

How to Help Landowners by Preliminary Expropriation

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SUMMARY

In Denmark there are strict rules as to what and when it is possible to expropriate land from private landowners. The strict rules are good for the landowners rights of property, but it has a disadvantage - the landowner may have to wait for several years from the first ideas of the new road are made until the expropriation process is finish, and the landowner again know the future of his property and maybe his home.

A few years ago the landowners, not able to sell there property to a normal marked price because of the plans of a new roads or other major infrastructural construction project, were given the new possibility of preliminary expropriation. But certain conditions have to be met, including the personal situation of the landowner. The preliminary expropriation is not provided by statute, but it is a possibility for the landowner and for the Danish Road Directory in order to help these landowners.

This paper describes the conditions which have to be met in order to carry out a preliminary expropriation. It also outlines the advantages and disadvantages of the new process and mentions the satisfaction studies among landowners affected by preliminary expropriation.

SUMMARY IN DANISH

I Danmark er der stramme regler for hvad og hvornår man kan ekspropriere ejendom fra private. Dette har den ulempe, at en grundejer kan komme til at vente i mange år før et større anlægsarbejde kan gennemføres.

For få år siden blev der åbnet mulighed for at de grundejere, som ikke er i stand til at sælge deres ejendom på grund af planlægningen af et større infrastrukturanlæg. Der er knyttet betingelser til en forlods overtagelse, blandt dem grundejerens personlige forhold. Der er ikke tale om en ret, men om en mulighed for Vejdirektoratet i Danmark at hjælpe de grundejere, der er kommet i klemme.

Der er i denne artikel beskrevet betingelserne, som skal opfyldes for at gennemføre en forlods ekspropriation. Den opridser også fordele og ulemper til denne nye procedure og omtaler de tilfredshedsundersøgelser som lodsejere, der har været berørt af forlods ekspropriation.

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1. INTRODUCTION TO THE PROBLEM

In connection with infrastructural construction projects, the landowners who must relinquish their property to the project are most often eager to sell as quickly as possible. This contrasts with the fact that it is not possible to expropriate at random – and just expropriate every property that is a part of the early plans of a major project. There are strict rules and limitations as to which purposes it is possible to expropriate. The normal rules of expropriation can put the landowner in a problematic economical situation for maybe many years.

Therefore has Denmark recently made it possible for landowners - under certain conditions - to have their property expropriated before it is strictly necessary after the normal set of rules. The conditions for an early or preliminary expropriation are:

- A necessity for the project
- Specific personal circumstances

This paper describes the conditions related to the infrastructural construction projects as they are carried out in Denmark and with the Danish State as the project owner. When carrying out municipal projects the rules are somewhat different, although the principles and the legal rights are the same. This paper will describe the conditions connected to building new and expanding existing state roads (primarily main highways)

To explain the problem it is necessary to describe the process from idea to realisation of the infrastructural construction projects. In addition, it is necessary to describe the process of expropriation.

Advantages and disadvantages to this process are also described as well as the satisfaction surveys carried out among the landowners.

