

Distribution of net added value from rezoning - A challenging measure in the Norwegian Land Consolidation Act

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SUMMARY

Distribution of net added value from rezoning was implemented in the Land Consolidation Act in 2006. The measure was intended as a supplementary means of action for densification. Legislator's intention was that with these legal rules, a more rational design of plot areas could be achieved which would facilitate a planned development, and it would also achieve a distribution of land values and costs in the development area.

The measure means that property owners whose properties are designated by the authorities as public outdoor recreation areas, areas for open-air recreation, access roads, etc. in the zoning or building development plan, can receive a share of the development rights for other properties in the zoning plan area. There are special rules regarding how the Land Consolidation Court shall perform its valuation in distribution of net added value from rezoning, but they are inconclusive. The measure has not been used to a great extent. There are believed to be a number of reasons for this. The reasons relate to both the design of the regulations and their implementation, how the regulations are institutionalized and organised, and what familiarity the various actors have with the regulations.

As of January 2023, only two cases have been dealt with by the land consolidation court. Both the land consolidation court and the appeal court have pointed to the lack of legislation when this measure is applied in areas where the zoning plan prescribes a transformation from commercial use to housing. This paper will describe how the measure works, what kind of challenges that arises with the use and why it is not being used to a greater extent. The focus is on valuation, time spent, uncertainty for property developers and the distinction between municipal administration and the land consolidation court. The conclusion is that the measure is not adapted to transformation of areas that has already been developed.

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1. INTRODUCTION AND METHOD

Traditionally, land consolidation in Norway has been practiced in rural areas. There was a growing interest, however, in using land consolidation to solve urban land tenure problems. The jurisdictional scope of urban land consolidation was extended by the 1979 Land Consolidation Act. In 2006, a new measure was introduced: The land consolidation court may distribute the net added value from rezoning between the properties that are covered by a zoning plan, cf. section 3-30 to 3-32. This measure became part of the Land Consolidation Act in January 2007, see Sky (2008) for more details.

The measure means that property owners whose properties are designated by the authorities as public outdoor recreation areas, areas for open-air recreation, access roads, etc. in the zoning or building development plan, can receive a share of the development rights for other properties in the zoning plan area. This may be done if the municipal planning authority has stipulated in the zoning plan that value added by rezoning shall be distributed in this way. In contrast to other cases under the Land Consolidation Act, the land consolidation court is therefore dependent on the planning authority adopting a regulatory provision which gives the land consolidation court right competence to hold a case.

When the municipal planning authority has stipulated in the zoning plan that value added by rezoning shall be distributed, landowners who are covered by the provisions can claim proceedings before the land consolidation court. The land consolidation court's task is to value and distribute the net added value, cf. Land Consolidation Act § 3-30 to § 3-32. There are special rules regarding how the land consolidation court shall perform its valuation, but they are inconclusive. The measure has not been used to a great extent. There are believed to be a number of reasons for this. The reasons relate to both the design of the regulations and their implementation, how the regulations are institutionalized and organised, and what familiarity the various actors have with the regulations.

In the spring of 2019, the Supreme Court heard an appeal in the first case before the courts about distribution of net added values through land consolidation. The case in the Supreme Court concerned a development (Kilen syd) in Tønsberg municipality. In the zoning plan the municipality introduced a provision that the distribution of net added values within the area were to take place through land consolidation. The case originates in a land consolidation decision from the Vestfold Land Consolidation Court from 2017 (JTON-2015-28). The case was appealed to the Agder Court of Appeal (LA-2017-111634), which made a new land consolidation decision in 2018.

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The Supreme Court quashed the Court of Appeal's land consolidation decision and The Court of Appeal received the case back from the Supreme Court in 2019. Due to illness in court and Covid-19, the case was postponed until October 2021. In the summer of 2021, the remaining parties reached an amicable solution to the case, which entailed that the Court of Appeal's judgment in 2018 were to be carried out.

Both the land consolidation court and the appeal court have pointed out the lack of legislation when this measure is applied in areas where the zoning plan prescribes a transformation from commercial use to housing.

This paper will take a closer look at the proceedings in cases of distribution of net added value from rezoning and focus on the challenges that arise with the use of this measure and why it is not being used to a greater extent.

Before looking closer at the measure (chapter 5) and why it is not used (chapter 6), there is a need to explain what is meant by land consolidation and outline the land consolidation process (chapter 3); and give a short description of the procedural rules and the role of public administration in distribution of net added value from rezoning (chapter 4) before concluding in chapter 7.

This study is mainly based on legal methods and legal sources, such as preparatory documents to the relevant acts, circulars and reports from the Ministry of Agriculture and Food and Ministry of Local Government and Modernisation. There are a limited number of land consolidation court hearings on distribution of net added value from rezoning.

