# Spatial management in Indonesia : from planning to implementation : cases from West Java and Bandung : a socio-legal study

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# CHAPTER VII
# SPATIAL PLANNING AND PERMITS REGULATING ACCESS TO LAND

## 7.1. Introduction

This chapter will look at permits regulating access to land. These permits comprise an important but much neglected part of spatial management in Indonesia. First, I will explore what kinds of permits are normatively and practically related to the system of hierarchical and complementary spatial plans as constructed by the SPL 1992 and SPL 2007. Attention will be paid to both their legal normative aspects and how they are perceived by users and third parties. Next, I will focus on permitting practice, and what adaptations/deviations from the normative framework occur. When examining how permits regulate land acquisition and land use, my focus is on how they determine access and how they influence perceptions regarding tenure security.

The issue of land acquisition in the public interest is particularly important. [466] It may only take place in accordance with existing (district) spatial plans. Therefore spatial utilization permits (*perizinan pemanfaatan ruang*) and development location permits (*perizinan lokasi pembangunan)* are the most important legal tools in controlling and monitoring such land acquisition. The SPL 2007 highlights these functions and points at the importance of having accurate district spatial plans to this end (Art. 26 par.(3)).

The literature on spatial planning and land acquisition in Indonesia seldom addresses this issue. If the topic is raised at all, the ways in which the permits concerned relate to spatial management, access to land and land acquisition are generally ignored.[467] The same applies to the spatial management literature and how permitting influences people's perception of

[466] See Ministry of Home Affair Regulation (MHAR) 15/1975 on land acquisition procedure, MHAR 2/1976 on the applicability of land acquisition procedure for private enterprises, Presidential Decree 55/1993 on land acquisition for development in the public interest, Ministry of Agraria/Head of NLA Regulation 1/1994, Presidential Regulation 36/2005 (amended by PR 65/2006) on land acquisition for development in the public interest. See also Chapter IX on the evolution of the land acquisition procedure.

[467] See Irene Eka Sihombing, Segi-Segi Hukum Tanah Nasional dalam Pengadaan Tanah untuk Pembangunan, (Jakarta: Universitas Trisakti, 2005); Adrian Sutedi, Implementasi Prinsip Kepentingan Umum dalam Pengadaan Tanah Untuk Pembangunan (Jakarta: Sinar Grafika, 2007); Mudakir Iskandar, "Dasar-Dasar Pembebasan Tanah untuk Kepentingan Umum (dilengkapi peraturan perundang-undangan & Peraturan Presiden no. 65 tahun 2006) (Jakarta: Jala Permata, 2007).

their tenurial security.[468] Here, secure tenure is understood not only as the right of all individuals and groups to effective protection by the state against forced eviction, but also to possess secure access to land.[469]

As indicated in the previous chapters, spatial plans regulate land use only at the abstract and general level and should function, according to the Indonesian Coordinating Board for National Spatial Planning (BKTRN), as a guiding tool in the implementation of national development planning (*pedoman pelaksanaan pembangunan nasional*).[470] Effective implementation occurs through detailed planning, zoning regulations and permits regulating land access and use. The ways in which the government/bureaucracy wields permits to a large extent determines formality and informality in land use and the costs of maintaining property rights on land.[471]

The first section of this chapter will discuss general issues, such as how spatial management relates to certain permits and how those permits relate to land access. The rising importance of spatial utilization and development location permits as oversight measures under the SPL 2007 will be highlighted. The second section will look into the question regarding what spatial utilization and development location permits comprise of and how this relates to rules allowing investors to access land. Central to the discussion will be how the permit-in-principle (*izin prinsip*) and location/site permit (*izin lokasi*) have evolved and how they relate to other permits regulating land use. This will necessitate a look at land use permits issued at the district level and how these permits have been perceived by users, which has greatly changed after the introduction of the RGL 1999 and 2004. Special attention will be

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[468] Cf. H. Muchsin & Imam Koeswahyono, Aspek Kebijaksanaan Hukum Penatagunaan Tanah dan Penataan Ruang (Jakarta: Sinar Grafika, 2008).

[469] Clarissa Augustinus & Marjolein Benschop, Security of Tenure: Best Practices (UN Habitat, 2009) downloaded from www.unhabitat.org/downloads/docs/ last accessed 1 August 2009. Cf. Lynn Ellsworth, A Place in the World: A Review of the Global Debate on Tenure Security, (New York: Ford Foundation, 2009). For a discussion on the meaning of tenure security, especially in the context of urban land tenure and competing claims on the best use of land, see Reerink, G. (forthcoming), Tenure Security for Indonesia's Low Income Kampong-dwellers: A Socio-Legal Study on Land, Decentralization and the Rule of Law in Bandung, (Leiden University, Phd Dissertation, Leiden University Press. But see also Alain Durand-Lasserve and Harris Selod, "The Formalization of urban land tenure in developing countries", paper for the World Bank's 2007 Urban Research Symposium, May 14-16, Washington DC.

[470] Ministry of Public Work in his opening speech for National Working Group Meeting of the Coordinating Board of National Planning (Badan Koordinasi Tata Ruang National) Surabaya, 14 Juli 2003.

[471] Hernando de Soto, The Other Path: An Economic Answer to Terrorism (NewYork: Harper & Row Publishers, 1989), pp.132-187.

paid to how site permits have been used to control access to land and influence tenurial security for land occupants at the district level. The chapter will conclude by evaluating the weaknesses revealed in the implementation of spatial plans through spatial utilization permits.

## 7.2. Permits in Spatial Management

In general terms, a permit, or "license" (*toestemming*), is a special kind of legal action. It allows a natural person or legal body to do something which is normally prohibited, but is distinct from a dispensation (*vrijstelling*), which allows someone not to meet certain obligations under certain conditions. [472] Both are exemptions to a general rule, comprising of prohibitions (*verbod*) or obligations (*gebod*). Both must meet certain principles: they must be issued for a legitimate purpose, they must be 'performable', contain an appropriate subject matter, be issued by an authorized body and be known to the public.[473]

From the point of view of administrative law, permits are important government tools for directing and monitoring people's behaviour, in order to achieve certain goals and/or implement specific laws.[474] Public authorities must hold adequate powers for this. If not, their actions will be *ultra vires*. The power to formulate and issue/reject permit applications may thus be considered part of the attributed or delegated power granted to public authorities. Moreover, this power must be exercised in service of the purpose for which it was created.[475] This requirement is in accordance with a well-established rule in administrative law, i.e. that all government decisions must be lawful in terms of being based

[472] Laboratorium Hukum FH-Unpar, Ketrampilan Perancangan Hukum, (Bandung: Citra Aditya Bakti, 1997), pp. 6-10.
[473] CST Kansil et.al. Kemahiran Membuat Perundang-undangan (Jakarta, 2003): pp. 70.
[474] See: Paulus Effendi Lotulung, Beberapa Sistem Kontrol Segi Hukum terhadap Pemerintah, (Bandung: Citra Adity Bakti, 1993). Cf. Diana Halim Koentjoro, Arti, Cara dan Fungsi Pengawasan Penyelenggaraan Pemerintahan ditinjau dari Optik Hukum Administrasi Negara dalam dimensi-dimensi Hukum Administrasi Negara (Yogyakarta: UII Press)
[475] See Carol Harlow, "Global Administrative Law: the quest for principles and values" (the European Journal of International Law Vol. 17 no. 1, 2007): 187-214. This principle applies not only to the European states Harlow refers to, but also to Indonesia. Cf. Adriaan Bedner, "Administrative Courts in Indonesia: a socio-legal study" (dissertation, Univ. Leiden, 2000) and Safri Nugraha (et al), Hukum Administrasi Negara (Jakarta: Badan Penerbit Fakultas Hukum UI, 2005).

on written-formal law (*wetmatig)* as well as *rechtmatig* (which refers to not only being grounded in written-formal law but also of being just).[476]

Permits may be issued orally or in written form. Only written permits, formally issued by government organs in the form of decrees will be dealt with here. In Indonesian administrative law, such written decrees or permits are known as "*beschikking*" or administrative decrees (*Keputusan Tata Usaha Negara*). The Administrative Court Law (5/1986, Art. 1(1) gives the following definition:

> "A government body or organ's legal action conferring certain rights and obligations to a natural or legal corporation, which is concrete, individual and final."

Accordingly, permits related to spatial management refer to a government decree (concrete, individual and final) which allows the permit holder to do things generally prohibited in the spatial planning law, any spatial plan or any land use plan.

Neither the SPL 1992 nor the SPL 2007 are clear about "spatial utilization" or "development location permits". They do not provide any guidance on what kinds of general prohibitions exist. The SPL 1992 only provides that all spatial utilization permits (*izin pemanfaatan ruang*) not granted in conformity (*yang tidak sesuai dengan*) with district spatial plans will be declared void (*batal*) by the district head (article 26). Art. 22 par.(4) further states that the district spatial plan (which is an elaboration of the provincial spatial plan) shall be the basis upon which development location permits (*perizinan or izin lokasi pembangunan*) are issued. The formal elucidation of this article stipulates that district spatial plans shall function as a reference for the district government:

(1) to decide on the allocation of land for development projects (*lokasi kegiatan pembangunan dalam memanfaatkan ruang*);
(2) to design appropriate development planning to the extent it relates to land use;
(3) to issue recommendations on spatial use (*pengarahan pemanfaatan ruang*).

Unfortunately, no further explanation is provided on what development location permits, spatial utilization permits and recommendations on spatial use consist of or the ways in which they relate or how they differ. The same applies to the SPL 2007, in spite of the fact

[476] Ibid.

that the SPL 2007 views permits as a government oversight instrument of similar importance as zoning, incentives/disincentives and (administrative-criminal) sanctions (Art. 35).

The SPL 2007 only provides that the authority to issue permits shall be regulated by the appropriate government level according to the existing law (Art. 37 par.(1)). This suggests that each government level holds the authority to provide spatial utilization and development location permits in controlling land use according to the appropriate spatial plan implemented for a certain area. This obviously refers to the distribution of spatial management powers by and between the central, provincial and district governments as regulated in GR 38/2007 and the SPL 2007. It renders the system more complex than it was under the SPL 1992, when permits could only be issued on the basis of district spatial plans, not on those formulated by the central and provincial governments.

However, the SPL 2007 is not consistent on this matter. Art. 26 par.(3) provides that:

> "The district spatial plan shall be the basis on which to process development location permit applications and develop land administration policies".

This suggests that, contrary to what has been described above, only district governments have the power to regulate land use and develop land administration policies. As a consequence, the provincial and central government have no control at all on how land will be utilized by districts. The importance of this becomes apparent in the spatial management of protected or conservation zones shared by two or more adjacent districts. As mentioned earlier, it also does not fit with the distribution of spatial management power between central, provincial and districts envisaged by the SPL 2007 and the existing spatial management practice. Such inconsistencies flow over into the permitting system as will be discussed below. Another problem with this power is the authority of the NLA and other government bodies to issue permits related to land use and control access to land.[477] As we will see later, these competing and overlapping authorities in practice create serious problems of legal certainty and tenure security.

[477] Government Regulation 16/2004 on land use planning (*penatagunaan tanah*); Presidential Regulation 10/2006 on the NLA and Presidential Decree 34/2003 on the Land National Policy. The last named regulation specifies which powers, 9 particular powers, are delegated to the districts.