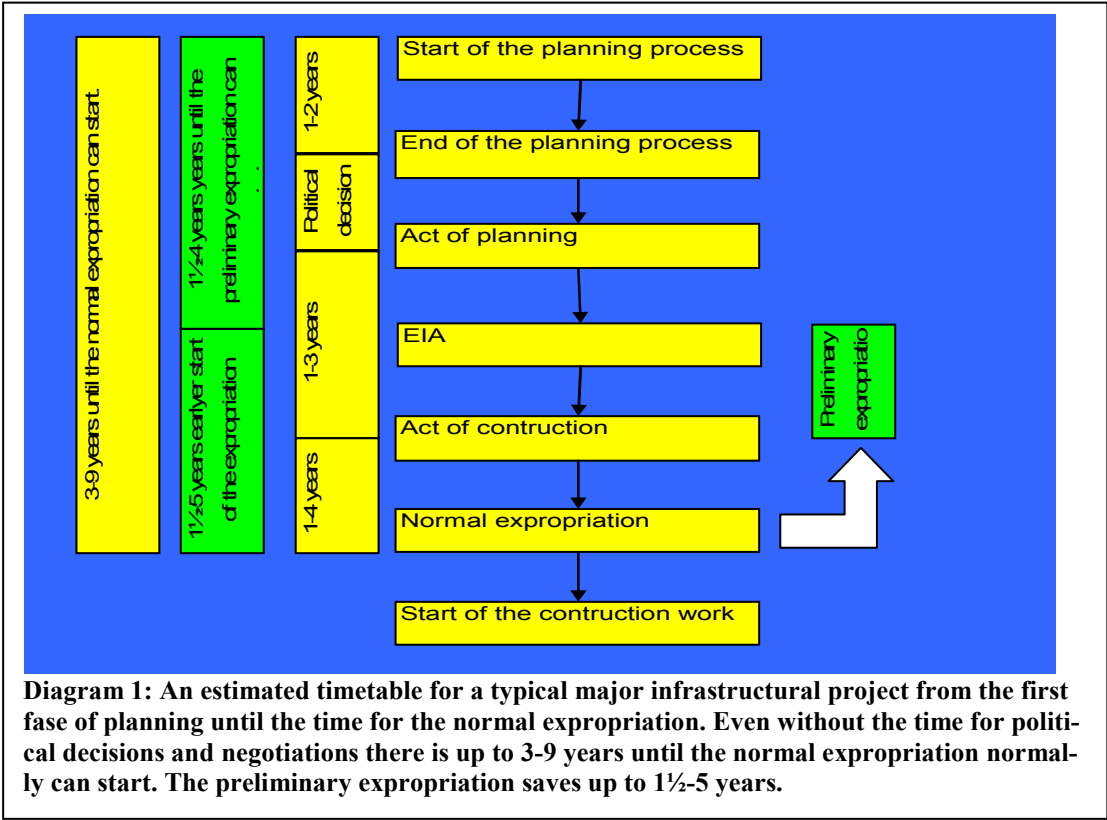
2. THE PROCEDURE IN CONNECTION WITH INFRASTRUCTURAL CONSTRUCTION PROJECTS

2.1 Planning Act and Construction Act [see ref: 1.2, 1.3, 1.5, 1.9]

In Denmark it is decided by law which roads are state roads. New state roads are decided by a Planning Act and later a Construction Act.

Already by the first appearance of a Planning Act it is described which surveys must be carried out in order to settle a layout for a new road or railway. This may involve one or more corridors and can be several kilometres wide. Even at this point the landowners are anxious to know what the result will be some time in the future. Typically the surveys can take several years depending on the progress of the political decision makers. In Denmark the majority of

the state roads are financed by taxpayers. Normally decisions are made once a year or every second year to outline the infrastructural projects to be carried out within the next span of years. The money for the construction of state roads is given by the Parliament in the Finance Act.



A Planning Act enables the Minister of Transport to explore the possibilities of carrying out a construction project. The exploration may result in a Construction Act. A stage on the way is carrying out an Environmental Impact Assessment (EIA). This assessment normally takes up to two years and with the succeeding political negotiations and decisions another year or two may pass.

During this time several landowners are in a situation where they are not allowed to sell their property to a normal market price. They express this as “an insurmountable obstacle”. New building activities and renewed mortgaging may also cause difficulties.

Figure 1 shows that an estimated timetable for a typical major infrastructural project from the first phase of planning until the time for the normal expropriation.

3. THE PROCESS OF EXPROPRIATION

In Denmark a number of regulations line out the limitations in connection with the expropriation process. It is necessary briefly to examine a set of acts to understand the problem.

3.1 The Danish Constitutional Act, section 73

According to the Danish Constitutional Act, section 73 [see ref. 1.1] no one can be forced to give up his or her property, unless it is in the public interest. Under this condition expropriation can only take place according to an Act, and the owner of the property must be fully compensated. In Denmark it is decided in an act passed by the Danish Parliament which major roads (State roads) must be built.

