

PUBLIC REGULATION OF
PRIVATE REAL PROPERTY

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1. THE THEME

The behaviour of individuals as members of a society is conditioned by many different factors. Most of these factors lie beyond the traditional horizon of the jurists, and other social sciences such as sociology, social psychology, economics, etc., are better suited than is legal science to deal with them. Inside the domain of the jurists, however, lies a category of factors of great importance for the behaviour of the individual. In all societies except the most primitive, the constitutionally appointed rulers—in Denmark parliament and the central and local administration—quite consciously seek to influence the citizens; and these endeavours by the rulers to direct or regulate play a dominant part in moulding the behaviour of the people they govern. A knowledge of such public regulation is of great importance to jurists. As advisers to and officers of the public authorities they have a major responsibility for the elaboration and application of public regulation, and as counsellors of private citizens, whose intentions conflict with this regulation, they have a professional interest in its content and implementation.

This paper contains a survey of the manner in which a limited sector of public regulation is organized in Denmark. The limitation is a double one. First, the paper is concerned only with regulation of private real property. Secondly, that part of this regulation which is traditionally labelled as belonging to “private law” is left out of consideration. The borderline between private and public law is indistinct and contested. The following examination is, however, concentrated on regulation that possesses the following characteristics: (1) it pursues other aims than those that can be expected to be fulfilled by the—possibly contrary—endeavours of private owners to secure maximum satisfaction of their needs; (2) other public authorities than those traditionally enforcing the law—the police and the courts—are actively engaged in the implementation of the regulation.

2. FACTUAL AND IDEOLOGICAL BACKGROUND

(a) A few data on how the land of the community is used, and by whom, may serve as a starting point for our enquiry.

The land in Denmark, a country which in 1965 had about 4.8 million inhabitants, was in that year used as follows:

Agriculture, market gardens, etc.	30,222 km ²
Forests, etc.	4,724 km ²
Buildings, yards and courtyards, gardens, etc.	2,054 km ²
Weekend cottages, allotment gardens, etc.	421 km ²
Parks, sports grounds, etc.	140 km ²
Sites not yet built up	263 km ²
Churchyards	35 km ²
Roads, open places, squares, etc.	686 km ²
Railways and airports	128 km ²
Harbours	26 km ²
Heather, bog, dunes, fencing, small private roads, pits, small watercourses, etc.	3,659 km ²
Lakes and large watercourses	700 km ²
Total	<u>43,068 km²</u>

There are no complete statistics regarding the distribution between privately owned and publicly owned land within each of these categories, but the information available is sufficient to give a pretty clear picture.

Outside the towns private property is predominant. The predominance is especially pronounced concerning that part of the land—nearly three-quarters of the total area—which is used for agriculture, market gardening, etc. Publicly owned agricultural land represents a quite insignificant proportion of the whole. Public authorities, however, own about a third of the forests and about half of the dunes.

Inside the towns it is more difficult to get a clear picture of the distribution between private and public ownership. It is certain, however, that publicly owned land is of much larger extent in the towns than in the country. In 1960 about 41 per cent of the urban areas were estimated to be used for housing, about 7 per cent for industry, about 1 per cent for other business premises and about 51 per cent for public utilities and other public institutions, traffic installations, parks, etc. And a statement from 1964 shows that

41 per cent of the total urban area of the provincial towns was used for parks, sports grounds, traffic installations, etc.

The land in private ownership is divided between a very large number of persons.

Of all the farms in Denmark—in 1964 there were about 177,000—only 0.5 per cent were of 120 hectares or more, while about 40 per cent were of 10 hectares or less. Other figures confirm this impression. In 1965 the land-tax registers listed about 899,000 properties outside the towns. Of these about 183,000 were farms, 5,100 market gardens, etc., and 447,000 were private dwellings.

Inside the towns the corresponding figures show a similar picture. In 1965 about 281,000 properties were registered. Of these 124,000 were single-family houses and 98,000 were private blocks of flats or business premises.

For the private owner, public regulation may be especially embarrassing when he wants to put his land to a different use. In present-day circumstances one such situation is of paramount interest, namely the development of agricultural land for building purposes. It would, therefore, be essential to the understanding of public regulation of real property to know what proportion of the land likely to be developed in the not too remote future is in private hands and what proportion is in public ownership. No very exact figures are available. But some statistics about areas ready for development, but not yet built up, in the neighbourhood of Copenhagen suggest that a considerable part—albeit far less than half—is owned either by public authorities directly or else by housing associations, on whose management public authorities have considerable influence.

(b) Even if publicly or semi-publicly owned real property is thus of greater extent than most people probably imagine, the result of the distribution of ownership in real estate is that decisions about how the greater part of the area of Denmark shall be used are made by a very large number of private owners. In a society like that of present-day Denmark, the ideological assumption is that each of these numerous private owners shall separately be free to use his land to satisfy his individual needs, above all in order that he may choose the most profitable exploitation.

This ideological assumption has, however, never at any time been fully realized, even during the 19th-century heyday of *laissez-faire*. Society has for centuries set limits to the free use of land, and these limits have—compared with the situation in other

fields—been narrow. It is not difficult to find reasons for this. Ever since the country became fully cultivated, land has always been scarce in one sense or another. With the growth of population and the steady increase in the standard of living the scarcity has become more acute. Land was once by far the most important means of production, and even in an industrialized society it is a very important part of the total supply of capital goods. The distribution of ownership in land between different groups and individuals has therefore always had important social and economic and consequently also political effects. Lastly, the use that the individual owner makes of his land often produces direct and tangible consequences for others. This special ability to influence the environment has been intensified as a result of the growing urbanization and of the increasing solidity of building constructions. The way in which a private owner uses his land may not only influence a large section of his contemporaries but may also condition the environment for generations to come. Once land has been put to a certain use, it is—especially in the towns—so costly and difficult to bring about a change that large-scale renewal may be practically impossible. In these circumstances it is important that public regulation should intervene in the original disposition while it is still possible to choose between various alternative uses.

When we seek to organize our society in such a way that decisions concerning the use of a very great part of the land shall be made as freely as possible by a large number of private owners and yet that, at the same time, the liberty of action of these owners shall be limited by social considerations, the immediate task of public regulation is clear. The public authorities must try to prevent the individual owner from doing what—left to pursue the satisfaction of his individual needs—he would have preferred to do and must try to induce him to act in a way which he would otherwise have had no incentive to adopt.

Such public regulation may take many and varied forms. In a society like ours legal directives are traditionally the measures to which the rulers have recourse before others.

3. LEGAL DIRECTIVES

Introduction

It is characteristic of regulation by legal directives that the behaviour which the authorities desire the owner to follow or not to follow is described in a directive, the non-observance of which may lead to the use of compulsion by the state against the owner.

(a) The legal directives concerning public regulation of private real property are found in or are issued under the provisions of a great number of statutes or statutory instruments. A mere listing of all the acts would be useless to the foreign reader. An outline of the main content of the most important acts may, however, serve as an introduction to the following systematization of the various forms of legal directives in actual use.

