvement of unjust or imperfect situations. Those, especially, will feel right at home here, both on this campus as well as with these organizers.

In reading your abstracts, I developed a great urge to quote one of the giants of international cultural criticism, especially of property, the American Romantic philosopher Henry David Thoreau.

Early on in his account of his two years as a squatter in a self-built cabin in the woods, Walden, we find the unforgettable sentence: ‘At a certain season of our life we are accustomed to consider every spot as the possible site of a house.’ And onwards: ‘I walked over each farmer’s premises, tasted his wild apples, discoursed on husbandry with him, took his farm at his price, at any price, took his word for his deed, and withdrew when I had enjoyed it long enough, leaving him to carry it on. This experience entitled me to be regarded as a sort of real-estate broker by my friends.’

Eventually, ‘I let it lie … for a man is rich in proportion to the number of things which he can afford to let alone.’
‘A man is rich in proportion to the number of things which he can afford to let alone.’ This is not a negation of property, but a reinterpretation of it, and I have found such—albeit different—interpretations also in some of your papers. ‘I never got my fingers burnt by actual possession,’ Thoreau continues and concludes: ‘I found thus that I had been a rich man without a damage to my poverty.’

Because the true value of landed property, he says, and I believe this is getting very close to some versions of planning philosophy, lies somewhere else: ‘But I retained the landscape, and I have annually carried off what it yielded without a wheelbarrow.’ ‘I have frequently seen a poet withdraw, having enjoyed the most valuable part of a farm, while the crusty farmer supposed that he had got a few wild apples only.’ Thoreau’s differentiation between land and landscape may be of help for some of the subversive notions of property negotiated at this conference or it may help to create a context of subversion in which to locate them.

Having referred to the theme of your conference, I should also say something about the venue and the region in which it is taking place. You are finding yourself on the Southern Campus of a relatively modern public university, which was founded some 40 years ago. One can say that the university in Dortmund is in itself the result of planning minds because it, along with the other universities in this region, Bochum and Duisburg-Essen, was founded as a result of strategic considerations.

Since the 19th century, the Ruhr Region had been the industrial heart of Prussia and Germany. It fueled German industrialization, it produced Hitler’s arms, and it was the source of what little warmth Germany had left following the fatal destruction of World War II. Most importantly, its industrial and energy resources provided the basis for the surprising industrial comeback of West Germany starting in the 1950s.

But already at that time, it had become clear that these ‘old’ industries would not survive in a more advanced industrial and post-industrial age and thus the universities founded in these four cities in the Ruhr were supposed to be the basis for a restructured economy and society.

Of the three industrial pillars, steel, coal and beer, only beer has survived, and even the Dortmund breweries have been taken over, symbolically enough, by Germany’s pudding czar. But much new has sprung up and that not in sharp confrontation with the old but building on it. The European Capital of Culture which is taking place this year in Pécs, Hungary, Istanbul, Turkey, and the Ruhr Region, the ‘Ruhrgebiet,’ is taking its cue from this gigantic transformation—itself the result of planning minds—which has us no longer mine for coal but for innovative ideas for an ecological restructuring of our
society. The most important agent of this change is culture and it is therefore not surprising that it has been supremely expressed by another American writer, the late poet Allen Ginsberg with whom I have been able to exchange repeatedly on his experience of Europe.

In 1979, during a visit to Germany, he wrote a poem called *Ruhrgebiet*, which addresses precisely this change. Much of what he is targeting no longer exists, much of the pollution is gone, many of the environmentally hazardous but job-rich industries have disappeared.

Some of the political events are history, such as ‘Stammheim’, a special prison near Stuttgart, for the German terrorists of the 1970s, and on this starting day of your conference there is, differently from what the poem proclaims, certainly enough snow.

But altogether, I believe, the poet Ginsberg has understood the contradictory diversity of the Ruhr Region and admirably re-created it in this poem which I will read to you trying to emulate if not the voice or tone, so at least the spirit in which he recited it to me. It is a critical poem and in this way characteristic of the region, which is very strong in self-criticism from which oftentimes emerges innovation and hope.

In closing, I would like to dedicate it to your conference.
Allen Ginsberg (1979)

Too much industry
too much eats
too much beer
too much cigarettes

Too much philosophy
too many thought forms
not enough rooms –
not enough trees

Too much Police
too much computers
too much hi fi
too much Pork

Too much coffee
too much smoking
under gray slate roofs
too much obedience

Too many bellies
too many business suits
too much paperwork
too many magazines

Too much industry
no fish in the Rhine
Lorelei poisoned
too muchembarrassment

Too many fatigued
workers on the train
ghost Jews scream
on the street corner

Too much old murder
too much white torture
too muchoneStammheim
too many happy Nazis

Too many crazy students
not enough farms
not enough apple trees
not enough nut trees

Too much money
too many poor
Turks without vote
‘Guests’ do the work

Too much metal
too much fat
too many jokes
not enough meditation

Too much anger
too much sugar
too many smokestacks
not enough snow

Too many radioactive
plutonium waste barrels
take the Rhine gold
build a big tomb

A gold walled grave
to bury this deadly nuclear slag
all the Banks’ gold
thinning impenetrable

All the German gold
will save the nation
build a gold house
to bury the Devil
Introduction

All over the world, ecological problems are mounting. Global warming, receding ozone layers, maritime pollution, destruction of tropical rain forests, decreasing variety of species and depletion of fossil fuels and other non-renewable resources are only a few keywords characterizing the ecological consequences of our growth-oriented way of life. For a number of years it has been attempted to find solutions to these problems using the principle of sustainable development.

Sustainable development has a distinct spatial dimension. The utilization of space by humans for production, reproduction, consumption and leisure determines the consumption of material and energy, the locations of land uses and the pressure on the natural environment. The spatial distribution of land uses determines the spatial division of labor and hence the degree of spatial interaction and so energy consumption and environmental impacts of transport.
Decisions about the locations of workplaces, housing, retail and leisure facilities and the spatial interactions between them have a significant impact on the achievement of sustainability goals. These decisions are largely made by private actors (firms and households), but to a substantial part also by public actors, from local governments to the European Union. Recently, under the influence of neo-liberal economic theories, more and more decision powers have been transferred to private actors and, for the improvement of public participation, from higher to lower levels of government. The traditional model of government setting the framework for private decisions has been replaced by a flexible system of communication and adjustment between public and private actors called governance.

From the point of view of sustainable spatial development, the trend from government to governance must be put into question. In a situation in which long-term ecological challenges, such as climate change and energy scarcity, are likely to exceed the short-term problem solving capacity of democratic decision structures, these need to be strengthened rather than further weakened.

One way to achieve this is to ensure that decisions are made at the appropriate level of government at which not particular interests but the common welfare are pursued. This is not always the municipal level. Due to the evolution of transport systems, the problem space of sustainable spatial development has long exceeded the jurisdiction of local communities.

The growing influence of strong private stakeholders on local government decisions and a tax system rewarding competition between municipalities rather than co-operation has led to urban sprawl and more unsustainable transport, in particular if under the motto ‘less government, more market’ regional planning above the local level has been disempowered or even abandoned. The most effective policies to achieve sustainable spatial development, policies that make mobility more expensive, can be implemented anyway only at the national or European level.

The conclusion is that sustainable spatial development requires the reinforcement of democratic decision making at higher levels of government than the local level. This is demonstrated in the paper using the recent planning experience in the Ruhr agglomeration in Germany as an example.

**Sustainable development requires decision making at higher levels of government.**

**The spatial organization of spatial planning**

The small-scale territorial organization of the Federal Republic of Germany is a fortunate heritage of the medieval division of Germany into many small states. Despite the subdivision into provinces, districts and counties following rational principles after
the collapse of the Napoleonic Empire and numerous functional and territorial reorganizations after World War II, important elements of the decentralized spatial structure dating back to the Middle Ages have remained intact, with the effect that Germany's urban hierarchy is today more balanced than those of most other European countries. This is one of the reasons for the relatively strong position of cities in the political system of the country.