Other matters must be taken into consideration before expropriation can be carried out:

- It must be determined, that the arrangement can not be realized in a less radical way
- The expropriation must not include more than what is absolutely necessary to carry out the arrangement
- Finally the expropriation must not take place earlier as possible before the realization of the project.

With these rules of expropriation it is necessary to use up to nine years, see figure 1, plus the time for political negotiation and decisions from the time of the first idea of the project until the expropriation. This is a long time for the landowner.

3.2 The Expropriation Process Act

The Expropriation Process Act [see ref 1.8] describes the authorities used by the Danish State. It depicts the constitution of these authorities and the set of rules they have to follow. Finally it describes the requirements to the documents needed: plans and descriptions which have to be present at the expropriation.

3.2.1 The Expropriation Board, its constitution and its independence.

The Board consists of 5 members: a chairperson who is a government official and a lawyer, (The State Commissioner for Expropriations), 2 members appointed by the Ministry of Transport and 2 members selected from a municipal list. Members from this list are chosen by the municipal councils and are selected by the chairman of the Expropriation Board.

The Expropriation Board is independent. This means that it only has to observe the laws of the country and is not subject to rights of duty from the state administration. This way, the Board has a significant authority, and gives the landowner a good secure for the rights of property.

3.2.2 The tasks of the Expropriation Board: Inquiry and expropriation including compensation proposal.

The task of the Expropriation Board is divided into two: First an inquiry and approval of the given project and the expropriation itself. Second the Expropriation Board has to calculate the compensation of the property involved.

At the inquiry the Board examines the project. The landowners have the possibility and the right to make suggestions for alterations to minimize the damages caused by the project on the property. The Board can decide alterations to the project against the wish of the road authority. The Board's approval of the project is essential, and the decision of the Board is final. If the decision is to be altered it is necessary to pass an Act in Parliament. This is a good secure for the landowner's rights of property.

The expropriation process contains an important element compared to ordinary property transactions. Expropriation involves of the protection of the law for the citizen. The approval of the project involves a public phase, where the landowners are able to suggest alterations to the project. This happens every time those alterations are made and approved. These alterations may result in advantages for one property and damages for another but it is done in complete openness.

When carrying out a preliminary expropriation this examination is not done, because the project is not yet so detailed.

The second task of the Expropriation Board is to calculate the economic compensation for each property involved in the project. Questions and considerations these matters may raise will not be discussed in this lecture. One aspect has to be emphasized though. The Board is obliged to examine each case and calculate the right price regardless of arguments produced by either the landowner or the road authority. This is because the arrangement is compulsory and a landowner must not by passivity be able to avoid a decision. A landowner's lacking ability to plead his own cause must not be a disadvantage for him. At an ordinary property transaction the price will - to a degree - depend on the negotiation skills of the landowner. This way there is a risk of dissimilar treatment of citizens. Equality for the landowners is wanted.

3.2.3 Appeals

Not all landowners are content with the amount compensation measured by the Expropriation Board. It is possible to appeal the amount of compensation to an Appraisal Board – which is costless for the landowner. A final possibility to have the question of the compensation resolved by the courts exists. In Denmark nearly 90 % of all expropriation cases end at the Expropriation Board, 9 % continues to the Appraisal Board and less than 1 % reaches the courts.

The principles behind the rules in the Expropriation Process Act can be studied in ref. 2.1 and 2.2.

3.3 The act governing public road

The act governing public road [see ref 1.6] contains procedures for expropriations carried out of the municipalities. At Working Week in Stockholm 2008, these procedures [see ref 4.2] were the subject of a lecture and they will not be discussed here. The act governing public road contains also regulations about buying property, which have an analogy to preliminary expropriation, but under other circumstances.