The most important statutes concerning public regulation of private real property deal with buildings and urbanization, agricultural properties, and the preservation of certain amenities.

The statutes about buildings and urbanization concern both individual buildings and the urban milieu. A great number of rules about individual buildings are of a technical nature, for instance regulations about the construction of foundations, walls, floors, insulation, ventilation, heating, plumbing, sanitary fittings, and so on. Similarly, regulations governing access, water supply and open spaces, and laying down minimum standards for business premises and dwellings both safeguard the usefulness of the building for the individual user and protect him and his neighbours from inconveniences. Some important rules about maximum height of the building, maximum exploitation of the site, building lines, etc., are likewise of great importance for the user's neighbours. It has, however, been characteristic of the evolution of the law concerning buildings and urbanization that regard for a wider neighbourhood or even for the whole town has resulted in rules designating the areas where urbanization may begin, where different sorts of buildings should be placed, where highways and other public installations should be situated, etc. Such rules concerning the urban milieu may aim solely at regulating the future urbanization, but they may also seek to produce immediate changes in the existing towns.

In Denmark, statutes regulating agricultural properties are first of all concerned with the distribution of properties between different categories of agriculturalists. Existing agricultural pro-

properties are in principle to be maintained as independent units with buildings from which the occupiers can till the soil. Some categories of owners, especially companies and persons already possessing agricultural property, may acquire agricultural property to a limited extent only; and certain properties, especially cottages for agricultural labourers, are reserved for a special group. Limits are also set to the possibility of dividing or amalgamating agricultural properties. Most of these rules are part of a long historical process, reflecting a traditional endeavour to preserve and strengthen family farms and even smaller holdings. Another characteristic of the agricultural statutes is that public regulation has to a great extent aimed at changing existing conditions. Historically the purpose of abolishing communal cultivation and tenantry has played an important part; more recent examples are the endeavours to consolidate scattered holdings and the securing by the state of an option on certain large agricultural properties in order to acquire land that may be parcelled out in small holdings.

In Denmark, statutes that in one way or another set limits to the changes that may be brought in the physical environment or that even demand positive steps to preserve the present environments are fairly numerous. One of the most important, the Act of June 18, 1969, concerning the preservation of natural beauty, gives public authorities the power to prevent changes in the existing conditions in certain specified areas. It contains general rules concerning the preservation of ancient monuments and lays down boundaries around such elements of the landscape as forests, lakes, etc., inside which boundaries buildings can only be erected with official permission. Another important statute is the Forests Act of May 11, 1935, the main provision of which is that most of the existing forests in Denmark shall be preserved. Examples of acts that require positive steps to prevent changes in the existing conditions are the Coast Protection Act of June 12, 1922, and the Dikes Act of April 10, 1874.

(b) Public regulation by legal directives occurs in many variants. A survey of these can be obtained through a systematization on the basis of some well-known legal distinctions.

Of great importance for the organization of the regulation is whether the legal directives are *general* or *concrete*. General directives describe the desired or unwanted behaviour by reference to an undetermined—often large—number of cases, the individual characteristics of which are not fully known and which are

thought particularly likely to occur in the future. Concrete directives describe the desired or unwanted behaviour by reference to a fully characterized sequence of events which either lie in the past or are expected to occur in the near future.

From the point of view of the authorities the typical difference between regulation by general and by concrete directives is that general regulation lays down the norms for the future with a uniform and mostly not too detailed content. Concrete regulation, on the other hand, is directed against an actual, not a future situation, and it determines in detail the behaviour of the regulated owner in respect of this particular situation. From the point of view of the private owner, the typical difference is that when general regulation is used the owner's behaviour must be judged by already existing norms. When concrete regulation is resorted to, the behaviour that the public authorities demand from the owner is not determined until the concrete situation occurs in which he wants to make a change or maintain the status quo.

The distinction between general and concrete directives is not, of course, clear-cut. Important intermediate forms may be found in practice, and furthermore it is possible consciously to blur the dividing line. The use of regulation, formulated as general directives but with special regard to actual situations, is possible and it occurs; such use presupposes only that it is possible to find a combination of general terms which exactly fits the existing situation which the legislators have in view. As an example we may take tax rules which use normal general terms but in fact are meant to apply only to a very few individuals whose identity is already known.

The distinction between general and concrete regulation has a clear connection with the distinction between *norms of behaviour*, which describe the desired or unwanted behaviour of the citizens, and *norms of competence*, which bestow upon an authority (or a private person) the power of legal action. Regulation by general directives generally occurs in the form of norms of behaviour contained in statutes and statutory instruments. Regulation by concrete directives is based on norms of competence laid down in statutes and statutory instruments, except for the rare cases in which the concrete regulation itself is determined by a statute.

The distinction between norms of behaviour and norms of competence cannot, either, provide a clear alternative. Norms of competence very often contain instructions about the possible content of the concrete directives issued on the basis of the norm,

and these instructions may indirectly have an effect on the behaviour of the possible addressees of the concrete decisions that is similar to that of the descriptions in norms of behaviour which are directly addressed to the citizens.

It is a well-known fact that the *degree of precision* with which the desired or unwanted behaviour is described in the legal directive may vary considerably. With special regard to the norms of behaviour it is customary to distinguish between precise directives, on the one hand, and standards, or vague and elastic rules, on the other. The dividing line between the two types is not distinct. This is true also of the boundary between standards and such norms of competence as add, to the power to act legally, instructions concerning the content of the concrete directives issued on the basis of the norm. And norms of competence of this sort merge smoothly into those where the exercise of the legal power is limited only by the general rules of public law, such as improper purpose, extraneous considerations, equality, etc.

As already mentioned, it is characteristic of legal directives that, if the prescribed behaviour is not complied with, it can be enforced by the means of coercion possessed by the public authorities. This *securing of the observance of the directives* may be organized in various ways. A survey of some of the main variations, with special regard to the general directives, follows below.

The traditional manner of enforcement is that the non-observance of a general directive is reacted to by the interested private party and/or the police, and that both the legally effective ascertainment of the non-observance and any decision to use force in the form of punishment or other legal enforcement on that account lie with the courts.

This classical pattern plays a relatively insignificant role in public regulation of real property. Deviations from the classical pattern occur especially in two main forms:

(1) Administrative authorities, often specialized agencies, take over the role of the private party or the police in seeing to the observance of general directives. The actual procedure used may vary. Generally the courts maintain their monopoly of decision about the use of force, and their exclusive power to ascertain non-observance of the rule. As a rare exception the administrative authority may itself decide about the use of force in the form of punishment. Less rare are the cases in which punishment and other sanctions follow not only from the violation of the rule

itself, but also from non-observance of the administrative decision that ascertains non-observance of the rule.