### 7.3. Administrative Sanction and Penalization of Non-Compliance

The SPL 2007 contains more rules than the SPL 1992 regarding the situation that a spatial utilization permit is issued in violation of spatial plans. The main rule of Art. 37 par. (2) provides that permits violating spatial plans are to be revoked (*dibatalkan*) by the central or regional government that issued the permit. Art. 37 par. (3) moreover stipulates that a permit obtained without following the proper procedure shall be declared null and void (*batal demi hukum*), which means that it is assumed to have never existed. In that case all the actions based on the permit are in fact illegal. If permits are obtained following the official procedure but still violate existing spatial plans, they must be cancelled (Art. 37 par. 4) or, in the case they are not in compliance with spatial plans promulgated after the date of the permit, the relevant government (central or regional) may cancel the permit (Art. 37 par. 6). In both cases, a permit holder whose permit is cancelled may demand compensation, the procedure of which shall be provided in a government regulation (par.8).

Strikingly, no similar provision exists with regard to location permits. The consideration of Art. 60 provides society *(masyarakat*) with the right to submit an objection or file a cancellation petition for the cessation of development performed not in accordance with the spatial plan (par. e). Society also has the right to receive adequate compensation for damages suffered from development activities performed in accordance with spatial plans or file a compensation claim addressed to the government and/or permit holder in the case that development activities violating spatial plans result in damages (par. c and f).

Art. 37(7) reconfirms the importance of spatial plans by prohibiting government officials to grant permits in violation of such plans. Art. 73 even penalises such action. Remarkably, once again no comparable rule exists with regard to location permits. However, it would make no sense if the same principle regulating the issuance of spatial utilization permits would not apply *mutatis mutandis* to development location permits, so we must assume that this was the objective of the legislator.[478]

[478] Unfortunately, as earlier mentioned, existing Indonesian literature on spatial management does not pay much attention to the permitting system and issues related to the utilization of this system in the implementation of spatial plans. Even A. Hermanto Dardak, the former directorate general of spatial planning at the Ministry of Public Works pays scant attention to the role of permits in the implementation and enforcement of spatial plans. See: A. Hermanto Dardak, Menata Ruang Nusantara: Geostrategi Abad 21, Menuju Masyarakat Sejahtera. (Jakarta: LKSPI Press, 2008). In comparison, the *Dewan Perwakilan Daerah* (regional representative board) of the Indonesian Parliament, paid more attention to the general failure of the SPL 2007 to be implemented. See their report as summarized in: "Disimpulkan, UU Penataan Ruang Tidak Implementatif", 22 June 2010, (www://dpd.go.id/2010/06/, last accessed 27/04/2011).

The central role of permits as a government oversight mechanism for securing compliance with spatial plans is also underscored by Art. 61 which determines that every person is under the legal obligation to:

a. Comply with spatial plans duly enacted by all government levels;
b. Utilize land in accordance with spatial utilization permits (*izin pemanfaatan ruang*) as granted by appropriate government agencies;
c. Comply with all requirements set out in the above permit;
d. Allow public access to areas declared as public property (*milik umum*) by law.

Violation of these rules constitutes a criminal offence (Arts. 69-72). Perhaps for this reason the legislator has provided an exhaustive list, whereas one can think of other forms of violation as well, such as violation of existing building codes or zoning. The Elucidation provides a brief explanation regarding the meaning of these particular legal obligations. Here, the term "compliance" means that every person is under the legal obligation to acquire spatial utilization permits issued by the appropriate government agency before using land in accordance with its allocated function and the conditions established by the permit. "Access" is meant to guarantee the public's free access to public areas. A brief explanation on the criteria of public areas is also provided: they must be allocated for general public use and enjoyment (e.g. beaches, water springs) or serve as connecting roads to public areas.

Violations may also be followed by administrative sanctions comprising of (Art. 62-63):

1. Written reprimands;
2. Temporary termination of activities;
3. Temporary termination of public services;
4. Closure of (business or development) site;
5. Revocation and cancellation of license;
6. Demolition of constructions;
7. Rehabilitation of land;
8. Fines.

The next article (Art. 64) makes the use of these sanctions dependent on the promulgation of government regulations providing the procedure for imposing such sanctions. Additionally, individuals suffering damages from the implementation of spatial plans have the right to sue the perpetrators before the civil court to obtain compensation (Art. 66). The same right to

sue has been mentioned earlier in Art. 60 but specifically in the context that damages result from violation of the spatial plan.

In fact, criminalization of non-compliance with spatial plans at the district level had been introduced earlier by Bandung district. The Bandung Spatial Plan (PD 4/2004) determines, rather vaguely, that every violation to the rules in this district regulation could be penalized with a maximum imprisonment (*pidana kurungan*) of 3 months or a fine of up to five million rupiahs. The next paragraph determines that violations of spatial plans causing environmental pollution/damage or threatening the public interest (*mengancam kepentingan umum*) shall be punished in accordance with the prevailing law, in this case the Environmental Management Act (EMA) 32/2009, earlier 23/1997 or any other law on environmental protection.

While in principle it should be valued that non-compliance with spatial plans, violations of the spatial planning permit and its conditions, and the hindering of access to certain public areas are considered criminal offences, one may wonder whether the wordings of these are sufficiently clear to meet the legality principle.[479] The main problem is that the criminal court has to evaluate the legality of a permit awarded by a public administrative body or whether certain conditions attached to the permit have been fulfilled, as well as whether the crime committed has resulted in a serious threat to the environment or public interest. As this is not the expertise of a criminal court it may lead to problems of interpretation.[480]

A related question is whether criminal law is a suitable mechanism to address the complex social and economic concerns inherent in land use or acquisition. As suggested by Nawawi, criminal law should rather be used sparingly, as it cannot take into account the wider government concerns in such complex fields as land management.[481] Most land owners or occupants in urban kampongs or slum areas cannot afford to build their houses in compliance with spatial plans, zoning regulations and building codes, all of which consist moreover of

[479] On the legality principle see J. Remmelink.Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia (Jakarta: PT Gramedia Pustaka Utama), pp. 355-358. See also Fajrimei A Gofar, "Asas Legalitas dalam Rancangan KUHP" (position paper advokasi RUU KUHP Seri #1) (Jakarta: Elsam, 2005).

[480] Cf. M.G. Faure, J.C. Oudijk & D. Schaffmeister (eds), Kekhawatiran Masa Kini: Pemikiran Mengenai Hukum Pidana Lingkungan Dalam Teori dan Praktiek", (Bandung: Citra Aditya Bakti, 1994). Particularly, Chapter 1 on the enforcement of environmental law through civil law, administrative law and criminal law and Chapter 2 on the impact of environmental criminal law to administrative law, pp. 1-130.

[481] Barda Nawawi Arief, Kapita Selekta Hukum Pidana (Bandung: Citra Aditya Bakti, 2003) especially Chapter II (the use of penal sanctions in administrative law).

technical norms alien to them.[482] To automatically regard them as criminals fit to suffer punishment would result in gross injustice. Criminal law certainly cannot remedy social-economic or politic structural deficits which make such crimes possible in the first place.[483]

We will now return to the question as to what constitutes a spatial utilization permit or a location permit as mentioned in the SPL 1992 and 2007. Is it just one or a collection of permits related to land acquisition and land use? And what permits related to land acquisition and land use are issued in legal practice?

### 7.4. Spatial Utilization Permit(s) and Development Location Permit(s) in the SPL

Neither the SPL 1992 nor the SPL 2007 provides a clear answer to the above questions. The SPL 2007 attributes the power to determine which permits are created as part of the spatial planning oversight mechanism to the central, provincial and district governments within their individual jurisdictions (Art. 37). This has resulted in a complex network of permits and binding recommendations[484] controlling access to land and regulating land use. This situation is exacerbated by the fact that these jurisdictions are seldom clear. For instance, the Bandung Spatial Plan (PD 4/2004) determines that spatial utilization permits refer to government efforts at regulating activities which have the potential to violate spatial and development plans, and, consequently, may go against the public interest (Art. 1 par.(42)). They include permits related to location, quality of space, land use, intensity of land use, technical rules regarding construction and the satisfaction of all other infra-structure related requirements (*kelengkapan prasarana*), in accordance with the prevailing law, *adat* law and custom (Art. 1 par.(43)). Development location permits are not mentioned at all. I therefore suggest that we now take a closer look at which permits, even those officially unrelated to existing spatial plans, are used in legal practice to regulate and monitor access to and use of land.

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[482] One of the causes of this problem seems that many developing countries have adopted rules suited for developed/industrialized countries with different physical, climatological and social environments. Such codes have often been inappropriate and have increased development costs substantially, making it difficult in particular low income groups to afford housing built to legal building standards. See further: Unescap, "Urban land policies for the uninitiated" (http://www.unescap.org/huset/land_policies/index.htm) last visited 11/14/05.

[483] Barda Nawawi, Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana (Bandung: Citra Aditya Bakti, 1998), pp.41-47.

[484] Such as the environmental impact assessment and the traffic impact assessment .

## 7.5. Permits in Spatial Management

### 7.5.1. Controlling Access to Land and Restrictions to Land Use

As indicated earlier in Chapter 4, two permits are related to control and monitor access to land: the permit-in-principle (*persetujuan or izin prinsip*) and the site/location permit (*izin lokasi*). Both permits were introduced and gained in importance as part of the open-door policy initiated in the early 1980s to promote industrialization and reduce Indonesia's dependency on natural resource exploitation. They were outcomes of the policy to make it easier to obtain land for private commercial enterprises, for which a separate procedure was established.[485]

These two permits were also central to the New Order's housing and settlement development program, and to the large scale 'housing industry', including the establishment of new towns (self-contained or dependent) around and adjacent to major cities such as Jakarta, Bandung, Semarang, Surabaya, Makassar and Medan.[486] Adrian, working for an estate management of a new self- contained town (Kota Baru Parahyangan) on the outskirts of Bandung, concedes that:[487]

> "The most important permits to be acquired from the government are the permit-in-principle and the site permit. With that in hand, access to land is secured. The same permits indicate a guarantee that proposed land use had been approved and declared to be in conformity of existing laws"

Other permits related to land use only become important after land has been acquired on the basis of these two permits.

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[485] Ifdhal Kasim and Endang Suhendar, "Kebijakan Pertanahan Orde Baru: Mengabaikan Keadilan Demi Pertumbuhan Ekonomi" in Noer Fauzi (ed), Tanah dan Pembangunan: Risalah dari Konferensi INFID ke-10 (Jakarta: Pustaka Sinar Harapan, 1997), pp. 97-170.

[486] Cosmas Batubara, Kebijaksanaan dan Strategi Pembangunan Perumahan Rakyat (Jakarta: Kantor Menpera, 1986) & from the same author, Kebijaksanaan Pembangunan Perumahan Nasional: Sebuah Sumbang Saran (Jakarta: Kantor Menpera, 1987); Djoko Sujarto, Kinerja dan Dampak Tata Ruang dalam Pembangunan KotaBaru: Studi Kasus Kota Terpadu Bumi Bekasi Baru, unpublished doctoral dissertation, ITB-Bandung, 1993.

[487] Personal communication, Bandung (Kota Baru Parahyangan) 20 April 2005. Similar views were voiced by Tigor Sinaga, the vice head of West Java branch of Real-Estate Indonesia during an interview, 25 May 2005 and by an ex-Bupati of Bekasi. Lieut.Col of the Army (ret.), Djamhari (1995-1997) and other government officials at the district and provincial levels interviewed separately during this study.

### 7.5.2. 'Permits-in-principle'

During the New Order, investors had to obtain an 'investment–approval-in-principle' (*persetujuan prinsip penanaman modal*) from the President. Approval meant that the proposed business activity was in conformity with the "Negative Investment List" (*Daftar Investasi Negatif*)[488] and that the investors were eligible for preferential treatment. This included tax breaks and government support in controlling and facilitating access to natural (and agrarian) resources.[489]

In 1976, the Ministry of Home Affair promulgated a regulation allowing investors to use land acquisition procedures hitherto reserved for government development projects. [490] Art. 1 of this 1976 ministerial regulation stated that:

> "Land release (*pembebasan tanah*) by private corporations in the interest of development projects in support of public interest and social facilities may be performed using the procedure established in Chapter I, II and IV of the Ministry of Home Affairs Regulation 15/1975."

