



The Center for the Comparative Study of Metropolitan Growth

# Housing and Land Use Regulations in Spain in the Framework of the European Union Law

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# I. PLANNING IN SPAIN IN THE EUROPEAN CONTEXT



# II. ZONING AND URBAN SPRAWL IN SPAIN IN THE EUROPEAN CONTEXT

# I. PLANNING IN SPAIN IN THE EUROPEAN CONTEXT

## 1. INTRODUCTION

The Spanish Constitutional Court has defined urbanism as "the land use policy of a city that determines how, when and where "human settlements may arise or develop and in the service of which there are placed the planning instruments and techniques required for achieving that objective" (Spanish Constitutional Court ruling 61/1997).

Spain is defined by the OECD as a quasi-federal state with 4 levels of government; the national government, 17 autonomous communities (*Comunidades Autónomas*), 50 provinces and more than 8.000 municipalities[1]. The division of powers regarding land-use policy is specified in the Constitution and in other national legislation.

Urban planning is compulsory, both on a regional basis (decisions made by the *Comunidades Autónomas*) and, more importantly, on a local basis. Urban planning in Spain implies a range of different legal elements: several kinds of maps, some documents and the rules for dividing the land into zones. A plan must exist to regulate land use, as it is a legal requirement in all the *Comunidades Autonomas.*

Today's urban planning is rooted in the 19th century legislation governing the internal expansion and reform of cities, which to a certain extent was a response to the growing concentration of the population in cities and was based on the design of new neighborhoods to provide for planned urban growth. Contemporary Spanish urbanism was born with the Act May12, 1956 on Land Regulation and Land Use Planning (from now, LS 1956) and current urban development legislation remains heir to that law.

[1] We follow here partially the descriptions of the Spanish system included in: PONCE SOLÉ, J. "Land Use Law, Liberalization, and Social Cohesion Through Affordable Housing in Europe: The Spanish Case", The *Urban Lawyer*, Spring 2004, volume 36, number 2, pages 322-331. We also use information included in OECD, LAND-USE PLANNING SYSTEMS IN THE OECD: COUNTRY FACT SHEETS: https://www.oecd.org/publications/land-use-planning-systems-in-the-oecd-9789264268579-en.htm. Finally, we rely heavily on the discussion paper elaborated in 2012 by the Spanish *Comisión Nacional de la Competencia* (Competition Authority) with the title COMPETITION PROBLEMS IN THE SPANISH LAND MARKET: https://www.cnmc.es/index.php/eu/node/334604. Actually, different parts of the excellent English version have been used literally.

## 2. HISTORICAL DEVELOPMENTS. THE TURNING POINT IN THE XXth CENTURY.

Regulation of land use has existed in Spain since the times of the *Ancièn Régim*[2]. The modern context dates back to the liberal state of the 19th century, under the jurisdiction of the police (*policía*) on a local level. The regulation focused on the growth of cities (urban developments of *ensanche*) and on problems of health and security. Public intervention was made possible by a wide range of laws, e.g. ordinances, alignments and compulsory purchases, which were first regulated in the Compulsory Purchase Act 1836[3].

Land use law developed in a more technical way in the 20th century. From the 1920´s more modern legal techniques were included in legal codes, such as the Municipal Charter of 1924, which introduced "zoning". In the 1930´s, the idea of Regional Planning arrived to Spain. Catalonia was a pioneer with the "zoning distribution Plan" in 1932, but the Spanish Civil War (1936-1939) destroyed the possibility for concrete developments.

After the Spanish Civil War, public efforts were addressed to rebuilding the devastated country. Thus, the *Instituto Nacional de Vivienda*, a public specialized body, was created in 1939 to achieve this goal. Some years later, in 1957, a dedicated Department, the *Ministerio de la Vivienda*, assumed responsibility for housing policy in Spain. The modern land use law was introduced in 1956, in the middle of Franco's 40 years dictatorship. The 1956 National Act came into force when Spain was a centralized, non-democratic country. But in spite of this context, scholars agree that the act was of high technical quality and the foundation of modern Spanish land use law.

The departure point of the regulation was priority of agricultural land. Subsequent construction was granted by public powers through urban planning. As a general rule,

[2]And under the colonial Spanish rule a similar regulation of land uses was enacted in South America. See BREWER-CARÍAS, A., *La ciudad ordenada*, Instituto Pascual Madoz, Universidad Carlos III, BOE, Madrid, 1997.

[3] Martín Bassols, *Génesis y evolución del Derecho urbanístico español (1812-1956)*, Montecorvo, 1973.

the plans regulated the right of property , without expropriation[4]. And the plan (at least formally[5]) awarded decision-making powers to municipalities, with an element of discretionary interpretation. However, this discretion was not always used by democratic municipalities and there were regular abuses of power in favor of supporters of the fascist mayors.

Consequently, urban planning was the central *pièce de résistance* of the whole legal system. But twenty years after the 1956 Act, just 7,5% the Spanish territory had an urban plan implemented[6]. So, the failure of the plan was in reality the failure of law.

On the other hand, the national Act 1956 established a legal system to develop public infrastructures and public facilities, still in work, based *grosso modo* on the owner's legal duties of giving freely a fixed percentage of land to the municipality (which is effective still today in general terms, as we will see), of giving freely the necessary land to streets, green areas and local public facilities and of making all the necessary works to develop the area where the plot of land is included[7]. But in the real world this rigid system is made flexible by means of development agreements between the city councils and the developer (a source, by the way, of corruption in some cases). Development agreements between municipalities and owners or developers are regulated in land use laws. The Spanish legal system accepts them but imposing certain procedural conditions in order to promote accountability.

## 3. THE LAST PART OF THE XXth CENTURY. THE CONSTITUTION OF 1978 AND THE DISTRIBUTION OF POWERS.

Spain saw a rapid population growth, especially from 1960-1970 and 1970-1980, encouraged by the increase in industrialization of the metropolitan areas of large cities such as Madrid, Barcelona, Valencia, Bilbao and Saragossa. From 1960-1970 all of these

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[4] Supra, note 29

[5] Although urban policies were in hands of local bodies, the real situation was that the national level interfered continuously, changing local decisions. We have to take into account that before the Constitution of 1978 did not exist the idea of local self-government, and national level had the "custody" of local authorities.

[6] Tomás-Ramón Fernández, *Manual de Derecho Urbanístico*, La Ley, 20 ed, 2008, at 23.

[7] Fernando López-Ramón, Introducción al Derecho urbanístico, Marcial Pons, at. 118.

urban areas had high annual population growth rates. 1970-1980 also saw rapid population growth but at a reduced rate. Population growth declined considerably in the decades which followed, bottoming out towards the end of 1990-2000. Since 2000 in particular continued migration has contributed to a steady increase in the natural rate of growth.

Rapid population growth from 1960 to 1980, concentrated in the metropolitan areas of large cities, produced a serious shortfall in infrastructure, housing and facilities, and a consequent deterioration in urban life quality. From the mid-1970s this combined with industrial decline in places such as Bilbao and the central area of Asturias, home to the iron and steel and shipping industry which went into crisis throughout Western Europe. In the urban sphere, the important phenomenon was the migration of a large part of the population from agricultural areas to cities, with the inherent problems of adequate housing. The growth of the cities was quite chaotic. Theoretically, the plans were in place to deal with this migration, but a large number of municipalities did not pass plans and in other cases, as I explained before, arbitrary decisions helped speculation and made it impossible to achieve orderly urban sprawl.

This is the context in which took place the first reform of LS 1956, after almost two decades of implementing it. It was developed through Act 19/1975 of 2 May 1975, aimed at amending certain elements of the previous legal framework, but conserving the previous model. Later, those two acts were recast in the Consolidated Text of the Law on Land Regulation and Land Use Planning, approved by Royal Decree 1346/1976 of 9 April 1976 (CT 1976). First, it introduced new planning concepts for some type of planning to exist in small municipalities. Second, the land use "net benefit" (*aprovechamiento*) technique was regulated and the present-day urban development management systems began to be designed. Third, the new framework provided for its regulatory development and implementation, leading to the approval of the Urban Planning, Implementation and Control Regulations in 1978.

The Constitution of 1978 highlighted the deep changes in Spain with the introduction of democracy and the autonomy of the regions (effectively we passed from a centralized model to an almost federal one). Both elements had a legal impact in the

field (see art. 148.1.3 of the Spanish Constitution) and on the local level (see art. 140, establishing the autonomy of local government)[8]. An act in 1985 specifically mentions land use regulation among the local authorities[9].

Using the Constitutional Clause (148.1.3) the seventeen *Comunidades Autónomas* have enacted laws, creating their own land use law.

The Spanish Constitution recognizes and protects the right to property, accepting expropriation with just compensation and the regulation of the right according to its social function (art. 33):

"1. The right to private property and inheritance is recognized.

2. The social function of these rights shall determine the limits of their content in accordance with the law.

[8] Article 140 of the Spanish Constitution (English version prepared by the Spanish Parliament, http://www.congreso.es/portal/page/portal/Congreso/Congreso/Informacion/Normas/const_espa_texto_ingles_0.pdf ) (last visited, July 24, 2009):
"The Constitution guarantees the autonomy of municipalities. These shall enjoy full legal entity. Their government and administration shall be vested in their Town Councils, consisting of Mayors and councillors. Councillors shall be elected by residents of the municipality by universal, equal, free, direct and secret suffrage, in the manner provided for by the law. The Mayors shall be elected by the councilors or by the residents. The law shall lay down the terms under which an open council
of all residents may proceed."

[9] Act 7/1985, Foundations of Local Regime

3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law."[10]

According to the Constitution, Spain was declared a "Social State" (see art. 1), and several social rights were introduced including a right to housing in art. 47:

"All Spaniards are entitled to enjoy a decent and adequate housing. The authorities shall promote the necessary conditions and lay down appropriate standards in order to make this right effective, *regulating land use in accordance with the general interest in order to prevent speculation*. *The community shall have a share in the benefits accruing from the town-planning policies of public bodies*[11]".

Art. 45 is also relevant:

"1.Everyone has the right to enjoy an *environment suitable for personal development*, as well as the duty to preserve it.

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[10] Spain has signed the European Convention of Human Rights which protects the right to property in its Protocol I. Article 1 of this protocol establishes that:
"Article 1 – Protection of property

- Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
- The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Regarding the case law of the European Court of Human Rights protecting the right to property from national interferences through land use regulations, see H. Burak Gemalmaz, "Reconciling the Right of Property and Planning in the Light of the European Convention on Human Rights", *Annales de la Faculté de Droit d´Istanbul* XLII, N. 59, 41-66, 2010.

[11] All the English quotations of the Spanish Constitution come from the Spanish Parliament's translation.

2. The authorities shall safeguard a rational use of all natural resources with a view to protecting and improving quality of life and preserving and restoring the environment, by relying on essential public cooperation.

3.Criminal or, where applicable, administrative sanctions, as well as the obligation to make good the damage, shall be imposed, under the terms to be laid down by the law, against those who break the provisions contained in the foregoing paragraph".

Bot articles are included in a section devoted to social and economic policy principles, which bind authorities in the way described by art. 53.3:

"The legislation, judicial practice and general action of the authorities shall be based on the acknowledgment, respect and protection of the principles recognized in Chapter 3. The latter may only be invoked in the ordinary courts in accordance with the legal provisions implementing them".

Thus, the Constitution "only" provides that public powers ( that is, the Legislative, the executive, including municipalities, and the judicial branch) are obliged to give a "realistic opportunity" of enjoying such a rights through land use regulations. (using the American expression from the *Mont Laurel* case law[12]) . These Spanish constitutional duties does not extend to results, but rather to an attitude towards achieving the constitutional goals[13].

[12]*Southern Burlington County NAACP v. Township of Mt Laurel* (336 a.2d 713 NJ), known as Mont Laurel I. As it is known, this decision was followed by two more, known as Mont Laurel I and Mont Laurel II, in 1977 and 1986.

[13] Juli Ponce, "El derecho a la vivienda. Nuevos desarrollos normativos y doctrinales y su reflejo en la Ley catalana 18/2007, de 28 de diciembre, del derecho a la vivienda", in Juli Ponce and Domènec Sibina (Eds..)., *El Derecho de la Vivienda en el Siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo. Con análisis específico de la Ley catalana 18/2007, de 28 de diciembre, en su contexto español, europeo e internacional,* Marcial Pons, 2008.

Using the Constitutional Clause (148.1.3) the seventeen *Comunidades Autónomas* have enacted laws, creating their own land use and housing law. Nevertheless, despite that shift of authority, national legislator continued producing urban development laws. Although central government had delegated many of its powers, it continued making laws concerning land use using several constitutional clauses (especially art.149.1.3, which allows it to enact supplementary legislation to complete the regional legal systems[14]). Using this argument, two national acts came into force in 1990 and 1992, creating a common legal framework in spite of increasingly decentralized government. A reform was carried out of the general framework established in 1976 by means of the Act of 25 July 1990 on Reform of the Rules on Urban Planning and Land Appraisals. That reform was later incorporated into the Consolidated Text of the Act Regulating Urban Development and Land Use Planning, approved by Legislative Royal Decree 1/1992 of 26 June 1992 (CT 1992).

The Consolidated Text of 1992 provoked that regional governments brought lawsuits questioning the constitutionality of the 1990 and 1992 Acts. The litigation was solved by the Spanish Constitutional Court with its decision 61/1997 of 20 March 1997. It was a highly controversial decision which almost destroyed the common legal structure in Spain. It ruled that the 1990 and 1992 national Acts were partially (about 80%) unconstitutional and, consequently, void. It established that land use law was a regional business and that the national level could only exceptionally regulate this matter (e.g. basic rules about compulsory acquisition, art. 149.1.18, which are connected directly with property right).

The decision declared unconstitutional the most important substantive part of CT 1992, with great impact in the Autonomous Communities that had not adopted already their own urban planning laws. Some of those regions passed single-article laws or minimal regulations that were confined to establishing CT 1992 as their regional law. Simultaneously, the Constitutional Court's decision holding that the repealing provision of CT 1992 was unconstitutional meant that CT 1976 came back into force, which from then became of subsidiary application to the regional laws.

[14] According to this article, the Spanish Parliament can enact legislation establishing "basic rules and coordination of general economic planning", which are binding for the regional and local level.

Even after the Constitutional Court's ruling, the national government still maintained a series of powers recognized in the Spanish Constitution. On urban planning and development matters, the State's powers referred to the regulation of the Basic Urban Property Statute, which covers the following aspects: rights and duties of the owners of each type of land; rules on appraisals; compulsory expropriation as a result of urban planning; and financial liability of authorities for urban development acts. One year after the mentioned relevant decision of the Constitutional Court the State approved Act 6/1998 of 13 April 1998 regulating land and appraisals (LS 1998). , The national Act of 1998 tried to fill the gap and gave some general rules about classes of land and limits to local plans, as well as some rules about compulsory acquisitions. This act was replaced by the Land Act 8/2007 of 28 May 2007 which was complemented by Legislative Royal Decree 2/2008 of 20 June 2008 approving the Consolidated Text of the Land Act (CT 2008).

Later, the State passed a new Act about rehabilitation and renovation (law 8/2013, 26 June, of urban rehabilitation, regeneration and renewal) and it and the CT 2008 were merged in the current Land Act 2015 (Royal Legislative Decree 7/2015, October 30, Which Approves The Revised Text Of The Law Of Land And Urban Rehabilitation).

## 4. THE CURRENT SYSTEM

The Constitutional Court decision 61/1997 served to clarify the powers of the different territorial public administrations in the domain of urban planning and development. The State, on the one hand, exercises indirect competence under the authority attributed in article 149.1 of the Spanish Constitution to regulate what the CC terms the Basic Urban Property Statute, as mentioned above. And the regions, on the other hand, have direct power to legislate on the entire urban planning and development process, and specifically on the three phases that characterize it: planning, implementation and control of development.