(2) Sometimes the ascertainment of the compliance with the general directive is moved forward in time, and the regulated citizen himself is expected to take the initiative in having the observance ascertained. The power to decide about the use of force generally stays with the courts in such cases also. This method, too, may vary in its details. The legal system may be organized in such a way that private legal acts—for the sake of commercial intercourse, of safety and order and of other considerations which do not, solely at least, belong to public law—must or may be registered. In Danish law, where real property is concerned such registration occurs first and foremost as the result of the statutory obligation to register every individual property in the Land Register, but it may also arise through a rule whereby deeds, mortgages, etc., may be recorded with the courts in order to secure full legal protection against third parties. By charging the official registrars with the ascertainment of the observance of general directives about the use of real property, the practical possibility of getting the rules complied with is greatly increased. Farthest removed from the classical pattern, however, is the very common situation where an owner may not act until an administrative authority has ascertained that the prospective act is in conformity with the directive. A form intermediate between such prior ascertainment of compliance and the traditional subsequent ascertainment of non-compliance occurs when the law prescribes that an intended or already executed act shall be reported to a public authority. Where this is the case, the authority has a more secure basis for concrete acts against non-observance of the rule than it would if it had to rely solely on supervision on its own initiative.

On the basis of the distinctions now mentioned, we may confront the *two extreme poles* of public regulation of real property by legal directives.

One extreme is to be found where the regulation is made by laying down general norms of behaviour, the observance of which is subsequently seen to and ascertained.

The other extreme is to be found where the regulation is made by means of concrete directives, issued on the basis of norms of competence, which give discretionary power to the authority and according to which the use of discretion is limited only by general principles of public law.

It is not without interest to examine these two extremes. They are based on different ideologies. The first extreme is in accordance with the liberal ideal of "Government by Law and not by Men" and is in harmony with fundamental value judgments towards which most jurists are sympathetically inclined. The other extreme represents for many "the Administrative State", and a degree of "dirigisme" that we have not experienced since the mercantilist period. Secondly, the difference between the extremes has certain legal consequences. According to the safeguards of private property in the Danish Constitution it is pertinent to the claim of compensation whether the private owner suffered loss on account of a public regulation operated by means of concrete or of general directives. Thirdly, the difference is of obvious importance for the effectiveness of the public regulation. The nearer the regulation can come to the second extreme, the easier it will be to adapt the regulation to this particular physical situation on this particular property.

In practice a great many *intermediate forms* are, of course, to be found.

The effectiveness of public regulation by general directives may—as already mentioned—be augmented, if the ascertainment of the observance of the rule is moved forward in time, and the initiative of undertaking the ascertainment is placed with the regulated citizen. As long, however, as the general directive contains a precise formulation of the desired or unwanted behaviour, this variant represents no fundamental deviation from the traditional pattern. The preceding general determination of the behaviour is still characteristic, and the concrete acts by which the ascertainment is made contain no element of discretion. But if preceding ascertainment is combined with description of the desired or unwanted behaviour by means of a standard, one moves away from the traditional general regulation and towards extreme number two. One moves the nearer, the less precise the formulation of the standard is. The significance of concrete decisions for the operation grows with the diminishing precision of the standard. A similar sliding towards extreme number two may be the result of a combination between the duty to report to the authorities and general rules formulated as standards. On account of the uncertainty about the detailed content of the norm of behaviour, the report tends to evolve into a petition for a preceding ascertainment. There are also other ways in which one may move towards extreme number two and yet maintain a regulation of a

fundamentally general character. If a precise general directive, the observance of which is ascertained beforehand, is combined with wide powers for the ascertaining authority to make exceptions from the general directive, the result may be a situation which, often at any rate, is similar to the second extreme.

Modifications of the second extreme—regulation by concrete directives—are also common. The norm of competence often contains expressed or unexpressed instructions about the way in which the power to issue concrete directives should be used. To the extent that this is the case, the directive contains—albeit indirectly—a more or less detailed general description of the desired or unwanted behaviour. And even where the norm of competence does not contain such instructions for the use of the legal power, the individual directives will tend to appear as manifestations of a pattern, wherever concrete decisions are made in relatively large numbers. The administration may formulate this underlying pattern as a general norm, as in an instruction from a ministry, or in the reasons given for a concrete decision or in an internal note or a similar document. In such cases the difference between regulation by general directives and regulation by concrete directives is primarily a question of who has the competence to make the norm and of the publication of the norm. Most often, however, the pattern is not found formulated as an explicit general norm, but certain practices are actually applied. It is a fact—though possibly a paradoxical one—that the greater the number of concrete directives issued within a certain field of public administration, the more these directives tend to appear—both for the authority and for the public—as manifestations of a general norm regarding the desired or unwanted behaviour.

With special regard to the regulation of private real property a specific intermediate form between the two extremes, that of the public plan, is of particular importance. Public plans often include a very large number of properties. On the other hand, their content is decided upon after consideration of the concrete conditions of individual properties.

Against the background of this survey of possible variations in the organization of public regulation by legal directives, some common types of regulation in Danish law concerning the use of real property are described in the following paragraphs. It should first be mentioned, however, that the types concerned seldom occur alone. Normally, more than one type is used in the same statute, often even in the same section.

Types of Public Regulation by Legal Directives

(a) *Precise general directives.* It is characteristic of this type that the desired or unwanted behaviour is described in general terms in a statute or a statutory instrument so precisely that no really dubious questions of interpretation occur.

This type of regulation plays a main role in all spheres of public administration. This is also true concerning regulation of the use of real property. There are a very large number of rules which in general and nearly precise terms describe the behaviour which society expects from owners of real property.

Notwithstanding the very great importance of precise general directives, it is a widely held opinion that, instead of the precise general directive, it is the concrete decision which is paramount in public regulation of private real property. One explanation of this opinion is probably that precise general rules, especially those concerning the right to build, previously played an even greater role than today. Another explanation is that nearly all the precise general directives concerning the use of real property are supplemented by standards and/or extensive powers of the authorities to make exceptions. Further, the observance of general directives is achieved by active and concrete efforts by the public authorities.

There are, of course, general rules concerning the use of real property, the observance of which is looked after in the traditional way by interested private parties, the police and the public prosecutor. It is, however, characteristic of general directives concerning real property that to a very large extent the ascertainment of the compliance is pushed forward in time and that the initiative is placed with the owner concerned. The two methods mentioned above (p. 83) are used. Thus the Land Registrar is assigned certain controlling functions, or a specialized agency is established for the purpose of ensuring the observance of the rules. An example of the first method is provided by sec. 2 of the Land Parcelling Act of April 10, 1967, which lays down that the partition of real property cannot be approved by the Registrar in cases where the parcelling and the intended use of the sites are not in accordance with general statutory directives or, under the provisions of a statute, require prior permission. A clear case of the combination of a preceding ascertainment of compliance and placing the initiative for the investigation of the concrete case with the individual owner is found in building law. The

principal rule is here that no building activities may be begun without the permission of the building authorities and that no one may start using a building until these authorities have attested that the work was performed according to the rules.

