A Property Rights Analysis of Urban Planning in Spain and UK

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Abstract

This study compares urban planning and land management in Spain and the UK. Its purpose is to identify key differences in the legal bases for these activities in the two countries and to comment on the way in which the institutions that deliver them allocate property rights between the state and private organizations and individuals. In particular, we analyse the respective approaches to allocating rights to compensation and betterment value associated with land development, commenting on the efficiency and equity of each system and, in Coasian tradition, the influence the assignment of property rights has on municipal government behaviour.

Introduction

In April 2010, the English planning system introduced a procedure for capturing the social costs of development. The Community Infrastructure Levy (CIL) will formalize the process of exactions in the British planning system, adding further clarity to property rights over urban land value. This follows a period of about 20 years when rights over urban land value uplift created by development were ambiguously stated in law and subject to decentralized, piecemeal negotiation in practice. In a landmark 2007 planning law, Spain also changed the procedures for allocating land value created by development and for capturing social costs. In this paper, we reflect on the two approaches and use the comparison to create insights into their relative performances in terms of efficiency, equity and government opportunism. The analysis adopts the conventional distinction between compensation and betterment value as a device for understanding the issues involved in land planning and management (Munby, 1954; Keogh, 1985; Bowers, 1992). It concludes with comments about the behavioural impact of alternative property right allocations to surplus land value.

There have been relatively few English language papers on the Spanish planning system, and fewer still comparing it with planning systems in other countries. Gormsen and Klein (1986), García-Bellido (1991) and Keogh (1994) contributed to filling this gap by providing some insights into Spanish town planning up to the 1990s. Ponce's discussion of affordable housing and social exclusion offers a legal background relating to land use (Ponce, 2004), whereas Muñoz Gielen and Korthals-Altes (2007) provide an introduction to the Spanish planning system as a background to their account of infrastructure provision in Valencia. One of the problems of comparative institutional studies is the choice of analytical dimensions along which to make comparisons. A secondary purpose of this paper is therefore to offer an example of a comparative analysis of planning in two countries that focuses on the way each system allocates property

rights. The paper is timely given the uncertainty over the significance of the new UK and Spanish laws on market and government behaviour and built environment outcomes and offers a framework for future papers reflecting on planning and property market roles in destabilizing the Spanish economy. The remainder of the paper is divided into four sections: terms and concepts; private property and planning rights in Spain; private property and planning rights in the UK; comparison and analysis in three related parts; and a conclusion.

Terms and Concepts

Property rights, using the scholarly tradition of "Law and Economics" (or more generally "New Institutional Economics"), are of two kinds: economic and legal (Alchian & Demsetz, 1973; Barzel, 1997). Economic property rights are defined as the ability to gain from the use or transfer of a resource by any kind of sanction including de facto and customary rights and individual force. Legal property rights are defined as rights protected by law. While governments may seek to define a legal set of rights over urban land value, ambiguities in drafting and the real politics of practice typically mean that the ultimate distribution of resources (land value) is determined by a mixture of legal and economic rights, which might variously favour different sets of interests.

A private property right traditionally means the right to use a resource, to enjoy derived benefit from it (for example, by renting it out), the right to alienate it (to sell it) and the right to exclude others from using it. Modern law and economics theory sees property as a bundle of rights that can include non-exclusive (collective) rights. It also allows for the idea that there are degrees of rights, depending on the degree of effective excludability (Barzel, 1997; Webster & Lai, 2003).

In analysing the planning laws of Spain and the UK, we take the view that governments as well as private organizations and individuals and firms act opportunistically. The term opportunism is used in a weak sense, to mean self-oriented behaviour (not necessarily amoral behaviour) and roughly synonymous with the idea of "rent-seeking", which is a technical term in political economics meaning the extraction of unearned profit. The opportunism we are concerned with is the extraction of compensation and betterment value from land and development thereon. Due to the fact that compensation and betterment values largely lie in the public domain without clearly defined property rights over them, the extraction of these values often depends on the outcome of opportunistic competition among individual interests. Individuals and organizations compete to maximize their return from land possession or development beyond what is explicitly defined by law. In the absence of laws that guide or constrain the competition arising from these public domain resources, competition can be unproductive and its outcome unjust. At the same time, the guiding laws themselves add to the various factors influencing the degree and final outcome of competition, potentially contributing to undesirable resource allocation if not well targeted. The problem addressed therefore is "how do the two systems constrain the competition between public and private agencies (governments, land owners and developers) for unearned land rent? How do they structure the competition for land value?

In addressing this question it is important to distinguish between two types of land value that without planning and land laws, typically remain in the public domain and thus subject to costly competition. These can be characterized as compensation and betterment. Compensation, we define as the value of social costs (off-site costs or negative externalities) created by a developer or land user (Bowers, 1992; Webster, 1998). It is a notional value—the value of uncosted factors in the development process, unless it is exacted by some instrument by the community that bears such costs (by taxation or payment in kind for example), in which case it becomes an accounting value. Webster and Wu (2001) demonstrate, by simulation, what is likely to happen to urban land-use morphology when this value is priced into development.

