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Theme: Participation and justice in land use planning

Adjustment of legally binding local plans

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Abstract

Traditionally, and by law, new urban areas in Denmark are regulated and planned through legally binding local plans. Recently a tendency has occurred: The municipalities make the legally binding local plans quite open for future adjustment, and they are using a substantial amount of 'empowerment provisions' which empower the municipalities to later ruling. This way of making plans postpones the actual regulation of an area (i.e. the planning permission) making it an individual ruling for instance at the application of building permits. Case studies show examples of this way of regulating an area, which seem to be beyond the scope of the Danish Planning Act.

This paper deals with this problem through case studies and a legal analysis of present law. If the combination of the legally binding local plan and subsequent added requirements is misused, it will weaken the legal rights of the citizens (property owners) and in general the justice in land use planning.

The scope of the paper is to establish to which degree the permission permission can be postpones, and to which degree the use of empowerment provisions legally may be used in the planning process. In detail this will include the considerations of legal rights, the extend of the legal use of empowerment provisions and the combination of the use of legal binding local plans and other legal instruments such as easements and sales agreements.

1. Introduction

In 2011 Aalborg University conducted an empirical study of the two latest published binding local plans¹ from all the Danish municipalities (Post 2010). The overall conclusion of the study is that the take the task of making local plans serious and are making plans that seem both meaningful and useful. But when looking into the details of the plans a slightly different picture appears.

The Planning Act (The Ministry of Environment 2009) defines a set of minimum rulings that need to be complied with in the local plans. In a number of the analysed plans these demands do not seem to be met. Furthermore many of the local plans do not seem to have enough rulings in order to secure the desired plans of the area. Add to this that the plans contain a substantial amount of provisions which empower the municipalities to later ruling, for instance *"Subdivision of the land may only be executed after the acceptance from the Municipal Council of a composed subdivision plan. Before approving the buildings a plot over the buildings placement as well as drawings of the buildings' plan, facade and sectional view must be presented to the Municipal Council. There must also be accounted for the regulation of the terrain"* (Post

¹ A binding local plan is a juridical plan regulating the future development of an area. The binding local plan is made in persuance of the Planning Act (Consolidated Act No. 937 of 24 September 2009)

2012, page 42). In the Danish planning system the binding local plan is the most detailed plan for regulation of property and with the enactment of the local plan it is not legal to bring forth any supplementary rulings about the buildings appearance and placement as the planning permit implicitly is given by the legally binding local plan. Of course there is a later permission process in order to secure that local plan regulation and other regulations are obeyed. In this process for instance the Building Law is addressed in order to secure a safe and healthy building. Hence it is an illegal claim to demand additional plans. This can only be made through the making of an additional local plan, and a complaint regarding such rulings will be favoured by the appeal board (Environmental Board of Appeal). See for instance (The Environmental Board of Appeal, 2008)

The empirical study of local plans conveyed following problematic rulings:

Type of ruling	Total number	In number of local plans
General rulings of empowerment	45	30
Rulings of empowerment regarding details	345	125
Requirements of actions	105	75
Undefined standards	55	50
Imprecise rulings	240	115
Redundant rulings	390	145
Rulings not statuted by the Planning Act	195	105
In total	1375	(196 local plans)

Tabel 1 Problematic rulings in the analysed 196 local plans (Post 2010, page 39)

The study shows there is a schism between the planning and the apparent need of making post-planning decisions on the basis of single issues.

This municipal practise is further investigated through four case studies.

Case I – The use of sales agreements

If the municipality is the landowner, it is possible to bring forth additional demands in regard of terms connected to the sales agreement.

