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of Open Agricultural Areas**

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Non-Conforming Use¹ of Open Agricultural Areas

Use of agricultural land for business and commercial purposes — whether by way of non-conforming use, as specified in the Planning and Building Law, or by way of illegal building (supported or not by the use of the unauthorized-building legal mechanism) has become a widespread phenomenon. This phenomenon is reshaping the agricultural landscape and the country's open areas, and is creating a reality with grave implications, especially in the Central District. A survey held by the Planning and Development Authority of the Ministry of Agriculture in late 1997 found 7,400 cases of business activity being conducted on agricultural land in moshavim (cooperative villages) throughout the country, 3,000 of them in the Central District. This appears to be an underestimate, since according to another survey that was held by the Central District Planning and Building Committee in mid-1998, there were some 7,250 cases of such non-conforming use in moshavim within its jurisdiction alone.

This phenomenon occurs, by the nature of things, mainly in rural areas but also in open areas within city limits. **The purpose of this study** is to examine the issue of non-conforming use as a tool to facilitate the rezoning of agricultural land or its use for non-agricultural purposes. **The hypothesis being tested** is that the flexibility permitted by law in respect of non-conforming use has been abused, and — together with illegal building — it has created a reality with widespread and grave implications.

The Planning and Building Law defines non-conforming use as the use of land or a structure in a way that is not authorized (by permit, plan or regulation). According to both the letter of the law and judicial rulings, the implementation of such non-conforming use should be restricted and should not become a substitute for preparation of a new plan. A permit for non-conforming use is possible only in

¹ This term will be used throughout the paper, for the sake of brevity; the full legal term is “non-conforming use exception.” The Hebrew term “shimush horeg” (deviant use) is widely used for several different meanings; it refers here to the strict legal sense.

cases where such use does not substantially alter the environment, and, in cases of use that is unauthorized according to a plan, only for a limited period of time.

The phenomenon of illegal building and non-conforming use of open areas also has weighty implications from environmental, social and planning aspects. This phenomenon is utterly opposed to the guiding principles of Israel's national planning, as expressed in the national and regional master plans, and it constitutes a real threat to the contiguity of the remaining open areas in the Central District. The proliferation of development hubs and their distribution across the area, together with their attendant infrastructures, leaves only small and disjointed patches of open area, with very little value in respect of landscape, ecology and recreation.

Non-conforming uses have negative implications in the environmental-quality field: lack of sewage solutions, hazards stemming from unregulated storage of dangerous substances, and so forth. Proliferation of non-conforming use also causes a decline in the image of localities and community conflicts, as well as adversely affecting agricultural soil and the possibilities for assigning it to its stated purpose. The enormous scope of this phenomenon, which contravenes an inadequately enforced law, also has a grave significance in respect of values, as it encourages offenses and contempt for the law. The continuation of this phenomenon permits an illegal reality, with all its negative implications, to dictate long-range planning.

The illegal conversion of agricultural land to non-agricultural uses also generates unfair competition with the cities and diminishes their viability. This phenomenon causes great economic damage to the public and the state, of which some is quantifiable (such as inefficient investment in infrastructure and unrealistic leasing charges) and some is immeasurable (such as adverse effects on open areas, quality of life and the environment.)

An analysis of court rulings relating to non-conforming uses shows that these rulings take a rigid line against unlicensed building and lenient application of the unauthorized-use mechanism. But a thorough study of these rulings, along with an analysis of case histories as well as data collected from interviews and meetings of experts on the subject, indicates the following: Penalization for building infractions is relatively slight and inadequately deterrent (despite the penalties prescribed by law;) the clear and decisive statements included in court rulings are handed down after protracted and complex proceedings; the deferments granted

by the courts are generally extended; entrepreneurs commence licensing procedures simultaneously with the legal proceedings, thus fully exploiting both playing fields and causing a great delay in the handling of non-conforming use. All these cause the legal process to require an extremely long time span, during which, in most cases, illegal facts continue to be created on the ground.

