



The role of courts in open space conservation: Lessons from the Israeli experience

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ABSTRACT

Under conditions of increasing urbanization and expanding development, the issue of open space conservation is becoming more complex and controversial. This is manifested, among others, by the growing body of research dedicated to various aspects of the issue and the factors that affect it. However, research so far has largely neglected one of these factors, namely, the significant role that courts may play in conservation. This paper highlights the role of courts and the constraints that frame their potential impact on the consequent spatial layout of open spaces. The paper provides evidence from a recent study of Israeli court rulings that were concerned with issues of conservation and planning decisions, and offers practical suggestions for immediate implementation as well as directions for further research.

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1. Introduction

The conservation of open spaces receives much attention in research, covering both quantitative (e.g., how much open space is needed) and qualitative (e.g., how people use open spaces) aspects. One of the most prominent issues inherent in the essence of open spaces is securing their “openness” over time, especially under conditions of accelerated development and expanding urbanization. Land use planning is a powerful tool for this purpose. Ideally, planning decisions made by statutory planning systems are supposed to balance existing and future conflicts and interests. However, under development pressures and increasing conflicts between competing interests, planning decisions may be adversely affected, especially where conservation interests are concerned.

Planning decisions are made in a very complex environment, subject to economic, political, social and cultural impacts, and are therefore often fraught with conflicting interests. Issues of open space conservation – which represent a public interest – are especially controversial due to the inherent conflict with developers’ aspirations for profit-maximizing development. Consequently, in many cases planning decisions arouse opposition that sometimes leads relevant parties and stakeholders to appeal to the court for assistance in their case. Courts may actually play an important role in planning decisions that affect open space conservation, yet so far this role has rarely been studied. This paper claims that understanding this role and the constraints that frame it may prove helpful in the constant struggle over open space conservation in the face of development. Based on this premise, the paper provides some pre-

liminary insights related to this subject, as emerged from a recent study that examined Israeli court rulings in cases that involved statutory land use planning decisions intertwined with issues of conservation.

The paper begins with a short description of the planning decision making process, and then presents the study and its main findings. This is followed by a discussion of the significance of the findings, focusing on the factors that may affect the potential role of courts in planning and conservation. The paper concludes by offering some practical suggestions and directions for future research.

2. The planning decision making process

Planning decisions are usually made by administrative statutory planning systems, in a process that may vary according to local laws and conditions. However, additional agents and factors play an important role – in varying degrees – in the planning decision making arena. The most important agents are the developers and the public.

The role of developers and land owners, motivated by economic interests, has already been observed by Logan and Molotch (1987). Developers are actually the most important agent in the development process; they determine the size, density, timing and spatial distribution of development, and are involved in financing, planning, building and shaping the urban environment (Morgan and O’Sullivan, 2010; Peiser, 1990). However, developers have to operate within the regulatory framework of the local statutory planning system, where decision-making is subject to pressures that may be induced by developers, land owners or political stakeholders as well as by other land owners, public organizations and individuals that contest the proposed projects. In fact, development decision-making may be described by a triangular model, where the points

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represent (a) the developers who initiate development plans, (b) the planning system that is supposed to approve these plans, and (c) the public, whose demand for residential and occupational areas drives development in the first place. The interactions among these three factors will eventually determine the attributes of the new development and the spatial pattern of developed areas and open spaces.

The public is the most passive and the least dominant of the three factors mentioned. However, its impact on planning decisions is two-fold. The public's demand for developed areas is a main trigger for development, and its locational preferences – as expressed by willingness to pay in terms of money and time – affect land prices and drive developers to initiate profit-maximizing development projects in areas of high demand. At the same time, the public opposes planning initiatives that seem to negatively affect its interests. In Israel, for instance, under the current Planning and Building Law from 1965 individuals and public non-governmental organizations may participate in planning only by opposing submitted plans. In other words, the public acts, if at all, in response to the planning initiatives of developers. Although in some places the public may play a more active role beside or in cooperation with the institutional planning system, it is usually the planning system alone that makes the planning decisions.