The constitution assigns responsibility for spatial planning to the autonomous communities, but the national government prepares framework legislation that guides regional laws. Furthermore, the national government has important powers in policy fields related to spatial planning. It can impose environmental legislation and related legislation that affects the possibilities to develop land. It also prepares a sectoral plan for national infrastructure, for example related to transport and energy. However, according to the constitutional court, it has no authority to prepare a general national spatial plan.

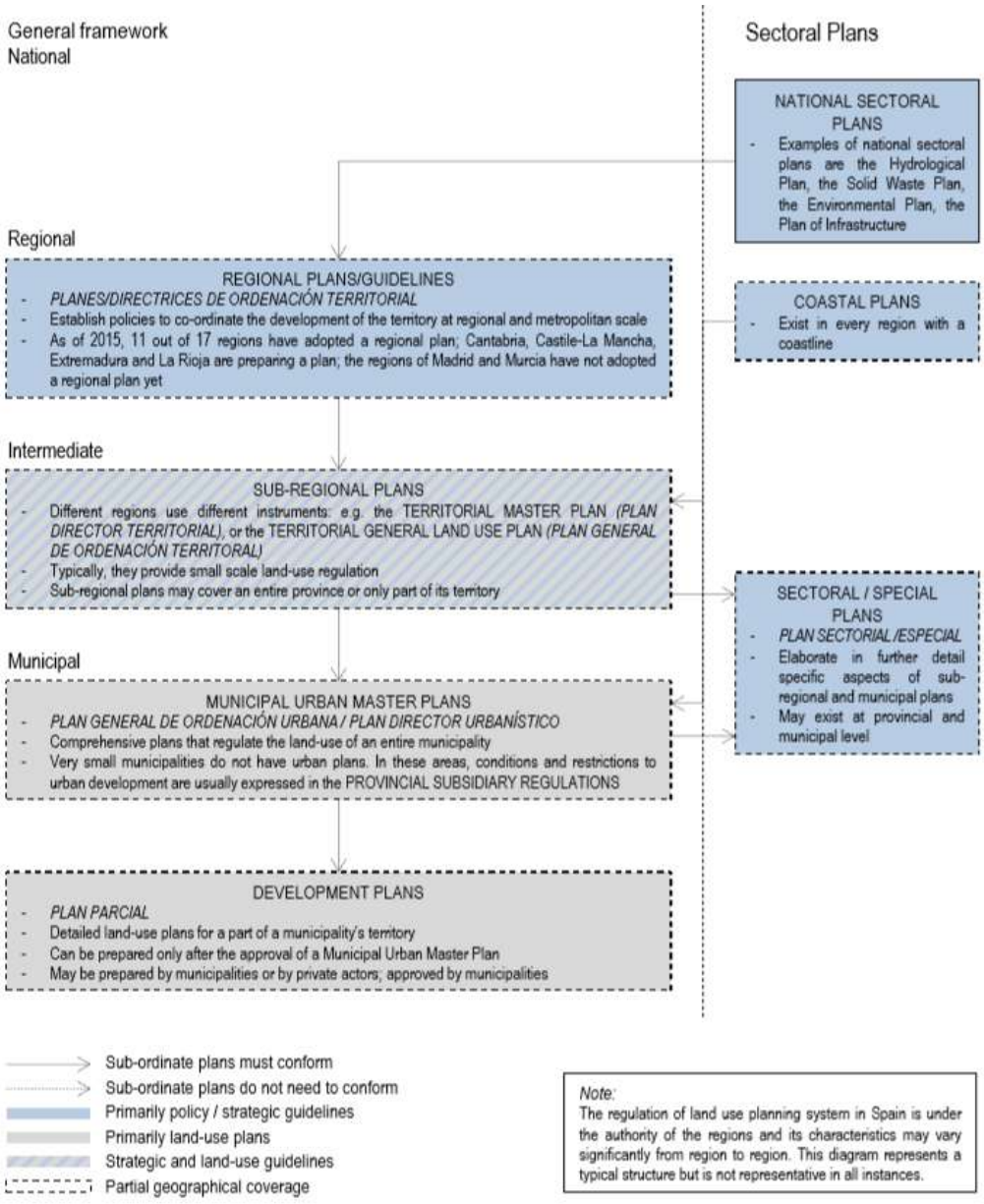
Autonomous communities develop and complement the basic national framework legislation concerning land use by establishing their own legislative framework on land-use planning. At present, Regions apply the Act of 2015, the specific law of each Autonomous Community and relevant implementing regulations, where such exist; with subsidiary application of CT 1976 and its implementing regulations insofar as matters not regulated by the law of each Autonomous Community. There must also be considered the urban development regulations contained in sectoral laws. For example, provisions on urban planning and development matters exist in laws on State property (Waters, Coasts, Ports, Roadways, etc.), environment (Laws on Conservation of Areas or on Noise) and cultural heritage (Spanish Historic Heritage Act).

Within the limits set by the national framework, this allows them to establish their own comprehensive planning systems. This includes, for example, the definition of the requirements of municipal master plans to delineate land as “suitable for urban development”, as “not suitable” or as “protected according to its environmental, natural cultural, etc. value”: and the definition and the content of the different planning instruments. Most regions have adopted a hierarchical system in which the regional government is responsible for preparing a regional spatial plan that is binding for municipal governments. Depending on the region, regional governments are also responsible for issuing building permits for specific development projects, such as large scale or particularly sensitive projects.

Municipalities are the main actors in land-use planning. They prepare and enact local plans, which vary in their details between regions. In general, medium size and small

municipalities adopt a simplified version of the Master Plan, with very similar contents. Only very small municipalities have no land-use plans; in this case, the conditions and restrictions to urban development are usually set up by the Provincial Subsidiary Regulations. In most cases, municipalities are also responsible for assessing applications for building permits.

An overview of the Spanish planning system can be seen here:



Source: OECD, 2017

All 17 Spanish regions use a hierarchical model of planning, in which lower level plans must comply with higher levels. Thus, co-ordination between levels of government in a narrow sense is provided by the requirement that local planning follows the plans established at the regional level. Co-ordination also occurs through administrative consultation requirements between levels of government. The hierarchical planning system guarantees that lower level plans are in accordance with higher level plans; at the same time, higher level plans may on purpose include ambiguous elements to ensure sufficient flexibility at the local level.

However, the system is rigid and passing a municipal General Plan can take years. On the other hand, procedural illegalities have been controlled by courts, striking down General Plans after a long time of preparation.

In order to inject flexibility in the system, national and regional regulations recognize the validity of the so-called **town planning accords**, wherein the administration agrees with private parties to promote certain changes in planning instruments. As we underlined above, they allow a degree of flexibility on the rigid system explained, although can also be a door to corruption. This is the reason because since 2008 these accords haven been subjected to a stricter legal regulation.

Their essential purpose is to prepare a revision or amendment of the prevailing plan, giving guidance as to the content of the change, but without being the instrument that effectively modifies the plan, given that the power to do so rests with the administration and is not transferable.

The key features of planning accords are described below:

• They are agreements between the administration (usually the municipal government, but at times regional authorities as well) and any public or private persons who may but need not own land affected by the accord.

• The purpose is to prepare a planning change, and, specifically, through these agreements the administration undertakes to put in motion all necessary procedures for that change to be carried out.

• In the event the modifications referred to by the accord are approved, the private party is obliged to fulfil the commitments made in the accord. Those commitments can be varied in nature, including: cash payment; assignments of land; execution of land lots; construction of underground accessways to a shopping centre.

• The accords do not bind the administration in the exercise of its planning powers, given that said powers cannot be disposed of by contract32. In theory, there is nothing to prevent the administration from approving a decision contrary to the accord.

• They cannot act contrary to the law, so an accord containing an unlawful provision would be rendered absolutely null and void. Specifically, national legislation applicable to all the regions prohibits town planning accords from requiring additional obligations or consideration of landowners that are more burdensome than those determined by law.

• According to the 9th Additional Provision of CT 2008, which amended Act 7/1985 of 2 April 1985 that regulated the Basic Terms of Local Government, authority to approve accords that modify the land use plans and other planning instruments provided for by urban planning legislation rests with the town council in plenum.

• The resolution approving the accord must identify the parties thereto and state the scope, subject matter and term of the accord, and must be made public after the accord is signed. In procedural terms, both regional law and case-law subject the processing, execution and performance of the accords to the principles of publicity and transparency, and, in fact, national legislation requires the accords to be submitted to public input. In some cases, such as Andalusia, the regulations require the accords to be entered in administrative registries.

• Breach of a town planning accord may generate a right to compensation in certain cases, according to case-law. Compensation would only be possible in those cases where the private party can demonstrate that he has certain vested building rights, and

not just mere expectations. On the other hand, a claim could be based on the administration's contractual liability for breach of the town planning accord. This approach is more likely to be successful. In this case, the indemnification would arise from the administration's contractual liability. The action allowable in this situation would be for rescission of the contract, with a claim demanding that the administration either perform the accord or, if that is not possible, that it pays damages.

Let´s analyze the whole Spanish planning system. As we have already explained, we use extensively the excellent description elaborated in English by the Spanish Competition Authority in one of its public reports[15].

### 4.1 SPATIAL AND LAND-USE PLANS

As we underline before, according to a ruling of the Constitutional Court, the national government is not allowed to prepare a national-level spatial plan for Spain. However, it may prepare sectoral plans and does so for several policy fields (i.e. the Hydrological Plan, the Solid Waste Plan; Environmental Plans, the Plan of Infrastructure).

On the regional and local level, the system of plans differs between autonomous communities. Typically, a Regional Plan exists at the level of the autonomous community that guides and co-ordinates planning at the local level. Furthermore, all coastal regions have prepared a Coastal Plan in order to deal with the particular development pressures and environmental sensitivities along the coast.

Of particular importance is the issue of second homes, strongly connected to tourism, which is mainly concentrated on the Spanish peninsula coast, especially along the Mediterranean. The long-term construction boom has accelerated in recent years and is exerting huge pressure on the environment and using up extensive areas of land. This pressure on the coastal environment has attracted the European Parliament's attention. In a 2004 report[16], it is stated that:

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[15] See footnote 1.

[16] http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/660/660551/660551en.pdf

*"What is spreading along the Spanish coastal region of the Mediterranean is not so much the programmed sustainable development of local communities – although such developments do exist; it is too often the spoliation of community and culture, the concretisation of the coastline, the destruction of the fragile flora and fauna and the massive enrichment of a small minority at the expense of the majority. Hillsides are invaded by a cancer of identikit dwellings not because they are needed but because they provide a profit for the urbaniser and the builder, for the architect and the lawyer."*

It is therefore vital to promote active policies, based on urban planning instruments and observance of the law, to assure sustainable long-term urban development; more importance should thus be placed on the restoration and revitalization of the present urban structure. In the case of Catalonia, one of the regions which has been better preserved, the Catalan Government passed during 2005 different spatial plans for the protection of coastal lands. Thanks to these plans, there is now a prohibition against building in the first 500 meters of land from the Mediterranean Sea. As a result, about 24.000 hectares were preserved.

The influence of the principle of environmental sustainability on Spanish land use Law (through UE law) is also visible in regional legislation in Spain. Different regional laws establish legal principles guiding urban activity towards continuity in urbanization, limitation of urban sprawl and preference for urban infill and revitalization instead of new developments[17]. The fight against urban sprawl has generated some interesting new legal techniques. This is the case of the prohibition of urban development *per saltum* (discontinuity in urban sectors of development)[18] or the legal decision about

[17] E.g. art.9 Andalucía Land Use Act 7/2002; art.32 Cantabria Land Use Act 2/2001.

[18] In that sense, art.86 Castilla y León Urban regulation

minimum standards of density[19]; deciding specific limits to new urban developments[20]. Another interesting technique is the "capacity of territorial resistance", which consists in establishing urban growth limits in each city in accordance to population, economic activity, available resources, infrastructures and facilities[21]. In the same way, regional legislation tries to avoid urban sprawl by establishing legal principles in favor of sustainable urban development, including a legal principle guiding urban development towards compactness, for example included in Catalan legislation. New developments will be decided by urban local planning considering those legal binding principles.

Hierarchically below the regional level, sub-regional Territorial Plans are prepared by intermediate levels of government (e.g. *Comarcas*) in some autonomous communities. Their content and geographical scope varies between autonomous communities. In some cases, they focus only on selected areas of high importance or on areas for which no local land-use plans exist, whereas in others they cover the entire jurisdiction of the subnational government.

The main land-use plans at the local level tend to be Municipal Urban Master Plans – comprehensive master plans for municipalities. In all autonomous communities, these plans may contain legally binding regulation for land owners. In geographical sectors that have been designated as suitable for development by Municipal Urban Master Plans, the conditions for development are further elaborated on at the second stage by the sector's Development Plan, a detailed plan that shows permitted land use and regulates building conditions for each individual plot included in the sector.

**4. 2 URBAN PLANS**

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[19] Following the recommendations of the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 2004 titled *Towards a thematic strategy on the urban environment*.

[20] That is the case of the Asturias´ legislation which establishes that the Master Plan will decide percentages of land in which will be possible new urban developments (*suelo urbanizable*). This decision will be taken according to necessities of each municipality but in the case of towns with a population superior to 40.000 inhabitants the percentages of land for new development must be inferior to 50% of land already occupied.

[21] E.g. Cantabria´s *Plan de Ordenación del Litoral* (Act 2/2004).

The core objective of urban plans is to design the land use transformations that will be carried out. The purpose of planning a is to envision the future city, determining the part of the territory that may be developed and the specific uses of the land. At the same time, planning plays a legitimating function for urban development transformations, as approval of the relevant plans is a necessary condition to be able to develop land.

Urban planning is the product of the rulemaking authority of the administration and, as a discretionary power, enjoys a very wide margin for its configuration. The discretionality of the planning power is legally limited by two techniques: the legal rules of direct application (i.e, imposed directly to the planner, e.g. regarding views and landscape) and the minimum urban development standards (regarding different aspects, including affordable housing by means of inclusionary zoning).

Planning consists of a series of instruments designed to delimit, in greater or lesser detail, how land must be used. Those instruments are organized by priorities based on hierarchy and specialization. It is the regional lawmaker who designs and configures the planning system. In any event, despite the introduction of certain changes, regional laws remain faithful to the traditional Spanish legislation on urban development initiated in 1956 and, specifically, to the framework set down in CT 1976 and CT 1992 and described above.

The planning system is divided into two main categories. First, supra-local planning, of a fundamentally executive nature, and included in territorial planning, before exposed. Second, local or municipal planning, which is primarily operative in nature and gives legitimacy to land development operations.

Within the local planning a distinction should be made between general planning and development planning. General planning is normally embodied in the General Plan or similar instruments, such as what are known as Subsidiary Standards. Development planning, for its part, is primarily materialized in the Partial and Special Plans.

### 4.2.1 GENERAL PLANNING

The General Plan is an integral land use planning instrument and the cornerstone of urban planning. Although its scope is normally that of a specific municipality, it may on occasions span more than one municipality (supra-municipal plans), if deemed necessary. It is original, in the sense that its approval does not require the existence of any previous plan, and necessary in that it is indispensable both for the subsequent planning development and for the urbanization and construction activity. Despite its fundamental nature, the General Plan must respect the terms of the Territorial Plans and Guidelines, as well as other provisions included in sectoral plans (for example, roadway and infrastructure plans). It is contained in all regional regulations, although with slightly different names. In some Autonomous Communities, the existence of the General Plan is compulsory for all municipalities, whereas others only impose it for cities that surpass a specific population threshold.

The General Plan includes general and specific provisions on municipal land, in particular, using two essential techniques of the Spanish planning system: **classification and zoning**.