Already in the 1970s there was a debate about the most appropriate spatial organization of spatial planning. Frido Wagener argued that the non-compatibility of planning space, administration space and decision space is an impediment for long-range development planning and proposed a five-level spatial planning hierarchy analogous to the federal system of Germany (Wagener, 1970). More recent tendencies in administrative science and practice, however, have reinforced the responsibilities and decision powers of local governments to reduce bureaucracy and strengthen citizen participation (Landesregierung NRW, 2003).

These tendencies affect spatial planning at all levels of the federal system. The reform of federalism of 2006 revoked the right of the Federal Government to define the principles of national spatial planning. Instead, both the Federal Government and the Federal States (Länder) are now entitled to make plans for the spatial organization of their territory, and the Länder have the right to deviate from national plans (ARL, 2008). In several of the Länder, state planning was transferred to the intermediate level of government districts, as in North Rhine-Westphalia, or even to the local level, as in Lower Saxony (Bogumil et al., 2004). The question is whether this decentralization of decision powers takes account of future challenges for the spatial organization of society.
New challenges

As I have mentioned before, the principle of sustainable development has been employed in recent years to tackle numerous environmental problems on the global, national, and local levels. Of the new challenges the reduction of greenhouse gas emissions to mitigate global warming is the most recent and most demanding. The Kyoto Protocol of the United Nations of 1997 defined targets for the reduction of greenhouse gases.

According to the Kyoto Protocol, world-wide greenhouse gas emissions are to be reduced by 5.2 percent until 2012 compared with the level of 1990. For the affluent countries of Europe this implies an average reduction by eight percent, whereas no reduction targets were given for developing countries.

Under the impression of growing certainty of the threats of climate change, the heads of state of the European Union in March 2007 signed a declaration that by 2020 their countries achieve 20 percent less energy consumption, 20 percent renewable energy and 20 percent less greenhouse gas emissions compared to 1990 (and 30 percent if other developed countries co-operate). At the G8 Summit in L'Aquila in July 2009, the political leaders agreed that the rich countries must reduce their greenhouse gas emissions by 80 percent until 2050. Despite these commitments, the United Nations Climate Conference in Copenhagen in December 2009 turned out to be a sad demonstration of the ‘tragedy of the commons’, the over-use of free common resources (Hardin, 1968). In Germany already in 1990 a commission of the Federal Parliament had demanded that the industrialized countries reduce their greenhouse gas emissions by 80 percent until 2050 in order to allow the developing countries to advance their economies (Deutscher Bundestag, 1990). In August 2008, Chancellor Merkel announced that Germany will reduce its greenhouse gas emissions by 40 percent until 2020. In its strategy for sustainable development of 2002, the Federal Government set the target to reduce the allocation of land for buildings and transport from 130 hectares per day to 30 hectares (Deutsche Bundesregierung, 2002).

If these ambitious targets are to be achieved, also spatial planning will have to make its contribution.

Sustainable development

Sustainable development has a distinct spatial dimension. The utilization of space by humans for production, reproduction, consumption and leisure determines the consumption of material and energy, the locations of land uses and the pressure on the natural environment. The spatial distribution of land uses determines the spatial division of labor and hence the degree of spatial interaction and so energy consumption and environmental impacts of transport.

Decisions about the locations of workplaces, housing, retail and leisure facilities and the spatial interactions between them have a significant impact on the achievement of sustainability goals. These decisions are largely made by private actors (firms and house-
holds), but to a substantial part also by public actors, from local governments to the European Union.

At the same time all spatial processes have undergone a historically unique enlargement in scale. Because of increasing affluence and technological advances in transport technology, cities have expanded more and more into their hinterland, with the consequence of ever longer commuting and shopping trips. Labor market regions and catchment areas of central facilities have grown to a multiple of those in pre-industrial times. The disappearance of trade barriers and low transport costs have multiplied the volume of goods shipped from faraway countries. With growing interconnectedness of cities and regions, problem space and decision space increasingly fall apart.

Despite of this, in recent times, under the influence of neo-liberal economic theories, more and more decision powers have been transferred to private actors and, in the interest of public participation, from higher to lower levels of government. The traditional model of government setting the framework for private decisions has been replaced by a flexible system of communication and adjustment between public and private actors called governance. From the point of view of sustainable spatial development, the trend from government to governance must be put into question.

Spatial planning as system rationality

To make this understood, a short review of the history of spatial planning in Germany may be useful (Wegener, 2008).

The development of spatial planning in Germany reflects the history of the Federal Republic. After World War II, cities were rebuilt almost without planning. During the Cold War, the term planning was stigmatized as an expression of authoritarian government control. Only under the impression of the reform policy of the US presidents Kennedy and Johnson this taboo lost its force. In the 1960s, under a social-liberal coalition government, the concept of societal planning was accepted by policymakers also in Germany. At the same time the critique of the poor quality of cities rebuilt without planning increased (Mitscherlich, 1965). It became obvious that to create high-quality residential and workplace environments more comprehensive knowledge was needed than was taught at architectural and civil engineering schools. Following British and US examples, interdisciplinary planning schools were established at the universities of Berlin, Dortmund and Kaiserslautern. Under the influence of the then current paradigms of political economy and system theory, comprehensive visions of the ideal spatial organization of society emerged.

Particularly influential was the transfer of system theory to social theory by the soci-
ologist Niklas Luhmann. According to Luhmann, society is an open cybernetic system which survives against its environment by the selection of appropriate action. The reduction of complexity by stabilizing the difference between itself and its environment is the raison-d'être of a social system by which it distinguishes itself from biological systems (Luhmann, 1966). Planning, and also spatial planning, as a means to reduce complexity, is therefore a system rationality by which a social system maintains its existence.

But the ‘planning euphoria’ of the 1960s was shattered by the economic crises of the 1970s and 1980s. In the 1990s the neo-liberal economic doctrine originating in the United States and Great Britain spread also to Germany and led to a gradual withdrawal of the state from spatial planning: from grand designs to small, manageable and correctable incremental improvements, and from hierarchical top-down planning to voluntary co-operation between public and private actors termed multi-level governance.

It was again Luhmann who called attention to the possibility that the democratic decision procedures practiced today might not be able to adequately respond to the new ecological challenges (Luhmann, 1986, 14): ‘Thus the exposure to ecological self-endangerment remains within the context of the possibilities of evolution. [...] The possibility also exists that systems act on their environment in such a way that they cannot exist in this environment later on.’

There are many historical examples that originally prosperous human societies disappeared because they over-exploited their ecological resources (Diamond, 2005). Does the slowness of ecological processes exceed the problem processing capacity of democratic societies so that survival of the human species on earth is not guaranteed? The procedures of modern democracies were developed in the eighteenth century when protection against dangers within one election period was sufficient. But is the response scheme of democratic societies also sufficient for planning for future generations? If not, what are the consequences for spatial planning?

**Voluntary co-operation**

If Luhmann is right that future ecological challenges might exceed the problem processing capacity of today’s democratic structures, these need to be reinforced rather than further weakened. One precondition for this is the greatest possible correspondence of problem and decision space. Due to the evolution of transport systems, however, the problem space of sustainable spatial development has long exceeded the jurisdiction of local communities.

The influence of strong private stakeholders on local government decisions and a tax system rewarding competition between municipalities rather than co-operation has led to urban sprawl and more unsustainable transport, in particular if under the motto ‘less government, more market’ regional planning above the local level has been disempowered or entirely abandoned.
Ben Davy, drawing from Thomas Hobbes (1651), contends that the natural state of the world is ‘war of everyone against everyone’ (Davy, 2004). To overcome this, there are three ways: (i) to conclude a social contract in which power is voluntarily transferred to one or more individuals for rational and fair decisions about the distribution of goods, (ii) to leave decisions to the ‘invisible hand’ of the market or (iii) to solve conflicts between actors by voluntary co-operation. Davy illustrates the principle of voluntary co-operation by the ‘prisoner’s dilemma’ between two municipalities deciding about new commercial or industrial areas: If municipality A plans a large area and municipality B a small one, A wins at the expense of B. If both municipalities plan large areas, both lose. If both co-operate and plan small areas, both win, but less.