In Randers municipality they had tried for a couple of times to create a new approach to planning, using architecture contest in some cases and free architectural help in others. But the creative process

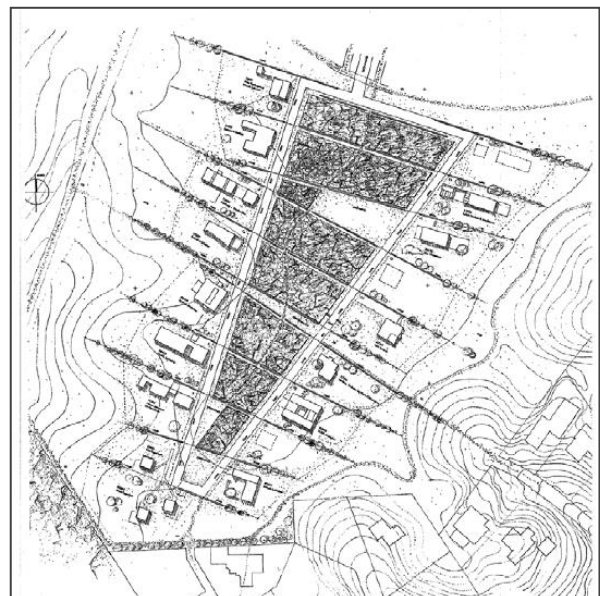


Fig. 1 Building plan from the referred local plan from Randers Municipality (Randers Municipality, 1998)

was still ruled by the binding local plan. The view of the municipality was that the focus on the rulings in the local plan overshadowed the creativity (Fälling, 2004). Hence the municipality went the whole length and decided not to put any rulings on materials or colours in the local plan (Randers Municipality, 1998), only a well sketched building plan and an 'inspiration catalogue'. And then the plots were put up for sale.

The procedure then consisted of the following steps: Interested buyers signed up for a plot; then they had to come up with a drawing of the house; the municipality needed to approve the drawing; and only then the buyers were allowed to purchase the plot. The approved building drawing was registered on the plot as an easement in the Land Book.

In this manner, by minimising the local plan and using the sales agreement instead, the municipality was in control of the final appearance of the area. According to the municipality this way of handling urban development not only resulted in a very architecturally successful area, but it also resulted in twice as high price on land as usual.

This way of planning inspired other municipalities to similar procedures. In a local news paper, the following statement could be read approximately a year later: *"In the sub-region of the development area where the compact-low buildings are to be placed, a so-called 'authorisation procedure' will be used when the plots are put up for sale. This will ensure the coherence between the architecture and the aesthetics ... The idea of an 'authorisation procedure' is an inspiration from the municipality of Randers, who has used the procedure with great success. Through guidance and dialogue they have created a fascinating and desirable resident area that has received a lot of publicity."* (Gammelgaard, 2006)

The 'authorisation procedure' as used in Randers and other Danish municipalities can be summarised as in the following figure.

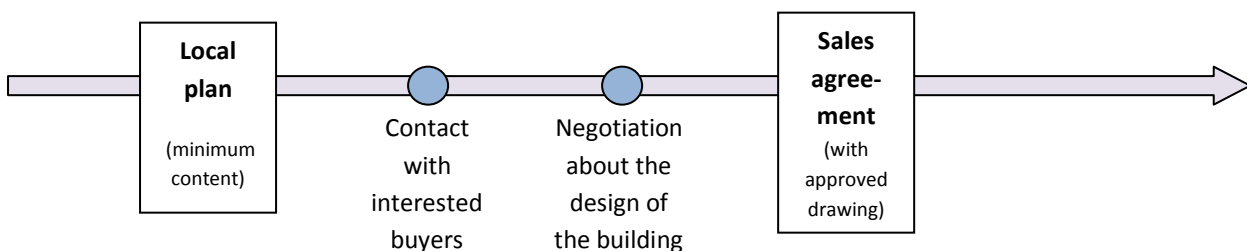


Fig. 2 Version 1 of a municipal approach to make the planning of an area more flexible.

Case II – The use of sales agreements (vers. 2)

In the municipality of Hinnerup they have used a similar procedure when planning for business parks.

The procedure differs from the procedure in Randers because Hinnerup has chosen to incorporate the 'authorisation procedure' as a more integrated part of the local plan and they have also supplemented the procedure with a set of 'homemade' rules about the right to complain.