(b) *Standards*. Standards or vague and elastic rules constitute general directives. They describe the desired or unwanted behaviour with reference to an undefined number of future cases. The difference between precise general rules and standards is to be found in the degree of exactness in the description of the behaviour. Where standards are used, the authority's decision as to whether an individual case falls within the wording of the directive is rarely indisputable. The lack of exactness may vary considerably. In administrative law there is a typical distinction between, on the one hand, instances where the lack of exactness concerns quantification on the basis of a fully or at least a relatively precisely described yardstick and, on the other, instances where even the yardstick is not precisely formulated. Directives using words like "greater", "lesser", "higher", "longer", "as durable as", etc., are typical examples of the former type, while rules using words like "suitable", "reasonable", "proper", etc., are examples of the latter type.

The issuing of standards is a widely used method of regulating real property belonging to private owners. The enforcement of a standard gives rise to problems similar to those mentioned under precise general directives. The more vaguely the standard is formulated, the more important become the findings whether or not the standard shall apply to the individual case. The standard permits an individualized adaptation of the regulation and thus a more detailed and thoroughgoing regulation. This effect is especially certain where a previously obtained ascertainment is required, and the authorities can therefore be sure that all cases will come under their notice. But the need of the individual owner to have the relationship between his individual case and the standard authoritatively established tends to make the owners seek permission from the authorities beforehand, even when the law lays no such duty upon them. Danish law knows various examples of this evolution.

(c) *Regulation by permit*. A feature common to the two types of regulation by legal directives that have already been described is that the desired or unwanted behaviour is described in general terms in statutes or statutory instruments, and that the decision of the authorities in a concrete case has in principle the character

of subsumption, i.e. the application of an already existing rule or standard to the present case. What the next three types have in common is that the desired or unwanted behaviour is not previously described in a statute or a statutory instrument, but is decided upon when need arises, and with regard to the concrete case.

Regulation by concrete legal directives may, of course, be organized in various ways. This paragraph is concerned with one form which has become important in recent law. The characteristics of this form are as follows: the statute or statutory instrument prohibits a behaviour which is of a normal, everyday character, and at the same time an administrative authority is given the power to make exceptions from the prohibition. The norm of competence is the main thing. The prohibition is not made in order to brand the prohibited behaviour with the disapproval of society, and the prohibition is not intended to be maintained generally. The aim is that the competent authority shall direct the development inside the field of activity covered by the prohibition. By giving or refusing permits or by attaching conditions to the permission the authority has to try to achieve the social purposes that have lain behind the decision of the legislature to adopt the regulation.

The detailed elaboration of this sort of public regulation by concrete legal directives may vary. A considerable element of administrative discretion is, however, always present.

Regulation by permit may stand alone or be the backbone of some public regulation. But it may also be found combined with the two types of legal directives mentioned under (a) and (b). When the law prescribes that the private owner's compliance with precise general directives or standards shall be ascertained beforehand by an administrative authority, it may be natural to combine such ascertainment with power to issue discretionary permits concerning other aspects of the behaviour.

Regulation of real property solely or mainly by permit has become relatively common in recent law. The most extreme contemporary example was found in sec. 22 of the previous Act concerning the Preservation of Natural Beauty, the Act of June 16, 1961. This section simply prohibited the erection in the open countryside of structures other than those intended for agriculture and local permanent habitation without the permission of a special local committee concerned with the preservation of natural beauty. For various reasons this rule had very little practical effect

and is now repealed. Another example was provided by sec. 20, subsec. 1, of the Building Act, 1968. Permission from the country council was a necessary condition for the erection in certain parts of the open countryside of structures other than agricultural buildings and isolated small houses, and permission might be refused solely for the reason that the building would be at variance with a sound and appropriate future urbanization. This rule has been replaced by a similar, but more comprehensive rule in the Act concerning Urban and Country-Zones of June 18, 1969. The rationing of building activity which lack of material or manpower has caused in much of the postwar period has also—like most other rationing schemes concerning production—normally been organized on a permit basis.

Where the behaviour of the private owners is regulated by permit the administration normally has—as already mentioned—a wide discretion. But precisely because of the very nature of the licensing system there is a tendency to limit the discretion. This is often intended by the legislators. Regard for equality and predictability, and the difficulty of coping with great numbers of individual cases, make for observance of a pattern laid down beforehand and militate against discretion based on concrete considerations.

The determination of this pattern may be more or less decided by instructions in the statutes, in the legislative history, or by general considerations concerning the purpose of the act, etc. But whatever factors determine the pattern, the pattern itself is laid down by the administration, not by the legislature. The use of licensing as a means of public regulation therefore implies a delegation of the power of issuing directives to the administration.

The pattern is materialized mainly in two forms, which in the typical cases are easy to distinguish: practice and plan.

The creation of a practice concerning the use of administrative discretion is a well-known phenomenon, but it is not easy to explain just how such a practice is established. The main point is possibly that the authorities, in deciding individual cases, stress points expected also to appear in future cases and deemed suitable as a basis for future decisions. The result is that within the field of discretion generalization develops and, consequently, the behaviour in an undefined number of future cases is established. This description of the way in which administrative practice is created is given with special reference to the situation, in which

the authority is conscious that it is laying down a certain practice. The more numerous the permissions are, the more common this situation will be. But in the main this description is true also of situations where practice is not created by conscious deliberations, but arises gradually. At a given time, by comparison between the present case and previous ones the administration finds the factors that are suitable for generalization.

A practice can be made publicly known in many ways. It may be formulated in general terms and published. Normally, however, it finds outward expression in reasons given for individual decisions or in the existence of a succession of similar decisions.

The use of a public plan as a pattern behind licensing presupposes that the administration has delimited a specific geographical entity and laid down some directives for the use of the individual properties within the area. The patterns behind plans are thus of a more concrete character than are most practices. In the deliberations preceding the creation of the plan, the considerations may have been the same as those that result in the generalization of specific factors inside the administrative discretion and thus create a practice. But once laid down, the plan functions—as long as it is maintained—more simply and with greater certainty than would an administrative practice.

Regulation by permit is in our sort of society often an alternative to regulation by precise general directives or standards laid down in statutes or statutory instruments. What are the motives, one may therefore ask, that have led Parliament to prefer this way to the more traditional one? There may, of course, be particular political or other specific motives for a particular arrangement. But normally the reasons for preferring regulation by permit to traditional general regulation are probably those set out below.

The use of reasonably precise general directives or standards presupposes either that it is possible to draw on an already large store of factual experience, or that such experience can be procured by widespread investigations before the rule is promulgated. When the store of experience is small, and time is short, and the ideas about how the regulation ought to function in detail are not quite clear, the choice of regulation by current permissions appears natural. By the use of this form of regulation knowledge of the effects is gained as time goes on. The rule-making is extended in time and therefore in the initiative phase may be limited to a minimum.

For practical purposes it is not easy to change general directives and standards—even where they are laid down in statutory instru-

ments. Regulation by permit is more easily adapted to new situations where the relevant social factors have not been stabilized.

Regulation by permit allows of a more detailed and a more precise formulation of the desired or unwanted behaviour in the individual situation than does even regulation by standards. The consequence may often be a regulation which is at the same time socially more opportune and more considerate towards the owner.