Benz et al. (1992) discuss the problems of voluntary co-operation systems as follows: Pareto solutions in which all win are not problematic, but rare. More frequent are Kaldor solutions by which inequality is accepted if the welfare gains are large enough to compensate the losers, for instance by payments or arrangements over time. The transaction costs of co-operation systems in terms of time and costs of negotiations are high. Without confirmation by an elected body, negotiated solutions lack democratic legitimation. In multilateral co-operation systems the transaction costs multiply.

With the number of co-operation partners, also the number of options to compare and the risk of cumulative vetoes grow, and compensations and arrangements over time become more difficult. If private co-operation partners are involved, the legitimation problem frequently becomes impossible to solve. They conclude that co-operation is a necessary element of social life, but that multilateral co-operation systems are less efficient than multi-level majority systems. Also co-operation systems are not more democratic than majority systems and imply serious legitimation problems, in particular when private actors are involved.

The conclusion for spatial planning is that for the achievement of long-term goals affecting the whole society and not only individual municipalities, voluntary co-operation between competing municipalities is not sufficient, but democratic decisions at the next higher spatial level above the local level are required—more government, less governance.

The Ruhr as an example

These relationships will be demonstrated using the spatial development in the Ruhr as an example (Wegener, 2009).

From the beginning of industrialization, spatial development in the Ruhr has been determined by the interests of large industrial corporations and the competition between the Ruhr cities. The result of 150 years of urbanization under these conditions is today’s settlement structure with its disorganized, almost random pattern of vacant industrial sites, transport corridors and housing areas and the continuing urban sprawl and reduction of open space. What is missing are
a common spatial vision for a sustainable spatial development of the Ruhr and the decision structures necessary for its implementation.

The Ruhr once was a pioneer in regional long-term spatial planning. The ‘General Settlement Plan’ (General-Siedlungsplan) of 1912 for the western part of the Ruhr by the chief planning officer of Essen, Robert Schmidt, was an early example of comprehensive, long-term regional planning that won international reputation (Schmidt, 1912). Its tradition was continued in the 1960s for the whole Ruhr by the Association of the Ruhr Coal Mining Area Cities (Siedlungsverband Ruhrkohlenbezirk). The regional development plan

Figure 1. Fragmentation of regional planning in the Ruhr
of 1966 was the first legal regional plan in
the Federal Republic and at the same time
the last one for the Ruhr (Petzinger, 2008).
The Siedlungsverband Ruhrkohlenbezirk
was founded already in 1920 and, since 1979
as Kommunalverband Ruhrgebiet, is the old-
est association of cities in Germany. Since
2004, the Regionalverband Ruhr is its suc-
cessor. The regional parliament consists of
representatives of eleven cities and four rural
counties (Kreise) with 42 local governments.
Membership is voluntary. In 2008, attempts
of the county of Wesel and the City of Hagen
to leave the Regionalverband failed only
because they did not meet the required two-
thirds majority. Dortmund and Hamm have
repeatedly announced their intention to leave the association.
Until very recently there was no regional
planning authority for the whole Ruhr. Since
the consolidation of local governments in
1975, regional planning in North Rhine-
Westphalia has been in the responsibility of
the five government districts (Regierungsbe-
zirke) of the state. The Ruhr is part of three
government districts: Düsseldorf, Münster
and Arnsberg (see Figure 1). Each of them
has set up its own regional development plan
(Gebietsentwicklungsplan).
However, since the 2005 revision of the
State Planning Law (Landesplanungsgesetz),
the regional plans are no longer binding for
local governments. Three or more municipali-
ties may issue a common regional land use
plan combining the functions of both a re-
gional plan and a local land use plan.
For a long time all efforts to establish a
common regional plan for the Ruhr have
failed because of the resistance of local gov-
ernments. Instead there has been a multitude
of bilateral and multilateral co-operation ini-
tiatives between changing coalitions of local
governments. In a research project together
with the Faculty of Spatial Planning of the
University of Dortmund in 2003, the eight
largest cities in the Ruhr—Bochum, Dort-
mund, Duisburg, Essen, Gelsenkirchen, Her-
ne, Mülheim and Oberhausen—formed the
Ruhr Region of Cities 2030 (Städteregion Ruhr
2030) to deliberate the future of the region. In
2007, the cities of Bottrop, Hamm and Hagen joined. The objective
of the co-operation was to overcome the nar-
row parochialism of the individual cities
without losing their own interests out of
sight.
Of the eleven cities six, Bochum, Essen,
Gelsenkirchen, Herne, Mülheim and Ober-
hausen, in 2005, established a planning as-
sociation to develop a regional land use plan.
The draft plan published in 2007 was criti-
cized by an expertise commissioned by the
state government (Greiving et al., 2008). The
experts argued that the plan assumes func-
tions of regional planning in a part of the re-
gion and so limits the freedom of future
plans for the whole Ruhr, but that at the
same time its spatial resolution of five hec-
In addition there is a great variety of informal co-operations. One example is the draft of a ‘Masterplan Ruhr’ presented in 2006 by eight cities—Duisburg, Oberhausen, Mülheim, Essen, Gelsenkirchen, Herne, Bochum and Dortmund—with chapters on housing, urban design and waterfront development. According to participants, these informal co-operations increasingly lead to formal results, but at the risk of getting lost in too many negotiation activities (Tönnies, 2008).

A good example for the problems of voluntary co-operation is the regional retail concept for the eastern Ruhr. The concept was commissioned in 2000 by 21 municipalities (Econ-Consult, 2000). Its general recommendations were to strengthen existing retail centers and to restrict retail development at non-integrated greenfield locations. In addition, recommendations were made for specific types of retail: Local food shops should be preserved as much as possible. Shops for clothing, shoes, toys, electronics, books, etc., should be allowed only in city or neighborhood centers. Do-it-yourself and garden centers should only serve the local demand of a particular municipality. Only furniture shops were allowed to serve the demand of the whole region. According to the participating cities, the regional retail concept has helped to protect existing shopping areas and to prevent new non-integrated greenfield developments (Stitz, 2007). In 2007, the concept was updated to take account of new developments (BBE Unternehmensberatung, 2007). Despite of this, in May 2008 a do-it-yourself superstore with 20,000 square meters of retail space was opened at a motorway exit between Dortmund and Witten without public transport access, grossly violating all principles of sustainable spatial planning, such as conservation of open space and reduction of car traffic.

In 2009, regional planning in North Rhine-Westphalia was again reorganized. In order to strengthen the international competitive position of the ‘Ruhr Metropolis’, the responsibility for regional planning in the Ruhr was transferred to the Regionalverband Ruhr (Lageman et al., 2008). The Regionalverband had already in recent years identified objectives of regional planning to be taken into account in local land use plans. Since 2005, a ‘Masterplan Spatial and Settlement Structure’ for the Ruhr is under development (not identical with the ‘Masterplan Ruhr’ mentioned above). So far, however, the plan covers only the northern, mainly rural parts of the Ruhr. It remains to be seen how conflicts with the regional land use plan of the six cities mentioned above and the other planning documents generated by the core cities of the Ruhr will be resolved.

Conclusions
In Germany Federal and Länder governments have increasingly withdrawn from national and regional planning and delegated responsibility for spatial development to local governments or private actors with the aim
of reducing bureaucracy and strengthen citizen participation.

From the point of view of sustainable spatial planning, this trend from government to governance must be put into question. In a situation in which long-term ecological challenges, such as climate change and energy scarcity, are likely to exceed the short-term problem solving capacity of democratic decision structures, these need to be strengthened rather than further weakened—more government, less governance. As long as all structures relevant for the relations between municipalities, in particular the influence of private stakeholders and the system of municipal taxes, reinforce competition rather than co-operation between municipalities, all efforts to achieve the objectives of sustainable spatial development, such as conservation of open space and reduction of car traffic, by voluntary co-operation between municipalities will fail.