Linking the idea of development with economic growth and investment blurred the distinction between the public and private realms. Purely commercial concerns could easily be "in the public interest" by arguing that they promoted national development (*pembangunan nasional*) and economic growth (*pertumbuhan ekonomi*).[491] Thus already in the late 1970s, the investment-approval-in-principle signified government support for investors to acquire land and even clear land in the public interest.

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[488] One important factor influencing the investment climate has been the List of Negative Investment. This list is regularly evaluated and updated. See Presidential Decree 96/2000 and 118 (2000).

[489] The most recent is Presidential Decree 127/2001 on economic activities reserved for small-middle scale businesses (*bidang-bidang yang dicadangkan untuk UKM*) and business activities declared open for middle large-scale business with the obligation to form partnerships with small scale businesses (*bidang yang terbuka untuk usaha menengah dan besar dengan kewajiban bermitra*).

[490] MHAR 2/1976 on the use of land acquisition procedure for government interest by private corporations (*penggunaan acara pembebasan tanah untuk kepentingan pemerintah bagi pembebasan tanah oleh pihak swasta*).

[491] See also People's Consultative Assembly (PCA) Decree 2/1988 (Broad Guidelines of State Policies).

However, only in the late 1980s did the 'investment–approval-in-principle' become a preliminary permit, pending the issuance of a business permit (*izin usaha industri*). The permit allowed companies to begin preparatory work (i.e. acquiring land to establish factories, offices and other amenities)[492]. Thus, it became linked to the site permit (*izin lokasi*) created by the National Land Agency in 1992. In other words, any company applying for a location permit had to first obtain an 'investment–approval-in-principle'. The procedure now looked as follows. If the business proposal fell outside the negative list, the investor could proceed by requesting a confirmation letter to be issued by the governor on the future site of the project. After receiving confirmation on the availability of land from the governor, he could request a permit-in-principle (*izin or persetujuan prinsip*). The governor should then issue the site permit enabling the applicant to start the land acquisition process on the site allocated.

Another permit referred to as permit-in-principle (*izin prinsip*) is the one issued by separate ministries or their branch offices at the provincial (*kantor wilyayah*) and district levels (*kantor departemen*) (or after 1999 by the office (*dinas*) of the district government). For instance, if one wanted to establish a hotel to accommodate tourism, the Ministry of Tourism or its branch office had to issue a permit-in-principle. Such business proposals must comply with the relevant sector's short or long term work plan, in this case a tourism development master plan (*rencana induk pengembangan pariwisata*),[493] made at the national or regional level. This step was required before a permanent business permit (*izin usaha tetap*) could be issued by the Ministry of Trade and Industry (or after 1999), by the district office for trade or industry. Just as the investment–approval-in-principle issued in case of foreign/domestic investment, this permit was also required for land acquisition.

It is not clear whether foreign and domestic investment companies had to apply for both preliminary permits. The fact that these permits operated under totally different regimes

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[492] See Presidential Decree 33/1992 (revoking 54/1977) on investment (*tata cara penanaman modal*). It served at the same time as a temporary permit to initiate business activities *(izin usaha sementara*)

[493] Thus PT. Dam Utama Sakti Prima, a real-estate/housing construction company, acquired a *persetujuan prinsip* and subsequently two *izin lokasi* before and after 1999 based on the government's consideration that their plan to develop the north Bandung area concurred with existing *rencana induk pengembangan pariwisata Propinsi Jawa Barat*. Another company, wishing to develop an abandoned dairy farm in Lembang (a sub-district of the Bandung District) acquired a similar approval before deciding on the development of an integrated tourism area or tourist resort near and around the Bosscha observatory. See Joan Hardjono, "Local Government and Environmental Conservation in West Java", in Budy P. Resosudarmo (eds.), The Politics and Economics of Indonesia's Natural Resources, (Singapore: Institute of Southeast Asian Studies, 2006), pp. 217-227. It should be noted that this article does not mention the *persetujuan prinsip*.

suggests that this was indeed the case. Those I interviewed for this study could not clarify the matter, but only referred generally to the need of a 'permit-in-principle' for obtaining site permits, without further specifying. The fact is that both permits served similar purposes: approval of the kind of commercial activity to be conducted or the investment to be made. Such duplicity, which for investors only means red-tape bureaucracy and additional transaction costs, should be avoided. Moreover, for the sake of clarity, one permit must be clear on what action is actually sanctioned. The permit holder should not hold a multi-functional permit which allows the establishment of a particular business enterprise and at the same time enables the private-commercial enterprise to conduct land acquisition. For that purpose, another permit using a similar name has been invented.

The permit-in-principle (*persetujuan prinsip*) should not be confused with a third preliminary permit, which was directly related to the approval to reserve land for investment by the Governor and thus to the implementation of the provincial spatial plan. Pursuant to NLA Regulation 3/1992, a so-called land reservation (*pencadangan tanah*) was a preliminary permit to later acquire land for investment purposes in accordance with the existing provincial spatial plan (art.1). Together with a recommendation issued by the district head/mayor approving the proposed land reservation, this reservation was required before an investor could apply for a site permit to the NLA.

In summary, it is extremely difficult to keep track of the various forms of preliminary permits, in particular because all of them are referred to colloquially as permits-in-principle. A number of initiatives have been taken at the national and district level to overcome this problem. In 1992, for instance, the Bandung district government decided to fuse all of these permits, including the mayor's recommendation, into one permit for land utilization (*izin pemanfaatan tanah*)[494] in order to simplify the land acquisition process and thus create a more favourable investment climate at the district level. However, this did not really work out well. The NLA did not regard itself as subordinate to the jurisdiction of the districts and continued to issue land reservations. Moreover, in 1998 the central government overruled the district government, exempting foreign/domestic investment companies from the

[494] Perda (PD) Kabupaten Bandung 5/1992 as amended by 2/2001 (*izin pemanfaatan tanah di kabupaten Bandung*). Article 1(7) explains that this *izin pemanfaatan tanah* should be considered as *izin peruntukan penggunaan tanah* as mentioned in GR 20/1997 and accordingly replaced and fused with the *persetujuan prinsip, izin lokasi and fatwa rencana pengarahan lokasi* (advies planning) issued by the Urban Planning Service (*dinas tata kota*).

obligation to acquire an approval-in–principle (*persetujuan prinsip*) from provincial and district governments.[495] This removed the legal basis from the Bandung district policy.

After 1999, each region seemed to be at liberty to rename the preliminary permits or create similar permits to meet specific development needs on the basis of their newly acquired autonomy.[496] The Bandung municipal government decided to return to the old system of different preliminary permits. To obtain a site permit, the applicant needed first: an investment permit-in-principle (*persetujuan prinsip penanaman modal*) signed by the President in case of foreign investment or signed by the Head of the BKPM in case of domestic investment, an approval-in-principle signed by the head of the sectoral office concerned (now always at the level of the municipality), a letter of approval for spatial utilization (*surat persetujuan pemanfaatan ruang*) as issued by the TKPRD (regional spatial planning coordinating team; headed by the municipal Bappeda); and another approval -in principle (*surat persetujuan prinsip)* signed by the mayor.[497]

The bewildering variety of preliminary permits should not obscure that in the end their result remained the same: They indicate government approval for the type of business or investment activity to be established and for acquiring land for this purpose.

### 7.5.3. The Legal Basis of the Site Permit

The site permit was first introduced in 1974 as a permit allowing investors or private companies to acquire land by virtue of the Ministry of Home Affair Regulation 5/1974. The development of this permit has been closely related to changing regulations regarding land acquisition in the public interest. Presidential Decree 55/1993 (on land acquisition for development projects in the public interest) revoked Regulations of the Minister of Home

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[495] See Presidential Instruction 22/1998 (*tentang penghapusan kewajiban memiliki rekomendasi instansi teknis dalam permohonan persetujuan penanaman modal*) and 23/1998 (*tentang penghapusan ketentuan kewajiban memiliki surat persetujuan prinsip dalam pelaksanaan realisasi penanaman modal di daerah*).

[496] For example, the Mayor of Semarang allowed for the reclamation of wetlands within its administrative territory on the basis of a *persetujuan pemanfaatan lahan perairan dan pelaksanaan reklamasi di kawasan perairan marina* (approval for land reclamation of wetlands and marshes) for the construction of a new residential area. See Dwi P. Sasongko, "Marina dalam regulasi Amdal" (Suara Merdeka, 9 june 2005).

[497] Particulars on this letter have been obtained from field research to the Bappeda-Kota Bandung (May 2005). The official working there (Neneng) was willing to provide me with two specimens of this *Persetujuan Pemanfaatan Ruang* (one granted in regard to a request to build houses on private land within the North Bandung Area; and Letter dated 16 June 2008 signed by the mayor of Bandung, Dada Rosada; and a draft letter in regard to a request to construct Hotel Grand Asirila in South Bandung).

Affairs 15/1975 and 2/1976. This created two distinctly different procedures for land acquisition for private-commercial purposes viz. land acquisition in the public interest. Both procedures, however, advance the same principles: that land may be acquired only on the basis of direct negotiation with land owners and that land occupants shall be offered compensation.[498]

New rules for private companies were laid down in Ministry of Agraria/Head of NLA Regulation 3/1992 and concerned the procedure for them to reserve land, site permits and the issuance, extension and renewal of land titles. (*tata cara bagi perusahaan untuk memperoleh pencadangan tanah, izin lokasi, pemberian, perpanjangan dan pembaharuan hak atas tanah serta penerbitan sertifikatnya*). It was mainly an outcome of the central government's continued economic policy to attract foreign and domestic investment, although sustained critique on the old regulations' use for commercial purposes was also important. The central government could use the new procedure to boost the growth of industrial estates companies (*perusahaan kawasan industri*)[499] and other investment initiatives.[500] Central to the new policy was the site permit, provided by the central government. This strongly suggests that the site permit was specifically created as a tool for the central government to control and regulate investor access to land.

[498] Art. 8 par.(5) of Presidential Decree 55/1993 stipulated that the land assembly committee (*panitia pengadaan tanah*) shall negotiate (*mengadakan musyawarah*) with land owners and the government agency needing land in determining the form and/or amount of compensation. Ministry of Agraria/Head of NLA Regulation 2/1999 on site permits stipulates in Art. 8 par.(1) that its holder may free land (*membebaskan tanah*) within the location indicated in the permit on the basis of consent (*berdasarkan kesepakatan*) with land occupants either through a sell-purchase act, by offering a compensation, land consolidation or other legal options available.

[499] The importance of the site permit for the government development policy in the industry sector was underscored the Presidential Decree 53/1989 (*on kawasan industri*) as amended by 41/1996. For a detailed regulation on how companies may acquire *persetujuan prinsip* and *izin lokasi* see Ministry of Industry's Decree 291/M/SK/10/1989 as amended by 230/M/SK/10/1993 (*tata cara perizinan dan standar teknis kawasan industri*). Other relevant regulations in this context were the Ministry of Home Affair Regulation 3/1984 on the procedure to reserve land and the granting of land rights, building permits and nuisance permits for foreign and domestic investment companies (*tata cara penyediaan tanah dan pemberian hak atas tanah, pemberian izin bangunan serta izin gangguan bagi perusahan-perusahaan yang mengadakan penanaman modal menurut undang-undang no. 1/1967 dan undang-undang no. 6/1968*).

[500] For example, hotels-tourist resorts, real-estate or housing construction companies. Important for companies specializing in the construction of residential areas pertinent is GR 30 of 1999 on *Kawasan Siap Bangun* (area prepared for construction) and *Lingkungan Siap Bangun* (environment prepared for construction).

