

From Rural to Urban Land Consolidation - An Analysis of Recent Urban Cases Treated by the Norwegian Land Consolidation Court

Helén Elisabeth ELVESTAD and Per Kåre SKY, Norway

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SUMMARY

Traditionally, land consolidation in Norway has mainly taken place in rural areas. The first evidence of urban competency in the legislation is found in the 1950 Land Consolidation Act, but the jurisdiction was very limited and few cases heard in court. The act was amended in July 2006 to include urban areas with a more comprehensive jurisdiction, but at the time, the Land Consolidation Act still had agriculture as its main focus and further revisions were necessary. The revised Norwegian Land Consolidation Act came into force in 2016. The act had undergone major changes.

In this article, we present and analyze urban cases taken before the Norwegian Land Consolidation Court. We investigate challenges in land consolidation in urban areas. We focus on four different measures. (1) Division of property in personal joint ownership; (2) Modifications to property and perpetual easements; (3) Establishment of joint ownership; and (4) Distribution of net added value from rezoning.

The study finds, among other things, that land consolidation is of great importance for urban development, but there are still challenges in using the Land Consolidation Act in urban areas. Urban land consolidation was not a key issue in this preparatory works of the act, but comes strongly into view in the distribution of net added value from rezoning.

1. INTRODUCTION

Land consolidation activities in Norway are organized under a special court, but there are no sharp distinctions between the court and government administrations. Norway, in fact, is the only country to have organized its land consolidation activities entirely within the court system (Sky 2015:84). An English translation of the Act can be downloaded from Lovdata, see The Norwegian Land Consolidation Act (2013).

There are 34 land consolidation courts in Norway, employing about 250 in total. This means that most of the courts are small units. Every land consolidation court has a senior presiding judge who also acts as a land consolidation judge, and as many land consolidation judges as stipulated at any given time, cf. the Land Consolidation Act, section 2-3. In addition, the land consolidation court may have at least one assistant judge

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who can perform tasks on behalf of the land consolidation judge. The land consolidation courts shall also have the necessary technical staff, cf. section 2-3 second paragraph. Today, technical staff or engineers make up approximately 40 percent of the employees in the land consolidation courts. They carry out technical work for the land consolidation courts, such as registration, mapping, boundary marking etc.

Rulings issued by the land consolidation court can be appealed to a court of appeal of which there are six in Norway. When reviewing land consolidation rulings, the court of appeal must sit with one land consolidation court of appeal judge, cf. section 8-7 second paragraph.

The appeal judges in land consolidation cases, the land consolidation judges and assistant judges must hold a Master's degree related to land consolidation, covering the subjects stipulated by the Ministry, cf. section 2-4.

The land consolidation court's jurisdiction in Norway covers cases in the following three areas: land consolidation (chapter 3 in the Land Consolidation Act); disputes regarding property boundaries and rights of use (chapter 4); and court hearings concerning cases of appraisal (chapter 5). We will focus on land consolidation.

In this article, we present and analyze urban cases the Norwegian Land Consolidation Court has dealt with. We investigate challenges in land consolidation in urban areas and focus on four different measures; (1) division of property in personal joint ownership; (2) modifications to property and perpetual easements; (3) establishment of joint ownership; and (4) distribution of net added value from rezoning.

Before we look closer at the cases (chapter 4), we need to explain what we mean by land consolidation (chapter 2); outline the land consolidation process and the prerequisites for land consolidation (chapter 3); before concluding in chapter 5.

2. LAND CONSOLIDATION

The legally defined aims of land consolidation vary from country to country. According to Vitikainen (2004:25-26), the general objective is nonetheless to improve land division and promote the appropriate use of real estate. This is done by consolidating plots through land exchange to form plots that are better adapted to their proper use. In Norway, we have an even wider general objective. We define land consolidation as measures that can change properties, physically or organizationally, to improve their utility to the owners (Sky and Bjerva 2018:21).