When faced with a decision whether it would be proper to permit non-conforming use or to change the plan, the courts usually hewed to a restrictive and scrupulous line, emphasizing that non-conforming use may be licensed only under extraordinary and special circumstances. In several cases, the courts even criticized the tendency of a local planning and building committee toward laxity in issuing permits for non-conforming use, and the way in which the committee ignored its duty to enforce the law and prevent illegal building. In recent years, proposals have been tabled in the Knesset to amend the Planning and Building Law in order to facilitate obtaining a permit for non-conforming use of agricultural land.

The case studies included mapping the non-agricultural uses of agricultural land and an analysis of the role of non-conforming use in the process of establishing such uses in urban and rural areas.

Along Route 4, south of Hadera to the approaches of Ra'ananna and Kefar Sava, **34 sites** of non-agricultural uses, including about **80 businesses**, were located within close range of the highway, in open areas between communities. Of these sites, only six were found to be operating legally (two according to an approved local plan, two operating under a permit for an agricultural structure, and two operating under a legal permit for non-conforming use.) The other 28 sites were operating illegally.

Judicial procedures are in progress against 15 of these sites, simultaneously with licensing procedures (in 10 cases these were procedures to obtain a permit for non-conforming use and in five a detailed master plan was being submitted.) Judicial procedures only were in progress against eight sites, while no judicial procedures whatsoever were being conducted against the other five, despite their operating illegally. The most widespread uses were: banquet gardens, various types of commerce, storage and industry. Another phenomenon observed was the increase in number and density of non-agricultural uses the closer the location was to the Tel Aviv metropolitan area.

In Rishon le-Zion, 27 sites of non-agricultural land uses were located. Unlike the situation along Route 4, most of these sites consisted of only one business. Six of them were constructed according to a detailed plan, after the agricultural land had been rezoned; four others had a permit for an agricultural structure and use. Various judicial procedures were in progress concerning 12 sites: seven of them had submitted requests for non-conforming use, most of which had already been rejected, and information was unavailable about five sites. The most widespread uses were banquet gardens and plant nurseries, some of which were also engaged in broader commerce.

From 1996 to mid-2002, 81 requests for unauthorized preservation were submitted to the Committee for Preservation of Agricultural Land and Open Areas. Based on a close acquaintance with the scope of requests submitted to the local committees, and recommended by them for approval, it can be stated clearly that only a small part of the requests for non-conforming use actually reach the Preservation Committee's table. Furthermore, since applicants who follow the prescriptions of the law are in the minority, the committee refrains from rejecting their requests and most of them are approved.

The study also included a survey of several cases which were investigated in depth. These were exceptional cases even among the non-conforming uses, and comprised extreme examples of abuse of the unauthorized-use tool; lessons ought therefore to be learned from these cases. The cases that will be described in detail are the Shama banquet hall in Rishon le-Zion and the Home Center structure (and its surroundings) near kibbutz (collective farm) Ga'ash.

Conclusions and Recommendations

The study indicates that the unauthorized-use mechanism allows the planning authority to grant permits and thereby to allow work on, and use of, the land that does not conform with the plan. This is by way of a mirror image of the mechanism prescribed by sections 77 and 78 of the Planning and Building Law (1965.) These sections empower the planning authorities to limit the issue of permits in any area for which they are preparing a plan, even if it has not yet been approved — whereas the unauthorized-use mechanism allows the planning authority to permit uses that are not authorized by a plan which is in force.

Non-conforming use and illegal building: Non-agricultural use of agricultural land (in open areas between communities) consists mainly of construction and/or illegal use of land or structures. The unauthorized-use tool has become a convenient technique for legitimizing illegal uses, which would have only slim chances of being legitimized by means of a plan. Frequently, the request for non-conforming use is submitted while this use is already in illegal operation, and in many cases this occurs only after judicial proceedings have begun against the offender. It was further found that many of those submitting requests for non-conforming use had not completed all the stages of licensing.