On the basis of NLA Regulation 3/1992,[501] a firm required a reservation permit to reserve land for investment (*izin pencadangan tanah)* before it could submit any site permit application.[502] As discussed in the previous section, this permit was provided by the governor and may be compared to the approval to reserve land for development (*surat) persetujuan penggunaan tanah untuk pembangunan* or a reservation permit *(surat konfirmasi pencadangan tanah)* (a confirmation letter to reserve land for specific commercial-investment purposes). This power to grant or withhold prior consent indicated that it was the Governor who thus held the authority to evaluate whether a project was in accordance with the provincial plan. This moreover indicated that the governor was allowed to override district spatial plans.

However, in 1993 the government adopted the Policy Package of 23 October 1993 and the NLA decided to get rid of this authority of the governor. The NLA central office instructed its provincial and district branch offices that investors no longer needed prior approval (the reservation permit above) from the governor before requesting a site and a business permit.[503] In other words, since 1993, even provincial governments lost their power to control land use within their jurisdiction. Apparently, the NLA, which answers directly to the President, held enough power to curtail the governor's authority in this way. Legally speaking this was incorrect, since the governor received his power in an NLA regulation and saw it removed in a letter of instruction.

In summary, since 1993 companies wishing to acquire land could directly submit applications to obtain preliminary permits and site permits from the central government (in practice meaning BKPM, NLA and sometimes sectoral agencies. This centralized system assured that provincial and district governments could be forced to support development

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[501] This NLA regulation was amended a number of times. The first by Ministry of Agraria/Head of NLA Regulation 2/1993 on the procedure for acquiring site permits and land rights for foreign/domestic investment companies (*tentang tata cara memperoleh izin lokasi dan hak atas tanah bagi perusahaan dalam rangka penanaman modal*) and its implementing regulation: Ministry of Agraria/Head of NLA Decision 22/1993 on the directives for the implementation of the Ministry of Agraria/Head of NLA Regulation 2/1993 (*tentang Petunjuk Pelaksanaan Pemberian izin Lokasi dalam Rangka Pelaksanaan Peraturan Menteri Agraria/ Kepala Pertanahan Nasional Nomor 2 Tahun 1993)*. It was again amended in 1999 by the Ministry of Agraria/Head of NLA Regulation 2/1999 (*tentang Izin Lokasi*).

[502] The Ministry of Agraria/Head of NLA regulation 3/1992 defines *pencadangan tanah* as a permit-in-principle approving land reservation for investment purposes in accordance with provincial spatial planning.

[503] Letter no. 5000-3302.A. dated 1 November 1993 (concerning government policy package of 23 October 1993. By virtue of this letter, companies would be required only to obtain a permit-in-principle *(izin/persetujuan penanaman modal*) from the BKPM or another government agency and then apply for a site permit.

programs initiated by private commercial enterprises, especially those that enjoy the central government's full support. Ultimately, the central government could now control spatial utilization for investment purposes through the NLA.

### 7.5.4. The Site Permit

Minister of Agraria/Head of NLA Regulation 2/1999 defines the site permit (*izin lokasi*) as a permit allowing private investors to acquire land (*izin pengadaan tanah demi kepentingan investasi*). This means that the investor has the exclusive right to negotiate with the owners about a transfer of their title. Thus, its functions are to transfer title (*izin pemindahan hak*) and allow land use for the investment purpose (*izin menggunakan tanah guna keperluan penanaman modal*). The site permit -which actually comprises three different permits- is hence primarily an instrument to control investor access to land and allow its acquisition and utilization. Unsurprisingly, the site permit, deviating from the basic principle that a permit should serve one clear objective, is generally considered to serve five or six direct objectives: (1) guiding the location of private investment and development projects; (2) co-ordinating government and private sector development activities; (3) facilitating land acquisition for development projects; (4) facilitating land acquisition for large-scale development projects, including new towns and industrial estate projects; and (5) attaching appropriate project development conditions to permits for land acquisition;[504] (6) encouraging contact between developers and government officials at an early stage and enabling officials to monitor and shape development.[505]

This means that the site permit has not been designed primarily to enable government agencies at the district level to control and monitor land use in a sustainable manner. In fact the central government, i.e. the NLA, could and has been known to override district spatial plans. Accordingly, districts habitually were forced to strike compromises and accommodate the needs of investors enjoying a site permit. By controlling who gets a site permit, the NLA – not the districts - effectively decides who gets access to land. Initially, only a few districts

[504] Tommy Firman, "Major issues in Indonesia's urban land development", (Land Use Policy 21 (2004) 347-355. Archers seems to disregard or downplay the permit-in-principle's connection to the site permit.
[505] Bruce W. Ferguson and Michael L. Hoffman, "Land Markets and the Effect of Regulation on Formal-Sector Development in Urban Indonesia"(Review of Urban and Regional Development Studies 5, (1993)).

held spatial plans and even those were not always interested in implementing them.[506] But this has changed, as will be discussed in the next section.

The site permit is also an important tool in preventing abusive practices of large-scale landholding by determining the maximum amount of land per site permit (Art. 4).[507] It also prevents land speculation, by setting a time limit: [508] a site permit for land amounting to twenty-five to fifty hectares is valid for a maximum of two years and three years for land larger than fifty hectares (extendable for one year if the land acquired already amounts to 50% of the land appointed in the permit).

In fact this rule has not been strictly applied, on the contrary. Parent companies have simply ordered their subsidiary companies to request a number of site permits within one area or in different regions. This was the legal loophole through which quite a number of conglomerates (including the family of the late president Soeharto) acquired land throughout Indonesia.[509] Moreover, while Indonesian land law has recognized a number of restrictions on land ownership and conveyance,[510] the necessary implementing regulations have never been made.[511] In other words, no effective statutory limitation exists on land ownership. This

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[506] As discussed in the previous chapters, practice shows that during the 1970-1999, only a few municipalities (cities proper) developed town plans. Most district governments assumed wrongly that they did not have any obligation to do so. This changed after the 1999 regional government law (RGL) determined that spatial management becomes attributed power of districts.

[507] This point was also made by Professor Maria W. Soemardjono when discussing the possibility of altogether abolishing the *izin lokasi-izin prinsip* scheme in controlling land acquisition (4 July 2007). See also Maria W. Soemardjono, "Tanah, dari rakyat, oleh rakyat dan untuk rakyat" (Media Transparansi Edisi 2/November 1998).

[508] Personal communication of Prof. Maria W. Soemardjono, UGM-Yogyakarta, June 7, 2007.

[509] Allegedly, the Soeharto family owned or otherwise controlled more than a hundred or more parcels of land spread in more than 15 districts, totaling 50 thousand hectares, in West Java alone. See: Soeharto, Sang Maharaja Tanah, (xpos, no. 44/I/31 Oktober-November 98); "Tuan Tanah Meneer Soeharto (Xpos, No 43/I/24. 30 October 1998). Cf. George J. Aditjondro, "Yayasan-Yayasan Soeharto" (http://www.tempointeraktif.com, 14/05/2004. Sihombing reports that Hutomo Mandala Putra owned, controlled or had access to 22 parcels of land amounting to 57.532 meter² (or 5.75 hectares) (according to NLA Jakarta Office Letter dated 15 November 2000). BF. Sihombing, Evolusi Kebijakan Pertanahan dalam Hukum Tanah Indonesia, (Jakarta: Toko Buku Agung), p. 21. Another example is land holding under control of a luxurious housing construction company, Pantai Indah Kapuk, amounting to 800 hectares in North Jakarta (Properti Indonesia no. 2/1994).

[510] Art. 7, 10 and 17 of the BAL mention the need to limit land ownership in regard to agriculture. This land-reform principle was further elaborated in Law 56/Prp/1960 on the Limit to Agricultural Land (*penetapan luas tanah pertanian*). Article 12 of this Law stipulates that: "the maximum amount one may own for residence or other development purpose shall be further regulated in a government regulation". Until now, no such Government Regulation has been promulgated

[511] Maria S.W. Sumardjono, Tanah dalam Perspektif Hak Ekonomi, Sosial dan Budaya, (Jakarta: Kompas, 2008), pp.4-5; pp. 13-18.

weakness in the land law and in the practice of issuing site permits has created wide opportunities for massive land hoarding and rampant land speculation.

Strikingly, most authors pay little or no attention to how site permits should relate to spatial management, even if in the words of the Director General of Spatial Planning of the National Planning Board the site permit is to be understood as "(…) an implementing tool in spatial management and part of the investment policy (…)" [512] A central issue here is who issues the site permit. If such power is held at another level than the one responsible for drawing up and implementing spatial planning, the chance that the site permit will effectively be used for this purpose is very small indeed. Until 1999 such convergence was absent, since the site permit was provided by the NLA. However, in that year this power was delegated to the district level.

### 7.5.5. Transfer of the power to issue site permits from the NLA to the Districts

The Regional Government Law (RGL) of 1999 and its implementing regulation determined that land affairs should be fully devolved to the districts.[513] However, strong opposition from the NLA, which considered the districts as unfit for this task,[514] resulted in a reduction of the transfer of authority to nine specific powers only – and thus to a violation of the RGL 1999. However, among the powers transferred was the authority to receive and process site permit applications (Presidential Decree 34/2003).[515]

The districts could either directly implement Ministry of Agraria/Head of NLA Regulation 2/93 jo. 2/1999 and related implementing directives (Minister of Agraria Decree 22/1993) or adapt it according to local conditions by promulgating a district implementing regulation.

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[512] Direktorat Tata Ruang dan Pertanahan Bappenas, "Pemberian Ijin Lokasi dan Hak atas Tanah Berbasis Tata Ruang" paper in www.bktrn.org, last accessed August 25, 2003.

[513] For a general discussion on the advantages and disadvantages of the policy of devolving land affairs authority to the district see: Thomas Rieger, Faisal Djalal, Edwar St. Pamuncak, Rusdi Ramon, Bedjo Soewardi, Decentralizing Indonesia's Land Administration System: Are Local Government and Land Offices Ready? Evidence from 27 Districts, Final Report-Commissioned by World Bank Jakarta Office-BPN, Jakarta June 2001.

[514] For further discussion on this topic see : Craig C. Thorburn, "The plot thickens: Land administration and policy in post-New Order Indonesia"(Asia Pacific Viewpoint, Vol. 45, no. I, April 2004): pp. 39-49.

[515] It concerns the following authorities/tasks: 1. processing site permits applications; 2. land acquisition performed in the public interest; 3. settlements of conflicts related to '*tanah garapan*'; 4. settlement of disputes in relation to compensation; 5. deciding on the location and recipients of land redistribution programs; 6. settlement of issues regarding customary communal land claims; 7. deciding on issues related to empty/vacant land; 8. granting rights to clear open access land; and 9. land use planning (*perencanaan penggunaan tanah wilayah kabupaten/kota*), which refers to various permits controlling land use.

The Bandung municipality opted for the latter solution, promulgating Mayoral Decree 170/1999 on the procedure to obtain site permits. Still, in this manner the authority to process site permit applications became a delegated authority rather than one attributed by law to the districts, while the NLA held on to its monopoly on land administration.[516]

None the less, whether they directly implemented the NLA regulation on site permits or transformed these rules into district regulation, the districts now determine when and how investors may access land and they have directly controlled land use through other permits since 2003. The question is whether the districts have been capable to perform these tasks in a proper manner, and whether they have been willing to account for their decisions related to land use.