The rationales for oppositions to plans may be divided into three types: (a) violation of private property rights, e.g., land expropriations, unbalanced land use allocation or denial of building rights; (b) violation of private amenities, such as may be caused by bordering new development, e.g. increased noise from roads or shading by higher buildings; and (c) violation of social amenities, such that may be caused due to loss of open spaces or damage to natural landscapes and ecosystems. While the first two types refer mainly to private goods that are the concern of individual interests, the third one is related to public goods that are essentially nonexcludable in use and nonrivalrous in consumption. The characteristics of open spaces as public goods lead to a “free rider” problem, namely, the individual has no motivation to invest time or money in protecting the public interest (Weimer and Vining, 1992). Therefore, in such cases some kind of group organization is needed to intervene in the planning decision process.

In Israel, oppositions of all types are brought before the planning commission, which is authorized to accept them, totally or partially, or reject them and approve the relevant development plan. Planning commissions are expected to balance between conflicting interests. Yet, often the final planning decisions leave opposing parties unsatisfied, and in many cases they appeal to the court for assistance. This is very common where issues of open space are concerned, because of the essential significant conflict between open space uses and development, due to the marked impact of development on increasing land values and potential revenues. In cases submitted for judicial review the court has the power to instruct the planning commission to cancel or reconsider its decision if such instruction is justified by the specific circumstances. In other words, the courts are in fact another agent that may play a significant role in planning decisions.

3. The study and its findings

To study this potential role of courts in planning and conservation I examined the contents of 33 court rulings that were issued by Israeli courts over a period of 20 years (1990–2010), all of which appeared – in many cases more than once (which reflects the intensity of the conflicts involved) – in public communications, such as daily newspapers. In all the study cases planning commissions were involved as respondents to petitions submitted to the court. Also, all the cases related to specific statutory land use plans that were

concerned, among others, with issues of open space conservation, e.g., conservation of a specific landscape, habitat or species. The list of cases (Table 1) reflects some of the characteristic conflicts related to open space conservation in Israel, mainly the high demand for development within the Tel Aviv metropolitan region (TMR) in the core of Israel (48% of the cases) (Maruani and Amit-Cohen, 2010). Table 1 also reflects the attractiveness of seaside development (30% of the cases) which in many cases was contradictory to national outline planning (NOP 13) that prohibited seaside development except hotels and tourism facilities. The cases were also diverse in several other aspects. For instance, in some cases the appeal to the court was in favor of conservation decisions while in others it was against them. Hereinafter I shall refer to appeals or decisions that favored open space conservation as open space positive (OSP) and the ones that contradicted open space interest as open space negative (OSN) accordingly.

Following are the main findings, grouped according to the judicial outcomes, identity of the main parties and the main reasoning for judgment.

3.1. Judicial outcomes

Out of the 33 cases, 18 appeals were denied by the court; the other 15 were accepted fully or partially. Twenty-one of the appeals were OSP – of them 13 were accepted and nine denied; 12 appeals were OSN – of them two accepted and ten denied.

In 14 cases (42%) planning decisions were actually cancelled by the court, and the relevant planning commissions were instructed to reconsider them. In most of these cases (12) the planning decisions in question were OSN (i.e., not favorable for open spaces, see above) and the appeal indeed called to cancel them. In other words, the court had a very significant impact on planning decisions in the study. Moreover, in many cases the court proved to be the guardian of open space interests against development-biased planning decisions.

3.2. Identity of the parties

Twenty-five cases involved environmental NGOs, almost always on the OSP side; in most of these (19), the appeal was against planning commissions, and sometimes also against developers and entrepreneurial firms or other institutional organizations such as local or governmental authorities interested in development. In the remaining cases NGOs – along with relevant planning commissions – were called to respond to petitions submitted by developers or land owners against planning decisions that, to their mind, were unbalanced or violated their property rights. The NGOs involved were mostly national organizations – especially the Israel Union for Environmental Defense (IUED) and the Society for Protection of Nature (SPNI).