In the local plan the potential buyers of area building plot are made aware of the use of a supplementary authorisation procedure. And as it is stressed in the rules of the plan: *"Hence a proposed building can be*

refused, even though it is legal according existing laws, if the building has architectural or aesthetic inadequacy according to the specific ruling of the municipality” (Hinnerup Municipality, 1990, page 27).

Together with the local plan a supplementary guidance and a collection of illustrations exemplifying the intentions of the municipality is published. And the procedure is again managed through the sales agreement.

As mentioned the procedure is supplemented with the right to complain.

The authority to approve the building drawing is placed at the Technology and Environmental Board in the municipality and any appeals are to be handled by the Economy Board.

Hence the procedure in Hinnerup can be summarised as in the following figure.

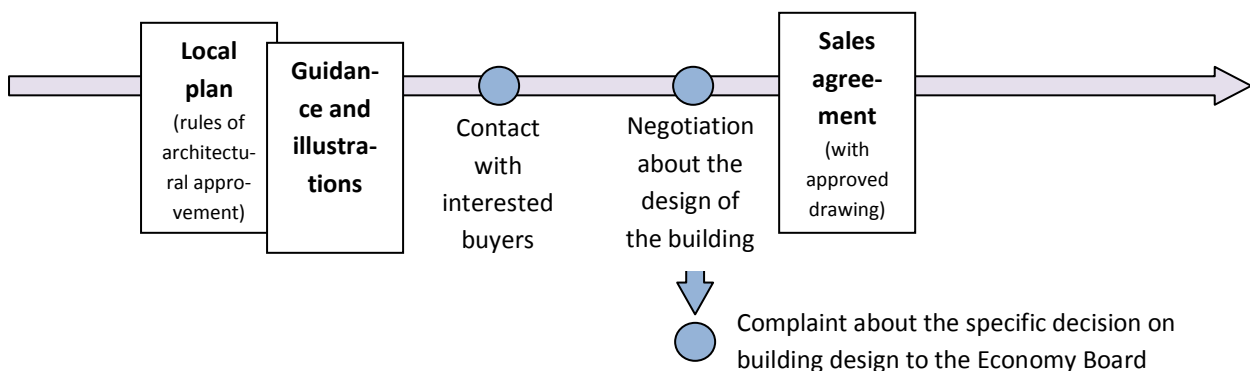


Fig. 3 Version 2 of a municipal approach to make the planning of an area more flexible.

Case III – The use of quality manual and easements

In Herning Municipality they have used ‘quality manuals’/’design manuals’ as a supplement to the local plan (Herning Municipality, 2006). This is done in order to pursue a goal of urban ecology.

In the local plan the area’s composition and architectural expression are regulated, and in a supplementary design manual rules concerning sustainable initiatives are outlined. These rules are not under statute by the Planning Act, and hence it would be illegal to make them part of a local plan. Instead the municipality makes a design manual with the different demands and register this manual as an easement on the included properties.

Hence it is possible to bring forth rulings about sustainable materials, - paint, - lighting, - house hold appliances, heat supply, about recycling of waste water and garbage, and finally, rulings about the prohibition of use of pesticides in gardens etc. Any of these rulings would be legal to include in a local plan as there are no legal basis in the Planning Act.

The design manual (registered as easement ind the Land Registry) is announced together with the local plan, and the local plan mentions and refers directly to the design manual. In order to secure the fulfilment

of the local plan and the easement the sales agreement contains requirement of sustainable building in line with the 'quality manual'/'design manual' .

This way of making plans for an area can be summarise as in the following figure.