### 7.5.6. The Site Permit and District Spatial Planning

The benefits accruing from the authority to provide site permits could only be fully realized if districts possessed spatial plans made according the SPL 1992 or 2007, since the request for a site permit may only be approved if the proposed land use concurs with existing spatial plans.[517] Both the SPL 1992 (Art. 26) and the SPL 2007 (Art. 26 jo. 37) hold that:

1. Spatial utilization permits should not be granted if their application violates existing district spatial plan;
2. The district government is authorized to process, approve and reject spatial utilization permit applications;
3. In the absence of a district spatial plan, no spatial utilization permit should be issued at all.

This indicates that district government at all times held the power to control access to land and monitor its use through the use of spatial utilization permits or development location permits. Nonetheless, this has not been the case. First, the invention of various permits-in-principle and lastly the site permit indicates that it had been the central government not the districts which determine access to land. Secondly, in practice deviation from this rule has been common.

[516] See Presidential Regulation 10/2006 on the NLA.
[517] Art. 1 NLA Regulation 3/1992 & Art. 3 NLA Regulation 2/1999.

This can at least partly be explained by the fact that the permit-in-principle and site permits mechanism were primarily invented to induce investment (and accommodate private initiatives in the housing and industry sectors) rather than controlling land use in general. Since development planning -general and sectoral- and spatial plans are mutually constitutive in legal practice, quite a number of site permits applications have been approved that are consistent with sectoral development planning (industry, tourism, etc), but not with spatial plans. Granting permits in disregard of spatial plans has become accepted legal practice and has undercut the authority of spatial plans to regulate access and monitor land utilization in the public interest.[518]

Even until 2003, the district of Bandung had a number of spatial plans for small towns within the district (*rencana umum tata ruang kota*)[519] but no comprehensive district spatial plan. This did not deter the NLA or the Bandung district government from processing site permit applications in violation of existing spatial plans[520] or even allowing land acquisition for the construction of new towns (satellites).[521] Likewise, districts did not consider the legal obligation to adjust existing district spatial plans to the SPL 2007 as a reason to stop granting permits-in-principle or site permits before such adjustments had been made.

The situation has been aggravated by the fact that by 2002 only 8.1% of existing district actually had a spatial plan, a situation which has continued to exist.[522] It consequently means

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[518] The site permit granted on the basis of a sectoral plan to develop tourism industry in the North Bandung Area discussed in Chapter 8 provides one example of such practice.

[519] Perda Kabupaten Bandung 12/1990 (RUTRK Soreang; 1989-2009); Perda Kabupaten Bandung 13/1990 (RUTRK Soreang; 1989 -2009); Perda Kabupaten Bandung 19/1990 (RUTRK Soreang); Perda Kabupaten Bandung 47/1990 (RUTRK Padalarang; 1995-2004); Perda Kabupaten Bandung 48/1995 (RUTK administrasi Cimahi; 1995-2004); & Perda Kabupaten II Bandung 49/1995 (RUTRK Lembang; 1995-2004). In 2001, these were replaced by Perda 1/2001 Bandung district spatial planning (RTRW; 2001-2010).

[520] In the 1980s, the NLA issued numerous site permits allowing corporations to appropriate land in the supposed "conservation area" of North Bandung and subsequently convert land reserved to function as a water catchment area for residential purposes. In the 1986-1996 period there were 105 developers controlling an area amounting to 3,611 hectares. Between 1996 and 2001, the NLA issued 7 other site permits for 7 developers covering 228 hectares of land. The district of Bandung issued permits covering 128 ha for 5 developers in 2001-2004. See. "KBU Dinyatakan Status Quo" (Pikiran Rakyat, 5 August 2006).

[521] Interview: Andrian Budi Kusumah (from PT. Bella Putera Intiland. At the time, he was employed in the town management of Kota Baru Bumi Parahyangan); August 2004. The absence of the Bandung district plan as a required reference in considering the company's application to acquire land was solved through the adoption of an architectural and environmental development plan (*rencana tata bangunan dan lingkungan*) signed by the company and the district government of Bandung.

[522] Status Raperda RTRW, Dirjen Penataan Ruang Kementrian PU (www.pu.go.id, last accessed 12/12/ 2005). Cf. "500 Pemda Langgar UU Penataan Ruang", http://fpks.or.id/2010/12, last accessed 27/04/2011. Commission V of the Indonesian parliament reported that in 2011, out of 33 provinces, only 6 provinces had updated their

that site permits had been and continued to be issued, in the absence of a district spatial plan, in reference to sectoral development planning instead. Huge tourism development projects initiated by investors may then be justified by referring to the official development planning. Conversion of agricultural land in Bali and Lombok since the late 1980s to accommodate the tourism industry may well have been made possible by such a system.[523]

By emphasising the importance of a top-down synchronized spatial planning system, the SPL 2007 may have further slowed down the adoption of district spatial plans. Provincial governments had to wait to make or adjust their spatial plans until the central government had promulgated a national spatial plan and determined which areas were to be assigned as national special zones. The districts in their turn had to wait for the provincial general and detailed spatial plans. Subsequently, provincial and district spatial plans had to be synchronized with the central government's forest planning, at the risk of annulment of provincial and district spatial plans by the Minister of Home Affairs.[524]

Hence, quite a number of years will pass before the ideal system as envisaged by the SPL 2007 will have been established.[525] As a result, site permits will continue to be issued without any district spatial plan in place and provincial spatial plans or even existing development planning will continue to be used as guidance for regulating access to land instead.

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spatial plan, i.e. South Sulawesi, Bali, NTB, Lampung, Yogyakarta and Central Java. Out of 398 districts (*kabupaten*) only 12 (including Bandung district) had revised and promulgated their spatial plans and from 93 municipalities (*kota*) only 3 possess perda RTRW. See also: "Masih Sedikit Daerah yang Punya Perda Tata Ruang" (hukumonline, 9/11/2010).

[523] At the time I worked as a junior associate lawyer at Makarim & Taira Law Office at Jakarta (1989) my first assignment was to assist an Indonesian corporation (allegedly owned by Bambang Triatmodjo, one of the late President Soeharto's sons) in acquiring land in Lombok to be developed into an integrated tourism area. A similar situation could be observed in Bali too, where corporations based in Jakarta acquired land in Bali for tourism development. See also note no. 44.

[524] See: "Banyak Perda Bermasalah Demi Genjot PAD" (17 July 2008) available at www.hukum.jogja.go.di/?pilih+lihat&id=44. This article reports that 53% of provincial/district regulations on spatial planning were made in violation of the Forestry Law (41/1999). Especially problematic is the practice by which district governments appropriate forest land through spatial planning and deem themselves authorized to convert forest land for other uses (*alih fungsi lahan hutan*) on this basis. The same article suggests that since 2002, quite a number of regional regulations (*783 perda and one quanun*) have been invalidated by the Ministry of Home Affairs on account of being found in violation of higher ranking laws related to tax and spatial planning laws. Cf. Hetifah Siswanda, "Menata Ruang untuk Semua (Kompas, 19 November 2008) which describes a similar disarray regarding spatial planning in an urban context.

[525] Art. 14 of Law 32/2004 (regional government law) stipulates that spatial planning, utilization and oversight is a government duty attributed to the districts. However, GR 38/2007 (Art. 7) stipulates that spatial planning is a basic service (*pelayanan dasar*) which must be performed by both provincial and district governments.

### 7.5.7. The Site Permit as a Tool to Control Access to Land and Tenure Security

The site permit is of particular importance for the tenure security of investors and land owners. Tenure security has been defined as protection of landholders against involuntary removal from the land on which they reside, unless through due process of law, including payment of adequate compensation.[526] As mentioned earlier, the site permit awards the permit holder with the exclusive right to negotiate with land owners, buy them out and prevent others from doing the same. On account of this "policy," the permit holder enjoys a monopolistic right to clear the land within the site permit area from competing land claims (*membebaskan tanah dalam areal izin lokasi*) on the basis of agreement (*kesepakatan*) with land owners.[527] The site permit is thus supposed to provide tenure security for both investors and land occupants. For investors it comes in the sense of an exclusive right to negotiate, and for land occupants in the form of a guarantee that they will receive fair treatment and adequate compensation. The influence of the site permit on the tenure security of those holding the land that will be the subject of negotiation between individual and communal land owners – disregarding the formality of ownership – will now be considered.

The NLA or the municipal/district land service (*dinas pertanahan*) considers that the location of the land named in a site permit is under 'status quo' (*ditempatkan di bawah status quo*). This means that land owners are not allowed to engage in any legal transactions transferring rights or titles to persons or legal bodies other than the site permit holder. This interpretation has been contested by legal scholars and government officials, who argue that a site permit, which is valid for two to three years and can be extended for another year, should not diminish a land owner's right to request a land title certificate or sell and transfer legal ownership to a third party.[528]

Such a status quo has a serious impact on the tenure security of those holding the land concerned. This applies in particular to those who only hold an unregistered land title, because the NLA has informally instructed the public officials concerned[529] not to accept and

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[526] Supra, note no. 4.

[527] Art. 8 par.(1). Ministry of Agraria/Head of NLA Regulation 2/1999.

[528] See Maria S.W Sumardjono (2008), op.cit, p. 40-41. She argues that such a function of the site permit is based on a misperception but is commonplace and apparently accepted as law. A site permit in practice will result in the "*lonceng kematian*" (death) of any land rights as owner or land holder since they cannot transfer ownership to a third party, obtain land titling or request a renewal of land titling. See also, Arie S. Hutagalung, Tebaran Pemikiran Seputar Masalah Hukum Tanah, (Jakarta: LPHI 2005:25-27).

[529] There are two kinds of *Pejabat Pembuat Akta Tanah* (public officials holding monopoly on the drawing of land certificates). One is the *camat* (head of the sub-district) by virtue of his official capacity. The other is a notary public who has been appointed as PPAT. Both are closely supervised by the NLA.

process any request for land certificates.[530] There is no official support for such a practice. Art. 8 (2) of Ministry of Agraria/Head of NLA Regulation 2/1999 expressly states that:

> "A land owner's right to submit an application for land registration shall not be diminished by the existence of any site permit".

None the less, this practice is generally condoned in order to speed up the land acquisition process. The NLA in such cases does not recognise unregistered legal claims to land ownership and declares the land concerned under direct control of the state. The NLA will then award a long lease to the site permit holder.[531] The extra bonus from the NLA's perspective is that any site permit that is successfully implemented increases the area of land formally titled by the NLA. Such land becomes fully taxable.[532]

The above unofficial policy has created the wrong impression that those holding unregistered land only have the right to negotiate the type and amount of compensation. They are not in a position at all to refuse the offer by the site permit holder. This is also evident from the 'socialization process' by which the site permit holder informs land owners of the development project as endorsed by the government.

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[530] Cf. the attached letter of the Minister of Agraria/head of the NLA dated 10 February 1999 to Regulation 2/1999. In this letter, he writes that this understanding of the site permit is based on a misperception. He further argues that the refusal of NLA officers to process land certification applications reflects no official policy but is the decision of an individual officer (see also Art. 8 of the said Regulation). Using this strategy, the NLA (and later the district government) have publicly denied that any site permit they issued violates the right of land owners to freely dispose of their land (personal communication: Reny SH, notary public, working in Bandung, 1 August 2005).

[531] This part of site permit*'*role was specifically mentioned during an interview with two government officials working at the BPN Regional Office of West Java, sub-section of planning and supervision (Budi Karyo & Wijoyo; 1 September 2004). In any case, the NLA possesses the exclusive authority to upgrade or downgrade land title claims. The legal term is "*perubahan hak*". Corporations, in contrast with individuals, may not enjoy *hak milik* (ownership) on land. They may be granted a master HGB (*HGB Induk*), HGU or Hak Pengelolaan. In 1999, the State Ministry of Agraria/Head of the BPN issued Regulation 9/1999 on the procedure for the granting and cancellation of rights on state land and the right to manage (*tata cara pemberian dan pembatalan hak atas tanah Negara dan Hak Pengelolaan*) .