The most effective policies to achieve sustainable spatial development, policies that make mobility more expensive, can be implemented anyway only at the national or European level.

The conclusion is that sustainable spatial development requires the reinforcement of democratic decision making at the lowest possible level of government at which not particular interests, but the common welfare are pursued.

For an increasing part of spatial planning decisions this will be a higher level of government than the local level.

References


Land and the Community  
(Willem Salet)

Three very productive papers were presented, exploring the legal and social concepts of the opening and closing of social communities at local level. Pamela Jo Hatley underlined the need of opening local community planning via bottom-up concepts of citizens participation in the extremely hierarchical context of Florida’s planning system. Iris Frankel-Cohen explored the theoretical dimensions of ‘gated communities’. After discussing more then 50 different theoretical concepts of gated community, she brightly managed to define the conceptual denominator of this multifaceted phenomenon as ‘the drawing of boundaries’ which has to be analyzed in ‘social’, ‘physical’ and ‘institutional dimensions’. Deborah Peel analyzed the social and legal consequences of creating ‘enclosures’ within urban neighborhoods. She explored the aspects of governance, the separating properties and the social implications of enclosures in the wider community. The analysis was illustrated with the emergent gated communities in Malaysia (‘GACOS’).

So Many the Use of Land  
(Greg Lloyd)

This was an excellent session with two presentations with a solid audience which was impressive, given it was held at 9.00am on a very snowy and cold Thursday morning. The first presentation concerned the development of parallel leases in NSW, Australia which considered an innovative institutional design to reconcile a national need for renewable energy with local concerns around the land resource. The second presentation concerned the evolution of the public use clause in Poland under its dramatically changed political and ideological conditions.

What at first sight may have involved two very different debates raised some very foundational questions for the planning, law and property rights community. First, it is clear that we cannot ignore the very special characteristics of the land resource itself. It is not simply an economic concept but carries with it important cultural, psychological and political dimensions. In short, we do not really make land any more and this was reflected in the presentations and in the ac-
companying discussions. Land is very precious and assumes iconic status in general and in particular localities at points in time. How regulatory and zoning planning arrangements, legal provisions and bundles of property rights reflect and articulate these specific features remains contested. The different pressures on land for a host of social, economic and environmental purposes require the appropriate institutional designs and organizational capacities to mediate and assert the importance of land in modern societies. Second, the importance of time is important in considering the management of the land resource. Time brings with it different political conditions and being sensitive to the impact of those changes on the social constructions of the public interest associated with land becomes an imperative. All in all, a fascinating start to the day and a reminder of the complex and layered issues associated with land matters.

Commercial Property
(Philip Booth)

A session entitled Commercial Property is not necessarily one to inspire much enthusiasm and would appear to suggest a dry discussion of floor space, prices and locations. But in fact the four papers presented in this session took the debate well beyond the limits of property development economics and had the great virtue of being usefully complementary. Bart Pasmans and Erwin van der Krabben, for example, offered an alternative view of industrial development in the Netherlands and argued for an increased role for the private sector as a way of rectifying the weaknesses of a development sector that was dominated by municipalities. Huub Ploegmakers and Erwin van der Krabben, also presenting work on industrial development in the Netherlands, argued for an analysis of the institutions involved as a way of understanding the outcomes of the development process. Paul Chorus looked at the activities of the railway companies in Japan in promoting development around railway stations in the context of libertarian planning. He noted the incentive schemes that the Japanese government offered as a way of stimulating private development, although this appeared to be very close to the American practice of incentive zoning. Finally, Michael Kolocek reflected on the discourses that surround shopping cen-
ters, analyzing the ways in which different groups communicated their concerns; perhaps unsurprisingly, developers were found to be the greatest users of the media to present their ideas.

The papers were not merely well coordinated, but had the merit of using different methodologies to investigate broadly similar fields of activity. This enabled the lively discussion to make connections between the cases presented.

PhD Roundtable
(Thomas Hartmann)

The young academics from PLPR assembled for the PhD roundtable during the 2010 conference. The aim of the session was to get in touch, learn from each other and help each other. In this manner, the 20 PhD students virtually conducted a PhD speed dating.

Each participant explained to every one of the other PhD students the three conclusions of their own thesis. Afterwards, all participants of that particular session split up in four groups, each creating a word cloud of keywords—one around ‘social justice’, one around ‘real estate’, another around ‘legislation’ and ‘stakeholders’. These posters reflect the wide scope of PhD topics within PLPR on one hand, on the other hand the roundtable showed that all PhD students within the association find common issues. This result encourages future PhD activities of PLPR.

Decline and Development
(Michael Wegener)

The session addressed a topic of growing relevance for planning in cities with declining populations. In shrinking cities, not urban expansion, but redevelopment or even rezoning of built-up land becomes the issue. However, historically all planning laws were designed to control growth, and if there is no more demand for new development, they become meaningless. The problems arising from this were discussed in four presentations: Finn Christensen asked how urban redevelopment strategies should be targeted; Jasper Beekmans discussed how to find new investors for vacant industrial estates; Christian Strauß reported on a government program to promote urban redevelopment in shrinking east German cities; and Alexandra Weitkamp reviewed new forms of governance to revitalise derelict brownfields to preserve open space.

The discussion showed that innovative solutions, such as new ways of using formerly industrial buildings for artists’ studios, lofts or offices, are required. However, it was also
argued that such conversions, as well as removal of buildings or re-zoning, require new instruments to deal with their legal consequences for existing property rights. Speakers and discussants agreed that with spreading urban shrinkage these problems will require more attention in the future.

Development Rights
(John Sheehan)

The session canvassed a range of different, but related development rights in Poland, Greece and Italy, but also touched on comparisons elsewhere. The post command economy of Poland is now dealing with the necessary relationship between Polish municipalities and private investors. However, the developing PPP formula being used is creating significant policy tensions given that such developments are on public land. Poland is also attempting to deal with development control in the absence of strategic land use plans in many urban areas, with development decisions now commonly dealt with as exceptions in the absence of development control—a potential for chaotic urban structure.

Greece is also attempting to formalize development controls to influence the nature of urban growth, however the use of hybrid zones which attempt to both guide the location of urban settlement and protect vulnerable ecosystems appeared to be confounding the formalization process. Much development still appeared to be possible in areas of Greece not subject to a strategic land use plan. Alternatively, Italy is using transferable development rights as a pathway to permitting development to occur on suitable land, but enabling land allocated for non urban use to generate development rights which can be transferred to more suitable sites. The transferable development rights are also funding necessary public infrastructure the cost of which, local Italian planning authorities are unable to meet.
Land Use Law
(Willem Korthals Altes)

All authors presented a paper. Ellen Basset presented a cognitive linguistic analysis of popular vote documents about measures 37 and 49. In the discussion, it was raised, in response to the paper by Jürgenson et al., that it is important that non-lawyers study legal proceedings in planning. Non-lawyers, in this instance surveyors, raise other questions and analyze case data differently, which may result in new knowledge about how planning law operates.

Both the papers of Sullivan and Bragar, and of Basset where about measure 37 and 49 in Oregon (USA). Both papers showed how different groups were aspiring to manipulate popular vote. Sullivan and Bragar analyzed the practical implications of these measures in relation to the established planning system of Oregon. Basset used another approach, which also indicated which role values play in these kinds of debates. The role of values in planning, law and property rights is in my observation very often touched during PLPR conferences, but mostly as a theme in the periphery of the research paper, for which various authors indicate there extreme importance. It may be interesting to organize a special session on values in planning law and property rights at the next conference.

Kaplinsky, presenting a paper on the new regional planning system in Alberta, Canada, showed again (after the round table on compensation) the weak position of vested rights
in Canada. As the developments are very recent, many effects are still to come. The audience shared the worries the author had about the new development in this planning system, and many of us were eager to hear about further developments next year in Edmonton.