Individuals were involved in 17 cases (56%), mostly as appellants (12), either in OSP (7) or OSN (5) cases. In almost all of these cases they had direct private interests, such as acquiring building rights on their property (which had been denied by the planning decision) or opposing proposed development that may cause them nuisance or economic damage. Entrepreneurial firms and developers were also involved in some of the cases, either as appellants (8) or as respondents (14), always on the OSN side.

3.3. Reasoning for judgment

The court would not intervene in the essential planning issues involved in the planning decisions that are brought to judgment; it does not replace the planning commission, as is repeatedly expressed in the rulings. The task it faces is to review and examine only the administrative aspects of the decision. Consequently,

Table 1
List of study cases.

No.	The planning issue	Open space features ^a					
		1	2	3	4	5	6
1	A hydroelectric power plant on the upper Jordan River		✓	✓	✓		
2	Radio transmission facilities (Voice of America) in the Arava region (on the great rift valley-intercontinental bird migration route)		✓	✓			✓
3	A new town (Modi'in) in a hilly area of historical, archaeological and scenic values ^b			✓			✓
4	Residential development (15,000 dwellings) north of the delta of the Yarkon River, Tel Aviv ^b	✓	✓			✓	
5	A new north-south cross-state highway (road 6)		✓	✓	✓		
6	Residential development by the seaside, in an area designated for hotels and tourism, the city of Haifa	✓		✓		✓	
7	Residential development (3500 dwellings) in agricultural lands on the fringe of the city of Herzlyia ^b				✓		✓
8	Residential development by the seaside, the city of Herzlyia ^b	✓				✓	
9	A complex of gas station and commercial services in open landscape, at the foothills of Mount Carmel			✓	✓		
10	A high-tech office building in agricultural land, Sharon region ^b				✓		
11	Low-rise residences in an area designated for tourism and recreation, adjacent to Ein-Hemed National Park			✓			✓
12	Development of public and commercial facilities in open land within an existing neighborhood, the city of Haifa					✓	
13	Additional lanes to the road to Jerusalem (road 1) in a section crossing a nature reserve		✓	✓			
14	Residential development replacing hotel and tourism services, adjacent to a rural settlement (Motsa Illit) near Jerusalem			✓			✓
15	Residential development expanding into a habitat of a rare species of Iris (<i>Iris atropurpurea</i>), the city of Netanya ^b		✓			✓	
16	A cross-state highway (section of road 6) crossing a proposed biosphere zone on the southern slopes of Mount Carmel			✓	✓		
17	Residential seaside development, commerce and marina replacing recreation and tourism designation, the city of Herzlyia ^b	✓				✓	
18	National Park and tourism services by the seaside, south of Kibbutz Shefayim ^b	✓	✓	✓			
19	Residential development in agricultural lands on the fringe of the city of Herzlyia ^b		✓		✓		
20	Annexation of public open space to private property in exchange for land intended for public facilities, the city of Netanya ^b	✓				✓	
21	Low-rise residential non-agricultural expansion of Kibbutz Ga'ash, next to the Sharon Coast National Park ^b	✓		✓	✓		
22	A large city park in a wetland habitat, the city of Herzlyia ^b		✓			✓	
23	Residential development expanding into a habitat of a rare species of Iris (<i>Iris atropurpurea</i>), the city of Ness Ziona ^b		✓				
24	Residential development in agricultural land in an area of scenic landscape values near Jerusalem			✓			
25	Development for tourism and recreation resort in the Timna Valley (site of ancient copper mines), north of Eilat			✓			✓
26	A seaside resort near Kibbutz Palmachim ^b	✓	✓	✓			
27	Low-rise residential non-agricultural expansion of Kibbutz Sedot-Yam	✓		✓	✓		
28	A new rural non-agricultural settlement in agricultural land and open landscape, the southern slopes of Mount Hebron			✓			
29	Residential development expanding into a wetland habitat, the city of Netanya ^b		✓			✓	
30	A new rural non-agricultural settlement in agricultural land and open landscape, the Lower Galilee region			✓	✓		
31	Residential building by the seaside, in a zone designated for tourism and recreation, the city of Rishon-Le'Zion ^b	✓		✓			
32	Residential development in natural open land (known as Valley of Gazelles) surrounded by existing neighborhoods, Jerusalem		✓	✓		✓	
33	Legalization of commercial uses (restaurant and pub) built in open space, the city of Haifa			✓		✓	