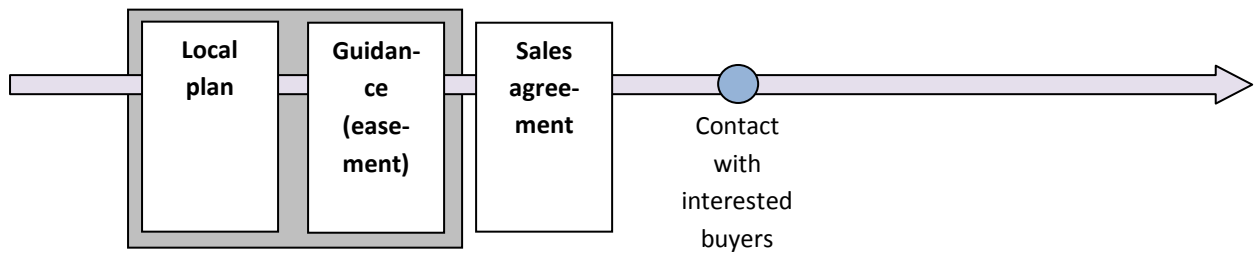


Fig. 4 Version 3 of a municipal approach to make the planning of an area more flexible.

Case IV – The use of quality manuals and local plan

All of the three examples described above challenge the way the planning process are stated in the Danish Planning Act.

Other municipalities use other creative approaches in the start-up phase of the planning of an area, but then limit the actual rulings to the legal content of a local plan.

Hillerød Municipality has used this approach. The municipality initiated the development of a larger urban area with an architectural contest. The winning proposal is implemented as a 'quality manual' containing recommendations and illustrations about both the composition and architectural expression of the area (Hilleroed Municipality, 2005).

The single local plans for the sub-regions of the area are made in accordance with the quality manuals, and within the scope of the Planning Act.

Hence this procedure does not try to make any post-adjustment to the plans.

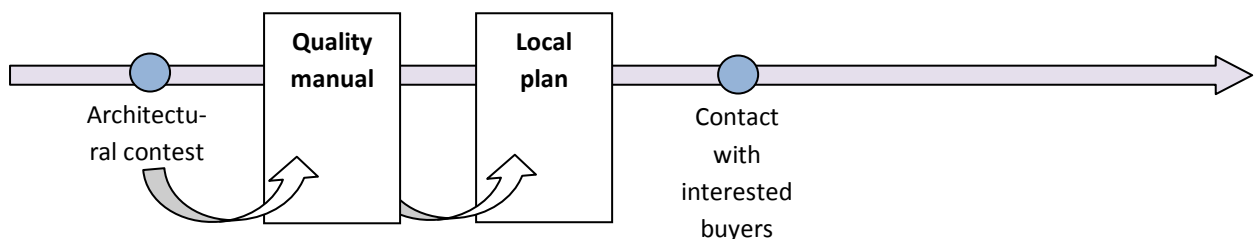


Fig. 5 Version 4 of a municipal approach to make the planning of an area more flexible.

2. Theory and method

There are different possible approaches to enter the outlined problem area.

It could be interesting to go into a more qualitative analysis of why the municipalities are using these different procedure, and hence the understanding of the correlation between planning and flexibility, confer for instance Patsy Healey et al. (Healey, 1992). This could involve a more exhaustive case study of the procedures and interviews with the municipalities.

It could also be interesting to investigate how widespread the use of these alternative planning procedures is by making quantitatively studies of the municipal planning procedures.

In this paper we will go into a legal analysis of the procedures from a legal right stanza. In a later Danish paper we will unfold the analysis in a Danish context with an emphasis on the Danish regulation of planning and realisation of planning, but in this paper we will relate to more generally applicable considerations on due process protection of individual rights.

There are different aspects of this discussion. The economical aspect is often an important issue for the land owners. It is also the economical aspect of the individual rights that is the motive behind The Constitutional Act of Denmark's ruling on the sanctity of property; § 73 *"The right of property shall be inviolable. No person shall be ordered to surrender his property except where required in the public interest. It shall be done only as provided by statute and against full compensation"*. The Planning Act has to a large extend overridden these considerations by stating that the underlying basis of a local plan is that the regulation is not compensated. The right to build in urban areas is often limited by a local plan and hence the property right in terms of the building right is not set free, and the economical exploitation of the building right is depending on the local plan, see (Christensen, 2011).

Due process protection of individual rights has another aspect, namely the public involvement, and hence it is part of the administrative law.