**Land Use Control**  
*(Leonie Janssen-Jansen)*

Three very interesting papers were presented in PLPR’s ‘Land Use Control’ session. Gabi Zimmermann presented a paper on a monitoring system for open space pledges in Germany based on her recently finished PhD thesis. Gabi Zimmermann’s statement that new land use laws and regulations need to be accompanied by monitoring systems in order to get implemented was very clear and followed by an interesting debate, not only on the used technology, but also on the German 30 hectares goal.

Fennie van Straalen and Adri van der Brink (Wageningen University) gave an assessment of land policy strategies in metropolitan landscapes, with the Dutch example of Park Lingezegen. Fennie elaborated on the new, and in their opinion, pivotal role of the Dutch provinces in such developments, as the authority of this intermediate government layer has been changed under the New Dutch Planning Act. The paper was intensively discussed by the audience.

The session was concluded with a paper of Naja Marot, on the Slovenian Planning system. In her presentation, Naja presented a developed method for quality assessment of
planning legislation and its implementation. She used six major criteria: effectiveness and efficiency, comprehensibility, feasibility, transparency, legitimacy and sustainability. This is a rather new way to evaluate the planning systems. The audience was very interested in learning more on the method.

Green Property
(Gabi Zimmermann)

Dietwald Gruehn discussed the German Federal Nature Conservation Law and potential impacts of landscape planning on spatial planning. He underlined constitutional peculiarities, such as the authorization for legislation on federal state level.

Hsiao-Lan Liu analyzed the German impact regulation from the perspective of the developing country Taiwan. Marianne Darbi presented German compensation agencies as a tool to facilitate development and to safeguard environmental protection and restoration. Marjolein Spaans and Herman de Wolff introduced the concept of red-for-green in Dutch urban development. New urban areas are realized in combination with an improvement of the quality of the surrounding rural landscape. The increase of land values in areas reserved for urban developments such as housing, offices and industrial estates is captured for covering the costs of improving the rural landscape. They presented several projects in which the concept has been used.

All participants agreed that environmental issues and property rights are closely connected.
We often communicate about planning, law, and property rights through written words. These words form a text which is published as article or book. Through their texts, John Locke, David Ricardo, Susan Fainstein, Doreen Massey, or T.H. Marshall speak to us. These texts shape our understanding of ownership and land and power. Some of these texts are more significant than others. Like Montag, the confused fire man in Ray Bradbury’s Fahrenheit 451, we choose the books we particularly like and memorize them (yet, sometimes the books choose us). Since 2005, I have been designing posters which combine quotes from famous or less known authors, who write about planning, law, and property rights, with pictures. The quotes are from texts I read or re-read this year. The pictures are photographs I took while walking through a world I feel curious about. All posters are available at www.bodenpolitik.de (you do not have to pay anything but attention). These posters are my attempt to save quotes I cherish from forgetting.
Rent as the reward for the ‘indestructible powers of the soil’: David Ricardo’s *Principles of Political Economy and Taxation* (1817) proposes an essentialist concept of land rent. The lonely green sofa dumped at the construction site for a new road near Technische Universität Dortmund seems to defy this essentialism: Spaces are a social construction, emerging from social relations! But soon the bulldozers will remove all traces of the social … perhaps all we shall be left with will be the memory of defiance.

In *for space* (2005), Doreen Massey theorizes relational space. The manhole cover on Madison Avenue in Manhattan, produced in India, illustrates how the intimate can be very global indeed. Manhole covers are valuable tools for spatial analysis. Does a city decorate its private parts (like Paris or Wien) or does it prefer a functional approach? Manhole covers are analytically important for understanding relational space because they are so ignorable. Like the human subconsciousness, they are always there, but easy to neglect.
John Locke’s *Two Treatises of Government* (1698) has influenced Western property theory. Locke promoted private property rights which he considered an expression of individual labor and liberty. But we must not forget that Locke did not favor unlimited appropriation. Unless the owner makes good use of a thing, her appropriation is illegitimate. The caviar boutique at Vienna International Airport exceeds Locke’s concept of legitimate private property. Unless, of course, obscene shopping is good land use.

The recent economic crisis, it has been said, started with real estate speculation. Susan Fainstein, in her book *The City Builders* (2nd edition, 2001), explains why speculation in real estate development is inevitable. Nobody knows what the future brings. But the problem is that we cannot easily undo the consequences of our previous decisions. Yet, if a farmer makes a wrong decision, he can start again in the next year. If developers make wrong decisions, we have to live with bad cities.
City planning is not a moral judgment on private land uses, but coordinates the actions of landowners. The ideal of compact cities puts the relationship between planning, law, and property rights to a test. This house near the French-Swiss border represents personal autonomy that has gone too far. Protected by property law, the owner has not acted in the spirit of civic virtue. Richard Epstein’s *Takings* (1985) is a manifesto of anti-planning. Yet, maybe Epstein makes us ponder where civic virtue really comes from.

Spatial planners think of themselves often as the natural born advocates for the poor. T.H. Marshall, in *Citizenship and Social Class* (1950), uses town planning as an illustration of successfully differentiating participation. This may be surprising, perhaps even insulting to many planners. The terrace houses in Manchester remind us, however, of the segregation and separation of uses and housing types which we typically find in an urban land use plan. Planners are, after all, often architects of inequality.
Anxiety about public space

In recent years, there have been growing concerns about urban public spaces. But public spaces have always been an integral part of cities. So we may ask: Why do we see such a shift of interest? A brief answer is that these anxieties are linked to the challenge of providing social goods within a laissez-faire political economy and rising social inequality. New social and spatial barriers have emerged, reflecting and intensifying social fragmentation and exclusion, as partially expressed in public space provision and accessibility. What is needed is reversing the trend through creating democratic spaces: accessible places made through inclusive processes.

The crisis of the postwar model of political economy was addressed by a radical shake up, cutting the size and scope of the state, and encouraging the private sector to take
the lead in economic revival. A central part of this transition was the reluctance by the better-off to pay taxes, which would be used to pay for public services, including the development and maintenance of public spaces. Taxation and attitudes to taxation, as John Galbraith argued, came to have a decisive effect on the overall management of the economy.

Through globalization, firms looked for reducing their cost of production and being free from labor disputes. The bonds between employers and employees that had grown during the twentieth century mass production were broken, and the economy became dependent on international competition. Relocation to other regions, however, was painful for the industrial cities. The public spaces were among the casualties of these changes, where the ability or readiness to look after them came under pressure.

The postwar welfare state had developed a sizable infrastructure to provide public goods and services. Its successor, the laissez-faire society with its service economy, higher risks and globalized interdependencies, however, was eager to introduce monetary relations to new areas and activities. The core concern, however, is that markets are not interested in delivering social goods, such as public spaces. Social goods are non-rival and non-excludable, and as such cannot be narrowly profitable. It is up to public authorities to provide them, getting undermined if these authorities are unwilling or unable to invest in them. Meanwhile, the civil society is not able or effective in dealing with the problem. The level of anxiety rises about how public goods and services will be provided and managed when public sector contributions are reduced or withdrawn.

**Social inequality**

The critical social outcome of these political and economic changes is social inequality. Across the OECD economies, income inequality has been growing in the past two decades. As globalization has intensified, the gap between rich and poor and the number of people below poverty line have both increased. In Europe, since the turn of the century, the picture has been complex, with some countries showing a reduction in income inequality and others a widening gap.

Social inequality is closely linked to social exclusion, which is a multi-dimensional process, whereby some people suffer from the compounded effects of lack of access to resources, to decision making, and to social recognition. This process finds spatial manifestation in barriers and enclaves in richer areas, creation of ghettos, and even homelessness. Private investors wish to maximize the returns on their investment by attracting better-off customers and ruling out any uncertainties. Meanwhile, the growing social inequality lowers the threshold of tolerance towards low-income groups. As a result, places are controlled by security guards,
gates and walls, to keep the so-called undesirables out. The resulting public spaces, therefore, are at best only partially public.

The growing diversity of the urban population is an associated challenge. Globalization and European integration have facilitated mobility, creating unprecedented ethnic and cultural mix in some areas. In creating prosperous public spaces, social diversity is seen as an asset, maybe even a prerequisite for economic growth. But in low income areas, social diversity becomes a major challenge.