Betterment, we define as unearned land value brought about by any particular development and by urbanization in general. It is the accumulated value of agglomeration economies (positive externalities, urban economies of scale, etc.) accruing to a piece of land, including value added by the owner/developer of the piece of land and value added by others. Since the former cannot happen without the latter and rarely has much intrinsic value without the latter, betterment is generally regarded as a publicly created value (the value of agglomeration economies, which are positive externalities). Figure 1 illustrates the relationship between betterment and compensation.

In the figure, P = profit from land development (private revenue less private costs) and S = social costs. Profit is assumed to diminish with quantity due to diminishing returns to density on fixed land. Social costs are assumed to rise with quantity as greater density imposes ever-increasing costs on collective infrastructure. If a development is allowed to occur without restraint and without land taxation, Q2 will be built and the betterment value accruing to a land owner (and shared with the developers) = A + B + C. This generates social costs for the community equal to B + C + D. If a plan could somehow judge precisely the amount of social costs (an unrealistic assumption), it might want to set the level of development (e.g. by density control) to Q1, the point at which the marginal social cost = marginal private benefit. If a law allowed development to be priced (such as the UK's CIL) and could gauge this price accurately, it might set a marginal pricing regime that equated to S; charging more as quantity of development increases. If the market responds rationally, it would build at Q1, the notional social optimum.

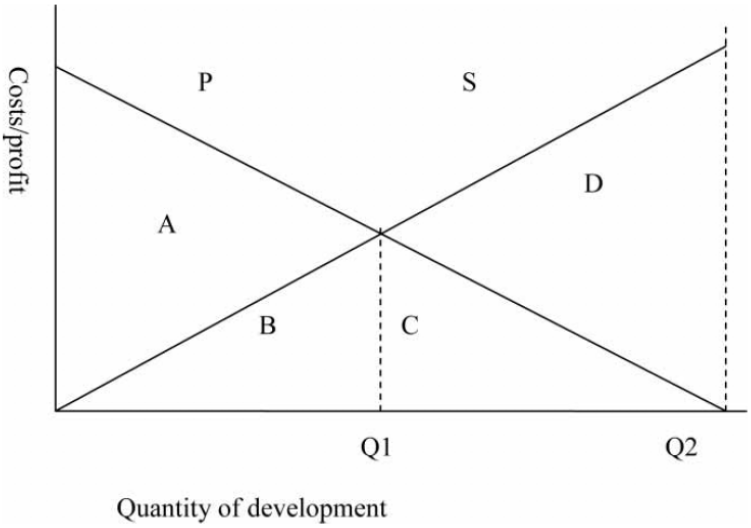

Figure 1. Betterment and compensation defined by private profit and social costs curves. After Bowers (1992) and Webster (1998).

The analysis in this paper addresses the laws governing the distribution of the values A, B, C, and D. If compensation can be efficiently exacted from a socially efficient level of development, the landowner ends up with pure betterment, net of social costs (A). If planning laws permit the local state to limit development to Q1 and to exact pure profit in excess of compensation, the value (A) will be divided between the state and landowner. If it takes too much of A, there will be no incentive to develop. If the developer has the stronger market power (for example in a weak local economy), then it may be able to retain all of A and capture some of B and C in addition. Following Nobel economics laureate Ronald Coase, we note that it is property rights that determine the resource allocation problem depicted in the figure.

We therefore consider the institutions that have emerged in Spain and the UK to allocate rights to these values. As a positive (descriptive) study, the paper seeks to identify the relative manner in which the planning laws of the two countries lead to very different systems of rights over compensation and betterment. As a normative study, we identify, a priori, scope for inefficiencies in the two systems as a result of, among other things, ambiguities in property rights allocations and asymmetries in power.

We take, as an additional starting framework, the idea that an urban plan, supported by various levels of laws, is like a contract (Webster, 2003, 2005, 2007, 2009). In pursuit of a set of social and private goals, it allocates rights to various parties, including landowners, the local community, general taxpayers, third-party landowners, national and local governments and so on (Lai, 1998, 2005). As a document that sets out a set of rights, it may be less or more precise. All contracts are imprecise (Hart & Moore, 1988) and it is their imprecision that partly determines their utility. The Economics and Law literature recognizes two

responses to contract incompleteness. The response of Oliver Williamson, Berkeley management theorist and 2010 Nobel Economics laureate, is to put into place strong and appropriate ex-post contract governance structures (Williamson, 2000). The response of Oliver Hart and colleagues is to design more efficient contracts (Hart et al., 1997). One is an ex-ante contract governance solution and the other an ex-post contract governance solution. Both approaches are appropriate to urban planning and there is resonance with the ideas of ex-ante and ex-post plan evaluation (Alexander & Faludi, 1989; Alexander, 2006). A state's "planning constitution" or planning system can therefore be thought of as providing a legal basis for assigning agreements ("contracts") over rights to land within a spatial and temporal timeframe and thereby affecting, or at least significantly influencing, the allocation of land value, including betterment and compensation value, between parties (between first, second, and third parties, between the community and private organizations and individuals, and so on).