Traditionally the understanding of the protection of individual rights in the administrative law has to do with the following three aspects:

- Predictability
- The material rule of law
- Procedural rule of law

(Andersen, 1975)

The first aspect – the principle of *predictability* – dictates that the citizens (and hence the land owners) should be able to predict the existing laws, and hence local plans for an area. The Planning Act has rulings regarding public hearing and regarding notification of the land owners included in a local plan area (§§ 24-26).

In the Planning Act the public involvement is paramount. It was stressed with the enactment of the prior planning laws all the way back to 1975. And today the preamble of The Planning Act dictates that the Act especially aims towards involving the public in the planning process 'as much as possible'. The (intended) high degree of public involvement is also a way of balancing the municipal power, since the municipal planning (including the local plans) after 1975 not longer needed a ministerial approval.

It is also according to the principle of predictability that ruling in a local plan should be precise. If the ruling is too vague or empower the municipality to later ruling the citizens have no possibility of finding out how the (landowner's) area is going to be and hence which rules that apply in the area.

In case of doubt of the interpretation of a rule in a local plan the second aspect of the *material rule of law* comes into play. This principle implies that the citizens are only subject to regulations that are under the authority of a given law. In regard of a local plan it is then only rulings under the statute of the Planning Act that are legal. Other rulings – and too detailed ruling - are invalid and can even lead to claim for compensation.

The third aspect - the *procedural rule of law* - implies that the citizens (land owners) have a right to appeal against the restrictions they are assigned to in the binding local plans. The appeal board are restricted to deal with claims of legal nature. The board cannot comment on the 'qualitative/political choices' made in the local plans. This underpins the importance of the Planning Act's rulings regarding public hearing, where the citizens' voices on the matter can be heard.

The described cases on adjustment of local urban plans will be analysed within this frame in order to comment on the compliance with the three aspects of rule of law as well as the legality of the procedures.

The method will be a legal analysis of the procedures based upon a statutory interpretation and upon verdicts and judgments regarding the Planning Act.

3. Analysis

There are different components in play in the four described cases.

One of the similarities in the first two cases is that the rulings in the local plan are kept to a minimum. Based on the principle of prediction there is a lower limit for the content of a local plan. According to the Planning Act there are three elements that need to be addressed in a local plan: the purpose of the plan and its legal effects, and then the plan shall be accompanied by a report describing how the plan relates to the municipal plan and other planning for the area. But based on the principle of prediction the Environmental Board of Appeal has stated that the plans furthermore must have sufficient rules that allow land owners to envisage the appearance of the future area, cf. verdict (The Environmental Board of Appeal, 1999).

Some of these quite light weighed local plans are combined with rulings demanding consecutive plan, e.g. building-, parking- or green area plans, or rulings empowering the municipality to later ruling on certain details. Based on the principle of prediction these rulings will also be disregarded by the appeal board, cf. verdict (The Environmental Board of Appeal, 2008).

Hence it is important, and obvious, that the local plans are legal. It is possible to keep the rulings in the plan to a (legal) minimum, and it is also possible to work with alternative plans for the area. Subsequently these legal plans can be combined with other requirements stated in a sales agreement or easement. Or stated in a design manual. But in order to have binding effect the rulings must be incorporated in the local plan, in an easement or in the sales agreement. The latter two requires that the municipality is the owner of the land before the land/building plot is sold and handed over to the land owner who is supposed to build on the land/plot.

When being the land owner the municipalities are given rather free rein in regard of use of supplementary tools. Still there are some restrictions. In Denmark there are some old rules from 1683 still in force regarding signing of an agreement (Kong Christian Den Femtes Danske Lov, 1683). According to these rules an agreement (including easements) may not violate "law and demure". That means that the agreement may not make other laws illusory in the sense that the sales agreement is overriding other laws. The question about demure is passed on to the Contracts Act in force. In §36 it is stated that an agreement may be altered or made invalid if there are 'unreasonable demands' or if the demands conflict with decent behaviour (Ministry of Justice, 1996, §36). The fact that an agreement cannot override other laws entail that the municipality as a main rule is obliged to sell land to the highest bidder and hence they are not allowed to choose potential projects (buyers) based on quality as a measure (Ministry of Economy and The Interior, 2011, §6). The exemption from this rule demands a 'reasoned municipal interest'.