Land consolidation changed in several countries into a modern form of land consolidation with multiple goals such as village renewal, recreation, environmental protection and nature conservation, see Thomas (2004) (Germany), van den Brink (2004) and van Dijk (2004) (The Netherlands), Bullard (2007) (multiple countries) and Vitikainen (2004) (multiple countries). To some extent, the same has happened in Norway in 1979 with the

introduction of project-related land consolidation in conjunction with public and private projects and conservation-related land consolidation as the result of constraints imposed by public authorities on the exercise of ownership rights, cf. section 3-2.

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 first evidence of urban competency in legislation is found in the 1950 Land Consolidation Act. The jurisdictional scope of urban land consolidation was extended by the 1979 Land Consolidation Act. However, it was with the July 2006 amendment to the Land Consolidation Act that the land consolidation court was given comprehensive competence in urban areas.

3. THE LAND CONSOLIDATION PROCESS

Although land consolidation is organized within the judicial system and the organization and the objectives of land consolidation vary from country to country, the actual land consolidation process is surprisingly similar internationally. The process in rural and urban areas in Norway is also similar and can be said to include the following stages (partly after Rognes and Sky 2004:61);

- applying for land consolidation;
- preliminary decision whether the case shall proceed;
- inform the cadastral authority that a land consolidation claim has been made;
- clarifying the boundaries and mapping of the consolidation area;
- valuation of anything that is subject to the exchange;
- preparation of a draft consolidation plan after input from the parties involved;
- presentation of the plan to the parties for discussion;
- comments from the parties;
- alteration on basis of comments on the plan the land consolidation court deems rights and proper;
- formal adaption of the plan; marking out of all new boundaries in the fields;
- formal conclusion of the land consolidation proceeding in the court;
- when the case is enforceable, the land consolidation court shall inform the cadastral authority (municipality) on the outcome of the case; and
- the outcome will be recorded in the land registry.

As can be seen, the land consolidation court and municipal authorities work in consultation with each other. This is necessary in order to conclude a land consolidation case and it is an important prerequisite for land consolidation. It is pursuant to section 3-17 second paragraph: *“The necessary official permits shall be in place when the land consolidation court issues its final ruling. The land consolidation court may apply for the permits required to effect the land consolidation.”* In the worst case, if this has not been done, the valuation of the land consolidation area could cause losses to the involved

parties because the valuation of the land is based on wrong assumptions or the land consolidation rulings will be impossible to implement.

There are three cumulative requirements to implement land consolidation in Norway:

- (1) The land consolidation court may effect land consolidation if at least one property or easement in the land consolidation area is difficult to use gainfully at the current time and under current circumstances, cf. section 3-2.
- (2) The land consolidation court may only effect land consolidation in order to make the property arrangements in the land consolidation area more advantageous, cf. section 3-3.
- (3) For any given property or easement, the land consolidation settlement shall not result in costs and other disadvantages that are greater than the advantages, cf. section 3-18.

All three criteria's must be fulfilled. If not, the land consolidation court will dismiss the case. A fundamental principle, not only in Norway, is that no party shall suffer loss as a result of a land consolidation case, as pointed out in (3) (Oldenburg 1990). This constitutes an important assumption in the final decision concerning any given land consolidation plan.

4. LAND CONSOLIDATION IN URBAN AREAS

4.1 Measures in the Land Consolidation Act

The measures used in land consolidation are listed in chapter 3 of the Act. There are 10 separate measures that can be used individually or together in each case:

- (1) Project-related land consolidation in conjunction with private and public projects, cf. section 3-2.
- (2) Conservation-related land consolidation as the result of the public authorities imposing constraints on the exercise of ownership rights, cf. section 3-2.
- (3) Modifications to property and perpetual easements, cf. section 3-4.
- (4) Establishing joint ownership, cf. section 3-5.
- (5) Dissolution of joint ownership and joint use, cf. section 3-6.
- (6) Division of property, cf. section 3-7.
- (7) Rules on joint use (shared use arrangements), cf. section 3-8.
- (8) Orders to carry out joint measures and joint investments, cf. section 3-9.
- (9) Creating owner associations and establishing articles of association, cf. section 3-10
- (10) Distribution of net added value from rezoning, cf. section 3-30 to 3-32.

We will focus on four different measures and illustrate their use in urban areas. We will highlight some of the challenges that occur, but also the benefits for the parties involved.