Land **classification** consists in assigning each part of the municipal territory to one of the traditional categories of land in the Spanish planning system: urban land, developable or 'urbanisable' land (*suelo urbanizable*) and nondevelopable or 'non-urbanisable' land (*suelo no urbanizable*). Although regional laws tend to bring in their own specific nuances and peculiarities, a general definition may be given of each one of those categories:

• Urban land is that which meets certain criteria.

The first is the transformation of the land which, starting from its initial state, is or becomes suitable for urban development. The second is the criterion of location, which endows urban status on land by reason of the consolidation of the surrounding area, irrespective of the services it may or may not have.

According to the first criterion, urban land is:

a) land which, at the time the general planning is approved, has already been transformed because it has, at minimum, access by roadway, water supply, sanitation service and power supply;

b) land which, though not having the aforesaid basic services when the general planning is approved, eventually acquires them through development pursuant to the general planning.

According to the second criterion, urban land is that which, irrespective of its state of transformation, is located in consolidated built areas.

A distinction is normally drawn between consolidated urban land (located in an area where urban development has been completed) and unconsolidated urban land (located in an area where urban development is pending).

• Non-developable land is that to which any of the following circumstances apply:

First, land subject to a special protection regime that is incompatible with its transformation according to land use plans or sectoral legislation by reason of: its landscape, historical, archaeological, scientific, environmental or cultural value; the natural risks evidenced in the sectoral planning; its subjection to limitations or easements for protection of the public domain.

Second, land included in the general planning because it is considered necessary for preserving the aforementioned values or for its agricultural, forestry or livestock value, for its natural riches, or because it is not considered suitable for urban development (for reasons of rational use of resources or for territorial or town planning criteria).

There are two types of non-developable land:

One is nondevelopable land subject to special protection. In this type of land, the General Plan must lay down the measures and conditions required to conserve and protect its natural elements.

And there is common or simple non-developable land, i.e., that for which no special protection is established, but it has been preserved from the urban development process.

• Developable land is land that does not fall into either of the two preceding categories and that may be the object of transformation according to urban planning legislation.

In many regions a distinction is usually made between developable land integrated in sectors for immediate development, and developable land not integrated in such sectors, which will foreseeably take longer to be developed.

A sector of developable land is a portion of developable land which has not yet been developed but for which the General Plan envisages future urbanization. The sector is properly the subject of the Partial Plan, an instrument that will be discussed further ahead.

Through its general or basic determinations, the General Plan outlines the theoretical model of a city. First, the General Plan classifies and zones land. Second, the overall structure of the territory is established, identifying, inter alia, the general communication and transport systems and free zones set aside for parks or green areas. Third, the public or private nature of the public purpose allocations is determined. Fourth, the appropriate measures are set forth for protecting the landscape and environment. Fifth, there are delimited, on a case-by-case basis, the burden and benefit-sharing sectors or areas (distribution sectors or areas) and the average or standard net benefit is established for each zone, and the norms are set out for programming the execution of the plan and its revision.

In its specific determinations, the General Plan includes provisions that vary according to each type of land. On urban land, the General Plan provides a detailed land use plan. For developable land, the General Plan provides a more general and less intense regulation. The detailed planning is determined as part of the development planning process, primarily through the Partial Plan. In non-developable land, the Plan preserves land from urban development and sets forth, if applicable, measures to protect the territory and landscape.

The General Plan must be accompanied by a series of documents of varied subject matter. One of the principal documents is the Memorandum to the General Plan and Complementary Studies (*Memoria* and *estudios complementarios*). The Memorandum describes the reasoning behind the General Plan, explaining the thinking behind its

general contours. The Memorandum will also play an important role in controlling the discretionary use of planning powers through judicial review. The Spanish Supreme Court case-law reflects the importance of the Memorandum and the binding nature of this document for the planning process. In its famous decision of 16 June 1977 (which goes by the name of *Plaza de la Memoria Vinculante*) the Supreme Court held that the Memorandum includes, above all else, the rationale of the Plan, and the decision of July 9, 1991, that the Memorandum is not an "accidental documental, which may or may not exist, but an indispensable requirement of law", and that "the profound discretionality of planning, a regulatory product emanating from the Administrations (…) explains the essential necessity of the Memorandum as a fundamental element for avoiding arbitrariness". And the Supreme Court decision of 21 September 1993 states that the importance of the Memorandum is obvious "from the public interest standpoint, because it ensures that the chosen and justified land use planning model will be realized". For these reasons, regional laws tend to include a series of rules intended to have the Memorandum justify the solutions and determinations contained in the Plan.

The Plan must incorporate other documents as well, including the information drawings and land use planning drawings. The information drawings map out the situation of the regulated territory at the time the Plan is drawn up. And the land use planning drawings give a graphic depiction of the determinations included in the Plan. There are also the town planning norms, the primary purpose of which is to regulate zoning and the different uses that can be assigned to the land subject to the Plan; the programme of action, primarily intended to schedule the Plan's implementation; the economic and financial study, which assesses the economic and financial possibilities of the Plan; the environmental report, which evaluates the Plan from the environmental standpoint. According to the case-law of Spain's Supreme Court, in the event of inconsistency between the textual documents and the graphic documents of the Plan, the former have clear pre-eminence.

The other general planning instrument is the Sectorization Plan (*Plan de Sectorización*, the main purpose of which is to include non-sectorized developable land in the development process (in case the General Plan does not include sectors), mapping out

the sectors and, where applicable, the execution units in which the planning will be implemented, that is, urbanized). In this regard, the Sectorization Plan, like the General Plan in sectorized developable land, establishes the general determinations for this type of land, and may also contain specific determinations, and is only limited by what the General Plan provides for that land. The division into sectors requires that they be adequately sized to allow realization of all phases of town planning management, in particular, its essential element, the fair distribution amongst affected landowners of the burdens and benefits of development.

Lastly, it should be noted that in many towns the general planning determinations are wholly or partly established in the planning Subsidiary and Complementary Standards, which stand in for the General Plan in a municipality or fill in any gaps that it may have. The Subsidiary Standards have an essentially supplemental purpose, although not as detailed, with respect to the general planning provisions in towns that have no General Plan. Specifically, they classify the land (urban, developable and nondevelopable) and provide the basic plan for the town. For their part, the Complementary Standards complement the General Plan, regulating aspects not provided for in the latter and developing points addressed there insufficiently.

### 4.2.2 DEVELOPMENT PLANNING

The purpose of development planning is to develop the general planning provisions for each type of land targeted for development. The two main instruments in this case are the **Partial Plan and the Special Plan.**

The Partial Plan is fundamental to development planning. It is derivative in nature as it presupposes and is hierarchically subordinate to the General Plan, and executive, as it legitimates the Plan's execution. The purpose of the Partial Plan has traditionally been the detailed development of developable land, thus culminating the planning process for that land and legitimating the execution of the development plans. In general

terms, this continues to be the Partial Plan's essential function, even though in some cases it may also be used to establish detailed planning of unconsolidated urban land, modifying the structural regulation of the General Plan, or even establishing such regulation in non-sectorized developable land.

Taking into account its main functions, the Partial Plan completes the land use planning for a sector defined in the Plan, and, in relation to its effective development, defines execution units within that sector through a detailed planning. The determinations of the Partial Plan are confined to: delimiting the sector into execution units; assigning specific uses; indicating reservations of land for public parks and gardens, public and recreational zones, and public-purpose uses according to the standards established by law; designing the layout and characteristics of the road and communications network for the sector and its connection with the general system; designing the characteristics and layout of utility and service networks (water, sewage, electric energy, etc.); performing an economic assessment of the installation of services and of the execution of the urban development works; and establishing a plan of stages for executing the development works and, where applicable, the construction works.

Another important instrument of development planning is the Special Plan, derivative in nature though not always necessary. Its purpose is to respond to a concrete and specific need, on occasion of a sectoral nature. For example, there may be an Special Plan for Interior Reform, a Special Plan for Historic-Artistic Protection or an Airport Special Plan. In essence, it provides detailed and specific regulation of a domain that cannot be addressed by the Partial Plan. Special Plans are by nature exceptional and not necessary.

### 4. 2. 3 OTHER INSTRUMENTS

Both the regional regulatory and national supplemental frameworks regulate other instruments which are differentiated by purpose, scope, importance and regulatory or non-regulatory nature.

First, the Urban Land Delimitation Project (*Proyecto de Delimitación de Suelo Urbano*), which mainly serves to define what part of the municipal land is urban and what part is non-developable in towns where Subsidiary Standards cannot be approved.

Second, Detail Studies (*Estudios de Detalle*), intended to complete or adapt, when necessary, the determinations established in the development plans for urban land on a detailed scale. They are regulatory in nature, although their capacity to effect changes in the planning is very limited.

Third, the Catalogues of Protected Domain (*Catálogos de Bienes Protegidos*), which are auxiliary documents that list monuments, gardens, nature parks or landscapes that are subject to special protection due to their specific values or characteristics.

Fourth, the Urbanization Project (*Proyecto de Urbanización*), detailing and scheduling the urban development works (for example, water supply, sewage system, electric energy) with the precision needed for them to be executed. Although this has traditionally not been considered a planning instrument, there are some regional provisions that introduce confusion in this regard. It is not regulatory in nature and requires the existence of a plan.

## 4. 3 PREPARATION AND APPROVAL OF PLANNING INSTRUMENTS

The legal framework sets down a set of rules on the power of public authorities to prepare and approve planning instruments. Private initiative is also recognized in certain situations. The assumption underpinning the regulatory framework is that the formulation of planning instruments rests with public authorities, and specifically with the municipal governments. This holds for the General Plan, the preparation of which can only be initiated ex officio, even though on some occasions that ex officio initiation is allowed to come pursuant to the request of a private party.

In any event, the legal framework allows private initiative in relation to development planning instruments, specifically in their drafting and in proposing them to the municipal governments, who have the final decision as to their initial approval or otherwise. Private initiative plans may be presented by any private person, although

provisions may be introduced which tend to favor landowners. At the same time, they are generally subject to the same requirements as public plans and to the normal processing period, although the landowners affected by the planning instrument in question are personally summoned.

The procedure to arrive at final approval of a plan begins with the initial approval phase. After initial approval the plan is submitted to a public input procedure, which usually lasts at least one month. After the public input phase ends, the plan is given provisional approval. Normally, initial and provisional approval of a General Plan rests with the plenary town council, as is also usually the case with Sectorization Plans. There are variants with respect to development instruments, which in some cases require approval by the plenary council and in others by the mayor.

The public input period and provisional approval is followed by the definitive approval phase:

• In general terms, a general plan is given final approval by the Autonomous Community, although in some regions it may be approved by the municipal government, with a prior binding report from the regional government. The regional authority must approve the plan unless it detects problems of legality or/and impact in a public interest which is of regional scope. Otherwise, it would breach the municipal autonomy recognized by the Spanish Constitution, according to a well-established case-law of the Spanish Supreme and Constitutional Courts.

• In relation to development planning, there are instruments (Partial Plan, Special Plan) which may be definitively approved by the municipal government in some cases, but in others their final approval rests with the Autonomous Community. Instruments such as Detail Studies and the Urbanization Project are approved by the municipal authorities.

**4.4 REVISIONS AND AMENDMENTS**

Given their regulatory nature, the plans are valid indefinitely. In any event, this does not mean that a plan cannot schedule or impose a time limit for its review, or for amendments and revisions.

Although both revisions and amendments imply planning changes, there is a difference between the two. A revision consists of adopting new criteria in relation to the general structure of the territory or regarding the classification of the land subsequent to the election of a different land use planning model stemming, for example, from the emergence of unforeseen factors related to demographic change or economic growth. An amendment, for its part, is confined to making isolated modifications which in principle do not change the overall land use model of the plan, but which may affect aspects such as land classification or zoning.

In any event, although many regional regulations recognize both concepts, they include them within a broader array of innovations or alterations in the planning instruments. This means that the rule that any change in a planning instrument must be made by the same instrument and pursuant to the same procedures has been nuanced somewhat. Thus, there are cases in which specific determinations of a General Plan may be changed by a hierarchically inferior instrument, such as a Partial Plan.

**5. IMPLEMENTATION OF PLANNING**

Approval of the planning gives way to the management or implementation phase in which the land will be developed (urbanised) in accordance with the terms of the plan. Urbanisation is the development phase prior to building and consists in equipping land with the services and infrastructure needed to acquire status as developed lot on which construction can take place.

In the Spanish land use planning system, exercise of development rights obliges landowners to fulfil a series of principal obligations. The first obligation is to carry out a fair distribution (*equidistribución*) of the benefits and burdens of the plan. This mechanism is intended to correct any "inequities" that may have been generated in the planning phase. This principle forms part of the Spanish urban planning tradition and today is set out in state and regional laws.

In essence, fair distribution seeks to ensure that within each execution unit all landowners obtain the same net benefit, even though the plan assigns different net benefits (for example, a public park for one owner and an intensive residential zone for another) and generates inequities. The main tool used in Spanish urban planning to

achieve that goal consists of redistribution techniques, which basically involve grouping together the properties existing in an execution unit and generating new parcels that conform to the plan so that the in any event will be less than the minimum required in the legislation on common administrative procedure, and must be made public in the manner and with the content provided by the relevant laws. On developable land, execution is done by means of execution units, which are normally portions of a sector and composed of parcels. Landowners are given an identical net benefit proportional to the size of their original parcels

In addition to carrying out the fair distribution, urban development requires that the landowners comply with the duties that the laws and regulations impose on owners when their land undergoes development. Those obligations mainly involve compulsory assignments of land to the administration, payment for the projected development works and delivery of the relevant infrastructure (again all based in the social function of property, art. 33 Spanish Constitution: it is regulation, not taking). The benefits (land use net benefit) and burdens (development costs, compulsory assignments of land, etc.) of the planning are distributed in the execution unit, thus complying with the duties of fair distribution, assignment and urbanisation.

According to the law, the compulsory assignment duties are to:

a) hand over to the competent administration land reserved for roads, free zones, green areas and other public-purpose lots included within the action or assigned to it for acquisition.

b) hand over to the competent administration, in order for it to become public domain land, land that is free of urban development burdens with the same weighted average building rights percentage (*aprovechamiento urbanístico*) as the development action (or as such higher framework of reference as may include that action) provided in the legislation regulating territorial and urban planning. In general terms, the percentage cannot be less than 5%, nor higher than 15%. Territorial and urban planning legislation may by way of exception allow a proportionate and reasoned decrease or increase of this percentage, up to a maximum of 20% in certain circumstances.

## 6. CONTROL OF DEVELOPMENT

The third phase of the urban development process focuses on the control of development. Once the planning phase has defined what the city should be like and those plans have been implemented in the development implementation phase, the public authorities, especially town councils, must make sure that the different forms of land use are consistent with the planning determinations.

Administrative intervention in this phase addresses different areas:

• First, there is preventive control, which consists in making certain actions subject to prior mandatory municipal licensing. Urban development licenses are regulated municipal authorizations that allow works to be executed or land to be used according to the provisions of the relevant planning instruments. The technique is based on monitoring construction and other land uses to ensure legal and planning compliance.

• Second, there is ex post control. Once the licensee has executed the works, he is subject to the planning duties established by law.

• The third type of control addresses situations referred to as 'legalizable' and enforcement of urban planning law, through a series of measures which, though not part of the sanctioning rules per se, are intended to restore urban planning legality. This technique is applied to different types of building activity. The measures adopted have to conform to the principle of proportionality and may consist, for example, in the suspension of actions that quality as land use, licensed or unlicensed, or in demolition where the unlawful nature of the works is evident.

• Fourth, there is control against the commission of urban planning irregularities that justify application of the sanctioning powers of public authorities, which are confined to levying fines on the persons liable for an illicit act that qualifies as an infringement of urban planning law.