^a Open space features: 1-coastal zone; 2-unique natural habitat; 3-scenic values; 4-agricultural land; 5-urban open land; 6-heritage values.

^b Plan area located within the Tel Aviv metropolitan region (TMR).

the main reasoning or justifications for judgment in the study cases were of the following types: (1) acceptability of decisions – whether or not the planning decision in question was reasonable under the circumstances, proportionate, balanced, a result of thorough consideration or compatible with the planning structural hierarchy; (2) procedural propriety – whether or not the decision making process was compatible in essence and order with legislative requirements, made in good faith and devoid of conflict of interests on part of decision makers; (3) interpretation of the law or the directives of the relevant plan.

The most prevailing reasoning type – in 14 cases (42%) – was concerned with acceptability of decisions. The court tended to ratify planning decisions when it found them reasonable and proportionate, while decisions that were conceived as unacceptable were cancelled. Consideration of procedural propriety was also evident, and in some cases planning decisions were cancelled because of procedural faults. In other cases the judgment relied on interpretation – of clauses in the law or in the relevant plans – that reflected the highly valued need for landscape and open space conservation.

All but one of the petitions against open space interests – which in all relevant cases were against planning decisions – were also denied on grounds of acceptability of decisions. In the one exception the appeal was accepted by the court when it found that the planning decision was unbalanced, and had not taken into account all relevant considerations, including private interests.

4. Significance and implications

The court rulings in the study could be distinguished according to their consequences for conservation: some of them favored conservation (i.e., OSP), ratifying conservation-oriented planning decisions that were challenged by developers or land owners, or cancelling other decisions that threatened open space values. Other rulings, on the contrary, favored development over conservation considerations (i.e., OSN), thus accepting development-oriented planning decisions or cancelling conservation-oriented decisions that ignored individual property rights. By ruling against the challenged planning decisions in almost half of the cases, the court proved that it may indeed play a significant, even crucial, role in the overall process of planning decision making. In addition, some of the rulings constituted important precedents that were followed in other cases later on. Moreover, the aggregate body of relevant court rulings gradually establishes norms and guidelines for proper decision making procedures and clarifies the distinction between right and wrong in this context. For example, in two cases (see Table 1, no. 4 and 7) the court cancelled decisions to deposit the relevant plan for public reference before required environmental impact statements (EIS) were completed. Now, while the Planning and Building Law requires an EIS in certain plans, it does not specify the timing for its submission. In both cases mentioned, the court stated that the deposition is a fundamental milestone in the planning procedure, since the public is allowed to review the plan, and oppose it if necessary only during the 60-day deposition phase. Therefore, EIS – if required – should be completed and available for public review along with all other statutory documents when the plan is deposited.