[532] Property taxes (including land and building tax: *pajak bumi bangunan*) are the most important source of revenue for the districts. The distribution of revenue collected by the districts follows well-established rules found in Law 12/1994 (property tax law): 90% of collected payment will be redistributed to the regions: it will be shared by the district government (64.8%) and the provincial government (16.2%). Only 10% will be retained by the central government. The district government allocates 9% for collecting cost, including 0.75% for costs incurred in organizing meetings with officials from the sub-districts or villages tasked with the responsibility to distribute the SPPT (*surat pemberitahuan pajak terutang*: tax invoice) to individual taxpayers.

The seriousness of this issue is underscored by the number of unregistered landholdings. Less than 40% of all land in Indonesia, excluding forest area, has been registered,[533] despite efforts to legalize land assets though systematic land titling schemes, sponsored by the World Bank and AusAid.[534] Another problem is that registers tend to lose their accuracy. As explained by Wallace:[535]

> "(t)he preference for informality in land transactions runs into land registration, so that derivative, or post-registration, transactions are not always formalized or registered, especially in the case of land that is not of high commercial value. (…) the sustainability of the registration system is also substantially prejudiced by official transaction taxes and other fees collected through BPN. These are officially about 20% of the value of each sale".

This is reinforced by Indonesia's adhering to a 'negative' system of registration, meaning that legal ownership can be challenged by a third party without time limits at any point in

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[533] The legal basis for systematic land titling was the Minister of Agraria/Head of NLA Regulation 1/1995. This regulation was revoked and replaced by Ministry of Agraria/Head of NLA Regulation 3/1995 on Systematic Land Titling. The current process and procedures for systematic land titling is to be found in GR 24/1997 on land registration. In 2004, only 32% of land was titled in Indonesia (tanahkoe.tripod.com 2004). A different source indicates that only 20% was titled, most of it in urban areas (Kompas 5 Oktober 2004). Soemardjito, a government official working at NLA Jakarta, has revealed that less than 40% of land throughout Indonesia was titled in 2009, mostly on Java and in urban areas (personal communication, March 25, 2009). Cf. Noer Fauzi, "Land Titles do not equal agrarian reform", http://insideindonesia.org/content/view/1247/47/ last accessed 20 October 2009. He asserts that: "Under the leadership of Dr. Joyo Winoto, BPN has pursued a process of 'legalising' land assets through accelerating the certification of land titles at an astonishing rate. The volume of government sponsored land 'legalisation' has risen sharply. In 2004, before Joyo was appointed, the BPN issued full legal titles for only 269,902 land holdings. By 2008, the total had reached 2,172,507 – an increase of over 800 per cent. Adding cases for which individuals, groups, and businesses paid their own processing fees brings the total to 4,627,039 property titles certified.

[534] See: Smeru, 2002, An Impact Evaluation of Systematic Land Titling under the Land Administration Project (LAP). Research Report, June. In the report that was written that as a result, the LAP, as performed by the NLA during the 1994-2001 period, successfully registered formal land ownership claims of 1.2 million parcels on Java alone. Moreover, according to a press release, AusAid (2001), the NLA successfully registered 1.8 million parcels during that period and provided tenurial security to more than 10 million people in doing so.

[535] Wallace, Jude, Indonesia Land Law in Timothy Lindsey (ed.) Indonesia's Law & Society, 2nd ed. (Sydney: Federal Press, 2006) p. 214. Informality is also likely to be caused by the costly and complex procedures regulating transfer of title. The cost for registering property transfer is fixed. However, parties to a sell and purchase agreement must pay a fixed transfer charge of Rp. 25,000.00 + 4% charge. Buyers must pay 5% (BPHTB and valued added tax). For first time registration, the cost may be more than 3% (of the land market price) as the buyer (new owner) must pay additional taxes (2-5%, excluding property tax). Transfer cost does not reach 1% excluding property tax. The established charge in registering land mortgage (and having the encumbrance registered in the land certificate) is also less than 1%.

Indonesia.[536] Anecdotal evidence suggests that even people who have held a land certificate for more than 10 years may lose their claim on this land because a third party has successfully proven before a court to have a legal claim based on informal transactions.[537]

Informality and legal uncertainty of land ownership will thus be the rule rather than the exception for many years to come. Any analysis regarding people's tenurial security should take this into consideration.[538] Furthermore, the site permit itself operates along such a formal-informal continuum. It certainly works to the advantage of the government and private investors. Those holding unregistered land titles have not even a formal right to compensation. None the less, The NLA regulation on the site permit expressly puts the site permit holder under the legal obligation to indemnify both formal and informal title holders.[539]

In summary, individual land owners or communities (in urban areas as well as remote areas including indigenous people), without legal title, generally possess very weak legal bargaining position. Their claim on land is not taken seriously as a state recognized right to be accorded legal protection[540]. In cases where local communities are more knowledgeable about state law and have access to legal and political support to advance their interests this stance has sometimes been successfully contested, but altogether these are exceptions. Compensation is usually marked as a voluntary gift or charity (*uang kerohiman, uang*

[536] Art. 32 GR 24/1997 (on land registration) stipulates that the time limit is 5 years after the issuance of the land certificate. However, this statutory time limit may be extended ad infinitum in legal practice.

[537] See "Kontroversi Sengketa Tanah Meruya: Kasus Puluhan Tahun Yang Belum Menemui Titik Terang Penyelesaian" (Analisis Mingguan Perhimpunan Pendidikan Demokrasi, Vol. 1 no. 9 May, 2007).

[538] UN-Habitat, Handbook on Best Practices: Security of Tenure and Access to Land, Implementation of the Habitat Agenda (Nairobi: UN Habitat, 2003), p. 2. The UN Habitat suggests that "any analysis of security of tenure and rights to lands needs to take account that firstly, there are a range of land rights in most countries which occupy a continuum, with a number of such rights occurring on the same site or plot. Secondly, it is not possible to separate the different type of land rights into those that are legal and those that are illegal. Rather there is a range of informal-formal (illegal-legal) types along a continuum, with some settlements being more illegal by comparison than others".

[539] Art. 6(9) (transfer of rights on land) Ministry of Agraria/Head of the NLA 2/1993.

[540] As argued by Gunanegara, this power to annul or otherwise award land rights (ownership, the right to building etc.) to persons or corporations is based on the state's right to control as embodied in Art. 33(3) of the 1945 Constitution. This award or annulment is performed by issuing a government decision (*beschikking*) as legal evidence of legal title and the recognition that such claims will be accorded protection. In this context, one should read the constitutional guarantee (Article 18H par. 4 of the 1945 Constitution) which stipulates that everyone is entitled to possession and must be accorded protection from arbitrary dispossession (*setiap orang berhak mempunyai hak milik pribadi dan hak milik tersebut tidak boleh diambilalih secara sewenang-wenang oleh siapapun*). See Gunanegara, op. cit. p. 14-15.

*pengusiran*)[541] and in some cases, informal title holders are simply evicted without compensation at all.[542]

### 7.5.8. The Socialization Process: Investors' Tendency to (Mis) Represent the Public Interest

Site permit holders always portray themselves as representing the public interest and enjoying full government support for this reason. Particularly relevant for housing construction companies or real estate developers is GR 80/1999 on making land ready for residential development.[543]The introduction to this regulation suggests that having a site permit indicates that a housing construction company is performing a public duty: providing the government with new residential areas or houses for the general population. Moreover, all site permits include a list of public duties transferred to the permit holder, such as a promise to finance or construct mosques, public schools or other public facilities.[544] The site permit thus serves as a public-private arrangement or partnership for development, and as a government tool to coordinate land development programs.

Unsurprisingly, private investment initiatives are often presented as part of the government's official development program (or at least as being beneficial to the local economy and population) during the so-called "socialization process". This is especially the case with housing and construction projects. Government support for the land acquisition process is often expressed as well during the public consultations prior to the issuance of a site permit. These consultations are obligatory (Art. 6(5) NLA Regulation 2/1999) and serve to disseminate information about the investment project, including its land acquisition plan. They also enable the developer to collect relevant data from the community and to discuss alternative forms of compensation with local land owners.

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[541] Ariadi Suryo Ringoringo from the Poor People's Association/Serikat Rakyat Miskin Indonesia points out that site permit holders in Jakarta mostly paid compensation out of charity rather than legal obligation to land occupants (personal communication, 28 January 2009).

[542] Bede Sheppard, Leonard H. Sandler Fellow, "Condemned Communities" a Human Right Watch Report available at http://www.hrg.org (last accessed 1/27/2010)

[543] Government Regulation 80/1999 on ready to use residential areas or environment (*Kawasan Siap Bangun dan Lingkungan Siap Bangun yang Berdiri Sendiri*).

[544] They are seldom enumerated and included explicitly in the site permit, but nevertheless form some of the terms and conditions of the site permit. Djamhari, a former bupati of Bekasi, has justified this practice by arguing that the district government seldom has the financial capability to fulfil its duty of bringing development to the local population. Similar arguments have been made by Tigor Sinaga from REI and other legal officers employed by housing construction companies interviewed for this study. The same system has been found underlying the *persetujuan pemanfaatan ruang* discussed earlier in note 36.

While the socialization process seems intended to give the local population a voice, it only allows for discussions regarding the amount or form of compensation. It cannot prevent the government from providing a site permit.[545] The same applies to the letter of approval for spatial utilization (*surat persetujuan pemanfaatan ruang*), which in Bandung precedes the site permit procedure.[546] Here, the applicant is likewise under the obligation to inform land occupants in the neighbourhood about the development plan, but they are not allowed much space to contest the plan. As one government official in Cimahi working at the city planning service confided:[547]

> "In case of an individual raising an objection, the government has the obligation to check and if need be mediate (…) in most cases objections shall be considered as merely a technical matter and dealt with accordingly"

The choice of words in both the site permit and spatial utilization approval indicates that this socialization process does not involve a genuine effort to encourage public participation in investment plans that may radically alter land use patterns. Rather on the contrary, it tends to reduce the negotiation process into a one-way discussion to which land owners and inhabitants of the area concerned are invited by sub-district heads (or heads of the village government) to be informed of the future project. This also indicates the government's tendency to view investment initiatives as automatically being in the public interest or at least to see them as part of its strategy to bring development to the people. This has resulted in a misreading of the principle embodied in Article 6 of the BAL: that every plot of land has a social function now means that land owners must be willing at all times to surrender their rights for the sake of development.[548]

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[545] Cf. Rosie Campbell, Keith Dowding and Peter John, "Modelling the exit—voice trade-off: social capital and responses to public service" (paper for the 'Workshop on structural equation modelling: applications in the social sciences', Centre for Democracy and Elections, University of Manchester, February 28 2007).

[546] See Note. 36.

[547] Nandang from the Dinas Tata Kota Pemkot Cimahi, personal communication 25 February 2004.

[548] See Gunanegara, op.cit, p. 27-28. See also Maria S.W. Soemardjono, "Dalih untuk umum masih dipakai untuk menggusur rakyat" (Kompas on line 27 March 1996); and Dedi Sinaga, UU Pengambilalihan tanah perlu dicabut (Tempointerakif 6 Februari 2001).

## 7.6. After land acquisition: land use for development

The situation described above works to the advantage of site permits holders when negotiating compensation. As a result, small rural or urban kampong landowners partially subsidize the cost of urban development initiated by private commercial companies,[549] while the government can increase the amount of formally titled land with the support of site permit holders.

The next part discusses how the site permit functions in practice, starting with the terms and conditions that are a part of all permits regulating land use at the district level.