# II. ZONING AND URBAN SPRAWL IN SPAIN IN THE EUROPEAN CONTEXT

## 1. INTRODUCTION

It is necessary to underline that in the Spanish model, planning and zoning are strongly linked, in the sense that the first includes the second. As we analyzed when explaining planning, the General local Plan includes general and specific provisions on municipal land, using two essential techniques of the Spanish planning system: classification and zoning or, in the Spanish terminology, *calificación*[22]. Whilst classification implies assigning each part of the municipal territory to one of the traditional categories of land in the Spanish planning system (urban land, *suelo urbano*, developable or 'urbanisable' land, *suelo urbanizable*, and nondevelopable or 'non-urbanisable' land, *suelo no urbanizable*), calification consists in in assigning uses and intensities to land that has been previously classified as urban land or urbanisable land[23].

Therefore, *calificación* or zoning establishes different zones in the territory by use, density, lot coverage, or volume, shape, height and class of buildings. *Calificación* or zoning is established by the town planning norms, a part of the documents which are included in the General Plan, the primary purpose of which is to regulate zoning and the different uses that can be assigned to the land subject to the Plan. The planning instruments lay down certain uses for each part of the territory as well as other characteristics relating to the intensity of the use, mainly in terms of construction, lot coverage and density.

Classification of land and *calificación* are regulatory techniques, not taking and, therefore, they does not imply compensation to the owners, excepting cases of

[22] See e.g DE GUERRERO MANSO, C., *La zonificación de la ciudad: concepto, dinámica y efectos*, Thompson Reuters Aranzadi, 2012 and YAÑEZ VELASCO, I., "Conceptos de uso en la legislación del suelo (Especial referencia a la calificación y zonificación", *Revista de Derecho Urbanístico y Medio Ambiente*, September-October 1997, pp. 65 ff.

[23] We use here the discussion paper elaborated in 2012 by the Spanish *Comisión Nacional de la Competencia* (Competition Authority) with the title COMPETITION PROBLEMS IN THE SPANISH LAND MARKET: https://www.cnmc.es/index.php/eu/node/334604.

inequality causing a singular vinculation. They are based on the social function of property, declared by art. 33 of the Spanish Constitution:

"1. The right to private property and inheritance is recognized.

2. The social function of these rights shall determine the limits of their content in accordance with the law.

3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the law."

In that sense, the Spanish Constitution of 1978 is in the same line that the Protocol I of the European Convention of Human Rights[24] and the European Charter of Fundamental Rights[25].

The plan basically draws up a list of uses and a map. Then, zones are assigned to different uses on the list. It is the planner who determines how each zone is to be used. The uses may be general or specific, with additional subcategories within the latter. So, we can distinguish general uses (*usos globales*) and specific uses (*uso pormenorizados*), which are assigned by the Partial and Special plans in urbanisable land and urban land under renewal.

General uses encompass residential, industrial, tertiary sector and public purpose uses (*dotacional*). Within each general use there are specific uses, which, in turn, consist of further subcategories.

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[24] See JACOBS, H.M. "An Alternative Perspective on United States–European Property Rights and Land Use Planning: Differences Without Any Substance" *American Planning Association Planning & Environmental Law*, March 2009 Vol. 61, No. 3 I pp. 3 ff.

[25] "Article 17
Right to property
1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected."

This generates a considerable number of highly detailed and different categories of use. The possible uses are not laid down in the regional legislation and mainly depend on the municipal planning authority, where a great variety of possibilities exist, although the planning instruments are always overly detailed, employing dozens of general uses and specific uses. The combination of such detailed uses with differences in building rights (floor area ratio) and density generates a very large number of uses that greatly segments municipal land.

A municipality may have (i) a tertiary general use, (ii) composed of specific uses such as tertiary services, large commercial centers or service stations, and (iii) the tertiary services general use may include commerce, offices, hotels, public entertainment, or parking facilities, and (iv) commerce may include different types of retail activity, such as small commerce and medium commerce. Since there are other general uses which are subdivided, the total final uses may be very large in number and heterogeneous in different towns, giving rise to very specific and detailed planning of each municipal territory. This regulation is quite rigid, in the sense that it is necessary to follow proper legal procedures to modify the *calificación*.

**2. SEPARATION OF USES VS. MIXED USES AND MIXED USES DEVELOPMENTS**

For each specific use, town planning norms, with the *calificación*, establish compatible uses (the ones with which the use can in theory coexist) and prohibited uses (those with which it cannot coexist).

The Spanish zoning practice follows a European tradition which tends to accept mixed uses easily than the US tradition[26]. It explains that Spanish cities show a high degree of mixed uses in comparison to other cities. The Spanish approach is less commonly based on the assumption of exclusivity (only one human activity, e.g. residential, business or industrial). The prevailing principle is that a zone is suitable for multiple types of activity, one predominant and the others compatible.

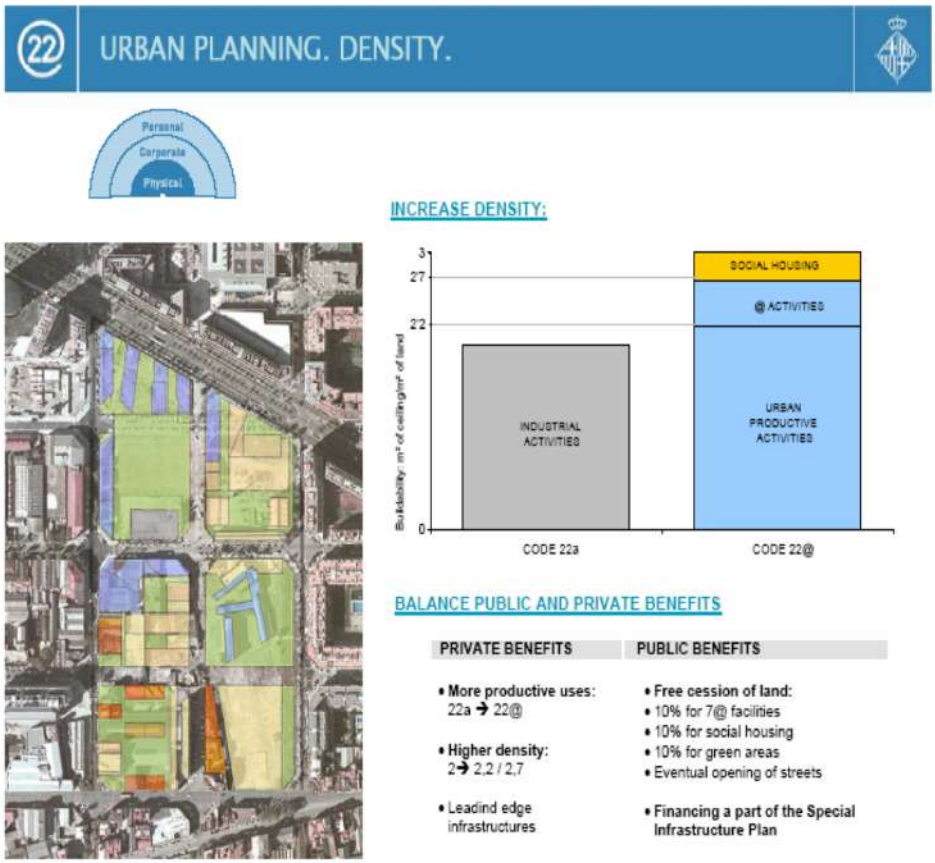
A good example of this is the existing zone in Barcelona, called 22 @. The 22@ Innovation District, intends to transform the old Poblenou industrial neighborhood (the

[26] HIRT, S., "To Zone or not to Zone? Comparing European and American Land-Use Regulation, *PNDonline*, II, 2010, pp. 2 ff.

so-called Catalan Manchester) into a new technology and innovation district by means of promoting the establishment of advanced services and knowledge-intensive activities, which are more environmentally friendly in terms of both air and noise pollution[27].

With the new 22@ classification, residential areas which have been affected since 1953 now fit into the overall vision and are earmarked for rest

oration. At the same time, over 30% of previously industrial and private land can be converted into new public facilities, green spaces and subsidized housing.




[27] http://www.22barcelona.com/content/blogcategory/50/281/lang,en/

Like most regeneration programs, 22@ fosters a mix of land use, turning the area into a place to both work and live. All areas are accompanied by green spaces that complement the many green areas, parks and gardens spread around Barcelona.[28]

In that sense, different American planning movements (e.g. Smart Growth and New Urbanism) which promote urban developments based on the ideas of compact cities, urban infill, city center revitalization, mixed uses or a more pedestrian-oriented style of urban life[29] are in the same direction that the traditional European model, including the Spanish zoning.

However, it is necessary to underline that Europe is in the middle of a "quiet revolution", based on micro and macro socio-economic forces (e.g desires to realize new lifestyles in suburban environments, outside the inner city or the real state forces operating without proper public control). The European Environment Agency has called this situation "the ignored challenge" in a very interesting report published in 2006[30].

According to this and other EU reports, the amount of housing space per person has doubled in the last half century as a result of higher living standards, declining family size and the increasing tendency for Europeans to live alone. Higher housing densities as a result of more compact housing estates and more 'high rise' living might in principle be able to offset the effect on land use. But in the last decade alone the size of urban sprawl increased in Europe by three times the size of Luxembourg. The building of new infrastructure such as roads and basic services, in part financed by the

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[28] See http://www.22barcelona.com/content/blogcategory/50/281/lang,en/

[29] KUSHNER, James A. (2002/2003): "Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations", *UCLA Journal of Environmental Law and Policy*, Volume 21, Number 1, pages 45-74.

[30] EUROPEAN ENVIRONMENT AGENCY (2006): *Urban Sprawl in Europe. The ignored Challenge* (http://reports.eea.europa.eu/briefing_2006_4/en/eea_briefing_4_2006.pdf and http://reports.eea.europa.eu/eea_report_2006_10/en)

Structural Funds, has allowed 'out of town' housing developments to flourish. This pattern may well now repeat itself in the more recent Member States[31].

'Out of town' estates offer families a better quality of life in a greener, more spacious, safer environment. Britons are famous for their liking of suburbia, but commuting long distances to work has become common in the small towns, villages and woodlands of the 'suburbia' that surround many major European conurbations. While those able to access these privileges often think themselves fortunate, these trends do not necessarily enhance the quality of life for society as a whole, taking into account economic, environmental and social (urban segregation) costs[32].

In that context, urban sprawl has become a modern problem in Spain too. The OECD has pointed at the possible useful tools to fight against it[33]:

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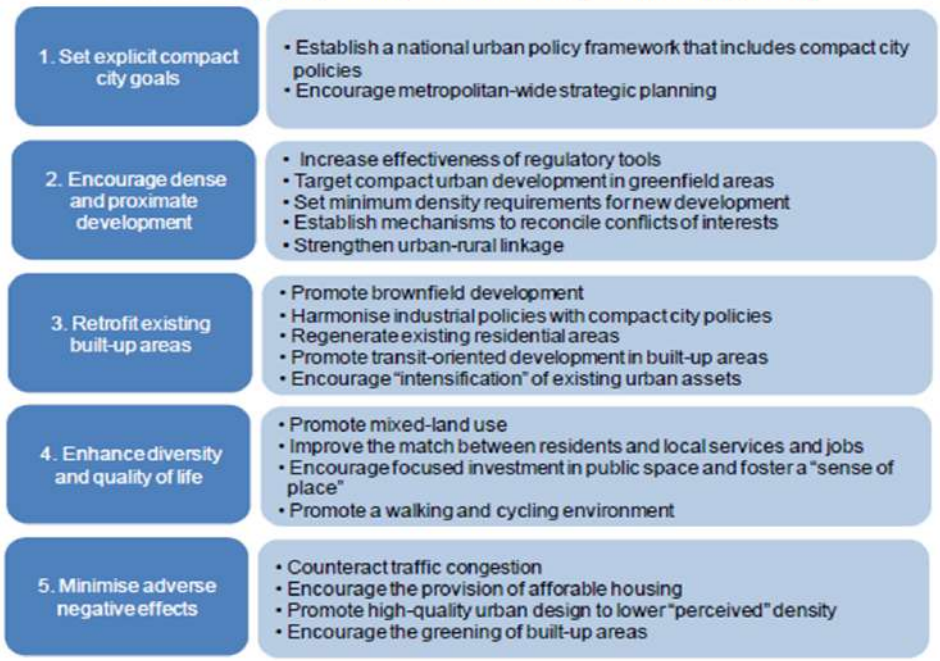
[31] See *A Consultation Paperr Fom the Bureau Of European Policy Advisers, Europe's Social Reality*, By Roger Liddle and Fréderic Lerais:

http://ec.europa.eu/citizens_agenda/social_reality_stocktaking/docs/background_document_en.pdf

[32] Urban sprawl results in more car journeys to work, to take children to school, to drive to 'out of town' shopping centers and to visit far flung extended families and friends. That in turn results in more congestion that causes economic loss, more energy use, more emissions that damage air quality and more CO2 that speeds climate change. In addition, rising affluence is still fueling growth in car ownership, where there is scope for a considerable amount of catching up in the New Member States. As a result, the demand for travel in EU urban areas is predicted to grow by no less than 40% between 1995 and 2030.

[33] OECD: Compact City Policies.
A Comparative Assessmenthttp://www.oecd.org/greengrowth/compact-city-policies-9789264167865-en

Figure 5.1. **Key policy strategies and sub-strategies for the compact city**




## 3. COMPACT CITIES VS. URBAN SPRAWL

Paradoxically, urban sprawl is becoming a new European concern and traditional American urban sprawl is being dealt with by different planning movements (e.g. Smart Growth and New Urbanism) which promote urban developments based on the ideas of compact cities, urban infill, city center revitalization, mixed uses or a more pedestrian-oriented style of urban life at the European way. Both tendencies across the Atlantic show a possible process of future convergence, with similar problems and possible common solutions, including legal techniques.

Beyond the new trends of urban sprawl in Europe, in general European cities, including the Spanish cities, are still much more compact than American cities. The comparation between Atlanta and Barcelona is clear:

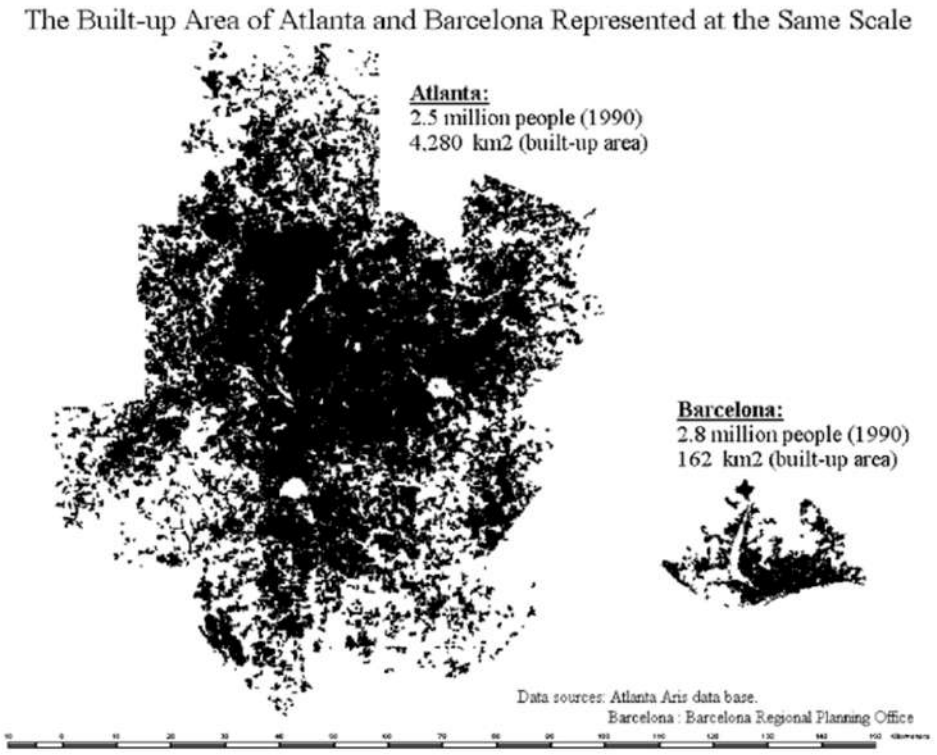



Fig. 4. Atlanta and Barcelona's built-up area represented at the same scale.