4.2 Division of property in personal joint ownership

The land consolidation court may divide and allocate a property with its associated easements in accordance with the ownership shares established.



Figure 1: Area with three leisure homes in personal joint ownership (left), divided and individualized (right) (Bjerva et al 2016:72).

An area in a personal joint ownership can be divided in three different ways:

- (1) The owners can make the division themselves if they agree and apply to the municipality for permission to divide the property. The municipal survey department surveys and marks off the new property boundaries.
- (2) The second option is to use the Joint-Ownership Act. The district court makes the division, but the surveying and marking off of the property boundaries must be done by the municipal survey department.
- (3) The third option is to apply for land consolidation. The land consolidation settlement or land consolidation plan has to be approved by the local authorities, but the surveying and marking off of the property boundaries are done by the land consolidation court. The parties do not have to agree to the proposed settlement. The land consolidation court issues a binding resolution, cf. section 3-7.

The fees of the three options vary significantly. For option (1) and (2) the parties have to pay fees to the municipality, which also vary considerably between municipalities. For option (3), fees are paid to the land consolidation court. The fee is the same no matter where in the country you are and lower than the municipal fees. For this reason, more and more people are applying for land consolidation.

Division of properties held in personal joint ownership often leads to more efficient land use. Especially in urban areas and in areas with leisure homes, owners are less dependent on neighbouring properties compared to rural areas. The area is individualized and each

co-owner can decide further development independent of the others. The individualization also makes it easier to mortgage the property.

4.3 Modifications to property and perpetual easements

The land consolidation court may modify properties and perpetual easements, cf. section 3-4. The easement must relate to real property. This is used to reduce fragmentation and it is one of the original measures in the Land Consolidation Act. Today, fragmentation is not a serious problem in Norway, but there is a need to make minor changes when properties are difficult to use gainfully.

In figure 2 we show such an example. The map on the left shows the property boundaries before land consolidation and a plan for parcelling out plots. We can see in the circle that some of the plots are owned by three different owners (A, B and C). The benefit for the parties involved is that they receive a new layout of plots customized to the zoning plan. If not, they have to bargain or at worst expropriate.

The value of properties is in most situations much higher in urban areas. Recall the strict requirement in the Act that no one shall lose out from land consolidation, cf. section 3-18. This, in connection with the lack of guidelines for estimating values and the limited amount of preparatory works for the Act, makes valuations challenging (see Prop 101 L (2012-2013) pp. 159-160).