Private Property and Urban Planning Rights in Spain

The legal basis of Spanish urban planning is administrative law (public law). The Land Law of 1956 was the first Spanish urban planning law which introduced a substantial change in the meaning of private property of land, and established the essential characteristic of the Spanish urban planning system, most notably, by granting a Municipality—via a Master Plan—the authority to assign a legal classification to each piece of land.

Being the first law to assign the responsibility for regional planning in Spain to public authorities, this 1956 law completely changed the legal status of land ownership. The law eliminated the Roman concept of property rights whereby the owner could use and enjoy a resource with no limitations beyond those established by law (Article 348 of the Spanish Civil Code). The public authorities thereby reserved for themselves competencies in planning, the legal bases of property rights and urban planning management.

For instance, the Spanish Civil Code defines property as 'the right to enjoy and to have a thing, without more limitations than those set forth in the laws'. This approach to property rights leaves the effective recognition of the right and the extent of that right in the hands of the legislative powers. According to Article 350 of the Spanish Civil Code, 'the owner of a piece of land is owner of its surface and what lies beneath it, and can undertake any construction work, planting and excavations, except those prohibited by deed restriction and subject to the provisions of the laws on Mines and Waters'. In effect, property rights over land are enormously limited since they are attenuated by administrative and public law. The foundation for this is in the Spanish Constitution (Article 33.2), which states that private property should serve a social function. But the constitution does not define the meaning of 'social function', and for this reason the article is used to justify many different interventions in the land market, including expropriation. Article 47 of the Spanish Constitution, for example, goes on to stipulate that 'the community will participate in the surplus value generated by the urban planning action of public entities'. The same Article gives all Spaniards the 'right to fitting, adequate, housing'. This is generally interpreted to mean that the state will take responsibility for securing social value from land via political intervention and that entrepreneurs or intermediaries in the markets cannot be relied upon to contribute to this end. Thus, according to Article 47,

'the authorities will implement the conditions necessary to materialise this right and will stipulate the statutory requisites to do so, regulating land use for the general good and to avoid speculation'.

Another significant change caused by the 1956 Land Law was that the General Plan of a Municipality has since then, the effect of assigning a legal classification of rights to any piece of land: land is classified by by-law into building or non-building land, as classified in the municipal plan. Making such a classification became the most important operation of each municipal plan. The three land classes established by the law of 1956 and still in force today are 'urbano, urbanizable and non-urbanizable land' (urban, developable and non-developable land). These become legal attributes of private land. The assignment of land classifications and their associated rights is the key institution for delivering the urban planning competencies of local governments. The classification system can be summarized as follows. Urban land is built-up land, following criteria on density and other characteristics set out in the town-planning legislation. Building land is land identified as suitable for development under the terms laid down in the town-planning legislation and the plans themselves. Non-building land or rustic land, as it is also termed in some legislation, is land that should not be developed, either for preservation reasons or because it is not needed to accomplish current urbanization objectives (i.e. reservation reasons). The crucial and most potent feature of this device is the obligation that the building land classification places on the landowner. Once classified, the land should be developed within a specified period according to the General Plan. This period is usually 4 years. We comment on this later.

The concept of 'aprovechamiento urbanístico' in Spain confers a right to build an approved use on every square metre of land. It defines not only the use but the building density as well. The concept was introduced in the Consolidated Land Law on land use and urban planning of 1976 and since then the concept of 'aprovechamiento' has played a fundamental role in Spanish planning.

An aprovechamiento may be registered as a private property, independent of the land to which it applies. This right is created once the Master Plan has been legally approved. Thus, in the event of expropriation, rights over land and rights to aprovechamiento are two different legal entities. This however has changed radically since the Land Law of 2007 was passed under which any undeveloped land is liable to expropriation regardless of future plans for building and development (Melian & Calzada, 2010). For this reason, the aprovechamiento may be registered, but should the land be expropriated as a private property, any 'aprovechamiento' will not be taken into consideration. In other words, the attenuation of the right to build 'an approved use on every square metre of land' will not be compensated.

The idea behind 'aprovechamiento' is that all land owners in one unit of development (or, under some autonomous region legislation, all land owners in an entire municipal area) should be allocated the same land-use (and thus betterment) rights by the plan. The device is generally useful for juggling diverse planning solutions. For example, if a given spatial unit is allocated building rights of 1.2 square metres per square metre of land, all the owners of that sector have that right even if their particular plot is classified as a green zone.