**Source: Alain Bertaud, *Clearing the Air in Atlanta*, 54 J. Urban Econ. 379 (2003)**

Moreover, legislation in Spain has been aware of the increasing urban sprawl and has reinforced legal reactions against it.

According to the Preamble of Legislative Royal Decree 2/2008, 20th June 2008 (National land use act[34], now included in Royal Decree 7/2015:

"The **EU proposes a model of compact city and warns about the serious consequences of urban sprawl**: environmental impact, social segregation and economic inefficiency, owing to the high cost of energy, building, maintenance of infrastructures and public facilities. Land is not only an economic resource but also a natural, scarce, non-renewable one."

Following those ideas, some traditional and new Spanish legal techniques against urban sprawl are the following:

[34] An English translation at: http://www.eukn.eu/fileadmin/Lib/files/ES/2010/2008-06-20_ConsolidatedTextLandAct_EN.pdf

### 3.1. LEGAL GUIDELINES ABOUT THE ZONING PRACTICE

The Royal Legislative Decree 7/2015, October 30, Which Approves The Revised Text Of The Law Of Soil And Urban Rehabilitation, establishes in art. 3 (Principle of territorial and urban sustainable development) that in accordance with the principle of sustainable development[35], the public policies referred to land must encourage the rational use of natural resources harmonizing the requirements of the economy, employment, social cohesion, equality of treatment and opportunities, health and safety of persons and the protection of the environment. Those public policies must contribute in particular to the combination of different land uses, integrating in the urban fabric as many as uses are compatible with the residential function, to contribute to the balance of cities and residential centers, promoting the diversity of uses, the approximation of services, facilities and equipment to the resident community, as well as the cohesion and social integration.

The Right to Housing Catalan Act of 2007 establishes in article 16 some legal guidelines to zoning too: the plots have to be situated in continuity with the urban fabric; urban planning has to avoid that land use regulations generate dispersion in the territory and social exclusion; and urban planning must guarantee the right of all the inhabitants to enjoy urban living conditions that favor the social cohesion and must ensure the coexistence of the residential use with other uses and the diversity of type of houses.

The Spanish Supreme Court has declared illegal several local plans which promoted urban sprawl because municipalities breached *the legal principle of compact city* without any kind of explanation about why it was necessary for the public interest (e.g. Decisions of July 10, 2012, 26 of March 2013 or May 21 2015).

### 3.2. MINIMUM STANDARDS OF DENSITY

In Spain, traditionally density was a limit to the compact city (the usual limit has been of maximum 75 housing units /hectare, being 1 ha=2.47 acres).

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35 See the recommendations of the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 2004 titled *Towards a thematic strategy on the urban environment*.

More recently, following EU guidelines, some minimum standards of density have been established by regional legislation. Catalonia, the Basque Country and Castile and Leon establish by law a minimum density, which are 50 units of housing/ha (for strategic residential areas only), 40 units of housing/ha (in the case of properties with an average area of 100 m2) and 30 units of housing/ha (for towns and cities with more than 20,000 inhabitants) respectively.

### 3.3. SPANISH URBAN GROWTH- BOUNDARIES AND OTHER TOOLS

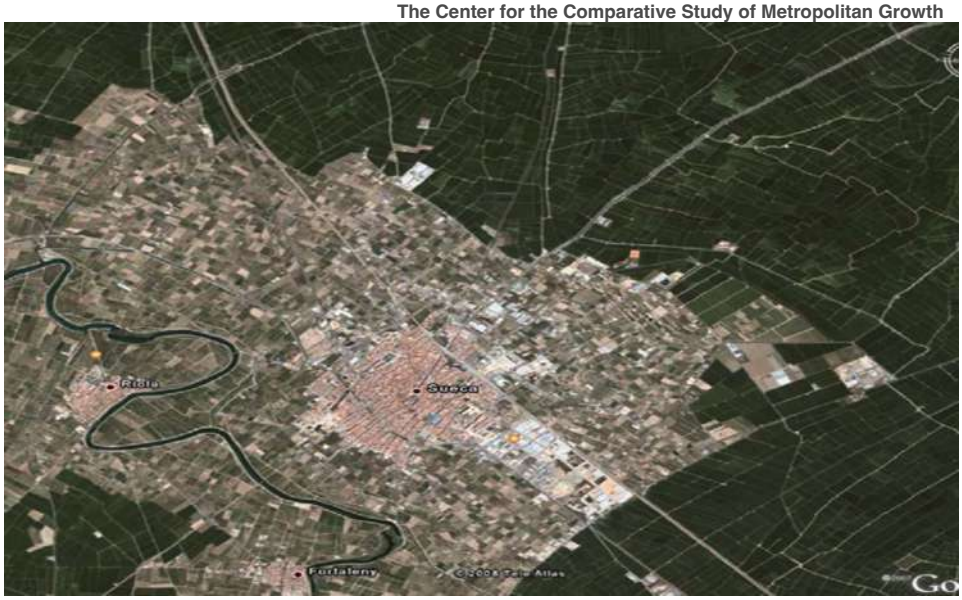
The explained *clasificacion del suelo*, with the declaration by urban planning of areas of land as no urbanisable, is a growth-boundary similar to UK Green Belts, both aimed to stop urban sprawl and the merging of settlements, preserve the character of historic towns and encourage development to locate within existing built-up areas[36].

The departure point of the traditional Spanish land use law is separating ownership of land and the right to build since the 50´s (what Italian legislator tried in the 70´s). The plans regulate the right of property, without expropriation (there is no regulatory taking, but regulation linked to the social function of property underlined by the Spanish Constitution of 1978).

The plan gives decision-making powers to municipalities, with an element of discretionary interpretation. From that perspective, Spanish law designs several tools to fight against urban sprawl:

-Urban planning decides where can be developed the land, distinguishing the built land (urban land) from the land designed to be developed (urbanizable land) and the land that is protected from development (non urbanizable land), and therefore establishing urban growth-boundaries (UGB): dividing lines drawn around an urban area to limit encroachment into surrounding rural areas.

[36] *National Planning Policy Framework*, 2012, pages 19 ff.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf




Sueca, Spain: effects of urban growth boundaries and urban density

The influence of the principle of environmental sustainability on Spanish land use Law (through UE law) is also visible in regional legislation in Spain. Different regional laws establish legal principles guiding urban activity towards continuity in urbanization, limitation of urban sprawl and preference for urban infill and revitalization instead of new developments[37]. Regional Planning can establish UGB. They are of a particular importance is relation to housing linked to tourism, which is mainly concentrated on the Spanish peninsula coast, especially along the Mediterranean. In the case of Catalonia, one of the regions which has been better preserved, the Catalan Government passed during 2005 different spatial plans (regional planning, affecting several municipalities) for the protection of coastal lands. Thanks to these plans, there is now a prohibition against building in the first 500 meters of land from the Mediterranean Sea. As a result, about 24.000 hectares are preserved.

The fight against urban sprawl has generated some interesting new legal techniques. This is the case of the prohibition of urban development *per saltum* (discontinuity in urban sectors of development)[38] or deciding specific limits to new urban

[37] E.g. art.9 Andalucía Land Use Act 7/2002; art.32 Cantabria Land Use Act 2/2001.

[38] In that sense, art.86 Castilla y León Urban regulation

developments[39]. Another interesting technique is the "capacity of territorial resistance", which consists in establishing urban growth limits in each city in accordance to population, economic activity, available resources, infrastructures and facilities[40].

## 4.HOUSING AND URBAN SPRAWL[41]

As is known, an argument in favor of avoiding public intervention against urban sprawl is that public intervention leads to increasing housing prices because containing development means less available land (supply) and therefore increasing prices of housing due to existing demand.

In relation to that question, Spain became a *laboratory* to experiment that hypothesis in the 90´s. In 1998 a new conservative parliament enacted a new national Act. According to the new legislation of 1998 all Spanish land was, in principle, available for development and *there was a legal right to do so* (property of land included building rights, departing from the traditional regulation since de 50´s).The clear goal of the reform was to increase the supply of land available to urbanize because the national government thought that it would reduce house prices. The regulation was compulsory on both regional and local levels.

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[39] That is the case of the Asturias´ legislation which establishes that the Master Plan will decide percentages of land in which will be possible new urban developments (*suelo urbanizable*). This decision will be taken according to necessities of each municipality but in the case of towns with a population superior to 40.000 inhabitants the percentages of land for new development must be inferior to 50% of land already occupied.

[40] E.g. Cantabria´s *Plan de Ordenación del Litoral* (Act 2/2004).

[41] Sources:
The Role of Construction in the Housing Boom and Bust in Spain by Carlos Garriga, FEDEA, 2010; The Influence Wielded by land developer lobbies during The housing boom: recent evidence from Spain, by A.Solé-Ollé and E. Viladecans-Marsal; Land Use Regulations and House Prices: An Investigation for the Spanish Case, by Jose G. Montalvo and The house price development in Spain between 1997, Building Boom and Political Corruption in Spain by F. Jimenez 2009 and 2012; An empirical analysis of the main drivers and the role of the government, by Ida J. Roaldset and Mari Støbakk ; Do Political Parties Matter for Local Land Use Policies?, by Solé-Ollé, A.; Viladecans-Marsal, E., CESifo Working Paper, No. 4284, 2013

The result of this deregulation process was an increase in the supply of land (measured in square meters) of 28 percent. And the bubble began. Spain had 4.3 million new housing units built during 2003-2007 representing 17 percent of the housing stock. At the peak of the boom, Spain built more housing units (around 800,000 per year in 2006) than Germany, France and the UK together.

The consequences of these developments for the Spanish economy are already well-known: the housing bubble burst, and the economic crisis began, as well as environmental impacts.

In 2007 with a change of government, a new socialist majority in the Spanish parliament change again the law to come back to the old model. We have now more than a decade to draw some conclusions.

This big expansion in housing supply was not able to contain housing prices, which since the mid-1990s have also experienced growth of an unprecedented magnitude. In the US, housing prices rose by around 86 percent (in real terms) between 1997 and 2006. In Spain the boom was even more spectacular, with a real price increase of about 150 percent for the whole period, and of 90 percent in 2000–06. In Spain, this generated a serious housing affordability problem, only mitigated by the ease of access to credit.

If we look at the evolution of housing prices in Spain, available official data seems to show that land liberalization had little impact on the provision of affordable housing (which was the formal reason for developing it).

A Spanish economist Garriga (2010) finds that the isolated effect of increased supply should reduce the price of land by 21%. However, because of the simultaneous increase in both supply and demand, the overall effect on land prices is found to be small. The results in a study of García-Montalvo (2010) indicate that the municipalities with higher supply of land available for construction experienced a higher increase in house prices between 2001 and 2005.

As it is known, higher supply of land is believed to decrease the price of land and thus reduce house prices. Using the Spanish experience, a Catalan economist García-

Montalvo argues that this assumption is false. He suggests that the causality is reversed and that increased demand for housing and thus increased house prices has driven the price of land not vice versa.

The effect of increasing supply was strongly outweighed by higher levels of demand, partly caused by the government who contributed to increase both supply and demand for housing by means of favorable tax policies and a lack of supervision of credit institutions. But it is also important to remember the role or irrational expectations. On the other hand, although there is no conclusive data, the Spanish legislator do believe that oligopolistic position of owners in the land market has been one of the relevant causes of the lack of housing affordability in the country, as it is explained in the preamble of the land use act of 2008.

But main causes of the situation were external to the country: the increasing flow of credit as a result of the introduction of the Euro, huge demand for second-home residences from foreign nationals, and the massive immigration inflow experienced during those years.

# III. THE RIGHT TO HOUSING IN SPAIN IN THE EUROPEAN CONTEXT

## 1. THE EUROPEAN UNION FRAMEWORK

Spain is a Member State of the European Union (EU) since 1986. It is important to underline that, according to its "constitutional" framework, the EU did not possess powers in the field of land use and housing. However, the goals of sustainable development, solidarity, the fight against exclusion and economic, territorial and social cohesion lead to increasing intervention in relation to European cities. An example of the increasing EU interest in housing is art. 34 of the Charter of Fundamental Rights of the European Union, which recognizes EU citizens' rights in their relationships with EU authorities[42].

In 2014, the Court of Justice of the European Union recognized the right to housing as a "fundamental right" linked to art. 7 of the Charter which recognizes the right to privacy (Judgment in Case C-34/13 Monika Kušionová v SMART Capital a.s.)[43]

The EU also had powers in the fields of the environment and other public policies with territorial impact (e.g. transportation or avoiding discrimination, see below), bearing in mind the *principle of subsidiarity* (that is, that matters ought to be handled by the lowest competent authority).

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[42] This article (included in chapter IV titled "Solidarity") provides that:
"3. In order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices."

[43] See the text of the judicial decision at:
http://curia.europa.eu/juris/document/document.jsf;jsessionid=7CA8E9169D73677AD8FDC9B754133E17?text=&docid=157486&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5803790
The Court says that: "Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13". The art. 7 establishes that: "Everyone has the right to respect for his or her private and family life, home and communications".

Therefore, those related powers, the political will of taking into account territorial issues by means of the promotion of intellectual and public experiences networking (generating a huge amount of reports, studies and papers) and the use of substantial investments explain the relevant role of the EU in urban affairs. Moreover, EU environmental policy has had a significant impact on land use law in European countries[44].

Nowadays, we can talk about the applicability of EU law in the fields of regional planning and land use, in connection with the idea of sustainable urban development.[45] However, an analysis of the existing situation shows how there is a certain separation and compartmentalisation between housing, on the one hand, and sustainable urban development, on the other hand. There is an increasing concern about the need to unify those perspectives in order to avoid negative urban consequences.[46] At the end of the day, housing is a relevant land use with strong links regarding how we make cities and the economic, environmental and social sustainable urban development.

EU law does not confer on the European Union an explicit competence in the field of housing. However, using various other competences, the EU has adopted a significant number of secondary law norms with an impact on this field.

The EU competence with the most immediate impact on housing matters is environmental protection, in connection with public health. We can also include in this category social policy aspects; economic, social, and territorial cohesion; consumer protection; and energy and transport. These are all shared competences according to Article 4 F of the Treaty on the Functioning of the European Union (TFEU). Moreover,

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[44]Beside the Primary sources of EU Law, we should bear in mind the Secondary sources, that is legislative previsions which are made and implemented by reference to an article of the EC Treaty. There are different kinds of secondary legislation (art. 249 EC Treaty). Among them, it is important to notice the Directives. A Directive is a legal EU instrument "binding as to the result to be achieved upon each Member State to which is addressed, but shall leave to the national authorities the choice of form an method".

[45] F. Haumont, *Droit européen de l´aménagement du territoire et de l´urbanisme*, Brussels, Bruylant, 2014, 2ª ed.

[46] See European Environment Agency, "Land use conflicts necessitate integrated policy", 29 March 2011, available at http://www.eea.europa.eu/highlights/land-use-conflicts-necessitate-integrated-policy.

tourism can be added to this list: according to Article 6 TFEU, this is a "support, coordinate, and supplement" competence vis-à-vis Member States, but it has links to the internal market, which is again a shared competence under Article 4 TFEU. Finally, the EU also has competence in the fight against social exclusion. However, this competence is hardly developed in Article 153.1 TFEU, which frames it as a "support and complement" EU competence, making it extraordinarily difficult to lay down European norms in this area.