Regulation by permit may often be a better means of realizing a plan than is the more obvious one of making the plan legally binding on the owners. When the authorities have power to regulate by permit they can avoid making the plan rigid and detailed and yet, by allowing the owners to obtain knowledge of the plan, they can to a certain extent achieve the predictability which is characteristic of regulation by rules and legally binding plans.

By using the system of permits, the content of rules and standards will be established by other persons than those who ordinarily are the legislators as members of the legislature and the central government. Regulation by permit gives scope for greater influence by local authorities and by experts.

(d) *Exceptions.* The borderline between this form of public regulation and the one described under (c) is by no means distinct. Whether permission can be said to be normal or should be characterized as an exception must depend upon how frequently the need for giving permission arises. When regulation is made by permits, the basic general norm of behaviour—the general prohibition—is so worded that even normal, socially desirable actions require permission to deviate from the norm. In the case of exceptions people are ordinarily expected to comply with the norm; the need for acknowledgment of a different behaviour arises only rarely and under particular circumstances that are difficult to predict.

The borderline between these two types of regulation is indistinct also in the sense that an arrangement originally intended to consist of precise general directives and standards supplemented by powers for the authorities to make exceptions may develop into a regulation by permit, e.g., when building regulations are not changed to keep pace with technological changes.

The method of using exceptions is, of course, common in all fields of public regulation of real property, normally as an adjunct to general directives or standards or to legally binding plans.

(e) *Concrete prohibitions and orders.* The law may be so or-

ganized that a certain behaviour is fully lawful until the authority by means of a concrete legal directive decides otherwise. These are the clear cases of regulation by concrete prohibitions or orders. In these cases the desired or unwanted behaviour is determined by the prohibition or the order itself and not described beforehand in a precise legal directive, a standard or a plan.

Such clear-cut cases are, however, rare. More common in practice are certain forms intermediate between regulation by concrete prohibitions and orders and the traditional method, where the authority's decision appears as part of a preceding ascertainment of compliance or a subsequent enforcement of the observance of a rule or a plan. The boundary against concrete prohibitions or orders made as part of a subsequent enforcement of a standard is especially indistinct. There is a gradual transition between the following situations: (1) a decision as a mere ascertainment of compliance with a general legal directive formulated as a standard; (2) a decision which has independent legal effect apart from that of the standard, e.g., because of the fact that both non-observance of the rule embodied in the standard and of the decision is punishable; (3) a decision issued on the basis of a norm of competence which contains instructions about the content of the prohibition or the order; (4) a decision issued under the provisions of a norm of competence which does not contain such instructions, though in practice there is a more or less clear pattern for the use of the power to make prohibitions or orders.

(f) *Plans*. The words "plan" and "planning" are very widely used today. People talk of planned economy, planning of the educational system, family planning, planning of industrial production, regional planning, urban planning, and so on. Evidently, "plan" and "planning" do not have quite the same sense in all these casually selected examples. But the words have a common core of meaning, albeit a meagre one. Planning is the designation of a process which consists in gathering knowledge of facts—especially with regard to resources and needs, available and predictable—and setting goals, and in laying down on this basis directives for the future. Through planning, subsequent behaviour assumes a rational, co-ordinated character in contrast to *laissez-faire* or to behaviour based on short-term and improvised decisions.

Used exclusively in connection with regulation of real property—often called physical planning—the word "plan" may be given a more precise meaning.

A characteristic of planning with regard to the use of real property is the issuance of directives for the use of real property within a defined often relatively large, geographical area. The characteristics of a plan may also be expressed by saying that a plan is a map with some directives for the use of the area shown on the map. Thus the plan contains a regulation of a specified area which has been the object of different sorts of concrete considerations which were incorporated in the plan. But at the same time the plan has characteristics similar to those of a rule. Most plans include a great number of properties. They often aim at moulding the destiny of the planned area in a relatively distant future, and they aspire to the uniformity and regularity which is one of the goals of general directives.

Plans occur in many variations.

Some plans are legal directives and are thus legally binding on the owners concerned, in the sense that behaviour by an owner against the plan may result in the use of sanctions against him. Other plans are directives for the use of the public resources by the authorities, i.e. for the acquisition and the use of public property. Yet others create a pattern for the use of the concrete legal directives, mentioned above, to the effect that permissions are given or refused and orders are issued in accordance with the plan.

Another point on which the plans may vary concerns the use of the real property concerned. The most important of our plans directly or indirectly concern urbanization, but plans concerning regulation of waterways, drainage, catchment areas and access to roads, etc., are also important. Plans concerning redistribution of land or common installations, such as dikes, coast protection, etc., can likewise be met with.

A third important distinction between different sorts of plans concerns the date when the plans will actually materialize. Most plans are put into effect by degrees. The plan materializes when a private owner wishes to change the status quo. A few plans, however, clearly aim at changing the present conditions within the planned area immediately or at any rate in the near future.

The role that the public authorities play in the initiation of the plans, the determination of their content and in their realization also varies. Normally the role of the public authorities is predominant, but there are cases in which the private owners' efforts play the main part.

As plans are an intermediate form between general and con-

crete acts, the possibility of variations as to the degree of detailed concrete determination of the use of the properties concerned are, of course, very large.

On the basis of these differentiations plans, as they exist at present in Denmark, may be grouped under a few main headings. The dividing lines between the groups are, of course, not distinct, and a number of existing plans belong to more than one group.

(1) To a *first group* belong plans that are legal directives and as such binding on the private owners. These plans only concern the future use of the areas under the plan; they do not, therefore, materialize unless and until an owner wants to change the status quo. The effort contributed by the public authorities in providing the plan is, with few exceptions, predominant.

In this group must be classed most of the plans which under present Danish law aim at regulation of urban growth and changes in existing towns. The most important of these are urban development plans—Act no. 279 of July 1, 1965, now replaced by the Act concerning Urban Country-Zones of June 18, 1969—and town plans—Act. no. 160 of May 9, 1962. The aim of the former type of plan is to fix the borderline between the towns and the open countryside. The plan covers a large area around or in the neighbourhood of a town and divides this area into two main zones: an inner and an outer zone. In the outer zone urban development is prohibited, unless exceptions are made. In the case of the inner zone the plan has no specific legal consequences for the owners. That their property is included in the inner zone simply means that they may develop their land without other permissions than those necessary under the ordinary building regulations. For the municipalities, on the other hand, placing an area in the inner zone has a legal effect, namely a duty to supply some of the main services necessary for urbanization, such as roads, water supply, etc.

Urban development plans play a very large role in regulating private property in Denmark. Of less practical importance are the town plans. Their aim is to regulate the various factors which enter into urbanization, but not to exclude urbanization. The means is a plan—seldom embracing a whole town—which determines the siting of different sort of buildings—dwellings, business premises, factories, high or low buildings, the size and form of the sites, etc.

To this group (group 1) also belong some very important plans concerning access to public roads. In accordance with the Roads

Act of December 9, 1964, special local authorities have power to decide where and to what extent there shall in the future be access from a site bordering on a road.