Private Property and Urban Planning Rights in the UK

In the UK, social control over private landed property is exercised in a different way. Individuals have well-defined and well-protected private property rights over land and buildings, governed by land and property law—some of it in legislation and some in common law. The right to initiate the development of land was expropriated by statute in the 1947 Town and Country Planning Act. This Act and subsequent revisions and replacements have defined development as 'the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land'. With the passing of the Act, the awarding of development rights became the responsibility of local planning authorities (LPAs), which formed part of more general purpose local government authorities. This has the effect of requiring a property owner to seek the right to undertake development. The right to develop is referred to as a planning permission. In applying to the LPA for planning permission, an individual seeks the transfer of a specific right to develop, which, if granted, is time limited. Temporary rights are therefore transferred back to property owners for a specific form of development at the discretion of the LPA, which is invested with the responsibility of ensuring that social value as well as private value is realized from a development.

The attenuation of land rights in the UK is less codified than in Spain. The administration of planning regulations is framed within the common law of property. Decisions are made about planning permission by taking into consideration the balance of social and private costs and benefits. This is in some ways closer to civil or private law (focusing on the rights of individuals) than to public or administrative law, upon which Spanish planning is based. Unlike the Spanish system, landed private property in the UK is not formally classified as urban or non-urban. It may be designated as development land or protected land in a plan but the plan does not change the de jure status of the land. Farmland in a designated protected area is non-developable for as long as the LPA chooses to enforce that designation. At the authority's discretion, the designation may change, altering the status of the land and raising its value. When considering a specific application for planning permission, the authority may choose not to enforce the designation, although regard must be paid to relevant national guidance.

Also unlike the Spanish system, a land-use designation in a UK local plan does not obligate any development. It does not even confer on a landowner the full right to develop. This has to be acquired by applying for planning permission. Classifying land as a building land in Spain 'removes its owner's right not to develop'. Designation in a UK Local Development Plan 'guarantees no right or duty to develop or build'. The right to build can be secured through a successful application for planning permission, but again this imposes no duty on the landowner. An applicant for planning permission may have no control over the land in question. The owner may not wish to sell even after planning permission has been granted. In this case, development proposals that have planning permission may not be realized. If the successful applicant proceeds with the development, it has to be in accordance with the planning permission and subject to any clauses in the signed legal agreement. An unused right to develop is rescinded after three years unless an application is made to extend the period.

Since the British planning system is not designed to explicitly allocate betterment value, unlike in Spain, it has neither a provision for equalizing land-use-density rights within a planning unit nor a process for transferring such rights. Planning officers make decisions to distribute density within a planning zone in order, for example, to ensure that the density of development matches road and other infrastructure capacity, but this is an efficiency, and not an equity, consideration. Because property owners do not own the right to develop, neither do they own the right to urban land value uplift through densification of land-use change and the state can distribute this according to efficiency criteria without consideration being given to equity. In this sense, the distribution of betterment value in the British system is arbitrary.

Comparison and Analysis

Notwithstanding the fact that the structure of the state in Spain and the UK are fundamentally different, the former being a compound of autonomies and the latter being more of a unitary state, the state in both countries has strong powers to attenuate private land rights. Spain does so via laws that develop the detail of its written constitution that upholds a strong protection of private rights with its Article 33.1. When the Spanish Constitution was approved, the debate about the nationalization of land was effectively ended since the Constitution recognizes the primacy of private rights—including land rights—for all Spaniards. The UK has neither a written constitution nor strong legal culture of protecting private land rights. On the contrary, the UK town and country planning system remains one of the last vestiges of the post-World War 2 welfare state apparatus that nationalized the 'commanding heights' of the economy (Yergin & Stanislaw, 1998). It was the right to initiate development that was nationalized; and this by and large remains as the underlying principle of UK planning. Ironically, as we shall demonstrate next, Spain, with its constitutional view of private landed property, has permitted itself to enact a planning law that removes a private land owner's right not to develop. 'The devil is in the detail' as the English say and not all is what it seems when it comes to 'planning constitutions' and the laws that emerge to govern transactions on the ground.

Planning Rights and Betterment Allocation

Compared with the UK, in Spain there is a much stronger statement of the state's ownership of both compensation and betterment value—all private land development should, by law, serve a social function and all private land rights are circumscribed by whatever laws are enacted to protect and enhance the social value of land. But interestingly, this stands alongside a stronger affirmation of private property rights in Spanish planning law. 'Serving a social function' in Spain gives the Spanish autonomous regions and their cities a strong right to make plans and policies that ensure that the social costs of development (such as congestion of urban services and infrastructure) are compensated and that redistribute unearned urban land value from private owner to the state. In the UK, the decision about how much social value to exact from a private land development project has always rested with LPAs, loosely and ambiguously constrained by the national law. There has been a major change in this principle with the 2010 CIL, giving LPAs the right to set charging regimes to recover compensation costs from land owners and developers. Like its predecessor, the so-called 'Planning Agreements' or 'Section 106 Agreements', this instrument is

ambiguous, however, about the State's right to betterment value. There is no clear decision in written or case law, nor any clear supplementary guidance, on whether LPAs have a right to set the level of CIL exactions above the level strictly required to recover social costs imposed by a development and thereby exact pure betterment value. The Spanish have a much clearer mandate in this regard.