The findings above suggest that the planning system needs an external monitoring mechanism to reduce biased and unbalanced decision making, especially under heavy development pressures. The court's potential role is actually that of such an external monitor, as judicial review of administrative decisions provides protection for individuals and public interests by preventing decision-makers from abusing their powers to the disadvantage of the public (De Smith et al., 1995). Nonetheless, the court operates under certain constraints and limitations that affect its effectiveness. First of all, in the planning decision making process the court plays a passive role in the sense that it would not intervene unless called to do so by interested parties through their petitions and appeals. However, my findings confirm that individuals and private firms tended to appeal to the court only when their private interests were at stake, which is compatible with the 'free rider' problem mentioned above. In addition, turning to the court is risky, since it requires considerable investments in terms of money and time, while there is no certainty as to the resulting outcome (Mautner, 2008). This explains why public organizations are more likely than individuals to appeal to courts in favor of public interests. Thus, in most of the cases where planning decisions were reversed by the court, the appeal was initiated in the first place by environmental NGOs. This illuminates the importance of NGOs as "watch dogs" over the planning system in protection of open spaces. In fact, NGOs might have been regarded as a complementary factor in the monitoring mechanism mentioned earlier (see also Bartholomew, 1999), had it not been for their non-statutory position and their (sometimes) limited financial resources.

Another constraining factor is the Planning Law, specifically the scope and extent of its directives. Laws are the essential tools of the court. A detailed and clearly phrased law will make it easier for the court to review the decisions in question and pass a relatively objective judgment. Otherwise, the law is open to interpretation, either by the planning system or by the court. The planning system is likely to interpret the law in a way that will best serve its interests, which often resemble those of developers, especially in the case of local planning commissions. In any case, interpretation is essentially subjective, and depends to a large extent on the interpreter's personality, knowledge and values. In other words, the judicial review of conservation related planning decisions depends, among other factors, on environmental awareness and positive tendency towards conservation interests on part of the judge. In the present study a considerable number of court rulings contained distinct positive expressions in regard to open space conservation. OSP rulings in particular tended to reveal higher occurrence of such expressions. This implies that awareness of open space values has some effect, even if subconscious, on the final judgment.

5. Conclusion and suggestions

The Judiciary is one of the three ruling branches, along with the legislature and the executive, in many democratic countries. As such it has the power to review administrative decisions in various contexts, including the context of planning, where governmental control over the use of land inevitably provokes intense disputes (De Smith et al., 1995). Preliminary empirical evidence in this respect is provided by the present study, which confirmed that court rulings had considerable impact on conservation-related planning decisions, reversing decisions in some cases. However, the court operates within a framework of planning legislation and other constraints that affect its possible influence. This calls for further research that will provide additional insights on the subject of planning legislation and planning decision making in regard to open space issues, and their interaction with judicial procedures to help promote conservation efforts. Meanwhile, I wish to offer some immediate practical suggestions, based on the evidence so far. First, planning laws and regulations should be detailed and unambiguous, in order to provide clear guidance in decision making, both to the planning commissions and to the court. Second, we have learned that environmentally oriented judges are more inclined to interpret the law or plan directives in favor of conservation. Hence, it is important to invest in environmental education at all levels in order to increase environmental awareness in society. Special educational programs in this regard should be designated for parties that take part in the planning decision making process, including decision makers, developers, public organizations and, of course, administrative court judges. Third, the aggregate body of relevant court rulings in each country should be learned and serve to prepare specific operational guides of "do's" and "don'ts" to help conservation oriented planning decision making, tailored to local laws and conditions. Such guides may be used as part of the educational programs suggested above.

Another topic that emerges from the study and deserves further research is the role of environmental NGOs and the factors that affect their potential involvement in conservation decisions. In the present study, for example, only two national-level NGOs – out of more than fifteen that are active in Israel – were especially conspicuous. Both are structured organizations with financial resources that employ professional staff including lawyers, which explains their readiness to initiate legal proceedings, if necessary, albeit they differ substantially in their aims, operational modes and other organizational attributes.

This paper focused on judicial review of conservation-related planning decisions, which relied on planning legislation. Yet, open space conservation is affected also by other laws, such as the Rivers Authorities Law (Maruani and Amit-Cohen, 2009) or the National Parks and Nature Reserves Law in Israel. The interaction between planning laws and other legislative measures designed for preservation purposes, their potential impact on the court when reviewing planning decisions, and the practical consequences for conservation constitute additional fields for prospective research.

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