### 7.6.1. Terms and Conditions of the Site Permit

After 2003, the district governments, rather than the NLA, have begun to determine what requirements are to be appended to all applications for site permits. This has been a very important shift in terms of granting districts concrete responsibilities regarding the control of access to land and the monitoring of its use. It also signifies the rising importance of district development and spatial planning. Districts, not the central or provincial government as in the past, now possess full authority to direct, control and monitor land use for development. Whether that means greater government accountability and tenurial security for land occupants remains to be seen.

In Bandung all site permit applicants now need to include:

(1) A permit-in-principle issued by the president, BKPM or an organ/service at the district level;
(2) A rough map/sketch of the land to be acquired;
(3) A description of the project;
(4) Spatial Utilization Approval (*persetujuan pemanfaatan ruang*) from the District TKPRD (which includes the district head, and heads of all government service or boards).[550]
(5) A letter guaranteeing applicants' willingness to compensate or resettle land owners;

[549] Cf. Raymond J. Struyk, Michael L. Hoffman and Harold M. Katsura, The Market for Shelter in Indonesian Cities, (Washington: Urban Institute Press, 1990). Esp. Chapter V (land acquisition and titling for BTN-financed housing), pp. 121-156.

[550] A team (committee) to be established by the provincial and district governments on the basis of a ministerial instruction (Home Affairs 19/1996 *tentang pedoman koordinasi penataan ruang daerah tingkat I dan tingkat II* as amended by Ministerial Decree 147/2004 (*pedoman koordinasi penataan ruang daerah*).

(6) A letter from land owners whose land has been acquired affirming their willingness to release any claims on land or transfer such claims to the site permit applicant.

This list shows that all district services or boards, as well as the TKPRD must have approved of the proposed investment plan and its location, but also that the applicant must guarantee that the land acquisition will be performed on a voluntary basis and that land holders will be adequately compensated. For land already acquired, the district government demands written evidence from land owners affirming their willingness to transfer title to the site permit holder. Such letters may be presented in the form of a notarial sale and purchase deed, or an agreement to release title in the event that the land was not titled.

The applicant's promise to acquire land on a voluntary basis also functions as a guarantee that it will be free of competing property right claims. Only after having acquired all of the land may an applicant proceed to request the NLA for a title. This protects the NLA against any third party claims contesting the legality of the land acquisition on the basis of a site permit. The site permit also contains a special clause for this purpose. The government may protect itself likewise from future legal claims filed by a third party for environmental damage caused by project development, putting all accountability on the holder of the site permit.

Other requirements may be appended from time to time and adjusted to specific conditions. For instance, a site permit awarded by the Mayor of Bandung in 2000 indicates that the applicant must also submit:

(7) A description of the integrated tourism project development (*uraian rencana proyek pembangunan kawasan wisata terpadu*) ;
(8) A statement signed by the applicant that he will abide by the law.

A different site permit issued by the Mayor of Bandung in 2003[551] states that the applicant must also submit:

(1) a description of the project proposal (*uraian rencana proyek pembangunan perumahan*);

[551] Mayor of Bandung Decree No. 595.82/Jep.1132-Huk/2003 on the site permit granted to PT. Bumi Antapani Mas (pemberian izin lokasi untuk keperluan pembangunan perumahan atas nama Pt. Bumi Antapani Mas beralamat di Jl. Cicalengka Raya no. 27 Bandung seluas ± 55/000 m ² (±5.5. ha) terletak di Kelurahan Antapani, Kecamatan Cicadas Kota Bandung).

(2) a spatial utilization approval from the District Development Planning Board (Bappeda) (*persetujuan pemanfaatan ruang*);
(3) a consideration concerning proposed land use (*pertimbangan aspek tata guna tanah*) issued by the NLA regional office or the land service of the municipality.

The above list indicates that the municipality is now in full control of the procedure. More importantly it signifies that any site permit approved should be in line with the district spatial plan or any other land use plan. On the other hand, confusingly, the above list mentions two kinds of spatial utilization approval, one to be granted by the TKPRD and another by the Bappeda, suggesting that applicants must request the same letter from two different institutions. This might not be case as the TKPRD is actually an ad hoc committee working under the auspices of the Bappeda. The request in practice is addressed to the Bappeda but discussed within the TKPRD.

Ironically, the site permits I obtained in this case [552] carry no reference to any district detailed spatial plan or zoning regulations. Nonetheless, eventually the spatial utilization approval was issued by the TKPRD and Bappeda, after its constituent services found that the project met the requirements for land use in general (city planning service: *dinas tata kota*), specific technical requirements for the construction of buildings and detailed land use (building service: *dinas bangunan*), the allocation of open green areas and public parks (public parks services: *dinas pertamanan*), and others.

It is noteworthy that the NLA -which lost its power to issue site permits in 2003- was brought back into the procedure to submit its considerations regarding aspects of land use. To what extent its role differs from the spatial utilization approval as issued by the both the TKPRD and Bappeda is rather vague. Apparently, the NLA uses its own land use plan (*rencana tata guna tanah*) for this purpose.[553] In sum, investors requiring land must seek

[552] Cf. note 36.

[553] One of the NLA's competencies concerns the determination of land use planning (*penatagunaan tanah*), i.e. the implementation of the Government Regulation on land use (No. 16/2004; *penatagunaan tanah*). A comparable permit is necessary before a government institution can acquire land, but carries a different name, "approval on the land acquisition of the land requested" (*persetujuan penetapan lokasi pengadaan tanah*) (see Mayor of Bandung decree No. 593.82/Kep.158-Huk/2006 (persetujuan penetapan lokasi pengadaan tanah untuk kepentingan pengembangan sarana olahraga terbuka di lingkungan kampus politeknik manufaktur Bandung Kelurahan Cigadung Kota Bandung seluas 6.093 m2).
Soemardjito from NLA Jakarta explained that *penatagunaan tanah* is actually the same as spatial planning (personal communication, March 25, 2009). An earlier visit (July 2004) to the Bandung land office also revealed that *tata guna tanah* is similar to spatial management (*tata ruang*: planning, implementation and oversight). Unfortunately, existing literature on the subject pays no attention to this difference between spatial

approval from the NLA, which has competencies regarding land use planning (*penatagunaan tanah*), the mayor, who approves applications for permits-in-principle and site permit, and the Bappeda or TKPRD, which comprises of various district government agencies that have competencies regarding the control and monitoring of actual land use. All of these actors hold similar responsibilities in controlling land use, which tend to overlap. Regardless, the permit seeker must still seek the endorsement of these three different government bodies.

Both the permit-in-principle and the site permit thus refer to terms and conditions related to how land should be acquired and used. These references concern obligations to the earlier promises, that permit holders should compensate land owners pursuant to the prevailing law. Another important obligation in the site permit is that the permit holder is to adapt his or her site/land use plan (the project's blueprint) to the district's detailed spatial plan. Such adjustments are to be made by the permit holder after the NLA has measured the land acquired and provided the permit holder a long lease for building purposes (*hak guna bangunan*) or one for cultivation (*hak guna usaha*). On this point specific conditions are enclosed in the site permit to ensure this obligation's fulfilment. They demand that the future land holder obtains other permits or binding recommendations from other services, particularly the public works, city planning and building services. In the process, other specific conditions may be required by these services. In other words, a number of additional permits and recommendations play a role controlling actual land use by the site permit holder. This suggests that how land shall be used by the permit holder is fully controlled and monitored by the district government.

However, the Bandung municipality has inserted a number of exoneration clauses into such permits. In the case that man-made disaster occurs – the direct or indirect result of actions taken by the permit holder - the government agency issuing the permit or recommendation shall be exonerated from any legal responsibility. It is the permit holder who will be liable and fully responsible to pay compensation for damages caused to third parties or to rehabilitate the environment damaged or polluted by its actions. In fact, the government thus renounces its "public" duty to plan, implement and control land use, which violates the SPL 1992 and SPL 2007. The result is that these permits grant dispensation to the permit holder to stray from spatial plans or zoning regulations and thus legalize illegal land use. Moreover, the municipality may even provide specific permits for the same purpose.

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management (*tata ruang*) and land use planning (*penatagunaan tanah*). See H. Muchsin & Imam Koeswahyono, op.cit.

### 7.6.2. Land Use Permits at the District Level[554]

Once the land for a project has been acquired, the site permit ceases to play a direct role in determining land use. Other government agencies regulating specific aspect of land use take over. The most important permits at this stage are:

(1) The land clearance permit (*izin pematangan lahan*), allowing land owners to clear land in preparation for its intended use; issued by the *Bina Marga* section of the Public Work Service (*Dinas Pekerjaan Umum*);
(2) A recommendation regarding flood containment (*Peil Banjir*) issued by the Water Management Service (*Dinas Pengairan*);
(3) The land use allocation permit (*izin peruntukan penggunaan tanah/IPPT*), issued by the City Planning Service (*Dinas Tata Kota*), which allows land owners to use land for its intended purpose in compliance with existing detailed planning and zoning regulations;
(4) The construction permit (*izin mendirikan bangunan/IMB*), which ensures that buildings shall be constructed according to the prevailing building codes, issued by the Building Service *(Dinas Bangunan*).

In order to obtain the IPPT and IMB in particular, applicants must first acquire a number of other recommendations related to land use and zoning regulations, such as a directive on land use (*fatwa tata guna tanah*) issued by the District Branch Office of the NLA (*Kantor Pertanahan*) and site plan approval (*advies planning*) issued by the City Planning Service. Given their non-binding nature, these two are typical "recommendations on spatial use" (*pengarahan pemanfaatan ruang*) or investment location (*arahan lokasi investasi)* as mentioned in the SPL 1992 (Art. 22 par(3c)). The SPL 2007, on the other hand, only mentions zoning, licensing, incentives and disincentives, and the use of legal sanctions as instruments available to the government to control spatial use (Art. 35). However, the use of "recommendations on spatial use or investment location" has been used none the less. In this manner each step in the process of gaining permission for land use seems to be closely monitored by the district government by means of permits and recommendations.

[554] This section describes the situation as it is in Bandung Municipality. The Bandung Municipal Government uses 28 permits to control business or investment initiatives. Only a few relate to land acquisition and land use. Other municipals or districts may have a different number and perhaps kind of permits. Certainly after 1999, districts enjoyed greater freedom in regulating access to natural resources and determining the region's investment climate by the creation of a number of permits. Cf. P. Agung Pambudi & Neil McCulloch et al, op.cit.

### 7.6.3. Permits as Exemptions to the General Rule

A first example of a specific permit providing an exemption from restrictions on land use is the permit for the adjustment of the course, form, dimension and slope of waterways or rivers (*izin perubahan alur, bentuk, dimensi dan kemiringan dasar saluran/sungai*), better known as "the permit to correct the course of rivers" (*izin normalisasi sungai*). It allows the land owners to disregard the obligation to preserve and protect river basins and watersheds.[555] They may even be allowed to close down natural springs. Both areas are explicitly mentioned in the SPL 1992 and 2007 as conservation zones where use is restricted. As stated by an official working at the Bandung Public Works Service, the basic consideration underlying the granting of this particular permit is to allow land owners to maximize land use by correcting the natural meandering flow of rivers and avoid having to manage the 200 m² encircling natural springs.[556]

Another example is the land clearance permit (IPPT). The IPPT has been interpreted as allowing land owners to close down bothersome springs and lakes established for flood control or level off slopes not fit for development although they should be protected according to the SPL 2007. The permit is used to justify violations of other land use restrictions as well.[557] The same government official quoted above explained that such a practice was prompted by district government agencies' desire to avoid burdensome legal obligations in managing protected areas. He argued that most government agencies, particularly the Public Works Services (which includes the Water Management Service), do not have the technical capacity or financial means for this.