What does all this mean for the distribution of land value in the two systems? First, it means that betterment value is more clearly allocated in law in Spain. The certainty imposed by a very strong plan has the effect of signalling a clearer spatial and temporal distribution of urban land value uplift. Second, exaction of betterment and compensation is less ambiguously allocated in Spain through clearly specified zoning conditions. In the UK, compensation is now more clearly allocated through the CIL, but the law is silent on the distribution of pure betterment. Third, by obliging a landowner in a development zone to develop, the Spanish state has a greater right not just to apportion rights to potential land value between owner and community but to realize those values. This also has the effect of curtailing private landowners' rights over speculation and thereby removing some of their right to 'future' betterment value. In the UK the right to future betterment cannot be taken away from a private party's bundle of landed property rights unless there is some other immediate reason to justify compulsory land purchase, which is rare because of the high cost. Interestingly, there seems to be no legal basis in either country for the compensated expropriation of land for the purpose of transferring future betterment value from a private individual to the state. This would not contradict any fundamental principle in the UK system and although it goes against the principle of private property in Spanish law, it could in principle be justified in terms of securing a social value for land. Such an institution would be particularly useful for securing a targeted fiscal source of funding for major infrastructure projects.

Plan Implementation and Value (Re)allocation

The strength of planning in Spain means that the spatial allocation of betterment and compensation value, once established in a plan, is little changed in implementation. For reasons we discuss in this section, however, the allocation of the land value between local government, private landowner and third parties 'does' vary according to implementation device. In the UK, by comparison, property rights regarding land use and density are as likely to be defined in the implementation process as in the plan-making process and so the betterment and compensation value for a development site is effectively set and allocated through negotiation. Note that this remains the case with the new CIL charging instrument: the unit fee is set in advance but the planning right to which it is set may be established by the plan or in post-plan negotiation. This is rather like a contract renegotiation where the parties to a contract can see mutual gains from changing the terms of agreement. Quite what difference the CIL will have on such negotiations remains to be seen: in principle it should enable both sides to predict the behaviour of the other rather more easily and thereby result in more efficient negotiated planning outcomes.

In the UK, the process of planning management or planning implementation is referred to as development control and lies at the very heart of the planning system. It is the outcome of this process that allocates

property rights rather than the statutory plan on its own. Although the 1991 Planning and Compensation Act gave primacy to a legally adopted statutory plan in arriving at planning decisions, professional and political judgement still plays an important role. Legislation states that decisions should be in accordance with the plan unless 'material considerations' (a legal term) dictate otherwise. Material considerations have a very broad scope and can include factors such as changes in national (or regional) guidance, new information that was not available at the time of plan preparation or simply the emergence of new development proposals. The planning decision on whether to grant or withhold planning permission represents the key stage at which property rights are allocated. Inclusion of proposals within a statutory plan may give greater certainty as to the likely decision but provides no guarantee of the outcome. Local government planning officers are empowered to negotiate with applicants to achieve an optimal development, although how this is defined ultimately rests on individual professional and political judgement.

Execution of the planning permission rests with the applicant, landowner or third party who may subsequently acquire an interest in the land. The permission is attached to the land and will automatically be transferred on change of ownership. It can be implemented by anybody with a controlling interest in the land. However, implementation may be delayed if a potential developer is unable to secure sufficient controlling interest or finance to take forward the proposed development. This may lead to rival proposals being put forward. It is not unusual for parcels of land to have a number of unimplemented planning permissions attached to them. This can be seen as a process by which various interests bid to both create and secure the legal right to private and social betterment value of a site. The process of competitive supply of private plans for the use of land in a strong regulative context tends to lead to the voluntary private supply of a certain amount of social land value. Planning officers actively negotiate—the more so the larger the scheme and the higher the land value—to increase the net positive externalities, with or without the help of a statutory plan.