Therefore, the relevant competences with regard to housing are mainly those touching on social policy, consumers and environmental protection, energy policy, and the freedom to provide services. On the basis of these competences, future EU legislation related to housing and urbanism could be envisaged. This may be possible if such legislation can be linked to the EU normative activity in the field of social and territorial cohesion, energy and environmental sustainability, and the general prohibition on discrimination.

In the area of social policy, the EU competence concerning the fight against social exclusion is complementary vis-à-vis Member States, which does not leave the Union much leeway to decisively intervene unless a wider consensus emerges amongst Member States, perhaps following a Commission plan and a European Parliament resolution. Housing as a factor of social inclusion is an interesting approach, although, in practice, Member States often tiptoe around social issues, notwithstanding the increasingly frequent calls by the Commission and the Parliament to intervene in social matters.

In any case, nowadays the powers to develop concrete public policies to promote social cohesion by means of land use and housing are already basically in the hands of national authorities. It explains the importance of national legislations.

## 2. THE SPANISH LEGAL FRAMEWORK

### 2.1 DISTRIBUTION OF POWERS

Housing in Spain, like in other countries, has been and is one of the biggest problems for citizens, since some sectors of the population do not have enough income to buy or rent a home in the market. The current Constitution of 1978 highlighted the deep changes in Spain with the introduction again of democracy, after a long period under Franco´s dictatorship) and the autonomy of the regions (effectively we passed from a centralized model to an almost federal one). Both elements had a legal impact in the field (see art. 148.1.3 of the Spanish Constitution) and on the local level (see art. 140, establishing the autonomy of local government)[47]. An act in 1985 specifically mentions land use regulation among the local authorities[48].

Since the new Constitution of 1978 came into force, the decentralization of government (with three levels: state, autonomous communities and local entities) helped to improve the quality of urban life throughout the whole of Spain, with the allocation of more resources for cities and autonomous regions, economic improvement and the nation's commitment to providing infrastructures, communications, facilities and housing. [49] Urban planning is compulsory, both on a regional basis (decisions made by the autonomous communities, or *Comunidades Autónomas*) and, more importantly, on a local basis. Urban planning in Spain implies a range of different legal elements: several kinds of maps, some documents and the rules for dividing the land into zones. A plan must exist to regulate land use, as it is a legal

[47] Article 140 of the Spanish Constitution (English version prepared by the Spanish Parliament)

"The Constitution guarantees the autonomy of municipalities. These shall enjoy full legal entity. Their government and administration shall be vested in their Town Councils, consisting of Mayors and councillors. Councillors shall be elected by residents of the municipality by universal, equal, free, direct and secret suffrage, in the manner provided for by the law. The Mayors shall be elected by the councilors or by the residents. The law shall lay down the terms under which an open council
of all residents may proceed."

[48] Act 7/1985, Foundations of Local Regime

[49] Spain built 700.00 housing units in 2007, doubling France and Italy and four times more than in Germany and UK, although the Spanish population is lower that the population in those four European countries (data extracted from the Catalan newspaper *Avui*, December 13, page. 19). Obviously, the situation is quite different after the economic crisis of 2008. See *The Economist´*s report "The Party is Over" of November 8, 2008.

requirement in all the *Comunidades Autonomas* (there are currently 17 autonomous regions in Spain) [50].

With regard specifically to housing, the important Constitutional Court decision of July 20, 1988 clarified the situation[51]. Although the Constitutional case law had denied the existence of a general "spending power" in relation to the national level, the Constitutional Court accepted a limited role for the national government in that important decision, thanks to its economic constitutional powers (art. 149, paragraphs 11 and 13: general economic regulation). According to those powers, the national level can define housing policy programs and establish national contributions to grant subsidies to the private sector. Complementary subsidies and detailed regulations are still in regional hands. Using the Constitutional Clause (148.1.3) the seventeen *Comunidades Autónomas* have enacted laws, creating their own land use and housing law. All Spanish cities' local autonomy is protected by the Spanish Constitution (art. 140) and regulated both by Spanish (Local Regime Act 1985[52]) and regional legislation (autonomous statute[53] and complementary legislation[54]). It allows municipalities to develop urban planning and housing policies within the limits of respecting regional and state legislation.

That legal system shows a high degree of complexity which has to be managed by means of different cooperative legal mechanisms (eg. sectorial conferences and public agreements, according to the Common Administrative Procedure Act 2015).

## 2.2 THE RIGHT TO HOUSING IN SPAIN: THE SPANISH ACT 12/2023, OF MAY 24, 2023, ON THE RIGHT TO HOUSING

[50] See PONCE SOLÉ, J. "Land Use Law, Liberalization, and Social Cohesion Through Affordable Housing in Europe: The Spanish Case", The *Urban Lawyer*, Spring 2004, volume 36, number 2, pages 322-331.

[51] Constitutional Court decision 152/1988.

[52] Act 7/1985

[53] Act, *Ley Orgánica*, 6/2006.

[54] Which can be consulted using the Catalan Parlament web: http://www.parlament.cat/portal/page/portal/pcat/IE01/IE0101

According to the Constitution, Spain was declared a "Social State" (see art. 1), and several social rights were introduced including. That is the case of the right to housing, in article 47[55].This article must be read in connection with several others in order to understand its full implications. For example, articles 9.2 and 14, regarding equality[56], or art. 45, regarding urban environment, which is also relevant.[57]

The Constitution does not directly provide dwellings for everybody, because it does not establish obligations of results, but of means. Art. 47 is included in a section devoted to social and economic policy principles, which bind authorities in the way described by art. 53.3[58]. Thus, the Constitution "only" provides that public powers (that is the Legislative, the executive, including municipalities, and the judicial branch) are obliged to give a "realistic opportunity" (using the American expression from the *Mont Laurel* case law[59]) or in EU terms linked to the right to good administration (art. 41 of the

[55] "All Spaniards are entitled to enjoy a decent and adequate housing. The authorities shall promote the necessary conditions and lay down appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town-planning policies of public bodies".
All the English quotations of the Spanish Constitution come from the Spanish Parliament's translation.

[56] 9.2 :"It is incumbent upon the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life".
14 :"Spaniards are equal before the law and may not be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstances".

[57] "1.Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it.
2. The authorities shall safeguard a rational use of all natural resources with a view to protecting and improving quality of life and preserving and restoring the environment, by relying on essential public cooperation.
3.Criminal or, where applicable, administrative sanctions, as well as the obligation to make good the damage, shall be imposed, under the terms to be laid down by the law, against those who break the provisions contained in the foregoing paragraph".

[58] "The legislation, judicial practice and general action of the authorities shall be based on the acknowledgment, respect and protection of the principles recognized in Chapter 3. The latter may only be invoked in the ordinary courts in accordance with the legal provisions implementing them".

[59]*Southern Burlington County NAACP v. Township of Mt Laurel* (336 a.2d 713 NJ), known as Mont Laurel I. This decision was followed by two more, known as Mont Laurel I and Mont Laurel II, in 1977 and 1986.

mentioned Charter) must act with "due diligence and care". This Spanish constitutional duty does not extend to results, but rather to an attitude towards achieving the constitutional goal[60].

### 2.3 AFFORDABLE AND WORK FORCE HOUSING

In Spain, legislation do not recognize yet the idea of affordable or work force housing. Instead, the Spanish legal framework uses the Spanish expressions *vivienda social* (Social Housing) or more technically *Vivienda de Protection Publica* (publicly protected housing, or V.P.O)[61]. Traditionally the Spanish model has had a peculiarity compared to social housing models in most EU countries, because housing has been provided almost entirely for owner-occupation. Only a small proportion of this housing, currently on the increase, is offered for rent.

The main characteristic of the *Vivienda de Protección Pública* is that construction, renovation and buying are subsidized by the State through reduced interest loans to providers. In exchange for this, dwellings complying with a number of conditions concerning size and quality are sold or let at prices below market to people with revenues below certain income ceilings. On the basis of income distribution, depending on the type of VPO, most part of households virtually has access to this type of housing. The person who use the dwelling must show a need of affordable housing and, consequently, not own or have a permanent right to use another dwelling. Disabled people and other vulnerable groups have a priority which can be designed as quotas in a development of VPO. Regional governments, using their powers described above, can establish other types of requirements.

The entire home-ownership sector represents around 85% of the total housing stock in Spain, while the rental sector is the smallest in Europe, corresponding to 11% of the

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[60] Juli Ponce, "El derecho a la vivienda. Nuevos desarrollos normativos y doctrinales y su reflejo en la Ley catalana 18/2007, de 28 de diciembre, del derecho a la vivienda", in Juli Ponce and Domènec Sibina (Eds..)., *El Derecho de la Vivienda en el Siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo. Con análisis específico de la Ley catalana 18/2007, de 28 de diciembre, en su contexto español, europeo e internacional,* Marcial Pons, 2008.

[61] I use the useful definitions used by Housing Europe and included at: http://www.housingeurope.eu/resource-124/social-housing-in-europe

total housing stock, and it is concentrated quite exclusively in few big cities such as Barcelona and Madrid. Just about 2% of the stock is social rental housing.

Public support for protected housing is dwelling-based, and open to all sorts of providers: public developers, commercial developers as well as not for profit organizations and cooperatives, as well as individuals who alone or collectively want to buy or rehabilitate a home.

### 2.4 THE SPANISH ACT 12/2023, OF MAY 24, 2023, ON THE RIGHT TO HOUSING

The Spanish Act 12/2023, of May 24, 2023 is a groundbreaking new European regulation in the field of housing. The purpose of these pages is to report briefly on its most important legal innovations.

1. Introduction

The Spanish Act 12/2023, of May 24, 2023, on the right to housing, is the first law on housing passed by the Spanish Parliament and affecting the whole country since the enactment of the Constitution. Affordable housing has historically been an issue neglected by both state and regional legislators and by local regulations, although in recent decades, especially since the 2007 Catalan law on the right to housing, numerous housing laws and local ordinances on the subject have been passed at the regional and local level.

This growing legal relevance has been accompanied by a parallel increase in public policies introduced in this area, following a prolonged period of bad governance and mismanagement that has led to a difficult situation for many fellow citizens.

Thus, a flawed regulation has allowed most of the almost 6 million social housing units built between 1962 and 2020 (almost 32% of the total residential stock) to have lost this condition and passed to the free market, at currently sky-high prices, as explained in the preamble of the new law. This explains why the current social housing stock is one of the lowest in Europe, not reaching 2% of the more than 18 million homes in existence. The construction of affordable housing thanks to public aids has plummeted in recent years, falling from about 68,000 units in 2008 to 5000 in 2017. Public spending, frankly miserable (7 times lower than that of the EU), fell 38% between 2007

and 2018. At the same time, between 2008 and 2019, almost 700,000 evictions were carried out, affecting almost 2 million people. In 2010 alone, 248 foreclosure processes were carried out in Spain per day[62].

This has had several negative consequences. Mental health disorders, including suicides, increased homelessness, residential segregation (and school segregation, linked), increased household spending on housing, or an age of emancipation of young people in Spain that is well above the EU average: 30 years compared to 26, as the preamble to the law also points out.

Although in the area of housing it is also necessary to take into account, which is not always done, the case law of the European Court of Human Rights and the law and case law of the Court of Justice of the European Union, which explain some measures of the law, here we will limit ourselves to an initial commentary on the state law. This law, as the preamble of the law reminds us, was one of the state's commitments with Europe related to the receipt of *Next Generation* funds.

As regards the powers conferred by the Spanish Constitution (SC) to the Spanish Parliament to enact such an act with application in all the Autonomous Communities and municipalities, the regulation mentions articles 149.1.1 (equality in rights), 149.1.13 (economic issues), 149.1.18 (civil legislation), 149.1.6 (procedural legislation), 149.1.14 (general treasury), but some of its precepts are only applicable to the Spanish Government (22, 23, 24, 26 and DA 2da), not to the regional level

2. Constitutional aspects developed in the new law

In connection with art. 53.3 SC, the law develops not only the state's competencies and the right to housing of art. 47 SC, but also alludes to the interconnections of this right with other constitutional rights. Thus, for example, various articles are dedicated to the interaction between the right to housing and the right to equality (with allusion to different types of discrimination that can occur in the housing area, art. 6), with the right to health (for example, in the references to homelessness in articles such as 3 letter l), with the right to the city (which, although not explicitly mentioned, is also

[62] See for more details https://www.hayderecho.com/wp-content/uploads/2023/05/Las-novedades-de-la-ley-estatal-jponce.pdf

mentioned in the precepts relating to urban planning, art. 15) or with the right to property and freedom of enterprise, as we shall see below.

The law refers to the fact that housing fulfills a social function, given that it constitutes a good destined to satisfy the basic housing needs of people, which is stated in the definition of housing itself (art. 3k). The social function of the ownership of housing declared by the act consists in the duty to use it for housing purposes, in accordance with the provisions of the legal system (art. 1.2), including in the legal regime of the right of ownership of housing a duty of "proper and effective use and enjoyment of the dwelling" (art. 11.1 a), in accordance with the legislation in force. It means that the limitations established by the act affecting owners are not takings but regulations without compensation.

3. The concept of large holder/owner and its legal implications.

The law makes a distinction between two types of owners: large holders/owners (*grandes tenedores*) and the rest. Large holders are individuals or legal entities that own more than 10 dwellings (in Barcelona, for example, according to a study published by the Barcelona Metropolitan Housing Observatory, 36% of the residential stock is in their hands[63]) or 1500 m2 of residential use (not counting garages and storage rooms), art. 3k. This definition may be changed in certain urban areas by the Autonomous Regions, in their possible declarations of the so-called *Zonas de Mercado Residencial Tensionado* or Stressed Residential Market Zones (ZMRT, which will be explained shortly). The inclusion of an owner in the category of large holders implies a series of legal consequences linked to the greater social function of his/her properties, as stated in art. 33 of SC or art14 of the German Constitution, which declares poetically that "property is binding. Its use must at the same time serve the common good" (and we add, it is more binding in these cases). The legal consequences will be referred to below.

4. Legal measures relating to tenant protection

4.1 Stressed Residential Market Zones

[63] See Owners of multiple properties have 36% of flats with regular rents | Housing (habitatge.barcelona)

The aforementioned ZMRTs (art. 18) are declared by the "competent authorities" in housing matters, in principle the Autonomous Regions (148.1.3 CE and Statutes of Autonomy). However, depending on the regional regulations on the matter, they could also be municipalities. As for the way this is carried out, the law refers to the autonomous region's regulation, but it establishes certain basic rules regarding the due administrative procedure, with public information to be followed, the existence of a report and a motivation. The regulation states the circumstances for such a declaration which the law indicates are a rise in the rental price of the dwelling in the 5 years prior to the declaration of more than three points above the CPI or the inability of the market to meet the demand at a reasonable price (which can be understood to exist when the tenants or mortgagors dedicate more than 30% of their income to the payment of the rent or debt, including the payment of basic supplies, according to the act).

Said legally foreseen circumstances must be evaluated ex post, 3 years after the law enters into force. Likewise, once the declaration has been made, it will last for 3 years, and may be extended annually depending on the evolution of the circumstances described.

The declaration, as has been stated, can establish that the concept of large tenant is linked to 5 dwellings, rather than more than 10. This leads to the need to establish a specific plan with a schedule of measures to be developed in the ZMRT. It also leads to the idea that, as a general rule, with the possibility of a reasoned exception, the land obtained by urban development transfers and included in public land assets must be used exclusively for the construction and management of affordable housing, which therefore binds the municipalities (art. 15e, which contemplates other uses only in exceptional and accredited cases). In addition, the large landholders in these ZMRTs have certain specific reporting obligations to the public administrations (art. 19).

### 4.2 Effects of ZMRTs

Once the ZMRT is declared, two effects are produced: the extension of leases with the same original conditions, which is mandatory for the lessor, and the establishment of rent control without any right to compensation.