(2) Plans that aim at a change in the existing physical condition inside the planned area immediately or at least in the near future constitute a second group. The realization of the plan is thus not conditional upon the initiatives taken by the private owners, gradually and in a more or less distant future. Most plans of this type do, however, also contain regulations aimed at future events. The plans are binding for the owners and are very concrete. Often the realization of the plan will affect not only the physical conditions, but also the existing pattern of ownership. An important element of the plans is therefore frequently an economic equalization amongst the owners involved. The efforts made by the owners in bringing about the plan are therefore likely to be of great importance.

Plans of this second category have existed for a very long time in agricultural law. The prototype is enclosure plans under the Royal Ordinance of April 23, 1781, which prescribed that any owner within a property applying the common-field system had a right to exchange his strips of land for one compact holding. Nowadays the most important plans of this group are plans concerning sewerage and urban renewal.

Plans belonging to the categories which will be described in what follows (groups 3 and 4) do not constitute legal directives. The non-observance of the plans by a person owning land within the planned area cannot result in the use of force against him. The plans of groups 3 and 4 are merely form patterns for the future behaviour of public authorities.

(3) Some plans are patterns for the use by the public authorities of powers—authorized somewhere else, not in the plan—to regulate the behaviour of private owners by means of permits, exemptions, concrete prohibitions or orders and the issuance of legally binding plans. Plans of this group therefore affect—indirectly—the private owners, provided the planning authority has the necessary legal power and does in fact use this power.

Present Danish planning practice knows a very important example of such a plan, the so-called “allocation plan”. The content of an allocation plan is similar to that of a town plan, but is often somewhat less detailed, and the plan often embraces larger areas. The plan is not binding on the owners, but on the public authority (i.e. the municipality), which—once the plan has been

approved by the Ministry of Housing—has a duty towards the Ministry to use its very wide powers under a great number of building and health and similar statutes or statutory instruments in accordance with the plan. Allocation plans are very widely used in lieu of town plans, probably because they are less rigid in content and much easier to change.

(4) Plans for the use that the public authorities make of their own resources constitute a fourth group. These plans lay down directions concerning areas which should be acquired by the state or the municipality and for the future use of such acquired land and for property already in public ownership.

Most of the plans already mentioned also contain elements of this type. Town plans, sewerage plans, urban renewal plans and allocation plans concern not only the regulation of private property, but also directions for, e.g., the siting of all those public services which are a necessary part of modern urbanization.

To a limited extent such plans may have legal consequences for the private owners, e.g. by forming the legal basis for compulsory acquisition. But usually they are without any legal effect whatsoever, even within the administrative hierarchy.

4. PROMPTING OF THE DESIRED BEHAVIOUR

The traditional means of regulation are, as mentioned before, the issuance of legal directives by describing the desired or unwanted behaviour in a statute, a statutory instrument, a legally binding plan or a concrete administrative decision with the effect that non-observance may lead to the use of force against the owner.

Public authorities, however, command other means by which they may influence the behaviour of private owners of real property. Broadly speaking, there are three categories of such means. They are dealt with in this section and in sections 5 and 6.

Some means resemble regulation by legal directives in that the regulation is made by traditional authoritative legal acts: statutes, statutory instruments or concrete administrative decisions. They differ from traditional legal directives where enforcement is concerned. The desired behaviour is not ordered, nor is the unwanted behaviour prohibited, in the sense that such an act results in the

use of force. The authorities do not go beyond making the desired behaviour attractive by attaching advantages to it, and the unwanted behaviour unattractive by other means than by the threat of using physical force.

(a) The last-mentioned method is not applied very often, but instances can be found. In the latter half of the nineteenth century and the beginning of this century Parliament used a great many means to encourage freehold ownership and to abolish tenantry. The law of tenantry was so construed that it became more of a burden than an advantage to own land tilled by tenants. A more recent example is found in the law of land rating. According to the Rates Valuation Act of July 3, 1967, the value on the basis of which the rates are levied shall be assessed at the price which the property would fetch in the market if it were sold to be used in the way that is economically most profitable in the prevailing circumstances. This rule and the differentiation of the rates paid by individual owners that results from it are not intended to serve fiscal aims alone. The object is also to influence the use which the private owner makes of his property. The differentiation of the rates intensifies the inclination of the individual owner to allow the use of his property to be decided by purely economic considerations. To the motive of profit which might be gained by a change in the use of the property is added the burden of higher rates.

(b) The normal form of prompting by authoritative legal actions consists, however, in making a desired behaviour attractive by offering advantages to the owner, if he uses his property in a certain manner.

Often these advantages consist in direct economic disbursements by public authorities in the form of subsidies, loans, a guarantee for private loans, etc., or in exemptions from duties and fees. Such means have been used for more than a hundred years in agricultural law, e.g. by providing incentives to betterment, and they have, furthermore, been in use for most of this century in one form or another to encourage housebuilding as part of the employment policy.

Another way of prompting that is often adopted is to offer public services to owners who use their property in certain ways. Agricultural law knows a great many examples of this. Thus enclosure plans and similar plans have been accomplished by instituting special authorities which offer their services to those who desire the dissolution of the common-field system.

A third method is to offer the owner who uses his property in the desired manner an exceptional position compared with other owners. A few instances may be mentioned. An owner may give a creditor who offers a loan to be used for betterment, a preferential mortgage without the consent of other mortgagees. A step in the long evolution away from the great landed estates towards medium-sized and small freehold units was an Act of February 19, 1861, under which a landowner was released from earlier prohibitions and permitted to add agricultural land to his home farm in a certain proportion to any land sold freehold to his tenants.

5. THE USE OF PUBLIC PROPERTY

The state and the municipalities or semi-official institutions own extensive areas (cf. pp. 76 f.). This is particularly true of the towns and their immediate neighbourhood.

Obviously, the public authorities, by acquiring or selling real property or by the use they make of public property at any given time, can influence very considerably the use which private owners make of their property.

The intensity of this influence and the way in which it functions vary widely. Of specific interest to our study are the cases in which public authorities, by their use of public property, deliberately influence private owners in the use of their land. A few significant examples will be mentioned in this section.

(a) The influence is especially clear and deliberate where public authorities selling publicly owned land condition the future use of the property. This mode of regulation has played and plays an important role in two fields: agricultural policy and urban development.

For a century and three quarters agricultural policy in Denmark has been characterized by endeavours to create a large number of medium-sized and small freehold farms. To achieve this aim, use has been made of all the means of regulation already mentioned. But in addition, the use of publicly owned land has played a major role.

So long as the state owned large areas of Crown land or land originally used for the support of churches, schools, etc., the aim could be achieved by selling such land on conditions which were in harmony with the nation's agricultural policy. Soon after the first world war the last of this publicly owned land was sold, and

until recently, when the prevailing economic conditions for agriculture made the policy of multiplying agricultural holdings seem of doubtful wisdom, the state bought agricultural land and sold it again, mostly divided up into small holdings. The state has thus acquired land which when it was bought was subject to one kind of agricultural system—normally estates or large freehold farms—and sold it again subject to another agricultural system and in some cases even another sort of ownership, namely the rather numerous cases in which the state has not sold outright, but has rented the land out on conditions influenced by the theories of Henry George. The land thus acquired has normally been bought in the open market, but some of the land from the great estates has been acquired by expropriation, and the state has had a right of preemption on certain properties.