In Spain, planning management functions result in quite a different process of creating and distributing social and private value. This was changed in a major way by the Land Law of 2007 (now the Consolidated Text of the Land Law of 2008). Until the 2007/08 acts, landowners had to contribute, in terms established by law, to the planning action of the authorities. The public entities directing the processes and executing the operations were, however, generally respectful of private initiative, allowing landowners to share in the process of detailed interpretation and phasing of the development. The new legislation currently stipulates: 'Regional and urban planning legislation shall regulate the right of the private individual to act freely in the open market in development projects, when the Administration concerned could not or will not act. Individuals may be granted permission to participate in the processes via open competition and the right should be awarded in such a way as to guarantee that the community will benefit from the profits arising from the planning operations as stipulated by law, notwithstanding the exceptional cases related to the private initiatives of landowners' (authors' English translation). In principle, this means a move from a system of management that encourages the private implementation of planning towards one that gives preference to public implementation. However, land development still happens under private initiative, but with various degrees of property rights take and value moderation. There are, in effect, two types of

development management in Spain: publicly and privately organized development. In most cases, the particular mode of planning implementation will be specified in the Master Plan.

Although each regional legislation (of each Autonomy) has different detailed specifications of development management devices, there are in practice two systems of public-led development procedure common to all: the system of expropriation and the system of cooperation. In the system of expropriation, the administration eliminates private property rights in the implementation process. The public administration itself, or a third party, via competition, takes over the implementation of the plan. The cooperation method is quite different and constitutes a hybrid public–private procedure. The landowner is obliged to supply the land for free. The administration executes the planning scheme and then charges the costs to the owner. This amounts to the state coercing an owner to participate in the creation of betterment value (private and social). It is designed to remove various types of constraints that keep land underproductive, including lack of capital and speculation.

Other types of land management include obligatory implementation and direct implementation. The first is applicable when, in a case of a privately implemented planning scheme, the various parties cannot agree. This is designed to lower the transaction costs of collective action. In the case of direct implementation, the administration directly takes over the land, granting the owner the 'aprovechamiento' of their property in another part of the municipal area covered by the Master Plan, via the transference of that 'aprovechamiento'. In this case, the private right to betterment on the original piece of land is removed and replaced with a similar right somewhere else. This allows the public authority to bundle land into large blocks under unitary ownership for the sake of simplifying the development process, but to do so without affecting a redistribution of rights to betterment. The device is necessary because of the concern for property rights protection and equity in the Spanish constitution.

There are two principal systems used in privately initiated development: compensatory and competitive systems. In the compensatory mode the owners execute the planning orders in their entirety. The owners come to an agreement and form an owners' or compensatory board. This board, which administrates itself, is responsible for reaching all the agreements needed to bring about a development project and to allocate betterment pro rata according to land-ownership. Should one owner be in disagreement with the majority, its property may be expropriated. The competitive system was formulated for the first time in the Land Law of the Valencia Community in 1994 and permits a developer to execute a planning order without owning the land. With one important difference, this is similar to the right of a developer in the UK to seek the right to develop land it does not own. The important difference is that a successful developer in Spain can action the development. The third party (developer) presents a project (designed to implement the Master Plan) to the local public administration. Should there be two or more competing projects, the proposals would go to competition publicly and the winner would execute the planning orders at the land owners' expense. Should the owners be unable to pay the costs of the infrastructure and building works and/or the costs incurred by the developer in organizing the project, then payment can take the form of building land, as happens in most of the cases. The result is that the developer takes some fraction of the land as payment for costs and profit while the landowners receive back the residual portion of the land. The system has been denounced

in European tribunals for not respecting rights of property and for resembling a private system of expropriation. Apart from the ethical considerations that have led the European parliament to condemn the device, it has a perverse effect: the possibility that a third party may take over a piece of land without the owners' consent tends to reduce land owners' willingness to invest in land designated for development. A case that has become internationally known is that of the many northern Europeans who bought pieces of land with holiday homes in the Community of Valencia. Many of these foreign owners returning after a period of absence found that their land had been developed and their property transformed into a new urbanization with new streets and houses. They were told that the General Plan had classified their land as developable and therefore any person could develop their land provided public authorization was given. To add insult to injury, the astonished owners were informed that they had a debt with the developer that they were bound under Spanish law to honour.

The Spanish have thus designed an institution that permits both the state and private third-party interests to compel a land owner to realize the private and social betterment created by a plan. If the landowner cannot afford to develop according to the plan, someone else who can afford to has the State's backing to profit from the land value uplift. The third-party developer has the right to a cut in the betterment value in return for delivering a project pursuant to the implementation of the Master Plan. The original landowners retain rights to a reduced quantity of land with higher value.

Securing Land for the Public Domain

Throughout history, an important preoccupation of urban administrations has been how to secure land for the public domain (defined as shared land, services and other resources, over which individual property rights are not defined). Spain and the UK have evolved a variety of devices for securing land for urban facilities, infrastructure and green spaces.

Expropriation for this purpose is rare in both countries because of the financial costs. So too is provision on public land, since neither country has a historical tradition of public land ownership. This means designing devices to secure public domain facilities from private land. These may be justified as a tax in kind on betterment or as compensation in kind for the increased demand for public goods arising from land-use intensification.