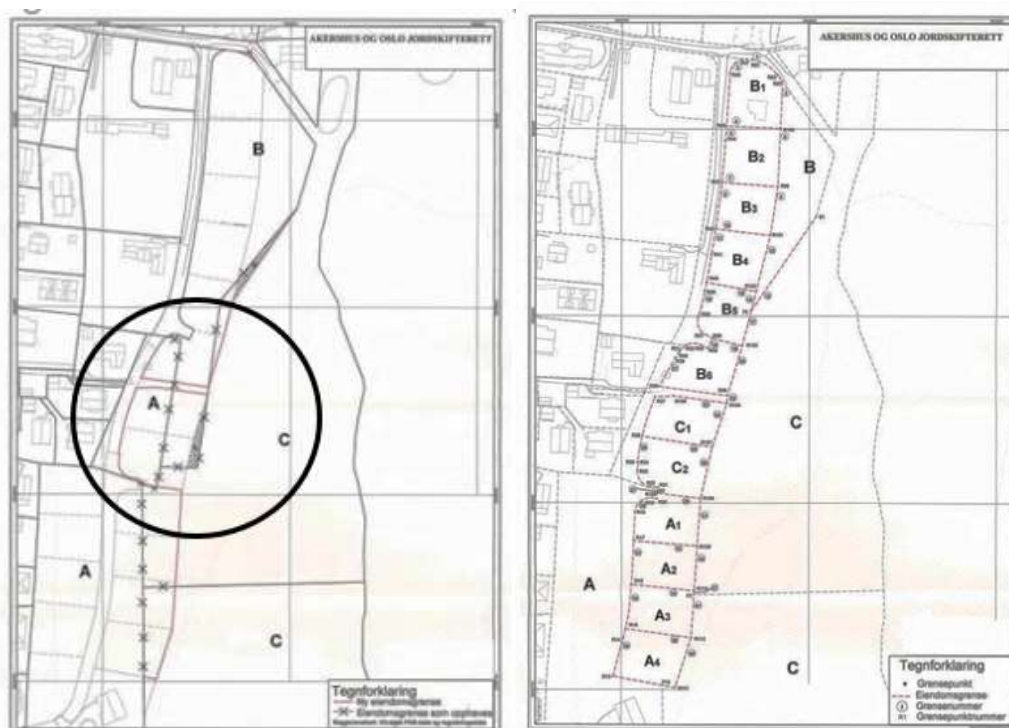


Figure 2: Before land consolidation (left) and after (right).

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4.4 Establishing joint ownership

The land consolidation court may establish joint ownership between properties if this resolves the impractical property arrangements more effectively than would be achieved by creating rules on joint use, cf. section 3-5. This measure was introduced in the latest revision of the Land Consolidation Act in 2013.



Figure 3: The road (cadastral unit 41/751) and the recreational area (41/756) are connected to the surrounding properties and each received a share of 1/6.

Conflicts may occur between the property owners and holders of an easement in situations where they, for instance, have right of way over the original property. The right of ownership has little value compared to the value of the easement. To reduce this potential for conflict, the legislator introduced the following measure (Prop. 101 L (2012-2013) p. 132). If the ownership of common infrastructure is divided between the holders of rights, their legal rights are clarified. As shown in figure 3, the typical application of this measure is in urban housing areas.

The obvious benefit to the parties involved is that the legal situation is clarified, but we have so far little experience of whether this new provision prevents conflicts.

The measure challenges the way we think about land consolidation. One of the traditional measure in the Land Consolidation Act was its ability to dissolve joint ownerships, not establish new ones, cf. section 3-6. The measure is generally designed and covers several different types of infrastructure as sewage and water, parking, recreational areas etc. This means that the land consolidation court must have professional expertise on a wide range of topics.

4.5 Distribution of net added value from rezoning

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.

We will first provide a background to explain why this measure was implemented in the Land Consolidation Act. The Norwegian Ministry of Agriculture established a working group (the Movik Commission) to draw up, among other things, proposals for legislative changes relating to the allocation of land values, costs and funds for mitigating steps when implementing projects pursuant to the Planning and Building Act (Ministry of Agriculture 2003).

One of the important points of reference of the Movik Commission was the report of the Commission for New Planning Legislation NOU 2001:7 Better municipal and regional planning under the Planning and Building Act (PBA). The Commission said it was necessary to look more closely at the potential expansion of the use of land consolidation measures. In order to improve the implementation of projects, the Commission proposed that a framework should be put in place to make it easier to make changes in urban areas that are already developed, based on the same principles as the framework for land consolidation. On page 95 of its report, the Commission also said:

«[c]omplicated, unclear and inappropriate property ownership is a common reason for developments and other measures being hard to implement, particularly in built-up areas. Property boundaries and rights often need changing for it to be practicable for a development to go ahead. It is sometimes also necessary to find a sensible way of allocating rights and values between property owners, in order to produce a project that is advantageous and reasonable from the point of view of all of the property owners. The measures set out in the PBA for dealing with this kind of problem – primarily expropriation and compensation – are sometimes conflicting or impracticable as a result of the available solutions and approaches not being sufficiently flexible» (Our translation).

The new 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.

Still, no enforceable cases have been dealt with by the land consolidation court. The only case (Kilen South) to be considered is currently under appeal to the Supreme 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 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 the zoning plan, the planning authority must have set the geographic boundary of the area within which the added value will be distributed.

There are special rules regarding how the land consolidation court shall perform its valuation, but they are inconclusive. It follows from section 3-31 that 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 also «*value the shares that each party shall receive of the added value. The land consolidation court shall value of the properties based on their characteristics for development purposes, and independently of the zoning plan.*»

Distribution of net added value from rezoning is not a traditional land consolidation measure, but is nevertheless mentioned in chapter 3 (on land consolidation) in the Land Consolidation Act.