The only Supreme Court judgment that directly concerns distribution of net added value from rezoning is HR-2019-1152-A (Kilen Syd).

The most relevant preparatory documents are those for the Land Consolidation Act from 1979 and 2013 (Ot.prp. nr. 56 (1978-1979) and Prop. 101 L (2012-2013)) and for the Planning and Building Act (Ot.prp. nr. 45 (2007-2008)). Especially the preparatory documents for the Land Consolidation Act from 2013 are relevant to the question of distribution of net added value from rezoning.

2. A SHORT DESCRIPTION OF THE PROCEDURAL RULES AND THE ROLE OF THE PUBLIC ADMINISTRATION IN DISTRIBUTION OF NET ADDED VALUE FROM REZONING

Competence of the land consolidation court is regulated in section 3-30. The land consolidation court may distribute the net added value from rezoning between the properties that are covered by a zoning plan. This may be done if the planning authority has stipulated in the zoning plan that value added by rezoning shall be distributed in this way. In the zoning plan, the planning authority must have set the geographic boundary of the area in which the added value will be distributed. Landowners who are covered by the provisions can claim case. The municipality, as a planning authority, cannot claim case.

How the land consolidation court shall perform its valuation is regulated in section 3-31. The land consolidation court shall calculate the total net value generated in the area where the added value will be distributed. The land consolidation court shall value the shares that each party shall receive of the added value. The land consolidation court shall value the properties based on their characteristics for development purposes, and independently of the zoning plan.

How the land consolidation court shall distribute net added value is regulated in section 3-32. The land consolidation court shall distribute net added value in such a way that each owner receives their share of the net added value from rezoning. The land consolidation court shall value the shares that each party shall receive of the added value. When distributing added value in accordance with the first paragraph, the land consolidation court shall, so far as possible, allocate each party development rights on or adjacent to property owned by that party. When a party is allocated a development right that does not relate to the property owned by him, the ownership right follows the site to which the development right pertains. If the added value from rezoning only constitutes part of a development right, the owner of the largest share of the development right is entitled to demand that the whole development right shall be allocated to him. If none of the joint owners demand that the development right be allocated to them, the site to which the development right relates becomes a joint ownership between the parties. If one of the joint owners takes over pursuant to the first sentence, the other joint owners shall receive cash compensation for the net added value from rezoning.

Bjerva et.al (2016) says that if the municipality has made a zoning plan decision on the distribution of net added values, it follows from the decision that the parties must claim a case before the Land Consolidation Court if they are to be able to develop.

In matters relating to the distribution of net added values, the planning authority carries out the geographical delimitation of the land consolidation area, cf. the Planning and Building Act section 12-7 no. 13 and the Land Consolidation Act section 3-30. Because of challenges regarding for instance high degree of shared infrastructure and dependency within the development area, the planning authorities must have carried out thorough real estate assessments before a demand for distribution is made, for the rules to work as intended and to make sure that the delimitation does not become inexpedient.

3. DISTRIBUTION , VALUATION AND LAY OUT OF NET ADDED VALUE FROM REZONING

Distribution of values should contribute to the realization of development plans in areas with several landowners and interests, and it is a less intrusive instrument than expropriation. According to Prop. 101 L (2012–2013) p. 188, the net added value is the difference between the planned increase in value and costs related to any measures in the land consolidation area as a result of the new plan.

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The land consolidation court must value all the plots based on "their characteristics for development purposes ", regardless of the purpose in the zoning plan, cf. § 3-31 last sentence. Characteristics can be actual conditions, legal conditions and any previous plans. Value changes as a result of the new plan must be excluded. The value for the individual property is converted into a ratio and becomes the key to the distribution of an overall net added value in the form of development rights, which the parties shall receive according to the new zoning plan.

Distribution of the values created can be done by considering the suitability of the area within the planning area for development. It does not matter where the development actually takes place; each owner within the planning area will receive a share of the added value from rezoning based on that suitability appraisal, and the development can therefore be planned independently of property boundaries. The principle of the distribution can fit well in areas that have not previously been developed and where there are no differences that it will affect the land price or development costs significantly. However, this is not always the case, especially not in urban areas, and valuation of other types of areas, for instance transformation areas, may be challenging.

The land consolidation court shall determine the shares that each individual owner shall have of the increase in value. In order to determine the net added value, the value of the areas disregarded from the current plan must be taken as a starting point. The land consolidation court must therefore value all the properties in the area for distribution based on the characteristics the properties have for development purposes, and regardless of what is stated in the zoning plan.