In Spain, there are two principal devices: the 'donation' of 'aprovechamiento' and the coerced contribution of urban facilities, green zones and other infrastructure. Both procedures are governed by planning laws. The 'donation' of 'aprovechamiento' is determined by law. Since the Land Law of 2007 these assignments amount to between 5% and 20% of a development area, depending on the rate of return of the project. These are areas in a project to be reserved for major public networks or services (so-called sistemas generals). The aprovechamiento for these areas is 'donated' back to (or exacted by) the state. This can be used by the local government to build social housing elsewhere in the Master Plan area. In practice, however, the aprovechamiento rights are generally sold back to the original owners who ceded the land. They can use

them in designated areas of the Master Plan and the public administration acquires money to spend freely elsewhere.

So the local authority first creates betterment value by making a plan. As part of the plan, it identifies land for various types of public services such as green areas, public buildings and infrastructure. These can be thought of, on the one hand, as mitigating the social costs imposed by the development on the existing facilities of the settlement, and on the other hand, as reducing the social costs within the new development itself. Either way, the public network or services add betterment value to the land. Having allocated a right to a certain amount of value uniformly throughout the zone (via aprovechamiento), the state then has to compulsorily take back the right from the land on which public network or services will be built. In a roundabout way, this appears to serve both equity and efficiency goals.

The main problem with this intriguing institution in practice, however, is that it can become inflationary. Selling planning consent (aprovechamiento) back to a landowner or developer raises the price of land. Theoretically, this might be viewed as internalizing the cost of public goods supply in the plan. Planning consent is removed from the public domain spaces in a project and becomes a free-floating right with a value equal to the aprovechamiento in the zone from which it was taken. Any price increment added to the buildings developed on the plot of land where the free-floating aprovechamiento is 'fixed' can be taken to be the cost of supplying land for public goods (elsewhere in the plan). This is true, but it still has the effect of inflating the cost/price of the 'fixed' development (which is not untypically, social housing). This is clearly inefficient in terms of pricing social housing. One thing it is likely to lead to is a reduction in social housing quality. What is really happening is that for the sake of equity, undevelopable land in the original development zone has been given an artificial value. The value of the aprovechamiento associated with the public domain land is artificial. It is created only for the sake of treating every square metre in the development zone equally. Apart from this interpretation of constitutional logic enshrined in the 2007 Act, there is no reason to create a planning right for these areas. The cost of doing so is arbitrary land price inflation unrelated to land users real willingness to pay.

The supply of public domain land also happens in Spain by various versions of the UK-style free (negotiated or coerced) contribution in kind. If the concessions only serve the unit of development they are called 'local systems' or 'networks', which, once built, should be handed over to the public administration free of charge by the private individual. Private developers are thus expected to internalize the cost of constructing infrastructure that creates urban land value on their land. The state then assumes ownership and the liability for managing and maintaining that infrastructure. Analysing it in this way raises the question of why the state assumes this liability. If the infrastructure is local and necessary primarily to service a particular project (and from the land owner's/developer's point of view, necessary to create value in the project), then it is probably in the interest of the subsequent owners (who purchase subdivisions of the developed land) to maintain control (maintenance and reinvestment) of these collective goods. The reason why post-development control of local infrastructure does not happen outside of co-ownership developments (such as strata-title and condominiums) is that the original landowner and developer generally retain no long-term interest in the land. The traditional model of dividing ownership of a new development between

subdivision owners and the state is probably not the best way of maintaining a stream of betterment over a project's lifetime since the state has less incentive than do the subdivision owners to maintain and update the public goods that contribute to the project's future betterment value.

The UK method of obtaining public domain land from private development has until very recently been by negotiation. This contrasts with the Spanish use of law to achieve the same end. For highways or other infrastructure within a development site, these are generally provided at the developer's expense. For large sites there may be a requirement to provide an area of open space or amenity land. For works that are required off-site, the developer may be obliged to provide them directly if the land is under the developer's control. Alternatively a financial contribution can be provided to the responsible body. This may also apply to provision of land (and buildings) for education, health or other non-profit-making uses. For large sites, the upfront costs in meeting public goods requirements may encourage a division of roles between a master developer who provides the public services and lays out the site and individual builders who purchase the serviced plots and build out the development. In some locations, public bodies may take on aspects of the master developer role, particularly where development values are low. The principal mechanism used to secure land or buildings for the public domain is the legal agreement or planning obligation (sometimes misleadingly referred to as planning gain). This can involve the direct transfer of land or buildings to a public authority or third party; ongoing management by the developer with a guarantee of public access; or financial contributions towards provision by others. The amount of public gain secured through the process depends on the outcome of negotiation and the likely development surplus that will be generated. In many cases the 'gain' to the community will be very limited and is confined to mitigating the most severe impacts of the development. In this case, the negotiated contribution should be seen as a recovery of in-kind compensation for social costs imposed by the development. Where adequate infrastructure provision already exists as a result of previous investment the developer cannot legally be asked to provide towards this. The developer will also not be expected to pay the full costs of providing public domain infrastructure where this renders the development unviable. In such cases, public sector 'gap funding' may be available or the statutory authorities may have to meet the additional costs of servicing the development directly from their own revenues. While this negotiated procedure operated (it is being phased out by 2011/12), the general ruling of the courts, who establish planning case law, has interpreted the laws that govern planning obligations (as we have already implied) as being an instrument to capture compensation value from developers, not betterment. So off-site 'contributions' have by and large been ruled as unlawful by the courts in their interpretation of the statutes.