The declining working class neighborhoods have become concentrations of disadvantage. People who suffer from various forms of vulnerability are brought together through market mechanisms or public policy. Public spaces in these areas could become a place of conflict and incompatibility, or neglect and abandonment, showing the cracks through which social fragmentation can be visible. These marginal public spaces are not the display windows that cities want to show off, and they are not at the top of list of priorities, unless they become a different kind of display, through radicalization and revolt. The European social model reflects this anxiety: hoping to stimulate economic competitiveness without losing social cohesion.

The other side of the coin is consumerism. The expansion of credit and consumption is taken as a new engine for economic growth. Public spaces are created as spectacles that would facilitate and encourage consumption, particularly in leisure and retail. Social and cultural mix is part of this spectacle, only so far as it can be kept under control.

With globalization and ICT, the nature of work and the conditions of workers change. A trend of urban living parallels a demographic shift towards smaller households; and the growth of urban office work. The impact can be gentrification, the replacement of one social group by another, higher-income group. Investment in public spaces is done to this end, as some see gentrification a desired outcome of urban regeneration. For people who have to move out against their will, however, it adds to their sense of exclusion, alienation and resentment.

Globalization has intensified interdependencies across the world, integrating different countries into a global marketplace, fuelling competition between cities and countries. Cities operate as firms, engaged in entrepreneurial promotion of their spaces to attract investors and visitors. Pressures for homogenization and differentiation are both at work. Public spaces around the world seem to be lined by the same brands, and some have complained about the rise of ‘clone towns’. To stand out in this crowded marketplace, cities are resorting to status symbols such as tall buildings, shiny new airports, and glitzy public spaces.

Democratic public spaces: accessible place, inclusive processes

The distinction between the public and the private has been criticized for undermining women, ignoring social diversity, and privileging private interests. The problem often
A new kind of process for making public spaces is needed.

comes from a narrow definition of the public, rooted in elite groups’ implicit or explicit assumptions about what constitutes the public. Places are called public if they are accessible to people as a whole. The network of public spaces in a city is the map of possible urban experience. Is this experience disjointed and episodic, mirroring acute inequality, or is it open, seamless and democratic? This map of urban experience tells us something about how the city and society are structured. The difference is particularly important for pedestrians and people with any form of vulnerability, and whether they find the city accessible.

The anxiety about public space is about reduced accessibility, a symptom of rising social inequality. The solution, therefore, must lie in moving in the opposite direction: making public spaces more accessible. This of course should not mean forcing the private sphere open to outside intrusion, nor accepting physical determinism, whereby space is thought to shape society. Accessible and open public spaces, nevertheless, are not being provided under the laissez-faire or communitarian paradigms, under the banner of personal or group interest. So the provision of public spaces which are accessible to all without too many preconditions would ultimately fall on the state. But the examples of the state-created postwar urban space often revealed a top-down, paternalist, and technocratic approach to urban development, which without maintenance, as they were in many public housing schemes, became quite dangerous and unpleasant places. Through urban surgery and suburbanization, cars were given prevalence, undermining the quality of life for local pedestrians, and threatening the global environment.

Therefore, while public sector involvement is essential, a new kind of process for making public spaces is needed: a more democratic, inclusive process which is open and beneficial to many people rather than a few. We can find examples of the co-production of inclusive places around Europe and elsewhere. In France, the collaboration of design teams, local municipalities and local populations could plan and implement accessible public spaces.

In Britain, the regeneration processes that have involved the citizens from the start have been recognized as successful examples of urban regeneration. In Mexico, the process of consolidation of low-income neighborhoods has led to the development of public spaces in which the local population and the municipality worked together.

If we compare two schemes, one with and the other without participation, the difference is often fully visible, if not in the physical conditions but surely in the way the outcome is understood and used by people. Of course, these inclusive processes cannot solve the deeper social problems of poverty and exclusion, and their impact would be limited within the conditions of rising inequality. But they can make a big difference
for many people’s everyday life. Co-production, however, does not necessarily mean physical change; it could merely be a change of image and attitude. In the Netherlands, an initiative to clean up the public spaces by fathers and sons, or in Germany, the idea of helping people feel safe and appreciate public spaces, are among these examples.

To conclude, economic and political change has had major social and spatial consequences: marketizing and globalizing goods and services, turning cities into the nodes of interconnected economies, and white-collar workers the new urban dwellers. In this process, social inequality has grown, as many are unable to join the ranks. The impact on the city has been fragmentation and segregation, with exclusive spaces and spectacles for global competition and for the enjoyment of the well-off. These public spaces have received much attention, while the marginal public spaces of the city may remain places of neglect, incompatibility, conflict and fear.

Part of the solution would lie in reversing the trend by creating open and accessible places through inclusive processes. Such places may offer opportunities for confronting social fragmentation, by being open and welcoming.
Global Interest in Private Property

Private property is a social and legal institution with a long history (Schlatter 1951). It has come into contemporary focus because of the changing nature of the global political economy. With the fall of the Berlin Wall in the late 1980s and the dissolution of the Soviet Union in the early 1990s, some commentators believed that the grand social debates of the twentieth century were finished (Fukuyama 1989). Throughout the century, the debates had been structured by the relative merits of conflicting political economies: socialism versus capitalism and communism versus democracy. In the new era, it seemed that only one set of ideas would prevail: capitalism and democracy.¹ The new countries

¹ Huntington’s (1997) notion of a ‘clash of civilizations’ is one alternate concept to the one advanced by Fukuyama (1989).
of Central and Eastern Europe and the former Soviet Union, as well as other countries that were undergoing their own independent political changes (such as South Africa) began asking themselves and others how to become more integral to the global community. How does a country acquire the economic standing of the advanced developed countries? How does a country acquire the political legitimacy of advanced developed countries? How does a country acquire capitalism and democracy? These became among the most pressing sets of questions of the late twentieth century.

An answer seemed to center on private property. Private property was the literal key to a market-based capitalist economy; likewise, private property was central to democratic political structures.

Over the last two decades, developing and transition countries around the world have, with the counsel of the multilateral and bilateral international aid agencies, moved to introduce the social and legal institutions of private property (Deininger 2003). This tendency has been aided by advocacy suggesting that the creation of private property is the central variable to alleviation of poverty in developing countries (de Soto 2000).

All told, this has led to a ‘global debate over constitutional property’ (Alexander 2006). Some suggest that the extent of private property rights serves as a reliable indicator of both economic strength and political freedom, leading to global rankings of private property rights robustness (Bethell 1998, Thallam 2008).

As the global discussion about private property rights has accelerated, one focus has become the status of property rights in the developed countries themselves. For decades, some neo-liberal advocacy groups in the U.S. have been pushing for a legal and social reconceptualization of property rights vis-a-vis their interpretation of American history and law (Jacobs 1998b).

This paper represents a preliminary examination of the nature of this advocacy in the U.S. and Europe. Its purpose is to seek to understand the causal relationship between advocacy and changing policy discourse about property rights and planning. Prior research suggests that such advocacy has been substantially influential, in both the U.S. and Europe (e.g. Jacobs 2003, 2008a).

**United States and Western Europe**

Since at least the beginning of the twentieth century Americans have looked across the Atlantic for models of what is now denoted as sustainable cities and landscapes. In the early and mid-century England served as model with its greenbelts and new towns; from the mid-century forward the focus was on Scandinavian countries and their use of public authority to purchase urban fringe
land and tightly control urban growth (e.g. Mandelker 1962, Strong 1979). In this current period the interest is in the creative application of environmental management principles for the fashioning of sustainable urban and regional environments (Beatley 2000, Siy 2004, Faludi 2007).