3.3.1 For which purposes it is possible to carry out an expropriation?

The act governing public road contains a list of purposes to which it is possible to expropriate. It is generally accepted that the list is not complete, because as time goes by, new standards can motivate other purposes than specified in the act governing public road. This lecture only deals with infrastructural construction projects. In the judicial literature, on the other hand, it is obvious that there is a limit and that for certain purposes are not possible to use the expropriation institute, [See ref. 2.1, 2.2 and 4.1].

4. PRELIMINARY EXPROPRIATIONS

4.1 Expropriation: A controversial concept?

Many people regard the concept of expropriation with great anxiety, but is it the truth?

Great infrastructural construction projects often result in heated public debates, where questions about the necessity of the project are raised. Another question often asked is about the relationship between the road authority and those landowners who may have to relinquish their property. This happens at such an early time in the process, that nobody is seriously able to have any idea of which properties are going to be expropriated by the project. In the media, stories are told about families, whose means of existence are destroyed. Horrible stories about the frustration of these people are vividly told. Of course human tragedies occur, but not as often as described.

But what is the actual situation when we talk face to face with the people who risk having their property expropriated? Then we experience a different attitude. Of course we meet people who are in opposition to the project, but the majority agrees that something has to be done to the existing problem. There is great understanding for the necessity of the project and the relinquishment of their property. The argument, that the right solution is building the road on the neighbour's property instead occurs but is not common.

The most urgent wish of the landowners is to get a quick decision so they know how the future will turn out. Can the landowner stay or does he have to move? It is also an issue how the landowner is treated by the Expropriation Board. A very common opinion is that the aim of the Board is to get the land as cheap as possible. This opinion is generally not in accordance with the truth.

The need to make Environmental Impact Assessments prolongs the time before a decision is made. On top of that more and more landowners want to take part in the decision making, and the communication effort needed is time-consuming as well. For those landowners who may have to relinquish their property it is just more unnecessary time consumption, because the decision will not be made and their situation may not be clarified.

Against this background the possibilities of having ones property preliminary expropriated is a significant improvement. The drawback is that it is not a common possibility but something which is decided on a project-by-project basis.

4.2 Conditions

In the past it was only in exceptional cases that it was possible to carry out a preliminary expropriation. If the house on a property burned down and a road construction project in a foreseeable future made rebuilding the house absurd, preliminary expropriation was a possible solution.

This situation put a lot of landowners in a very inconvenient position, for instance if the landowner had to sell the property because of a new job in another part of the country or a divorce. In 1996 the Danish Parliament passed a Planning Act [see ref. 1.2]. This Act contained a set of rules which gave the road authority the means to help landowners who risked economic crunch. It was not the intention to help everyone near the project to being expropriated- it is not a legal claim - but an option in an unfortunate situation.

It requires that the project conditions as well as the personal conditions are met. However at this stage the project is not detailed enough to carry out the inquiry mentioned earlier in order to get the approval of the project. In this situation the Expropriation Board is only asked to assess the economic compensation for the property. The risk that the property may not be needed for the project is taken over by the Danish Road Directorate. The property may then be sold later on.

Since 1996 many Planning Acts and Construction Acts for a great number of infrastructural construction projects contains regulations to help landowners in an unfortunate situation. An example of a Planning Act for a railway project is listed in reference 1.4.

4.3 Project conditions

From the first lines are drawn, a project undergoes many alterations to a greater or lesser extent. The project must involve expropriation of the property, before preliminary expropriation is possible. If more proposals are still in consideration, the conditions for an early expropriation are not met.

It has happened that an EIA has resulted in a demand for supplementary and more detailed investigation in an alternative layout of a project. In these cases it has been decided to give landowners involved in certain layout proposals the possibility to send an application for a

preliminary expropriation. Properties taken over by the state can be sold, if the layout proposal is abandoned. This is the case in the road project in Silkeborg, used in the presentation of this paper [see ref 1.9].