The lack of a transparent and consistent method of securing improvements to the public domain has contributed to an anti-development ethos in the UK planning system. Planning officers, local council members and local communities often resist development because of the perceived costs to the public domain. Concerns about traffic congestion and loss of open space feature highly in this debate. There is often a difficulty in attributing the costs of providing public domain to particular development parcels. This has led to the increasing use of standard formulae and tariffs to fund public infrastructure.

This approach has been taken to the next stage through the legislation we referred to in opening this paper—which took effect in April 2010 and enables LPAs to impose a CIL, a version of the Impact Fee instrument used for a long time in the US and elsewhere. The levy will be charged at a standard rate per unit of development and will be designed to meet the costs of infrastructure required to service new development across an entire local authority's area. In principle, this removes a developer's opportunity for free riding and should enable a more equitable distribution of social costs between the public and private sectors. Interestingly, the official understanding of the CIL is still ambiguous in respect to whether it may be used to capture betterment net of compensation. It is clearly designed to capture compensation value from urban land development but senior officials are ambivalent when asked about the betterment issue. When pressed on the issue, the understanding seems to be that there is no reason why the levy should not be set at a level that takes profit from land, net of compensation value (a portion of A in Figure 1), but that this point is unlikely ever to be reached since the real cost of supportive infrastructure that could be brought into the compensation equation is very high (B in Figure 1).

This is, in fact, a rather profound point since it challenges the long-standing theoretical distinction between compensation and betterment as depicted in Figure 1. The urban land value of any site (A + B) is, after all, almost entirely created by other people's investment, especially by state investment in infrastructure. It could therefore be argued in extremis that any exaction of value above costs and normal profit is compensation. In this sense, the distinction between compensation and pure betterment might be better understood to be specific compensation and general compensation: B in Figure 1 is specific compensation for negative social costs created by a development; A is compensation for diffuse positive externalities resulting from millions of other bi-lateral transactions between individuals, firms and governments."

Conclusions

The paper reflected on the significance of the new UK and Spanish laws structuring market and government behaviour in the built environment, highlighting the differences between the two European countries in their approaches to land value allocation. The focus on compensation and betterment values is a particularly useful one, given their implicit yet significant role in driving property markets. By bringing this important dimension under scrutiny within an international comparison, the paper offers a framework for future papers that reflect on the role of urban planning in destabilizing an economy through encouraging a property bubble. While it is credit supply that ultimately drives bubbles (in stocks, infrastructure and other commodities as well as in real estate), municipal behaviour in governing land supply, particularly where municipalities have a strong financial incentive to increase supply, is also an important part of the story.

Competency for the coordination of urban development in Spain and the UK belongs strongly to the state. Each country uses this competency differently, however, to create, secure and distribute urban land value. In Spain, urban planning is used as a source of finance by the public administration, specifically for the local treasury of municipal areas. Spanish planning law obligates landowners to hand over up to 20% of a development site's building rights. Local administrations thereby receive large sums for the local treasury. In a situation that is oddly reminiscent of the Chinese municipal finance business model, with its reliance

on land-leasing revenue (Zhao & Webster, 2012), urban planning is used as a principal source of funds in Spain. The many Spanish municipalities that had no planning intentions before this new incentive made haste to initiate planning in order to secure a new source of public funds. In many cases, the planning scheme itself is of no great importance: betterment exaction is merely an income source. Like Chinese cities, Spain's betterment 'printing press' passes on some of the costs of land value creation to land developers who supply local infrastructure and hand it over to the public domain, free of charge. This approach to planning and local finance could not be more different to the UK, where the state often supplies infrastructure and where local governments share much of the financial and social cost of new development but little of the financial benefit (Evans & Hartwich, 2005). This is changing, however, with the CIL helping to compensate local communities for social costs imposed by new development and a new incentive scheme announced in 2011 by the UK coalition government, which gives local authorities a stronger fiscal incentive to attract new housing. A forensic analysis of the extent to which Spain's betterment-maximizing local planning system contributed to its property bubble and subsequent economic crisis is the subject of another paper. Equally, the degree to which the UK's recent clarifications of property rights over land value uplift will shift the embedded anti-development stance of many local authorities and increase land supply is a chapter of UK planning history yet to be written.

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