The question is whether the municipality may discard a sales proposal if a potential buyer has complied with the local plan and the procedure with the additional design plan. Is it a reasoned municipal interest to demand for instance a house built of bricks instead of wood, if this is not regulated through the local plan? This is a question that needs clarification through trials, but it is hardly likely.

If the municipalities choose to use easements they are as land owners free to lay down supplementary rules. As mentioned before, these ruling may not make other laws illusory. On this ground the Ministry of Environment has announced that it is not allowed to use easements to prohibit the use of pesticides, because this will violate existing EU-laws on trade and pose anti-competitive premises (<http://www.kl.dk/Teknik-og-miljo/Artikler/66824/2010/01/Byudvikling-i-OSD-omrader/,06-02-2012>).

When using any supplementary legal instruments the local plan is an usefull place to inform about the involved supplementary tools and requirements. Not least in order to secure predictability.

The variation of the procedure where the municipality incorporate a supplementary appeal procedure shows that the municipality in some way takes the public involvement seriously, but it is illegal to bypass the appeal procedure stated by the Planning Act with this version, where the citizens have the right to bring any complaints forth to the Economy Board of the municipality.

4. Results

The scope of the paper is to establish to which degree the 'authorisation procedure' and the use of empowerment provisions may be used legally in the planning process.

An analysis of different cases showing variations of procedures draws a motley picture of how the municipalities are trying to postpone the decision making to the final stages of the planning proces.

A legal 'authorisation procedure' may be designed as illustrated in figure 6.

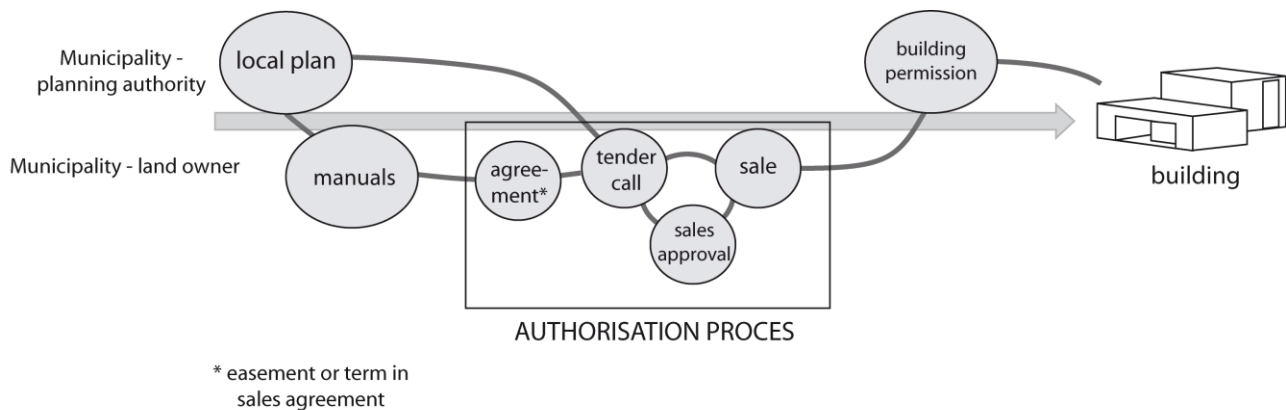


Fig. 6 How to supplement the local plan with other legal instruments in order to reach a desired result

If the municipality wishes to make demands on design approval, this may only take place in the sales agreement.

It is very important to emphasise the importance of the due process protection of individual rights. This means:

- Regulations – both in local plans and in easements etc. - need to be by clear statute; and local plans need to be at a certain level of detail in order to be legal. Otherwise material rule of law is violated – or the regulations are directly unlawful.
- Regulations needs to be precise and not empowering the municipality for later rulings; otherwise it violates landowners predictability.
- The municipality should refrain from appointing it self as a complaints board, because the land owner has by law a right to complaint to the The Environmental Board of Appeal. When doing so the municipality violates the 'procedural rule of law'.

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