Urban development of former agricultural or non-cultivated land is a complicated process, which necessitates the co-ordination of a number of factors. In the case of some of these factors, e.g. traffic installations, supply of water, electricity and gas, schools, major roads, etc., public authorities are normally in control. In others—and this is especially true of the land on which the urbanization is to be carried out—ownership is often in private hands. The necessary cooperation may be brought about by means of legal directives such as town plans or development plans. Obviously, however, the coordination will be easier to bring about if public authorities also control the land. Where this is the case, public authorities may even control a factor which cannot be touched by legal directives directing urbanization, namely the price of the individual sites.

As a result there has been a tendency, strongly augmented in recent times, for the municipalities to develop and parcel out land that is already in their hands, and to buy undeveloped land in the neighbourhood of towns for development use. The buying takes place in the open market. According to Danish law the municipalities have no power of expropriation, unless the ground is to be used for public installations. Normally, the municipalities themselves do not build, but sell the land parcelled out and furnished with the necessary installations.

(b) The examples of regulation of private real property by selling publicly owned land that have been mentioned in the previous paragraphs, are important, but still more important is the influence exercised by the property which public authorities retain.

Most public enterprises need a physical basis in real property. But there are great variations concerning both the importance of the physical basis for the enterprise and the ability of the enterprise to influence private owners.

Often the publicly owned real property is the necessary basis for enterprises like hospitals, museums, schools, gasworks, etc. In other cases the main content of the public enterprise consists in offering the publicly owned real property for the use of the public at large, e.g. parks, public beaches, sports grounds, roads, squares, ports and airports, etc.

Of greater interest, however, are the variations in the ability to influence private owners. This ability is particularly great where the function of the public enterprises consists in servicing users of private real property. Such instances are very numerous. Public authorities may therefore, by the organization of such public services, influence the use of privately owned land to a very large extent.

The possibility of influencing private owners is particularly great where the public service concerns the immediate neighbourhood. A clear example of this is main sewers. The delimitation of catchment areas for main sewers is often as decisive for the placing of urban development as is the boundary between inner and outer zones in a development plan. In practice public authorities often have a choice between these two means of regulation. One of the reasons why main sewers are alternative means of regulating urbanization is that the municipality normally carries a major part of the financial burden, at least by advancing the investment costs. Only very large and financially strong builders can aspire to undertake the necessary investment themselves.

A more indirect influence on the use of private real property may be exercised by the organization of public services that aim at a more extended neighbourhood. Urban development needs traffic installations, schools, etc., and public authorities may to some extent, by developing or non-developing such services, control the placing and the rate of urbanization. Another example of indirect influence may be mentioned. The opening of a beach with good bathing facilities often leads to its being backed up by a dense belt of summer houses.

Even more indirect is the influence on the use of private real property that can be aimed at by the siting of public enterprises that service the whole country or large parts of it. By distributing the central government offices, universities, state industrial enter-

prises, etc., throughout the country, one may hope at least to some extent to counteract the tendency towards concentration in the capital and a few large towns.

6. OTHER MEANS

The 'other means' used to regulate private real property which are dealt with in this section constitute a very varied group. These means are difficult to systematize, partly because they are really very different, partly because neither law nor any other social science offers a traditionally acceptable basis on which to build distinctions. The following survey, which is far from being exhaustive, starts with the means most similar to regulation by legal directives.

(a) Public authorities often use statements the content of which is identical with that of concrete legal directives, but which are mere *statements of opinion*, i.e. force cannot be used in the event of non-observance. Such statements of opinion by administrative authorities occur in many forms.

As mentioned in section 3 above, the law relating to real property is often so organized that anyone wishing to change the present use of his real property needs prior permission from a public authority. The purpose of such a rule may be to control the observance of a precise general directive, a standard or a plan, or to give the authority the opportunity to regulate the future use of the property concretely, by granting a permit or an exemption. Wherever prior permissions have to be obtained, the result is the establishment of a personal contact between the authority and the private owner desiring the permission. In the course of this personal contact the public authority will often express its points of view in a statement of its opinion to which no legal sanctions are attached.

Sometimes such statements of opinion have the character of *declaratory decisions*. The private owner asks the authorities how they would decide a concrete, but as yet hypothetical case. Such information is often of great interest to the owner. All the more important changes in the use of real property will normally require heavy investment, and the owner naturally does not want to incur such costs without knowing whether the requisite permission can be obtained. Private questions of this type are very common. The law is uncertain as to the extent to which the au-

thority has a duty to answer. Normally, this is the case when the private owner has a considerable interest involved and his question is a sufficiently concrete one. Be that as it may, public authorities are in fact normally willing to answer such questions. It is an intricate legal problem to what extent a declaratory decision is binding on the issuing authority and on other authorities.

According to certain enactments the administrative authority has a power *to decide a case on an uncompleted and provisional basis*, and sometimes it even has a duty to do so. Present Danish building law provides an example. In some situations the municipal council has the power to grant a building permit on condition that as regards its exterior parts the new structure will blend with the existing buildings in the near neighbourhood so as to make an acceptable totality. Where such a power exists, the builder may submit to the council a preliminary project before the final application for a building permit is made and request the council to issue a provisional decision about the external form of the building. If the council finds that the desired total effect is not likely to be achieved, it may reject the application on the basis of the preliminary project. But in such a case the rejection must include reasons which may serve as guidance for a revision of the project.

In the instances mentioned above, the basis on which the statement is issued was produced unilaterally by the private owner. In practice, however, *the content of the application is often produced piecemeal in the course of the discussions between the authority and the applicant*. This situation is especially common in building law. When a building activity necessitates a large investment, and especially where less standardized buildings are concerned (e.g. industrial plants, hotels, etc.), the builder or his architect will often apply to the authority at a very early stage in order to obtain information about the demands that will possibly be made by the authorities. In the course of the discussions that result from such an inquiry, the authority may influence the final application by making statements which are not binding on the party concerned. Such a statement may have a similar content to that of a declaratory decision. But the situation may differ. The authority may find a certain elaboration of part of the building to be desirable, without wanting to make this a condition of granting building permission. If it turns out that the builder does not object, an agreement is reached.

Where the observance of precise rules, standards and plans is ascertained by *subsequent control*, statements of opinion are also used as part of the regulation. Sometimes there is the same need for declaratory decisions as there is where prior permission has to be obtained. Observance of the provisions of the Worker's Protection Act, 1968, is controlled by the Labour Inspectorate. According to sec. 11 of this act every employer who intends to establish or change an enterprise covered by the act is entitled to have a declaratory decision from the Inspectorate as to whether the intended behaviour is legal. During inspections statements of opinion are also widely used by the Inspectorate, either in the form of answers to questions put by the employers or the employees, or in the form of reprimands or instructions.