A common and longstanding story in the urban planning literature sees the U.S. approach to land use planning and management as significantly different (even unique) in the context of other developed countries, especially western Europe (see, for example, Delaflons 1969, Cullingworth 1993, Alterman 1997). Reflecting U.S. history and culture, and this in return reflected in U.S. law, the U.S. approach is seen as less dependent on expert management, more protective of social values of individualism and local control, and centering around the necessary integrity of private property vis-a-vis the role of the state as representative of the greater good (the public interest) (Alterman 1997, Ely 1992, Hamin 2002, Jacobs 1989).2

Alterman (1997) has argued that the U.S. is particularly exceptional in the limits placed on government’s regulatory role—the concept known as regulatory takings. In contrast, in a set of recent articles I argue that a) the systems of private property and land use planning in the U.S. and Europe have, functionally and traditionally, not been as disparate as has been commonly depicted, and b) that changing institutional and legal conditions in the U.S. and Europe are bringing the two

2 Alexander (2006: 17-19) refers to the causal relationship of history and culture to law as ‘path dependency.’

‘countries’ increasingly together (to the extent they have ever been apart) (Jacobs 2008a, 2008b, 2009). I also argue that this tendency for convergence is reinforced by the global property rights initiatives noted above.

In this brief paper I build upon my prior comparative work by exploring the specific role of politically conservative (on the right) property rights advocacy groups in facilitating the changes that are occurring. As a topical context for this exploration I use the controversy over the 2005 U.S. Supreme Court’s decision in Kelo v. City of New London, Connecticut.

**Kelo v. New London**

In June 2005 the U.S. Supreme Court issued a much anticipated decision in the case of Kelo v. New London (545 U.S. 469 [2005]). The closely decided decision (5–4) galvanized the planning, development, redevelopment and property rights communities, and continues to have national and international repercussions. What was at issue?

New London, Connecticut is an old, Industrial, port city on America’s east coast. It had its economic height in the 1920s, when its economic base was ship building. Since that time the city has experienced substantial economic and population decline. As the population and property tax base has shrunken the city’s ability to provide basic public services has also deteriorated. In the 1990s, New London developed a plan for economic revitalization. The plan focused on an area with 115 separate properties. The plan required con-
solidation of these properties into a single parcel. The city further proposed to transfer ownership of some of the new, single parcel to a multi-national pharmaceutical company for a research and production facility.

The city approached landowners about their interest in voluntary sale of their land. 100 landowners agreed to sell, 15 refused to sell. The city then proposed use of eminent domain on the outstanding 15 properties (an action where they would agree to pay fair market value for the property). In so doing, the city did not assert that these properties were ‘blighted’ (the legal and planning standard under which such eminent domain actions existed since the 1954 U.S. Supreme Court decision in Berman v. Parker 348 U.S. 26 [1954]). Rather, under the authority of state enabling legislation and based on a thorough comprehensive plan, both of which the Court acknowledged, the city asserted only that the outstanding parcels were required to accomplish a greater public good—increased jobs for the community, increased public revenues (taxes), and increased economic competitiveness.

Susette Kelo and her ‘little pink house’ became the spokesperson for the opposition to New London’s proposed action. According to Ms. Kelo’s lawyers, the original Constitutional clause was intended to allow for governmental actions that create public facilities (such as roads, parks, airports, hospitals), but not for government to take private land from one private owner to give to another private owner. They asserted that if the Court found in favor of New London there would be no effective limit to any proposed physical taking of privately owned land by government; government could always assert that a proposed new use of land was in the greater public interest.

The final decision in Kelo was, from a law and planning perspective, unsurprising. On a base of strong legal and historical analysis the majority of the Court showed why the action by New London, Connecticut was acceptable. In so doing, the Court affirmed 50 years of similar actions by local and state governments throughout the U.S., actions which, while often clothed in a justification of ‘blight,’ regularly had no more (or less) justification to them than that provided by New London, Connecticut.

But in its decision, the Court itself provided the basis for much of the public policy controversy that followed. According to the Court, their decision was only about whether New London’s action was acceptable under the U.S. Constitution (did it violate the terms of
the takings clause in the 5th Amendment). But, the Court noted, ‘We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power’ (545 U.S. 469 [2005] at 489). That is, while New London’s and similar local and state governmental actions were legal under the federal constitution, the U.S. Supreme Court invited state legislatures to decide whether such actions should be legal under state constitutions.

The negative reaction to the Court’s decision was swift and strong. Within a week a proposal was floated that then U.S. Supreme Court Justice David Souter’s home in Weare, New Hampshire should be condemned so that it might be replaced by the Lost Liberty Hotel (Wikipedia 2010). Using the threat of unconstrained governmental action against ordinary homeowners, a national movement emerged to thwart the impact of Kelo. Following the invitation of the Court, state laws which appear to do just this have subsequently been adopted in approximately 40 states (Ely 2009, Morris 2009, Somin 2009, Jacobs and Bassett 2010). The explicit intent of most of these laws is to prohibit governmental eminent domain actions for the sole purpose of economic development, and where privately owned land is taken from one owner to be redistributed to another owner.

**Neo-liberal Advocacy and Property Rights**

In the United States the renewed interest in property rights law and policy is a conscious part of a multi-decade strategy on the part of the political right. Beginning in the 1970s, soon after Earth Day and the emergence of a new set of national and state laws related to land use and environmental planning and management, conservatives began a critique of these efforts (see, e.g., McClaughry 1975, 1976 for period pieces, and Epstein 1985 for what has become a foundational argument from the conservative perspective). Their argument, an argument that has not changed much in the ensuing decades, is that these efforts by government were and are economically inefficient, actually ineffective in achieving their stated aims and fundamentally un-American.

In the late 1980s, just prior to the end of the second term of the Reagan administration, these efforts took formal form in the establishment of the so-called wise use movement (Jacobs 1998b). A conference was held in 1988 for a broad range of those disaffected by their sense of growing governmental authority over land use and environmental resources (Gottlieb 1989). The integrity of private property rights became a useful analytical and rhetorical way to present and pursue a policy agenda focused on blunting the impact of the land use planning and environmental movements and reducing government’s purview over private property rights.

Over the last thirty years the so-called private property rights movement3 (a name evolution that proved more broadly appealing

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3 I have been writing about the property rights movement and its advocates for over a decade. See, for example, Jacobs 1995 and 2010.
that wise use) has grown substantially. There have been and are a wide range of advocacy groups pursuing aspects of a policy agenda.\(^4\) These include, for example, the American Land Rights Association, the Competitive Enterprise Institute, the Castle Coalition, as well as a supporting network of legal advocacy firms available to bring action on behalf of landowners and against elected officials (Ring 2007, Teles 2008).

By some measures, these groups have been wildly successful. During the 1990s (in the period of the Clinton administration) they focused their efforts on the passage of state laws intended to reshape the policy, administrative and legal actions and options of state and local governments. 27 of the 50 states (27 of the lower 48) passed these laws between 1991–1996. However much to the movement’s surprise and frustration the impact of these laws on actual governmental practice was limited (Emerson and Wise 1997, Jacobs 1998a).

Beginning in 2000, with the election of George W. Bush, the movement re-focused their attention at the national level. At first it appeared that this was a good idea. But events largely pushed the movement back to focusing on the actions at the state level (Jacobs 2003). Here again they appeared to be very successful. In both 2000 and 2004 in Oregon, a state recognized as one of the most progressively environmental in the U.S., the movement succeeded in getting ballot initiatives adopted that required substantial re-writing of Oregon’s 30 year old statewide land use planning program (Abbott et al. 2003, Liberty 2006).

But the Kelo case becomes a useful, specific example of the actions and intentions of these advocacy organizations. Ms. Kelo was specifically recruited to serve as a plaintiff in the proposed litigation by a self-proclaimed conservative legal advocacy firm, the Institute for Justice (http://www.ij.org/). Prior to the case’s outcome, the Institute and their supporters established a strategy where they were set to win regardless of the case’s outcome. If the case had been decided in favor of Susette Kelo and against the City of New London, Connecticut, they would have established a significant brake on governmental use of eminent domain for economic development purposes. However, their ‘loss’ in the case was turned into a ‘victory’ through a) public relations efforts intended to depict the outcome as reflective of insensitive and rapacious governmental activity (see the Lost Liberty Hotel incident cited above) and b) subsequent systematic efforts to promote state-based laws which follow the invitation offered by the U.S. Supreme Court for more restrictive state standards for eminent domain actions (see Sagalyn 2008 for a discussion of the media depictions of Kelo). The Institute together with its spin-off organization, the Castle Coalition, developed model

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\(^4\) All the groups noted here and in subsequent paragraphs can be searched on the web, and they in turn have links to related organizations.
The Institute for Justice delivered an engineered response.

state legislation, and actively recruited sponsors for its introductions across the U.S.