4.4 Personal conditions

Personal conditions must be of particular nature. If a family house is not spacious enough for the family, a preliminary expropriation may be relevant. Planning another child is not a sufficient reason. Old age as well as serious illness by the landowners can also be a cause for preliminary expropriation. Concerning illness it is necessary to investigate the degree of illness. Of course, if another authority (such as the social services department) has made a decision concerning the illness, for instance if the landowner is moved to a sheltered home, it will be used in handling the application for preliminary expropriation. Economic problems, such as sale by order of the court, may be another cause for preliminary expropriation. The landowner is in this situation not able to sell at a decent price because a potential buyer may use the situation to press the price and worsen the economic crunch. Businesses will not normally be in a situation, where the rules can be used, due to the lack of personal conditions.

If we look back at the actual cases, it is incredible which conditions led to preliminary expropriation. It goes to show that reality exceeds the theoretical considerations.

Handling an application often causes a close contact with the landowner wishing to be preliminary expropriated. This involves a personal visit at the home of the landowner, and those visits are welcomed, and they give the road authority “a human face”. We are often met with the remark: “Do you really take the time to come and visit us?” The application is often incomplete and through the personal visit we obtain the missing information and get the chance to get an impression of the conditions and the use of the property – information which we often need to estimate the expenses for the expropriation. This information we are not able to get from other sources.

These meetings often deal with very personal matters where it is necessary to ask very personal questions. In reality it is not a problem as long as we as public servants tackle these cases with a humble approach.

It happens that an application does not meet the conditions for a preliminary expropriation. The application can later be reconsidered if new information shows up. Often it is progression of illness or another situation that can change an earlier decision.

When the application has been approved by The Road Directorate the landowner signs an agreement to have the Expropriation Board value the property. This is done to give him the same rights as other landowners being expropriated. It also gives him the same possibilities of appeal to the Appraisal Board and the court. It is a question of treating all landowners equally.

If the project for one reason or another is abandoned, The Road Directorate can sell the property without the former landowner having the right to buy the property back again, or to a larger compensation, if the property is sold at a higher price than it was bought from the landowner.

In this connection it must be remarked, that until there have not been any problems related to repurchasing a property caused by the abandoning of a project.

5. EXPERIENCE WITH PRELIMINARY EXPROPRIATIONS

5.1 Number of preliminary expropriations

An obvious question in this matter is how many landowners do actually wish to have their property preliminary expropriated. Over the last ten years The Road Directorate has received approximately 150 applications - as an average approximately 15 applications a year. And about 20 % have been denied. The rest have been approved. Below in diagrams 1-3 is shown some statistical information about the use of preliminary expropriation.

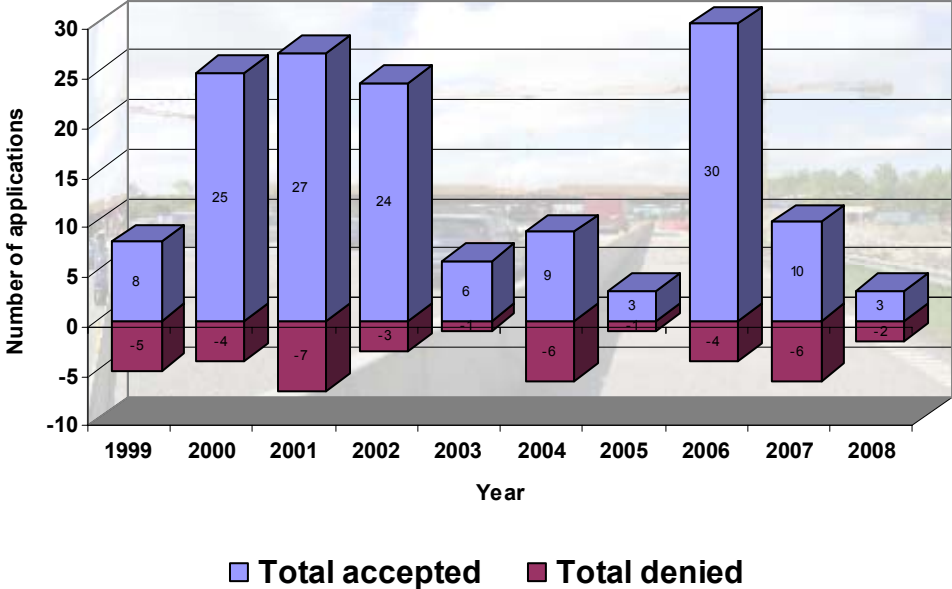


Diagram 2. The result of the landowners’ applicants for a preliminary expropriation shown as applicants/-year.