In the instances mentioned so far, the statement of opinion has had a content which the authority in question would in a concrete case have had the power to make legally binding. Exceptionally one may meet with statements which are not pure persuasion and at the same time could not have been issued as normal legal directives. Such statements occur in practice where the draft of a legally binding plan exists, but where the plan has not yet acquired legal effect, e.g. because it has not yet been approved by the appropriate ministry. In such cases the authority may seek to influence the private owner by letting him know that some intended behaviour is unwanted, because it is in conflict with the draft.

(b) *Statements of general content* constitute a category of their own. Such statements are quite common. Departmental circulars which—without legal effect with respect to the courts—interpret statutes belong to this group, as do statements explaining administrative practice and intended changes therein.¹

For the regulation of private real property preliminary plans, drafts of plans which can be turned into legal directives or plans which are merely patterns for the future behaviour of public authorities, are of particular importance. Experience shows that the publication of such preliminary plans often influences the behaviour of private property owners. The reason may, of course, be misapprehension concerning the legal character of the plan. But sometimes a private owner, in order to save time and trouble, may yield beforehand to the known wishes of the public authorities. Possibly the plan may even be acknowledged as reasonable.

¹ A good example of the use of statements explaining intended changes in administrative practice, taken from the regulation of radio and television in the U.S.A., is mentioned in Woll, *Administrative Law*, 1963, p. 139.

(c) A widely used device is the *contract* entered into between the authority and private owners of real property. Sometimes a *semicontractual* relationship is created. Ordinary contracts play a major role wherever publicly owned land is used to regulate private real property, and the private owners' consent or tacit acceptance is of great importance for the question whether burdensome conditions can be attached to discretionary permits, although the law is obscure on this point.

Contracts are, however, seldom used as independent means of regulating the use of private property. But in present Danish law the contract between the public authority and the private owner in question in some cases constitutes the only legal basis for the regulation. It happens that an owner wants to use his land in a way that is not in conflict with any legal directives, but is at variance with the content of an allocation plan (cf. p. 95). The municipality can then ask the Ministry of Housing to issue a provisional injunction for one year under sec. 9 of the Town Plan Act, and during this period a town plan which definitely prevents the unwanted use can be made and approved. In principle the municipality, with the ministerial approval of the allocation plan, is bound to follow this procedure. But if the conflict between the use that the owner desires and the content of the plan is of minor importance, and the municipality finds a temporary deviation from the plan reasonable, it may choose another way. The municipality may strike a bargain with the owner whereby he will get the necessary permission on condition that he agrees to a contract with the municipality—to be registered upon the property—to the effect, e.g., that the building shall be removed before a certain time.

(d) One of the reasons why public authorities are able to regulate the behaviour of private citizens is that the citizen, by behaving in accordance with the wishes of the authorities, can avoid unpleasantness. This is a fact acknowledged as far as legal directives and prompting by disadvantages (cf. above, pp. 82 and 97) are concerned.

Public authorities regulate the use of private property in less traditional forms, too, by making an undesired behaviour troublesome or onerous, a method which in American literature is often called *regulation by impedimenta*.²

² Cf. Simon, Smithburg and Thompson, *Public Administration*, 1950, p. 455, and Thompson, *The Regulatory Process in OPA Rationing*, 1950, p. 27.

Looking solely at the facts, and omitting any legal or moral judgement, one must acknowledge that regulation by *impedimenta* plays a not inconsiderable role. The trouble of having to apply for a licence as a necessary condition for changing the status quo, the inconvenience connected with making a complaint, the prospect of long-drawn-out discussions concerning unusual wishes, etc., will in fact prevent many an owner from a behaviour which, though not prohibited, is known by him to be one of which the public authorities disapprove. The psychological effect at work in such cases is not dissimilar to that which leads to amicable settlements in private law suits.

Regulation by *impedimenta* is, however—even apart from the legal and ethical aspects—difficult to describe, because it is seldom used deliberately by public authorities, and also because it is difficult to isolate it from other factors that determine the behaviour of public authorities. That an unusual and difficult case takes an unusually long time to handle is a matter of course, and it is the duty of the administration to act with special caution in case the owner wishes to behave in a way that is clearly unusual.

To illustrate the phenomenon, a few examples—not all of them concerning regulation of private real property—may be mentioned.

Some forms of regulation by *impedimenta* are obviously legitimate. A good example is the organization of the distribution of rationing coupons in Copenhagen during the war and the years immediately following. Coupons were issued for a specific period. It was therefore important that the coupons should be fetched by the consumers before the beginning of the period for which they were valid. But it was, of course, not possible to fix a time limit after which the right to coupons was extinguished. The solution chosen was as follows. The distribution of coupons within the normal deadlines took place at a large number of schools, all over the town, and was so organized that the waiting time was very short. Later the coupons could be fetched at one place only. As this place was not situated in the centre of the city, fetching the coupons there meant for most consumers a certain amount of travelling at a period where even interurban journeys were not exactly comfortable. If the consumer did not even then fetch his coupons, he had to apply to the Municipal Registration Office, which often involved some delay. This arrangement, which—whether this was intended or not—made an undesired behaviour troublesome, was a great administrative success.

On the other hand, some kinds of regulation by impedimenta are clearly illegitimate. It is a well-known fact that the number and the distribution of polling places and their opening hours were, formerly at least, not without importance for the result of an election.

Between these extremes lies a very wide sector. Thus allocation plans are often actually complied with, even without the use of the temporary injunction against non-compliance prescribed in the Town Planning Act, sec. 9 (cf. above p. 104). One of the reasons for this is the time and trouble which the process of making a legally binding town plan would involve also for the owner.

(e) It is a well-known fact that the behaviour of certain individuals tends to function as a *model* for others. For public authorities to take the lead concerning the use of real property is not unknown. A particularly clear example is the conversion into freehold tenure carried out on Crown lands in the 18th and 19th centuries. Public authorities have also tried to raise the standard of housing by erecting blocks of flats as a model for private builders, or to improve the way in which parcelling is executed by themselves making model parcellings.

(f) Ministers and members of Parliament and of municipal councils—civil servants too, especially those who are experts—have obviously a possibility of influencing the use of private real property simply by acting upon public opinion. The widespread acceptance of the ideals behind the town planning movement is not caused solely by legislation; another reason is the extensive and very competent propaganda which has for a generation been carried on for a better planning of urban growth. At the present time a similar endeavour to arouse public opinion is being made concerning air and water pollution.

(g) In this section a long series of different means aiming directly at influencing the use of private real property have been referred to. To complete the picture it should be mentioned that the nation's general economic policy has a very important, albeit indirect impact upon the behaviour of private owners. The use of land for urban development depends in a very high degree upon monetary policy, credit restrictions, availability of manpower, etc. And the use of land for agricultural purposes is—at least in the long run—dependent upon public support or lack of support for agricultural production by means of import duties, import regulation, premiums on export, home market arrangements, direct subsidies, etc.