The principle of this measure can be illustrated with the following figures (no. 4 and no. 5).

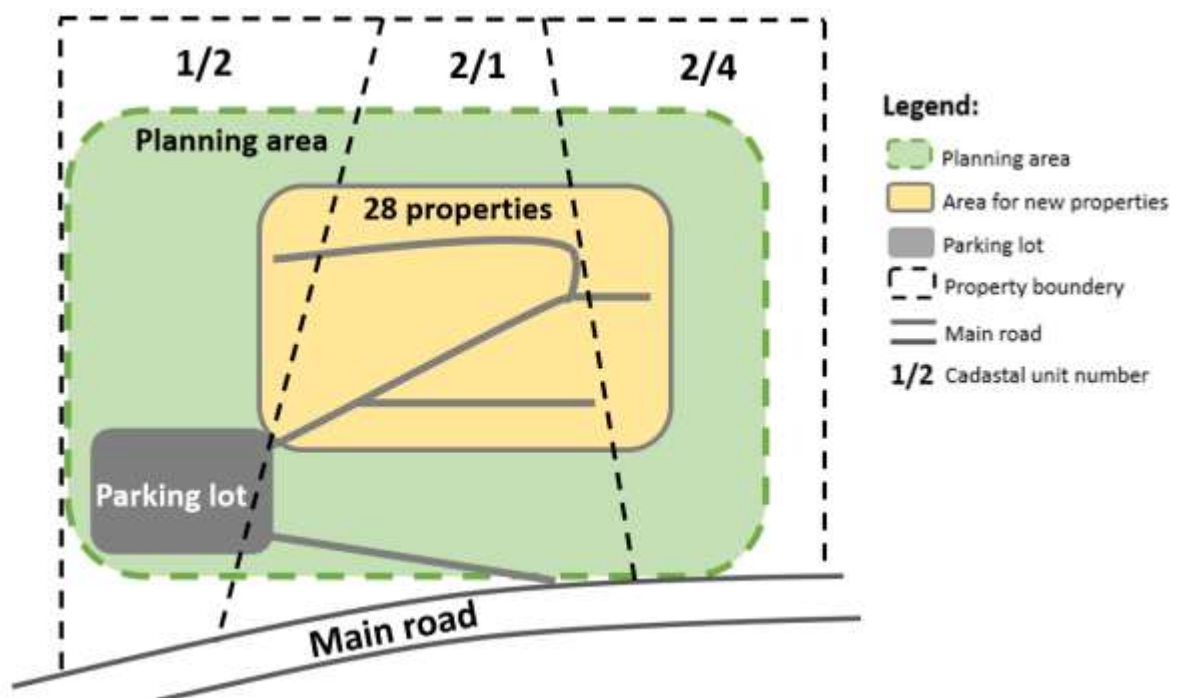


Figure 4: Zoning plan and property boundaries.