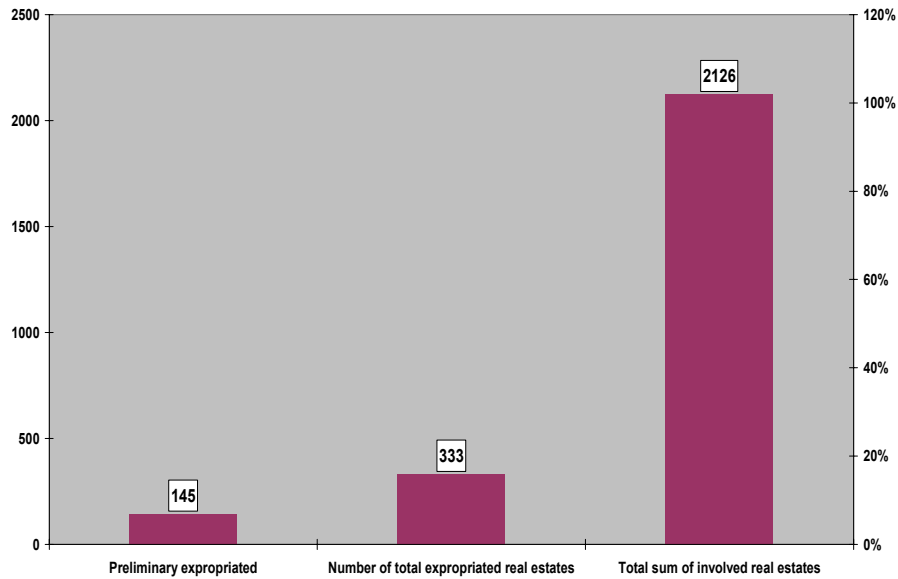


Diagram 3. It is seen that 7 % of the expropriations are the rules of preliminary expropriation used.

The diagram shows that preliminary expropriations (PE) amounts to 7 % (145 properties) of the total number of involved landowners and to nearly 50 % of the entire expropriations which are 16 % (333 properties) of the total number of all involved (2126 properties).~100 %.

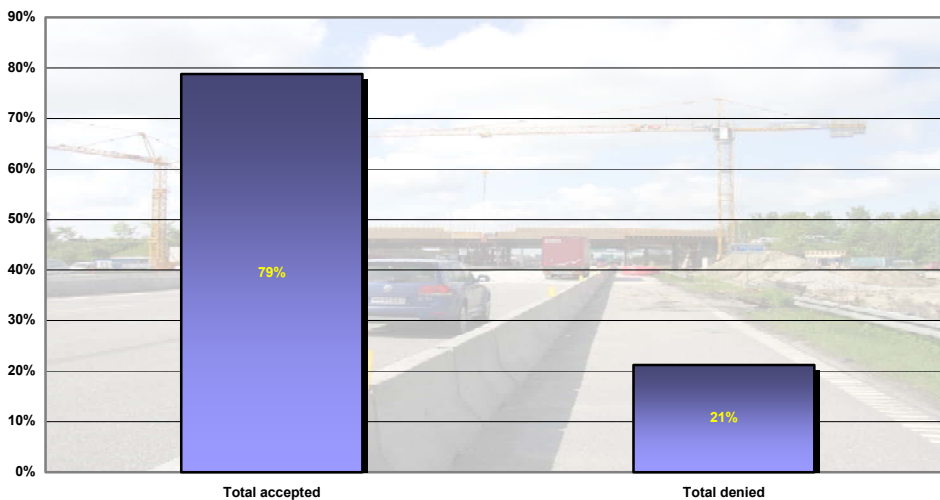


Diagram 4. Accepted/denied applications for preliminary expropriation.