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[555] Ministry of Public Work Regulation 63/PRT/1993 (on the Management of Watersheds and River basins: *garis sempadan sungai, daerah manfaat sungai, penguasaan sungai dan bekas sungai*). Art. 4 stipulates that the power to determine watershed lines (*garis sempadan sungai*) shall be divided by and between the Minister of Public Works, districts and a special legal body (*badan hukum tertentu*). For rivers running through districts, the line will be determined minimally at 10 meter from the riverside of rivers with a depth of 3 meters; 15 meters for rivers with 3-20 meter depth; and 30 meters for rivers with a depth of more than 20 meters (Art. 8). Implementing the above, the Bandung municipal government issued Regulation 6/2002 which stipulates that the watershed line shall be determined at 4 meters in case of buildings and 2 meter in case of a fence constructed along the watershed in very dense urban residential areas. A quick look at the Cikapundung watershed and other small rivers in Bandung reveals that this rule had been mostly ignored by society in general.

[556] Rosiman Karmono, personal communication, Bandung, August 10, 2004.

[557] As pointed out by Abrar Prasodjo, a kampong resident living adjacent a real-estate company. (21 August 2004). This company closed down a natural spring found within its area. Similar examples are found in abundance in and around Bandung. Taufan from DPKLTS relates similar examples in which companies have disregarded general rules prohibiting use of protected areas (30 July 2004).

Similarly, the Nuisance Ordinance Permit (*Izin Undang-Undang Gangguan*)[558] , although originally intended to control land use by industries or other business enterprises, in practice has been used in such a way as granting a permit holder the right to convert the use of residential buildings into business premises in deviation of existing zoning regulation. In the case that one residential building within a residential zone had been successfully converted, others quickly follow. This trend had been behind the rapid conversion of residential areas around the city center of Bandung into a busy commercial and business area.[559] Likewise, the prohibition against the conversion of rice fields[560] has been bypassed by the issuance of a permit allowing the holder to do just that (*izin perubahan penggunaan tanah pertanian ke non-pertanian*). This permit is provided by the Agricultural Service (*dinas pertanian*) on behalf of the Mayor or District Head.

District governments may also use these means to liberate themselves from spatial plan restrictions. Perhaps the most extreme example is the Cimahi Municipality's 2001 decision to build a municipal office in the middle of an irrigated valley along the basin of the Cimahi River. This went completely against the spatial plan, which in other respects, however, was quite problematic itself: it labeled the conservation zone in North Bandung "under-developed land" and allocated it for housing and business.

Violations and digressions thus occur at different levels. At the lowest level we have seen that what should be considered illegal is justified by the introduction of a permit granting the holder dispensation from complying with a general rule. This has led to a situation where real estate developers, and governments themselves, are allowed to continuously disregard

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[558] The Nuisance Ordinance Permit (*UU Izin Gangguan*) S.1926: 226 as amended by S 1940: 14 as further elaborated in Perda Kota Bandung 27/2002 on the Nuisance Permit and Business Permit (*izin gangguan dan izin tempat usaha*).

[559] In previous spatial plans of Bandung, notably those made by T. Karstens, the area along and around Jl. Dipati Ukur, Ir. H. Juanda (Dago), Cihampelas and Sukajadi (major transportation roads in Bandung) had been preserved for residential purposes, schools and hospitals. Since the late 1980s and continuing today, a great number of residential houses has been converted into business offices, shopping centres, and restaurants. Investors apparently have not been inhibited by zoning regulations as they can use or misuse the nuisance ordinance permit, which requires a prior neighbour approval (*persetujuan tetangga*) before being approved, to exempt themselves from the obligation to establish commercial or business enterprises within a residential area. In practice, the neighbour approval has been assumed to be acquired by conducting a socialization process or sending a circular notification on the plan to the closest neighbours. Apart from that investors may also be exempted from zoning regulations by the use of IPPT, allowing them to use land in accordance with their investment plan. See note 93.

[560] Presidential Decree 53/1989 on Industrial Estates (amended by Decree 98/1993 and 41/1996) explicitly prohibits conversion of fertile and productive irrigated rice fields. A similar rule is found in the Circular Letter of Ministry of Agraria/Head of NLA 410-1851 & 460-3346 of 1994.

restrictions on land use. Making matters worse, most district governments do not allocate sufficient funds for monitoring whether land use is in accordance with spatial plans or even zoning and building regulations.[561] As a result, even if a clearly illegal situation exists chances are slim that something will be done about it.

### 7.6.4. Investors, not District Spatial Plans determine land use

This situation reinforces the wrongful, but deeply embedded, perception that he who acquires and physically controls land enjoys the freedom as to decide how best to use it. As Agus Setiawan, an in-house lawyer of a big real estate developing company in Bandung (PT. Setra Duta), argues:[562]

> "After you acquire and control the land, it is practically up to the company (or owner) how to use it. As a company your first priority must be to acquire and control the land (take physical possession). How you will actually use the land depends on how you deal with the appropriate governments controlling various permits and binding recommendations."

Tonison Ginting, representing a Tangerang based real-estate company, put it far more bluntly:[563]

> "According to the prevailing law this land is formally-legally ours. So we are free to decide how to best use our land. On what basis do they (the government and the people) demand that we cease to perform certain activities? This is our land".

[561] E.g. Sri Dewi Sartika, "Perubahan Fungsi Lahan di Dago dikaitkan dengan pemberian Ijin Peruntukan Penggunaan Lahan dan Ijin Mendirikan Bangunan" (unpublished paper, Bandung December 2007). This study was performed under my supervision. Cf. Rumiati Rosalina Tobing, "Evaluasi Penerapan Peraturan Daerah tentang Bangunan di Kota Bandung" (Bandung: Lembaga Penelitian Unpar, 2004/2005).

[562] Personal communication, Bandung 2 September 2005. Setiawan refused to let me review PT. Setra Duta's permits or other relevant legal documentation. Two other real estate companies repeatedly declined requests for interviews (Batununggal and Dago Pakar). Instead, I gathered information during field visits to these sites.

[563] Ginting made this statement in defence of his company's decision to close down a manmade lake, established by the local government as part of a water management system. See "Pengembang Terus Menguruk Situ Antap" (Kompas 2 Novermber 2009).

While the argument made in the second quote is clearly incorrect, it is true that spatial plans and zoning regulations have become malleable to the concrete needs of land owners by the use or misuse of permits, a perception shared by officials of Bandung Municipality.[564]

Equally worrisome is the perception commonly found among government officials and high and middle ranking employees working in the housing industry that land use permits are merely a sort of procedural afterthought without any real legal consequence. Permits and recommendations related to land acquisition and land use are perceived merely as revenue collection mechanisms. The complexity of obtaining permits and related recommendations reinforces this view. Teguh Satria, head of the central council (*dewan pusat*) of Real Estate Indonesia (the association of housing construction companies), unsurprisingly complained that:[565]

> "Heads of Districts or Mayors apparently perceive that housing construction companies must share their earnings with the government (*membagi keuntungan*). Developers even have to beg to obtain permits (*mengemis minta izin*)."

This suggests that the complexity of the permit and recommendation system mainly serves to fill the coffers of the municipal government, but it also alludes to the opportunities it opens for members of the bureaucracy and individual government officials to enrich themselves. Instead, the complexity and opaqueness of the permit system in spatial management is a breeding ground for corrupt practice and hinders the establishment of good governance in spatial management.

[564] As concluded by Sri Dewi Sartika, op.cit, on the basis of interviews with Aa Sutarna form the Building Service (19 September 2007) and Rosiman Karmono from the Urban Planning Service (28 September 2007). The same perception emerged from interviews I conducted with government officials (Bandung municipality and district and Cimahi) during the course of this study (2004-2010). Behind this lack of interest in using the IPPT (and nuisance ordinance permit) as instrument to prohibit land use not in accordance with spatial plans (and zoning regulations) has been the floating policy mentioned earlier in Chapter IV.

[565] "Pemda belum peduli perumahan: pengembang seharusnya dapat kemudahan (Kompas, 9 november 2009: 23).

## 7.7. Conclusion

There is no doubt that it is important for the general public to be aware of when permits pertaining to land acquisition and land use are issued and what their contents are. It is equally important to have clarity about the laws underlying such permits and what they allow the government to regulate by means of them. Only in this way can permits be an efficient tool to regulate spatial planning in the public interest.

In practice, however, we have seen that the licensing scheme relating to the spatial utilization permit is best understood as the embodiment of a negotiated agreement with conditions appended to the permits. A permit reflects the relative bargaining power of government officials on the one hand and private investors on the other – with generally little influence of other stakeholders or the general public. It seems as if the role of government officials in issuing permits is not so much to articulate the public interest as to arbitrate between the interests of different groups and legitimate certain interests and policy proposals.

This situation is partly caused by unclarity about the functions of the spatial utilization and development location permits. In fact, these two permits as mentioned in the SPL 1992 and SPL 2007 do not exist in that sense in legal practice. Instead, various government agencies from different levels have created their own permits and binding regulations that control access to land and restrict its use. Legal practice, especially in the housing and construction industry, shows that access to land is controlled by the government through the permit-in-principle and the site permit. Both permits are more related to investment policy than to spatial management. My research has demonstrated this for Bandung, but it is likely the case in most other cities in Indonesia as well. Many other permits have furthermore been created to control specific aspects of land use, but often for purposes going against the whole idea of spatial planning.

The sheer number and variety of permits and related binding recommendations makes it extremely difficult to trace which government agency should be held accountable in the event actual land use by investors violates spatial plans. The habitual use of certain permits to waive government responsibility, especially with regard to how a permit holder uses his land, adds to the confusion. Moreover, a complex network of permits and binding recommendations obscures the underlying public-private partnership to bring "development" to the people.

This situation shows an uncanny similarity with production sharing contracts in the oil and natural gas industry, work contracts in the mining industry and forest production permits in the forestry industry. A prominent feature of all of these negotiated agreements is the delegation of the authority to exploit natural resources to the permit holder *together* with the transfer of a number of government responsibilities. In Indonesia this kind of public-private partnership in the management of natural resources has an ideological underpinning in the idea of share-cropping or share tenancy.[566] Rondinelli argues that the reason for the government's dependency on the public-private partnership stems from the general observation that:[567]

> "Neither national nor local governments in most countries have sufficient budgetary resources to extend services and infrastructure or to subsidize inefficient state enterprises or agencies. (….) The current and projected revenue base of most municipalities is inadequate to finance capital improvements and associated operating cost … (and) many municipalities has large debt obligations, leaving little room for major new loans"

It is in the context of how permits and binding recommendations control access to land and regulate its use that spatial management influences people's tenurial security. In theory, land owners should look at spatial plans in order to know exactly which "development" plans might potentially impinge on their tenurial security. This implies that citizens must be aware of which spatial plans are applicable for a specific location at all times and which government agency holds the authority to regulate land use by issuing permits and binding recommendations regulating access to land or restricting its use. The difficulties related to how spatial plans 'protect the public interest' and preserve people's tenurial security in actual practice will be discussed more deeply in the next chapters. Part of this discussion will relate to how public accountability has been compromised in the public-private partnership underlying actual land use.

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[566] Cf. Moeliono, Tristam (2008) "The Right to Avail and Share-Cropping: Natural Resource Management in Indonesia", paper presented at the seminar, *Ten Years along Decentralization in Indonesia*, which was organized by the Faculty of Law Unika Atmadjaya-Jakarta, HuMa, Leiden University and Radboud (Nijmegen) University, 15-16 July 2008, Jakarta.

[567] Dennis A. Rondinelli, "Partnering for Development: Government-Private Sector Cooperation in Service Provision", paper presented before the Fourth Global Forum on Reinventing Government-Citizen, Business and Governments: Partnership for Development and Democracy, 11-23 September 2002, available at http://www.unpan.org/conf_globalforum02.asp, last accessed August 2, 2003.