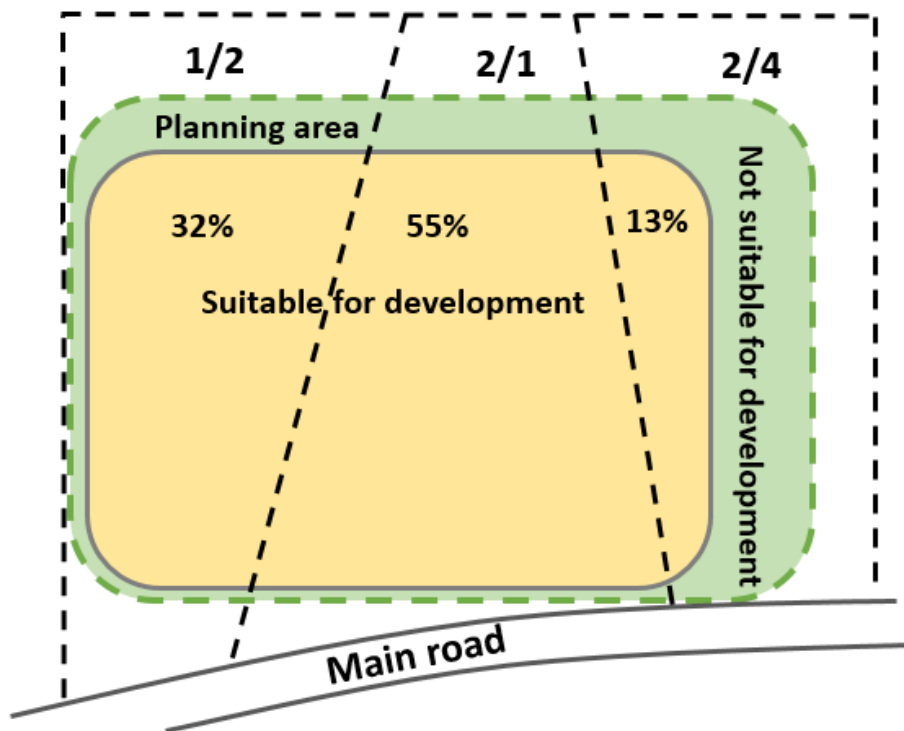


Figure 5: All areas (yellow) are equally suitable for development.

In such cases, distribution of the values created can be done by considering the suitability of the area within the planning area for development. Each owner within the planning area will then 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. In these cases, it does not matter where the development actually takes place; the individual owner gets his share anyway.

The proceeding of the Kilen South case has highlighted unresolved issues in the Land Consolidation Act and preparatory works of the Act. We will mention one of the most important; a lack of guidelines in connection with valuation. The following figures illustrate some of the challenges.

We have not taken into account in figure 5 if any area is more or less suitable for housing. Different factors can affect the appraisal. For example; marshes and mountains could affect the valuation as shown in figure 6. It is expensive to drain marshes and blow holes in mountains.

We can also imagine that the various forms of measures have already been implemented in the area. There may be buildings that have to be demolished, or a landfill that needs a clearance, see figure 7.

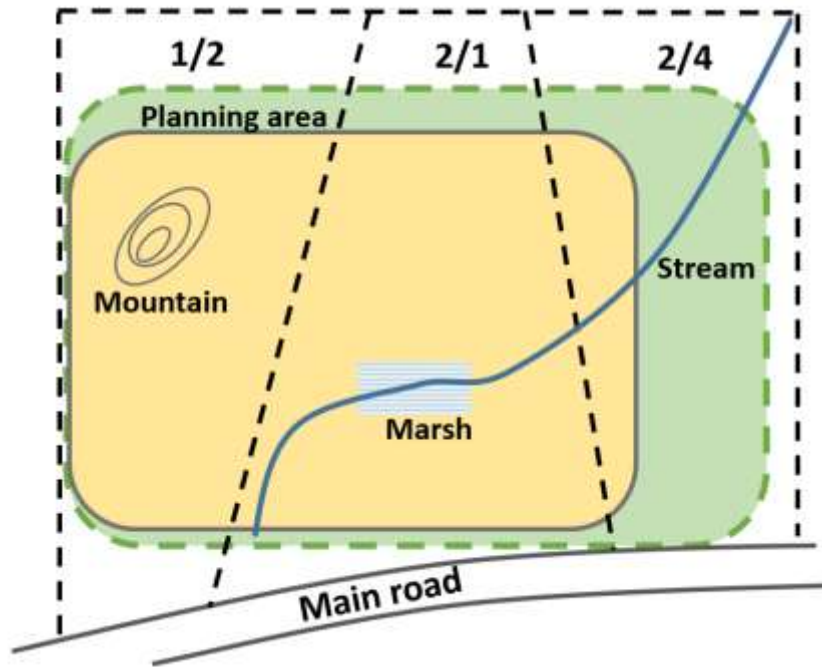


Figure 6: Topographical conditions mean that the areas have different development potentials.