5.2 How are we received by the landowners?

Every year The Danish Road Directorate examines our communication with the landowners involved in our major road projects. It is a target that the landowners are satisfied with the contact with the Road Directorate. It is not a target however, that they must be satisfied with the compensation – although satisfied landowners are easier to negotiate with.

From the implemented user surveys we can conclude that the landowners are very satisfied with the possibility of preliminary expropriation - compared with the usual expropriation procedure. This may not come as a surprise since it is a natural reaction for a landowner to want to look for a new place to live, when he is told that his home has to be torn down because of a construction project. Although it might differ how long it takes for a landowner to come to this recognition. If it is possible to give him this advantage, he is as happy as it is possible to be in the given situation.

The behaviour of the landowners involved in a preliminary expropriation is not surprising. People involved in a normal expropriation procedure have to wait and follow the timetable for the road project and the waiting may seem unbearable. If a landowner meets the conditions for a preliminary expropriation he has some influence as to how and when he must leave his property. It also brings goodwill to the road authority because the landowners get the feeling; they were “treated in a decent way”.

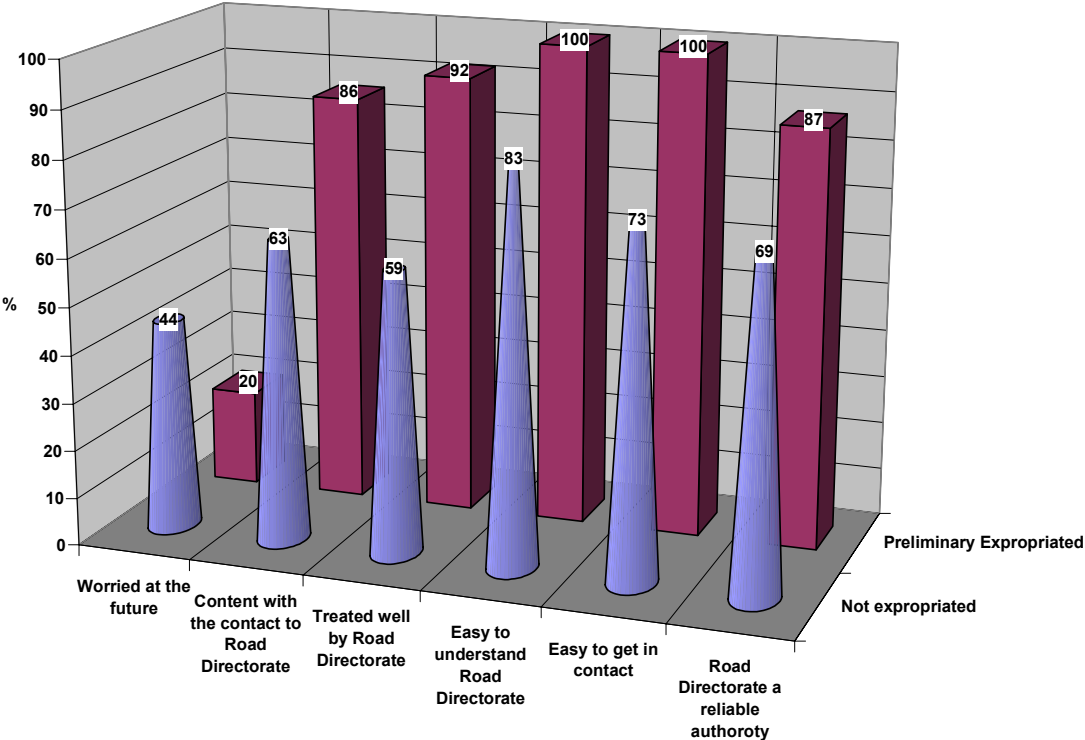


Diagram 5. Please note that only 20 % of the preliminary expropriated landowners worry about their future compared to 44 % of those landowners still waiting for expropriation. 86 % of them are satisfied with the contact to the Road Directorate. (Source: MEGAFON). [See ref 4.4] Please note that the survey is made after the preliminary expropriation and before the normal expropriation.