Regarding the extension, it will be mandatory for the lessor if requested by the lessee, which may be done annually up to a maximum of 3 years, except in various cases provided for by law (the need to occupy housing for family members or spouse in the case of a final separation ruling or dissolution of the marriage).

As for the control of the rental price, before analyzing the new Spanish act, it is relevant to remember that the existence of legal price control in certain urban areas is not unusual in the international and European context. In the latter, prominent examples are the examples of modern regulations in France (ELAN act of 2018) and Germany, which have been found to be respectful of the respective legal systems, both by the French Council of State and by the German Constitutional Court. In the latter case, it is considered that this control not only seeks to lower rental prices but also to fight against gentrification and urban segregation caused by the lack of housing affordability (German Constitutional Court ruling of 2019).

In the specific Catalan case, the act 11/2020 was applied for a period of two years and was finally declared partially unconstitutional by the Spanish Constitutional Court in rulings 37/2022 and 57/2022, on the grounds that it invaded Spanish competences in relation to the basic regulation on contractual obligation reserved by the Spanish Constitution to the state level.

Although there is a division of opinions on the matter, some of which raise the shadow of possible private conflicts of interest, and the interference of the COVID-19 in the attempts to establish correlations, the fact is that several studies from public and academic bodies point out that during the period the Catalan law was in force, the rental supply did not decrease, and rents were contained[64].

If we now analyze the Spanish act of 2023, the price control established by it will be different, depending on whether or not the landlord is a large holder.

If the landlord is not a large holder, the general rule is that in successive rental contracts for a dwelling, the rent may not exceed the rent of the previous contract, after applying the annual update. Exceptionally, the rent may be increased up to a

[64] See for example: The act to contain rents helped keep prices down and increased available housing | Housing (habitatge.barcelona)

maximum of 10% if a series of cases set forth in the law concur, based on the performance of renovations and improvements, including non-renewable primary energy, in the previous two years, the improvement of accessibility or the execution of a contract for at least 10 years or with the tenant's right of extension for the same period.

If the landlord-owner is a large holder, then the rent for new leases will be equal to or less than the price ceiling applicable under the reference price index system, to be set by the Spanish Statistical Office (*Instituto Nacional de Estadística*) before the end of 2024, using the new database to be constituted, affecting both new leases (if indicated in the ZMRT declaration, with respect to dwellings not leased in the last five years) and successive leases.

5. Urban planning law and housing. Legal measures related to the promotion of rental property and the fight against vacant housing: the municipal role.

Although we have already referred to some aspects of administrative law (who establishes the ZMRT, and how ...). Let us now concentrate on others that are also prominent.

5.1 Housing typologies

The law distinguishes (implicitly) between free market housing and subsidized housing (art. 3, art. 16). In the latter case, in turn, it distinguishes between publicly-owned social housing (on public land with surface rights or similar), limited-price subsidized housing, whether public or private initiative, administratively classified as such, and, lastly, privately-owned incentivized affordable housing that does not require administrative classification like subsidized housing.

5.2 Public housing parks

The law mentions public housing parks (arts. 27 to 29, in particular), establishing the impossibility of their assets being sold to private for-profit entities (only to Public Administrations and non-profit entities), a category of sale that had already generated judicial rulings to the contrary. The financing of public housing parks will be derived from various sources, including, obligatorily, the penalties collected for non-compliance

with the social function of property. The law establishes the need to set specific public obligations regarding the growth of these parks and a general default commitment of 20% of the total residential housing stock in 20 years in the ZMRTs, in the absence of specific regional regulations.

5.2 Urban law and housing

With respect to urban planning law and housing (art. 15), as we have seen, the new law regulates the public land assets in ZMRT, requiring a single use, except for exceptions provided for in the law, for the construction of subsidized housing. Likewise, the law declares the construction of subsidized housing on subsidized land to be compatible; as an inclusionary housing measure, it declares that zoning a plot as subsidized housing, as referred to in art. 20.1 b of the State Consolidated Text of Land of 2015 (TRS), cannot be modified in the future, unless there is justification for the unnecessary or supervening impossibility of the construction of housing; furthermore, subsidized housing cannot be administratively reclassified if it is located on land zoned for this purpose, and even if it is not, the general rule is that zoning must be maintained for at least 30 years.

Article 20.1b TRS is amended to increase inclusionary housing measures, as the percentages of land reserves for subsidized housing: on developable land, the land required to accommodate 40% of the planned residential buildable area, unless exceptions are made to guarantee full compliance and social cohesion, and on unconsolidated urban land that is subjected to renewal, 20%. Of these percentages, 50% must be for rental, unless the urban development plan justifies that this is not possible due to the characteristics of the applicants or other economic or social circumstances.

Nothing is said about consolidated urban land, that is the city already built and which is not under a global renewal operation, beyond the requirement that the autonomous region's legislation must establish effective instruments to ensure balance, quality of life, access to housing and the principle of sustainable territorial and urban development. It should be recalled that the Spanish Constitutional Court in its ruling 16/2021 considered the reserve for subsidized housing on consolidated urban land

established by the Catalan legislation, that is a legal inclusionary housing measure, to be constitutionally acceptable.

5.3 Data, right of access to information and active publicity in land and housing matters: new public obligations

Articles 32 et seq. establish a series of public obligations of annual active publicity of a series of details related to the public housing stock (inventory and report), budgetary investment, vacant housing, application of municipal local housing tax (*impuesto de bienes inmuebles*) surcharges, registry of applicants for subsidized housing and available public land.

5.4 Administrative Organization: Housing Advisory Council

In this area, this new body, set up to integrate social, economic and academic interests, stands out (art. 26).

5.5 Affordable housing fund

This fund is different from the not very successful Social Housing Fund, provided for in Royal Decree-Law 27/2012, of November 15, on urgent measures to strengthen the protection of mortgage debtors, which included a mandate to the Government to take the necessary measures to promote, with the financial sector, the creation of a social housing fund to provide coverage to those people who have been evicted from their habitual residence due to non-payment of a mortgage loan.

5.6 Public action

Art. 5 now recognizes public action in housing matters, that is, the citizens' general possibility of bringing a suit against public administrations in this field, a possibility that had been denied by the Constitutional Court in judicial proceedings, in its decision 97/2018, by holding that the Autonomous Communities lacked competence in procedural matters to declare it. This possibility, however, is limited by the act: it remains in the hands only of non-profit legal entities that defend general interests linked to the protection of housing.

5.7 Service of general interest

Article 4 of the law states that services of general interest, as key elements of economic, social and territorial cohesion, are considered to be those determined by the competent administrations in the field. This is not strictly speaking a new development, since various regional legislations had already declared housing-related activities to be services of general interest (such as the Catalan law on the right to housing of 2007, a pioneer in this regard), using this classic concept of EU law similar to the concept of public service. The question is to know what it means and what are the legal consequences of this kind of label.

In the sphere of State competence or collaboration of the State with the other administrations, the law directly establishes the activities that are services of general interest. Thus, on the part of the Administrations, those related to public housing parks, as well as the construction or rehabilitation of housing subject to a public protection regime and the improvement of the conditions of habitability, accessibility or energy efficiency of publicly- and privately-owned residential buildings are services of general interest. Private activities whose purpose is the construction or rehabilitation of housing subject to a public protection regime are also eligible.

These services may be managed directly or indirectly through different public-private partnership formulas.

This consideration is, according to the law, "for the purpose of directing public financing", thus connecting, we understand, this precept with articles 106.2 et seq. of the Treaty on the Functioning of the European Union, which are related to the possibility of giving public aids to private enterprises respecting competition law.

5.8 Legal measures related to the promotion of rental and the fight against vacant housing: the role of the municipality.

When the law comes into force, a reduction in personal income tax is provided for the declaring owner who rents. The reduction is calculated taking into account different circumstances: 50% (always), 60% (if there is rehabilitation in the 2 years prior to the contract), 70% (if it is the first rental of housing in a ZMRT, or the tenant is between 15 and 35 years old or is a public administration or non-profit entity with controlled rents)

or up to 90% (if it is a repetition of a new contract in a ZMRT and the rent is lowered by 5% with respect to the previous contract).

Regarding empty housing, in connection with the social function already alluded to, the act specifies what is empty housing for the purposes of possible municipal local housing tax surcharges.

A permanently unoccupied property is one that remains unoccupied, continuously and without just cause (the law already establishes some), for a period of more than two years (four, if it is a second residence) in accordance with the requirements, means of proof and procedure established by the corresponding tax ordinance, and belongs to owners of four or more properties for residential use. Local housing tax surcharges are therefore optional for the municipalities, and the law sets them at up to 50% (the standard), up to 100% (if the property has been vacant for more than 3 years) and up to 150% (in the case of owners of two or more unoccupied properties in the same municipality).

6. Entry into force. Calendar for implementation of the law

The entry into force of the law does not imply the immediate activation of all its instruments:

1. After its publication, all those aspects described above that do not require further activity.

2. No specific date: constitution of the affordable housing fund, creation of the Housing Advisory Council, regulation of incentivized affordable housing or creation of a public housing database.

3. 2024: setting by Autonomous Regions of the specific objectives for the expansion of public housing parks, detailing the budget invested in them and the degree of progress of the objectives; setting by the Spanish Statistical Office of the reference price index system; setting up a working group on rental contracts other than housing, especially seasonal; or active advertising related to public parks (drawing up an inventory), investment, vacant housing, applicants for subsidized housing, available public land, possibility of increasing municipal taxes on vacant housing.

4. 2026: the circumstances legally foreseen for ZMRTs must be evaluated ex post, 3 years after the law enters into force (DA 3).

5. 2044: activation of the minimum public housing stock commitment of 20% of the total stock, in the absence of regional regulation, in municipalities with ZMRT.

7. Aspects not considered in the new law: the local level

In the new law there is no regulation of aspects such as short-term rentals, the existence of an enforceable subjective right, as exists in other countries (such as in the 2007 French example of the *Loi sur le droit au logement opposable,* the DALO act) and the express enshrinement of the right to the city which has already been attempted in the Basque housing regulations of 2015 and Valencia ones of 2017, stable winter truces such as those stipulated in French legislation which avoid tenants being evicted during a period of one year, or the fixing of a specific part of future general state budgets to be invested in housing (what is known as budgetary pre-allocation or earmarking, used, on the other hand, in Spanish legislation on climate change[65]), for example. However, if anything is missing, it is a greater sensitivity towards the competences, resources and public policies of local authorities.

## 3. DISCRIMINATION, GENTRIFICATION AND URBAN SEGREGATION

Various studies and reports highlight how a phenomenon associated with the growing globalization and worsening urban problems, witnessed in growing urban segregation and, in the worst and most serious cases, a rising number of ghettos, are seen in the simplest of definitions which must be used momentarily for lack of a better term, such as spatial areas inhabited by people from a homogeneous background (ethnic, cultural, economic ...) thus setting them apart from the rest. In the particular Spanish case, factors such as the *cost of housing*, *immigration* or the *urban pattern of disperse*

[65] See in general and in English: Public Expenditure, Rights and Earmarkings: Towards Good Governance and Good Administration? - HayDerecho
In relation to the housing field specifically :
PONCE_ley estatal de vivienda y preasignaciones presupuestarias_22 (hayderecho.com)

*growth (urban sprawl)*, while each being interconnected, highlight the process of segregation, endangering social cohesion and coexistence, and generating the risk of future social divisions. This social division is seen on a territorial level through the phenomena of difficult neighbourhoods, which may become ghettos, and "gated communities":

a) As regards *underprivileged neighbourhoods*, an official study published in 2000 estimated that between 4 and 5 million people in Spain live in difficult neighbourhoods, i.e., 12% of the total population[66]. This alarming situation has even reached the State Parliament.

b) *As regards gated communities*, this refers to an expression concerning spatial segregation, though completely opposite to difficult neighbourhoods. This refers to fenced- or walled-off urban areas or closed-off by other means, with controlled access and private security. This type of communities exists not only in America, but also in Europe, where there are already signs of this residential type in Spain. In a study on Madrid, Canosa Zamora identified 21 high quality closed-off private residential areas, amounting to some 8,000 dwellings with some 30,000 residents[67].

Both the existence of ghettos and gated communities "for the rich" show, in terms of territory, a growing urban segregation, which is linked to less personal interchanges: certain persons who would like to have such an interchange cannot do so as they see their lives circumscribed in homogeneous "down market" urban areas, while other persons do not wish to mix with people who are different from them, thus they do not look for such an interchange and so *segregate themselves* in "up market" homogeneous urban areas. In sum, separations, whether desired or not, give rise to gradual degradation of coexistence, social contact (in public spaces, schools located in

[66] MINISTERIO DE FOMENTO, *La desigualdad urbana en España*, Madrid, 2000. Freely available at http://habitat.aq.upm.es/due/ (last visited, Mar.20, 2006).

[67] CANOSA, E., "Las urbanizaciones cerradas de lujo en Madrid. Una nueva fórmula de propiedad y organización territorial", *Ciudad y Territorio-Estudios Territoriales*, no. 133-134, 2002, pages 563-578.

homogeneous urban areas, etc.) and, in short, social contrast, affected by the "fear of diversity"[68].

In the case of tourist apartments or *Viviendas de Uso Turístico* (housing used for tourist purposes, that is short-term lets), they show negative externalities or, to use language that is no longer related to the field of economics but rather juridical in nature, serious impacts on matters of public interest in Spain, including gentrification of certain urban districts and, in general, urban imbalances caused by what has been dubbed *touristification*, including the intensive use of urban public spaces.

### 3.1 SOCIAL MIX

FEANTS (2005) believes that social mix is primarily a (urban) planning issue and that mechanism for the allocation of individual dwelling should only be a secondary means to ensure social mix. When it comes to the stage of allocation of social housing, the Catalan Right to Housing Act provides for positive action, through the technique of the so-called special quotas, reserved for vulnerable groups, among whom immigrants may be included (article 99). These kinds of quotas try to guarantee the presence of vulnerable groups' members. On the other hand, it seems that the act leaves the door open for the possible implementation of quotas (in that case as a limitation of some

[68] FRUG, G.E., *City Making. Building Communities without Building Walls*, Princeton University Press, 1999, p.149.

groups) and other measures against segregation in the allocation process for social housing by means of a lottery as mentioned in articles 100.3 and 101.5[69].

Without doubt, this is a delicate aspect which can shift the balance between the achievement of social mixing and possible discrimination when it comes to access to housing. As far as Catalonia is concerned, the Right to Housing Act associates the concept of social mixing with social cohesion in article 3, a key legal guideline in the allocation of housing.

[69] "Art. 100.3
In order to guarantee an effective social mix in official protected housing developments, the specific conditions of allocation in each development should establish systems which ensure that the final composition of the occupancy reflects the social makeup of the town, district or area, both in terms of income level as well as place of birth, and to avoid excessive concentrations of groups who can put the development at risk of social isolation."
"Art. 101.5
The lottery may be divided into blocks made up of applicants within various income brackets or various interests groups, to ensure the social mix established in article 100.3, or even the length of time the applicant has been registered on the waiting list in the Official Register of Applicants for Protected Housing."

### 3.2. FAIR HOUSING[70]

The 1997 Amsterdam Treaty included Article 13, which empowers the Community to take action to deal with discrimination based on a whole new range of grounds, including racial or ethnic origin, religion or belief, age, disability and sexual orientation.

In order to apply these measures, three directives have been introduced, along with various documents[71]. Under the current EC legal framework, racial discrimination is prohibited in the areas of employment, training, education, social protection, social benefits and access to goods and services (Directive 2000/43/EC). The scope of protection against discrimination on grounds of religion or belief, age, disability and sexual orientation is limited to employment, work and vocational training (2000/78/ EQ. Directive 2004/1.13/EC extends protection against sexual discrimination to the area of goods and services, but not to certain other areas covered by Directive 2000/43/EC.