This then leads to a broader set of comments about the activism of these organizations. Proponents and supporters of the so-called state-based Kelo laws consistently argue that these laws represent a bottom-up popular backlash to the U.S. Supreme Court’s decision in Kelo (Sanderfur 2006, López et al. 2009, Somin 2009). I do not interpret the situation in this way. While it is true that public sentiment was focused once aroused, I believe it is necessary to offer a different interpretation for why it was aroused in the first place. As noted, The Institute for Justice represented Susette Kelo before the U.S. Supreme Court, after actively soliciting her as a plaintiff. After arguments and before the decision the Institute poised itself for action based on the likely outcomes. It was the Institute that initiated the Lost Liberty Hotel media-publicity campaign immediately after the decision. It was the Institute that founded the Castle Coalition for continued activity around the case. And it was the Institute that drafted the model legislation for use by states, whereby states could take advantage of the invitation for restrictive state action offered up in the Court’s decision. Does this represent bottom-up, popular backlash? I don’t think so. I think, instead, it represents very astute organizing by a national organization with a clear policy agenda to capture and harness media and citizen attention. While I acknowledge that the Institute’s actions would not have worked had there not been fertile ground for the seeds they were planting to sprout, I believe this is a decidedly different situation than a grass roots, bottom-up response to the Court’s decision. It is, instead, I believe, an engineered response.

The situation in Europe is similar and different. As in the United States, throughout Europe there are a network of politically conservative, policy advocacy organizations. Broadly speaking they advocate less government regulation, stronger markets, and stronger individual liberties—a liberal position in the European sense of the term.

The Stockholm Network functions as a coordinating and networking body for over 120 of such groups throughout Europe (www.stockholm-network.org/). The Stockholm Network’s website groups activities into three broad areas: health and welfare reform, energy and environment (with further focus on climate change and cap and trade proposals), and intellectual property and property rights. Noticeably absent is the type of land-based property rights advocacy common in the U.S. The Centre for a New Europe, headquartered in Brussels, the seat of the European Union, is similar in focus, though it acknowledges on its ‘about CNE’ page the key role of property rights: ‘Private property ensures the freedom of the individual in his private sphere’ (www.cne.org/about2.htm). A notable exception is the International Center for Research on Environmental Issues in
France (http://www.icrei.org/). ICREI was founded in 1992 with an explicit mission to undertake research and education promoting ‘property rights and market transactions, assessing the net impact of social regulations, using the common law principle of responsibility and promoting institutional arrangements for a free society.’ Since 1996, they have organized a biennial international conference with a single environmental resource focus—theory and ethics (1996), water (1998), marine resources (2000), coastal zone (2002), waste (2004), land resources (2006), air pollution and climate change (2008), and forthcoming in 2010, biodiversity—from ‘the perspective of non-regulatory tools, i.e. property rights and markets.’ The attendees at these conferences have been strongly European and even more strongly French.

Overall, though, it appears (from the information that one can easily obtain) that European neo-liberal advocacy organizations are less well funded than their American counterparts. It also appears that they have less overall influence on shaping public discourse, even in those areas where they actively seek influence. And, as noted, it does not appear that, with the exception of ICREI, the European groups have chosen to focus on the property rights debate in the way the subset of American groups have.

But are things as they appear? Case study research conducted in Europe (France, Italy, Netherlands and Norway) suggests a significantly changed mood ‘on the ground’ (Jacobs 2006, 2008a, 2008b). According to public officials the mood of landowners and the legal process is undergoing a seismic shift. Landowners are more willing to challenge local authorities, and in the process a very new relationship is emerging about the balance of the relative rights of the individual and that of society (as embodied by government). And as landowners undertake these challenges, it seems as if the legal system is more likely to back them. Why? These challenges and successes are not a function of formal changes in national or European policy. And it is arguable whether these challenges are (or are not) a function of evolving changes in European law, such as European Human Rights law (see, for example, Ploeger and Groetelaers 2007, Jacobs 2009). Instead these social changes appear to reflect a spreading, local sense of a changed European mood, a mood more favorable to markets and property rights and away from the long-standing authority of the central state.
Conclusion

For a wide variety of reasons, I believe that social debate about property rights—specifically the appropriate balance of individual and social (governmental) rights in land—will continue globally as well as in the U.S. and Europe (see Jacobs 2010 for my most recent general analysis about why for and in the U.S.).

In the U.S., and using the aftermath of the Kelo case as an example, the state-based Kelo laws have been described by one of their ardent supporters as ‘merely hortatory fluff’ (Ely 2009). In describing them this way, even the proponents acknowledge that these laws have had little impact on actual planning, policy and governmental activity. Why is this so? One argument is that they are a solution to a problem that does not exist. Another argument is that the larger economic environment has changed so drastically from when Kelo was decided (2005) to now that the basis of thinking about what is and is not appropriate for government to do relative to private property has also changed. Put quite simply—American communities severely affected by the credit, housing, and mortgage-finance crises will be forced to re-examine eminent domain and related powers as ways to address abandoned housing and facilitate economic and social redevelopment. As communities do this, it is not at all clear what, if any, resistance they will experience from a citizenry wanting and needing solutions to real and seemingly evermore complex problems (Jacobs and Bassett 2010).

Will this dampen the activism of neo-liberal advocates? No. Just as they have, for over a decade, sought to continuously advance their agenda and learn from their policy experiments, they will, again, learn from their successes and failures with state-based Kelo legislation. State-based Kelo laws represent the latest, not the final, wave of policy activism on property rights issues by neo-liberals in the United States.6

In Europe it seems to me that the situation will be somewhat different. For the most part, neo-liberal advocacy organizations will ignore the types of land and property issues engaged by their U.S. counterparts. But their general levels of activism together with the momentous changes occurring within Europe and relative to Europe’s position to the world, will keep neo-liberalism an active part of public and policy discourse. As it does, it is likely to influence broader public and policy discussions and legal decisions about the rights and responsibilities of the individual and the state.

The strength of neo-liberalism advocacy, in both the U.S. and Europe, is a product of larger social and political forces and debates.

5 While I use the U.S. Supreme Court’s decision on Kelo throughout this paper to illustrate my argument, I could have likewise used the activism in the State of Oregon around the state’s statewide planning program to make exactly the same point; see for example the recent discussion in Bassett 2009.

6 It is important to note that the neo-liberal activism of the post-Reagan period was, according to some commentators, born out of the same turbulent social activism of the 1960s that gave birth to many so-called progressive movements; for an enlightening discussion of this point see especially Andrew 1997.
During strong times when markets appear to be well functioning it is easier to argue a neo-liberal perspective and to find policy and public sympathy for the position. During economic downturns (such as now!) an argument for un- or less constrained markets, low levels of government involvement, and strong private property rights can be harder to sustain. But neo-liberal advocates are strong in their beliefs about the ‘right-ness’ (pun intended) of their position. So, neo-liberal advocacy is not going to fade. The questions are how much impact it will have, and how? And, perhaps as importantly, how will those (such as planners) who do not believe the neo-liberal position correctly frames the argument, be able to talk about their perspective on planning, law, and property rights?

References


ABOUT PLPR

During the 2006 World Congress of Planning Schools in Mexico City, a group of interested faculty members from many countries convened under the leadership of Rachelle Alterman. They decided to establish an international association. Consequently, the International Academic Association on Planning, Law, and Property Rights was founded during the inaugural symposium in Amsterdam in February 2007.

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