



## **Agriculture and Foodsecurity Network: "Inclusive Land Governance – Road to Better Life"**

**Field Days September 7, 2016:  
Land Governance in Switzerland**

### **Visit 6: Expropriation and Waterprotection**

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ENTWICKLUNG DER LANDWIRTSCHAFT UND DES LÄNDLICHEN RAUMS  
DÉVELOPPEMENT DE L'AGRICULTURE ET DE L'ESPACE RURAL  
SVILUPPO DELL'AGRICOLTURA E DELLE AREE RURALI  
DEVELOPING AGRICULTURE AND RURAL AREAS

## 6 Expropriation – “public versus private interests”

**Field day example: Groundwater protection in Schlossrued**

While the property guarantee was an important issue of the founding constitution of the Swiss Confederation in 1848, the government issued only two years later a law on “liabilities from the surrender of private rights” which was mainly needed to push early industrialisation projects like railway construction, electricity, water utilisation. In the meantime the legal background has developed quite a bit, presenting today a complex set of regulations for property restrictions.

### 6.1 Basic principles

#### Guarantee of property and value (full compensation)

The present constitution, dating from 1999, states in its art. 26 that property is guaranteed and that “expropriations and ownership restrictions that amount to an expropriation shall be fully compensated.” And the law on spatial planning determines that if “planning leads to ownership restrictions that amount to expropriation, there shall full compensation.” The current “federal law on expropriation” dating from 1930 specifies that expropriations can be asserted for works that are in the confederation’s interest or in the interest of a major part of the country or for other reasons of public interest.

#### Public interest

The law on expropriation lists the following general causes for expropriations:

- creation, alteration, maintenance, operation and future enlargement of a work
- production and deposition of the necessary building materials
- acquisition of the necessary building materials
- in connection with a work for measures of protection, restoration and substitution in compliance with the federal legislation on the protection of environment, nature and landscape
- measures required for substituting expropriated rights or safeguarding public interests

#### Proportionality

Art. 1.2 of the law on expropriation declares that “the right of expropriation can only be exercised insofar as it is necessary to attain the purpose”. Or as the federal court explains in an opinion of a judgement: “Principle of the mildest means: there may never be a suitable and less interfering measure”. The expropriation must be appropriate to realise the public interest, it may only reach so far as necessary for the attainment of the goals, plus the gravity of the interception and the relevance of the aspired result should be in reasonable proportion.

#### Types of property infringements

According to the law on expropriation there are three types of property infringements:

- Formal expropriation - the withdrawal of rights and their transfer to the dispossessor or their elimination
- Material expropriation - restriction of property rights affecting the concerned right holder like an expropriation
- Public law property restriction without compensation - restriction of property rights with lesser impact

### 6.2 Formal expropriation

The polity can withdraw property rights (landed or moveable property, limited material rights, neighbouring rights, rights of use) fully or partially and transfer them to itself (or exceptionally to a third party), provided that this expropriation serves a public task and is necessary, proportionate and reasonable.

#### Compensation

The formal expropriation is always fully compensated, usually as a monetary substitute, in exceptional cases as a compensation in kind. Assessing the value of the compensation can be a complex task: first the market value of the withdrawn right (land, work etc.) must be determined, than possible additional damage (inconveniences like complications of management, obstructed access to parcels, transaction costs etc.) must be assessed (loss of calculated earnings value), finally there might also be reasons for a surcharge for involuntariness, meaning that the loss of one’s possessions and the associated rupture of affective attachment demands an indemnity as well.

#### Procedure

The process of formal expropriation passes the following steps:

1. Initial decision to carry out an expropriation with assessment of the prerequisites – suitability, necessity, proportionality – and determination of the legal basis
2. Request to the estimation committee (“Schätzungskommission”) for the determination of the compensation