The location of a plot can have a significant impact on its value. It will be normal for the market value of the plot to also vary with the location within the area, with facilitation costs, association fees and construction technical conditions. In the assessments made by the land consolidation court regarding the valuation, the preparatory works says that location, accessibility, view, processing costs for housing, access and garden etc. should be included in the assessment, cf. Ot.prp. nr. 78 (2004–2005) p. 23. If the development purpose is other than residential, the factors mentioned may not have the same value, and they will be weighted in a different way. All land within the area for distribution must be assessed in this way and based on the same assumptions.

As mentioned above, different area will be more or less suitable for housing and different factors can affect the appraisal. For example; marshes and mountains could affect the valuation. It is expensive to drain marshes and blow holes in mountains. Various forms of measures can also already have been implemented in the area. For example: there may be buildings that have to be demolished or transformed, a landfill that needs a clearance or a power line that must be placed in the ground, This will affect the percentage share each property shall have of the development rights, It can be complicated assessments that must be made in such cases and the land consolidation court may be dependent on different kind of expertise to perform the valuation. It must be assessed in concrete terms in each individual

case and the land consolidation court must correct for such factors when distributing the values.

The distribution is a transfer of net added value from an owner of a property with development area to another owner with property that does not have such area, or that has a worse degree of utilization for development, cf. Prop. 101 L p. 438. The distribution must take place by awarding development rights, cf. section 3-32 second paragraph. It is the land consolidation court that assigns development rights to owners within the area for distribution. The prerequisite is that the property lies within the geographical delimitation that follows from section 3-30 third sentence. This means that those who in the zoning plan are allocated land for open spaces, roads, playgrounds etc. also get their share of the net added value. The starting point is that such allocation must mainly take place on or next to one's own property.

It is specified in Prop. 101 L p. 439 that whoever is granted the development right has no obligation to develop. When a party is granted a development right that is not on his own property, the property right follows the plot to which the development right applies, cf. section 3-32 second paragraph. This means that the person who has development rights gets title to the plot. If the net added value only forms part of a development right, the co-owner with the largest part of the development right has the right to claim the entire right allocated to him and the co-owners with a smaller part of the development right then receive a settlement for the net added value in money, cf. section 3-32 third paragraph. If none of the co-owners of the development right requests to have the development right assigned to them, the plot of land for which the development right is included will be co-owned between the co-owners.

One of the challenges with the measure in its current design is that the system in the Land Consolidation Act assumes that it makes sense to allocate individual plots of land. This can be the case in virgin plot areas, where development rights can be allocated to plots for single dwellings or cottages. In urban transformation areas, there is often a high degree of shared infrastructure and dependency within the development area, for example that several building stages will share a common underground parking facility. The plots may also have characteristics and locations that indicate that they must be developed together, or in a specific order. The Land Consolidation Act's rules do not take such circumstances into account and the preparatory works provides no guidance on how such questions can be resolved.

4. CONCLUSIONS

Today's rules on distribution of net added values may work in virgin areas. For instance, the rules will probably work as the legislator intended in a situation where an area through zoning plan decisions goes from LNF (LNF area is an abbreviation for Agricultural, nature and outdoor recreation objectives) purposes to development purposes such as holiday homes, housing and business. Today's challenges in urban areas however, requires measures that have been developed for, and are suitable for, solving the special problems that arise when

implementing area plans such as a zoning plan. In transformation areas the challenges described above makes the measure less expedient. The greatest risks for the landowners, will be matters related to the time spent, especially on appeals, and uncertainty in the valuations that form the basis of new property design.

When the measure was introduced, there was drawn little attention to it and there has not been taken any central initiative to provide training on the regulations afterwards. As of February 2023, only two cases regarding net added value have been processed: Vestfold Land Consolidation Court has dealt with the Kilen-Syd case from Tønsberg (HR-2019-1152-A). Østfold Land Consolidation Court has dealt with a case, Opstadmoen, from Sarpsborg municipality (20-079254AJA-BORG/03).

Perhaps the measure makes too many associations with coercive measures such as expropriation, and that it could prevent political adoption of plans. The experience is that politicians are reluctant to use expropriation to realize, for example, housing construction according to area plans, and it has therefore probably been assumed that the same would apply to urban land conversion. See also Elvestad and Holsen (2020) p.335.

The legal rules on net added values provide few guidelines, especially regarding valuation. Nor do the preparatory works provide much guidance on use. Because there have only been two land consolidation cases regarding net added value, there is little input on how the regulations should be understood. This means that the measure is perceived as unpredictable both for the municipalities and for the private actors.

Based on the preparatory works of the act and experience so far, the provisions on the distribution of net added values from rezoning are probably best suited to areas that have not previously been built.

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BIOGRAPHICAL NOTES

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