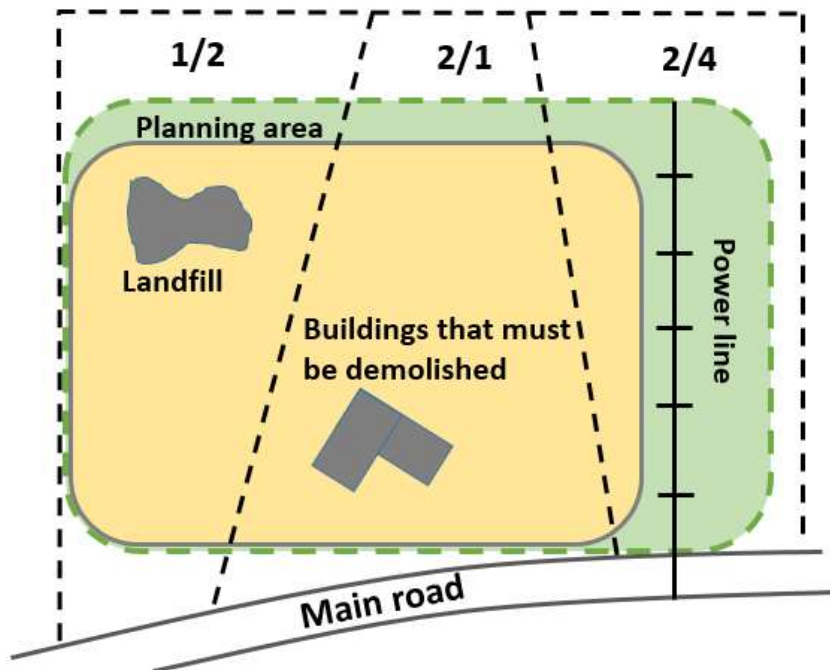


Figure 7: Existing construction and buildings that affect the properties

These are examples of different considerations the land consolidation court must take into account when calculating the entry value of each area. It must be assessed in concrete terms in each individual case and the land consolidation court can correct for such factors when distributing the values.

However, 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.

5. CONCLUSION

The measures in the Land Consolidation Act that we have presented above, are general and can be used for all types of properties and land use. From our point of view, they are suitable for use in urban areas. Over time these measures have gradually been introduced to solve impractical property arrangements in urban areas. Land consolidation in urban areas include properties of high value and the area is often more strongly regulated than in rural areas. The land consolidation settlement must not contravene binding zoning regulations, among other things, cf. section 3-17 first paragraph. This can take some time to get clarified and often involves applications to the municipality.

There is also a need to improve the valuation guidelines. This is an issue both in rural and urban areas and was pointed out by scholars during drafting of the act, but not taken into consideration.

Property development in urban areas often happens under time constraints. It can take a long time for the proceedings to start – and the proceedings themselves can take a long time. In Kilen South the owners applied for land consolidation in June 2015, the land consolidation court concluded the case in April 2017 and the appellate court in August 2018. The Supreme Court will hear the case in April 2019. Developers are impatient and time is money. Nevertheless, if the alternative is no development or a costly process involving expropriation, land consolidation is to be preferred if the procedures are efficient. Almost four years to decide a case, as in Kilen South, is not satisfactory.

As an overall conclusion, land consolidation is of great importance for urban development, but we are still in the beginning of its use. Land consolidation judges have to be trained and urban studies must be part of the curriculum of future students following the Master's programme in land consolidation.

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BIOGRAPHICAL NOTES

Helén Elisabeth Elvestad holds a masters degree and a Ph.D in land consolidation from the Norwegian university of life sciences. She is associate professor at Department of property and law.

Per Kåre Sky holds a masters degree and a Ph.D in land consolidation from the Norwegian university of life sciences. He is professor at Department of property and law. He also professor at Bergen University College and has been a judge in Nord- and Midhordland land consolidation court and Gulating Land Consolidation court of appeal.

CONTACTS

Associate professor Ph.D. Helén Elisabeth Elvestad
Norwegian university of life sciences
Faculty of landscape and society
Department of property and law
P.O.B. 5003 NMBU
N-1432 Aas
NORWAY
Tel. + 47 67231237
Email: helen.elvestad@nmbu.no
Web site: <https://www.nmbu.no/emp/helen.elvestad>

Professor Dr. Per Kåre Sky
Norwegian university of life sciences
Faculty of landscape and society
Department of property and law
P.O.B. 5003 NMBU
N-1432 Aas
NORWAY
Tel. + 47 67231242
Email: per.sky@nmbu.no
Web site: <https://www.nmbu.no/emp/per.sky>