Existing empirical studies show a panoply of actions and omissions causing discrimination and harassment in the housing sector in Spain. In the case of direct discrimination, the worst and most evident reports on a European level highlight cases accredited in Catalonia and Valencia, referring to rental advertisements placed by ral estate agencies which declared "no foreigners" or "we do not rent to non-EU foreigners." The intermediaries in some of these cases claimed that they were compromised to exercise the wishes of the owners. In the case of indirect discrimination, which is more subtle, existing European reports highlight cases in which length of residence in a municipality has been used as a barrier to prevent access to protected housing

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**70** See PONCE, J., ""Housing discrimination and minorities in European cities: the Catalan Right to Housing Act 2007", International Journal of Law in the Built Environment, Vol. 2 Issue: 2, 2010, pp.138-156, https://doi.org/10.1108/17561451011058780

71 See http://europa.eu/scadplus/leg/en/cha/c10313.htm

With regard to estate agent harassment, or *mobbing* as it is commonly known in Spain, this phenomenon can be explained within the context of specific economic and social circumstances in Spanish cities and in connection with rental legislation in force for many years in Spain. In the recent past, rental contracts provided one of the main bases of "social" policy with respect to accessible housing since they were heavily regulated in terms of duration and price under the Urban Rental Act of 1964. Since the 1980s *(Decreto-Ley* 2/1985, 30 April, Urban Rental Act of 1994), a new regulation for the rental market was introduced, although serious parallel public policies with regard to accessible housing were not applied and many existing rental contracts were still protected by the Urban Rental Act. of 1964, with financial conditions which did not encourage ownership, certainly when compared with newer contracts which were more likely to be agreed in accordance with real market factors.

This situation helps us understand the financial motives which are to be found behind many of the alleged cases of estate agent harassment: evict, by one means or another, the tenant, in order to obtain a higher rental income from the property in the future. Among the practices which can imply real estate harassment, can be mentioned the following for violation of existing laws, whether for omission (a typical case of lack of compliance in respect of urbanistic conservation duties on the part of the landlord, for example) or by action (cutting off utilities, disturbances caused by hypothetical "improvement" works, bad odors, lack of hygiene, the introduction of lodgers who cause trouble to the detriment of communal facilities or the peaceful enjoyment of the property, etc.).

The Catalan Housing Act was the first and more developed Spanish legal framework to fight against discrimination. We must refer to articles 45 and ff. which establish the general framework. Arts. 45 and ff. prohibit that *any person* (Spanish nationals or otherwise) suffer discrimination, either direct or indirect, or harassment and should be respected by all persons and all officials, both in the public and the private sector (article 45.1 and 2). In order to guarantee that this prohibition be respected, the law requires public authorities responsible for housing-related issues to adopt "appropriate measures" (article 45.2). These protective measures to avoid direct or indirect discrimination, harassment or any other form of illegal housing (such as sub-standard

housing or over-occupancy, for example) can consist "in adopting positive action in favor of vulnerable groups and individuals," the "prohibition of discriminatory conduct" and the need for "reasonable adjustments to guarantee the right to housing" (article 46).

Having established this mandate for public action, the law goes on to define a sundry of the terminology used and establishes a specific regulation with regard to the burden of proof and *locus standi,* in the same line that the aforementioned EU directives (articles 45, 46.2, 3 and 4, 47 and 48, respectively).

With regard to the definition of legal terms used, following European and state guidelines, the Catalan law defines the concepts of direct and indirect discrimination and real estate harassment (article 45.3)[72]. In relation to real estate harassment, the law defines what is understood to be harassment and it qualifies it as discrimination (article 45.3.). In addition, it modifies the burden of proof of harassment (article 47). Finally, associations and other organizations representing collective interests have *locus standi* if authorized by the claimant (article 48) in accordance with the EU directives and national legislation we have analyzed.

Regarding "reasonable adjustments to guarantee the right to housing" as a possible protective measure to be deployed by the administration, another EU concept, article 46, sections 2.4, defines these as:

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[72] "(a) Direct discrimination occurs when a person receives, in a housing related issue, a different treatment than others in a similar situation, as long as the difference in treatment does not have a legitimate justification that is objective and reasonable and the and means to reach that objective are adequate and necessary".
"(h) Indirect discrimination, occurs when a norm, a plan, a conventional or contractual clause, an individual pact, a unilateral decision, a criterion or a practice that is apparently neutral causes a particular disadvantage for someone in respect to others while exercising their right to housing. Indirect discrimination does not exist if the act has a legitimate end that is objective and reasonably justified and is used to reach an adequate and necessary motive".
"(c) Real estate harassment is understood as any act or omission of an act which causes one's rights to be abused and has the objective of disturbing one's housing needs through harassment and a hostile environment. This can be 'expressed in a material, personal, or social manner, with the ultimate motive of forcing someone to adopt a decision that they do not want in regard to their right which protects them from occupying their home, The unjustified denial of accepting rent by a homeowner is an indication of real estate harassment".

"the measures directed towards fulfilling the singular needs of certain. persons to help them achieve, without imposing a disproportionate burden, social inclusion and enjoyment of the right to housing in equal conditions with the rest of the population"

Without any doubt, people with disabilities are an obvious group which could be affected by these adjustments (for example, a landlord can have the right to impose a restriction on pets in the terms of tenancy. This would he discrimination if the potential tenant is blind and relies on a guide dog to compensate for his physical disability).

In the same way, we can highlight the regulation on positive actions in article 46.1 of the law. As we have already shown, article 47 Spanish Constitution (and 26 of the Statute of Autonomy of Catalonia) should be interpreted systematically in conjunction with article 9.2 Spanish Constitution (and 4.2 of the Statute), which establishes the mandate to the public authorities to promote conditions so that freedom and equality are real and effective, removing existing obstacles. This ruling therefore opens the door to the unfortunately named "positive discrimination," drawn from various EU directives with the terminology "positive action."

From a general perspective, the possible adoption of specific public measures to guarantee the equality of specific groups had already been endorsed by the Spanish Constitutional Court in various sentences[73].

Along these lines, therefore, article 46.1 of the Right to Housing Law indicates that:

"The protective measures which should be adopted by public authorities may consist in the adoption of positive action in favor of the vulnerable group or person, the prohibition of discriminatory conduct and a demand for the elimination of obstacles and restrictions in exercising the right to housing and reasonable adjustments to guarantee the right to housing"

Finally, we should emphasize that the law specifically typifies discrimination and real estate harassment, whether through action or inaction, as a serious administrative violation (article 123.2.a), with a potential fine of up to 900.000 euros (article 118.1),

[73] For example, Decisions 216/1991 and 269/1994, accepting positive actions in relation to gender or disability, quoting article 9.2 of Spanish Constitution

regardless of possible civil or penal actions which we have already alluded to. In this point, the doubt could be raised as to whether the imposition of an administrative fine and the simultaneous possible reaction in the criminal courts for an assumed coercion could imply a case of *bis in idem,* prohibited by Spanish judicial legislation (this means that it is not possible to punish a conduct both criminally and administratively if the punishment applies to the same person for the same conduct which contravenes the same legal fundamentals). We believe, however, that it can be argued that the grounds for the administrative fine are different from the criminal charges, since in the first case the legal fundamental is the right to housing whilst in the second it concerns equality. Thus, punishing the same conduct twice is not a case of *bis in idem,* but rather the defense of two different legal fundamentals by two different channels (administrative and criminal).

### 3.3 REMOVING OBSTACLES - (ANTI- EXCLUSIONARY)

A Spanish Supreme Court's decision of December 11, 2003 illustrates the possibilities of judicial control to guarantee constitutional rights implied by decisions on land use where residential segregation is an issue in connection to the equality.

This decision overturned a previous decision of the Superior Tribunal of Justice of Cantabria (December 15, 2000), concerning the dispute between a City Council and the Government in the Cantabria region, (Northern Spain), with regard to the construction of eight mobile homes on municipal land classified by the local development plan as rural land under special protection. An analysis of the details of the case reveals that the housing was intended for ethnic minority gypsy families, in connection with the municipal plan to eradicate slums. The City Council stated that it is a question of "buildings designed for public use and social interest which should be situated in a rural environment". The legal discussion, which ensued, centered on the following aspects.

The City Council alleged that the specific location was necessary for those concerned, since they needed the space to carry out their scrap metal business, but that it was provisional, until such time as systems and guidelines were established which permitted their full integration into future standardized housing, indicating that their current location was a transitional stage in the process of their integration into the urban nucleus, but without determining what the provisions were for the continuation of their business once integrated into city dwelling.

Both the regional Court and the Supreme Court judged that if the objective was integration into urban life, then it was logical to offer housing in the city rather than in a rural area, where integration would not be possible and that "it is difficult (...) to accept the need to house the group in a rural environment if the aim is to integrate them into urban life", a location which does not "fit constitutionally with their displacement" from the urban environment.

In this case, the Spanish Supreme Court considered unacceptable this kind of discrimination, albeit indirect, since it led to the spatial segregation of the group. Consequently, the Supreme Court stated null and void the local decision and protected the gypsy families´ right to equality.

### 3.4 POSITIVE REQUIREMENTS (INCLUSIONARY ZONING AND SET-ASIDES)

At the planning stage, the Spanish regulation, applicable also in Catalonia, Spanish national land use act of 2015, establishes a reserve of land for the construction of housing under public protection which is applicable all over Spain. The reserve is a consequence of the social function of private property in Spain (art. 33 Spanish Constitution) and it is a delimitation of the right to property which does not imply compensation. That is, it is a regulation, tot a taking.

This statute allows for the setting of maximum sale and rental prices, with a minimum requirement of 30 percent protected housing in all new development projects and 10 percent in urban renewal operation. The statute also allows for the increase or

reduction of these reserves through regional legislation on land use and urbanization, where the situation if classified as exceptional, while respecting certain limits, including that the distribution of their location respects the principle of social cohesion.

Following this act, the Comunidades Autónomas have regulated that aspect, developing state legislation. For example, in Catalonia this consideration is prevalent throughout the law, from the Preamble in favor of social mixing as the antidote to segregation, through the planning phase for social housing until the moment of its allocation. The Catalan Act of 2007 considers residential segregation as a kind of discrimination (at least, a *de facto* discrimination, caused by the market). Thus, the act designs some measures in favor of equality through social mix.

Reserves for social housing in the Catalan legislation respect the minimum requirement of 30 percent. With regard to urban areas which are already developed (*suelo urbano*, urbanized land) particular importance is placed on the potential to inject *Viviendas de Protección Pública*, for example article 66.4 of the Catalan regulation of July 18, 2006 which develops Catalan planning law. This establishes possible reservations for protected housing on consolidated urban land, both for new developments and for major renovations to existing buildings, totally or partially allocated for protected housing. Barcelona has been the first city in Catalonia and Spain in establishing in 2018 compulsory reservations for VPO in urbanized land, i.e. the downtown Barcelona (even without urban renewal operations but just in case of block by block new construction or major rehabilitation).

An important aspect connected with the social mix of the region, as an antidote to urban segregation, is the distribution of reserved land in the territory. This is because the reserves of protected housing, in order to provide dignified and adequate living conditions, should avoid spatial concentrations of poor people and be distributed evenly throughout the territory. In this sense, the best approach seems to be, in principle, an even distribution of affordable housing across all sectors. However, the

decision concerning specific location remains in some regions at the discretion of local departments planning within the general framework already mentioned[74].

## 4. FINANCING HOUSING THROUGH DEVELOPMENT CHARGES, IMPACT FEES, LAND VALUE CAPTURE[75]

The Spanish system is based on the elaboration of the *planes de urbanismo* (urban planning). Approval of the planning gives way to the management or implementation phase in which the land will be developed (urbanised) in accordance with the terms of the plan. Urbanisation is the development phase prior to building and consists in:

- equipping land with the services and infrastructure needed to acquire status as developed lot on which construction can take place.

-carrying out a fair distribution of the benefits and burdens of the plan

-compliance of landowners with the duties that the laws and regulations impose on owners when their land undergoes development.

In relation to housing, the compulsory assignment duties of landowner are to:

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[74] In the Catalan case, the Catalan Land Act establishes that the reserves for the construction of publicly protected housing should be situated so as to avoid an excessive concentration of housing of this type, in order to favor social cohesion and avoid the territorial segregation of citizens based on their level of income.

[75] I follow in this point the document *COMPETITION PROBLEMS IN THE SPANISH LAND. MARKET. Discussion Paper,* elaborated by the COMISIÓN NACIONAL DEL MERCADO Y LA COMPETENCIA, the Spanish authority in charge of protecting competence in the markets in Spain. See also FERNANDEZ, R., "Public Housing in the Spanish Land Act", *Revista de Derecho Urbanístico y Medio Ambiente*, number 297 BIS, A -M a y (2015), pages 117-130, and chapter seven of the book *Inclusionary Housing in International Perspective*, published by The Lincoln Institute in 2010. The chapter´s title is: "Spain's Constitutional Mandates: The Right to Housing, 239 Land Value Recapture, and Inclusionary Housing", and it has been written by Nico Calavita, Joaquim Clusa, Sara Mur, and Robert Wiener: https://www.lincolninst.edu/publications/books/inclusionary-housing-international-perspective . An open version of the chapter is available at: http://clusa-oriach.cat/20100510-20090124-Spain%20Jan-CapitolLlibre-VersioMesCompleta.pdf

a) hand over to the competent administration land which the planning instrument assigns to public-purpose housing under a protective scheme, that is public housing[76].

b) hand over to the competent administration, in order for it to become public domain land, land that is free of urban development burdens with the same weighted average building rights percentage (*aprovechamiento urbanístico*) as the development action. The percentage of value should be dedicated to VPO and it adds to the Spanish model of inclusionary zoning described above.

## 5. HOUSING AND GOVERNMENT SUBSIDIES

Finally, regarding subsidies, the system is based in the legal figure of *Viviendas de Protección Pública*, above explained[77]. The whole system is based on the *Planes de Vivienda del Estado* (State Housing Plans). Since the 1980s, three-year State Housing Plans have played a relevant role in the definition of housing policies in Spain, establishing the State's housing policy priorities. The multi-level governance structure of housing policies in Spain, described above, means that regional governments implement the State Plans, but also maintain broad powers to develop their own policies in this domain.

The latest State Housing plans aim at strengthening the rental market, and activating the construction sector by promoting employment in building rehabilitation, urban regeneration and renewal. They try to abandon elements central to housing policies up to that point such as the promotion of housing production, the occupation of new land, the planning of city growth, and the commitment to property-ownership as the main way to access housing. The programmes included in the Plans are co-financed by

[76] *Vivienda dotacional* ("dotacional housing", "housing in dotacional land" or directly "public housing") is a zoning and planning technique introduced by the Spanish Autonomous Communities with the aim of acting on one of the weaknesses of public housing policies, such as the limitation of public land. This type of dwellings are temporary and in a rotating system most of the time, and they are built for its occupancy by those citizens with more relevant difficulties to access housing

[77] I followed in this section the explanation provided by the European Commission and included at: https://ec.europa.eu/social/BlobServlet?docId=19993&langId=en

the Central Administration and the Autonomous Communities. The Central Administration budget earmarked for housing subsidies for the period 2018-2021 is €1.443 billion (62.46% more than the amount implemented/executed under the SHP 2013-16)[78]. One of the main current problems is low public investment in housing, well below the levels of the period prior to the economic crisis (from 0.9% of GDP in 2007 to 0.5% in 2016, according to Eurostat). Thus, according to this source, public investment in housing and community amenities fell from €9.841 billion in 2007 to €5.403 billion in 2016. The limited resources allocated to housing policy are insufficient to modify the model of access to housing, to offer effective solutions or to guarantee access to decent and adequate housing, especially for low-income households.

[78] Royal Decree 106/2018 of 9 March regulating the State Housing Plan 2018-2021. https://goo.gl/NdeEtZ