As earlier mentioned, preliminary expropriations only constitutes a small number of the total number of landowners to be expropriated. The disadvantage is that it increases our task compared to the “good old way” - mainly because of the greater effort in communication. The effect shown by the satisfaction of the landowners also contains remarks from people who have been interviewed:

“They [*two employees from the Road Directorate*] came and told us about the possibilities of being preliminary expropriated. And of the inconveniences it may cause if we wanted to stay. We discussed this proposal in the family and we choose to stay. It was good to have the freedom of choice”. (Male, Kværndrup – Stenstrup) [See ref. 4.3]

Others, who have not been so lucky, are of course not so happy when they receive a denial for a preliminary expropriation.

The statistics in this paper are based on 16 road projects. Some of them are now open for traffic and others are still under construction. The figures are to some extent estimated, but the trend is assumed to be representative for the subject of this paper.

6. TRENDS IN THE FUTURE

Preliminary expropriations are going to be used in a modified version in connection with the building of a highway through an industrial area in the town of Silkeborg in Denmark. At the time of writing, the Construction Act is being politically negotiated in the Danish Parliament, [see ref 1.9]. By Danish standards a great number of business properties have to be expropriated. Just as many have to be expropriated partially, and this raises questions of if and how they can stay. The function of the business properties may differ and a lot of negotiations await in the near future. This has great current interest since there is a political wish to realize the project with a tight time schedule, because the city/landowners have been waiting on the new road for around 20 years. This raises certain demands on the project but it is also necessary to provide greater understanding among the involved owners of the business properties.

Hopefully, some time in the future the rules will be of a general kind. The experiences we have gained create a good basis for designing useful rules which comply with the rights of the citizens in accordance with the ideas originally expressed by the rules in the first Planning Act. Fortunately, many acts contain rules of preliminary expropriation.

7. CONCLUSION

By introducing the idea of preliminary expropriation we have obtained a considerably improvement in the landowners possibilities to plan their future in spite of the great impact an expropriation often has. The initiative with preliminary expropriation has - with the figures shown - proven to be an important tool, giving the road authority an opportunity to help landowners minimize the inconveniences connected with a major road construction project.

It also shows that landowners receive this opportunity with great acceptance. This result is documented by statistics and through surveys among the landowners made by an independent survey company.

The Danish rules have proven to be a success and it can be recommended other countries to use similar rules adapted to the local legislation.

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BIOGRAPHICAL NOTES

Søren Baumgarten has taken his Ms.C. in Geodesy and Cadastral Science in 1971 as a Chartered Surveyor at The Royal Veterinary and Agricultural University, Denmark.

Since 1972 he is a member of staff at The Danish Road Directorate, a directorate under the Ministry of Transport. The job includes expropriation and land redistribution in connection with approximately 700 km state roads (mostly main highways), building highways from planning to opening of the new road - both in rural sites and in intensely urban sites, contact with landowners as neighbours to a major road, and dealing with landowners applying for preliminary expropriation.

Appointed by the Minister of Transport to be a representative of The Road Directorate as a member of an Expert Committee examining compensation for noise damages and questions about disturbance of access to properties [see ref. 2.3].

Klavs Petersen has taken his Ms.C. in Geodesy and Cadastral Science in 1998 as a Chartered Surveyor at The University of Aalborg, Denmark. Since 2007 employed at The Danish Road Directorate under the Ministry of Transport. The work has considered expropriation and EIA. From 1998 – 2006 has Klavs Petersen worked at the private firm COWI A/S with expropriation to the new metro in Copenhagen, at the Danish Directorate of Cadastral, and at the Ministry of environment with the issue of planning and the use of area in the urban areas in Denmark.

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