The difficulty of combating illegal building stems, among other reasons, from the weakness of the enforcement mechanism, which is concentrated in the hands of the local enforcement system. The latter, frequently and for various reasons, has a vested interest in not enforcing the law. There is also a problem of lack of resources, lack of coordination among law-enforcement agencies, and penalties that are insufficient to create a deterrent.

This study's recommendations in this field are: **concentration of law-enforcement authority** in a single, independent enforcement system which cannot be influenced by pressures of local political forces; **coordination among the various enforcement agencies**; refraining from granting permits for non-conforming uses which are operating illegally on the ground, as well as the granting of repeated grace periods by the courts; activation of enforcement and penalization provisions of **laws other than the Planning and Building Law**, and raising the priority of the illegal-building issue in the view of the agencies authorized to handle it, led by the Israel Lands Administration; **increased penalties** for building infractions as prescribed by law, to include a **minimum fine** for every day that a business operates illegally; and the employment of **economic and fiscal tools** to ensure that illegal land use no longer pays. Also, it is proposed that section 207 of the Planning and Building Law be rephrased, as the present language provides for deferments of the enforcement of decrees (demolition, stoppage of use etc.) and thus grants relative legitimacy and auspices for the continuation of illegal activity.

Non-conforming use as a mechanism for flexibility in the planning system: Non-conforming use is an essential mechanism for flexibility within the planning system, but its standing appears to have been devalued from two main aspects:

The maximum time allowed for such use has in effect become unlimited, and in many cases the non-conforming use is not only a conversion of an existing structure but rather the sole purpose of its being erected. The combination of these two elements, especially in respect of agricultural land which is not intended for construction, causes abuse of the flexibility allowed by law.

This study's recommendations in this field are: formulating **clear criteria for granting permits for non-conforming use**, which will be binding on the planning institutions empowered to grant such permits. The proposed criteria are: reversibility of the non-conforming use; use of a legally erected agricultural structure that is not functioning as such; completion of legal planning procedures; and suitability for rural areas (including an examination of the expected impact on the entire environment.) It is also proposed that **short time spans** be fixed for non-conforming use and that a legal distinction be created between a permit for such use in the urban sector and in the rural sector.

Licensing procedures for agricultural structures: The non-conforming use phenomenon is spreading due to the relatively lax approval procedures for agricultural structures. According to data from the Ministry of Agriculture, at least 500 hectares of agricultural structures have been converted for non-conforming uses, most of them in high-demand areas, and more than 1,000 hectares have been converted for ancillary infrastructures. It appears that the procedure for licensing an agricultural structure is an insufficient filter for preventing the proliferation of the phenomenon of non-agricultural use of agricultural land.

This study's recommendations in this field are: completion of a **recommendations paper** at the Ministry of Agriculture, which is to include fixing the size, location, height and technological character of agricultural structures; definition of these recommendations as a **binding document for planning committees**, following its approval by the Interior and Environment Ministries; tightening control on permits for agricultural structures, particularly detached ones, by **empowering only regional planning committees and the Program Committee of the Ministry of Agriculture to approve such structures**. It is also recommended to monitor the scope of these agricultural structures and their actual use.

Rural areas: Some of the questions that arise from the handling of the entire unauthorized-uses topic are connected with broader issues concerning the future character of rural areas. Preparation of plans for rural areas will be highly important in resolving these questions, but they also entail **risks as to the capability of preserving open areas**. The very preparation of a plan often motivates further development and the legitimization of various initiatives which may ultimately increase the pressure on open areas.

This study's recommendations in this field are: formulation of principles for the preservation and development of rural areas, based on the principles of national and regional planning, and promotion of plans for rural areas according to the aforementioned principles; **restricting the issue of building permits** for agricultural structures in districts where a plan for the rural area is under preparation; providing a planning **solution for agricultural and non-agricultural storage needs** within previously disrupted areas or adjoining them. It is also recommended that in planning, special reference should be made to agricultural areas located within city limits and on their fringes, where pressures are particularly intense.