3. Plan publishing procedure ("Planauflegeverfahren") in coordination with the approval procedure for the public work, wherein the draft plans are presented for inspection and the involved parties have the possibility to:
  - submit an objection against the construction project
  - submit an objection against the expropriation
  - place a request for plan modification
  - place a request of compensation
4. During the subsequent conciliation procedure ("Einigungsverfahren"), which includes a visual inspection, the parties have the opportunity to reach an agreement, else
5. Final decision by the guiding authority ("Leitbehörde") in a so called coordinated process, or else by the concerned ministry ("Departement") on
  - objections against the admissibility of the expropriation
  - the entitlement for a compensation and its extent
6. Implementation of the expropriation including the payment of the compensation and the subsequent transfer of the rights from the former holder to the dispossessor
7. Legal protection on the federal level allows the following steps of appeal:
  - in case of conflicts about applicability and scope of an expropriation: guiding authority or ministry decides on objections → next appeal to the Federal Administrative Court → last appeal to the Federal Supreme Court
  - in case of conflicts about the extent of compensation: first decision by the estimation committee ("Schätzungskommission") → next appeal to the Federal Administrative Court → last appeal to the Federal Supreme Court
8. Legal protection on the cantonal level may vary, but in general it allows the following steps of appeal:
  - in case of conflicts about applicability and scope of an expropriation: first decision by the Governing Council of the canton → next appeal to the Cantonal Administrative Court → last appeal to the Federal Supreme Court
  - in case of conflicts about the extent of compensation: first decision of the estimation committee ("Schätzungskommission") → next appeal to the Cantonal Administrative Court → last appeal to the Federal Supreme Court

#### **Examples for formal expropriations:**

- doubling of rail network (loss of land, noise immission et.)
- construction of a new freeway (loss of land, distance to parcel, form of trimmed plot, noise immission etc.)
- expansion of an existing road with a cycle lane (loss of land, distance to parcel, form of trimmed plot)

### **6.3 Material expropriation**

Contrary to the formal expropriation, property rights in a material expropriation are not withdrawn and transferred to the community, but merely restricted, while the property title remains unchanged. Furthermore, the dispossessor might also be a private project. The Federal Supreme Court discerns two statements of facts when defining the material expropriation:

In the first place, material expropriation occurs when the owner's previous or in the near future foreseeable use of an item is prohibited or restricted in such a way that the concerned person is deprived of an essential power linked to the affected property – *particularly serious infringement*

And secondly, even when the interference with the property rights is less severe, a material expropriation is still assumed in case a single person's sacrifice for the community would seem unacceptable and incompatible with legal equality should there be no compensation for it – *special sacrifice*

#### **Compensation**

Material expropriations are always fully compensated, following the same principles as in case of formal expropriations (see there). However, should the interference not be strong enough to justify a material expropriation, there will be no entitlement for compensation.

#### **Procedure**

The process of material expropriation follows in principle the same steps as the formal expropriation.

#### **Examples for material expropriations:**

- construction ban in zone 1 of ground water protection areas (loss of building right)
- closing of railway-crossings (loss of direct access to land)
- servitude for a tunnel (vibration immission, restriction of geothermal probes etc.)
- creation of danger zones (flooding, avalanches etc.) and subsequent loss of building right

## 6.4 Public property restriction without compensation

When a material expropriation can be excluded – because the imposed property restrictions represent neither a particularly serious infringement nor require a special sacrifice from the owner – the public property restriction will not be compensated.

### Compensation

Public property restrictions without compensation are – as the name not compensated. But there is a possibility to place an objection against the restriction measures and to demand an indemnity for the infringements. But in these cases the burden of proof is with the concerned property owner.

### Examples for public property restrictions without compensation:

- Building distances, construction lines
- Groundwater protection zones 2 and 3
- Watercourse corridors
- Interventions to protect police issues ("Polizeigüter") like public order, security, health etc.

## 6.5 Example field trip: Public property restrictions for water protection

The law on water protection prescribes that concerns of the protection and management of groundwater have to be coordinated with other spatial planning interests and to be integrated in the structure plan as well as in the land use plan. Conflicts of interest – for example between excavation of raw materials (like gravel), revitalisation of watercourses, agricultural cultivation and the protection of crop rotation areas – can thus possibly be solved in an early planning phase.

Groundwater supply has to be secured on a regional level through a prudent planning, taking into consideration the future water needs as well as the possibilities of utilisation of water resources. For this purpose the cantons are obliged to prepare an inventory of the existing water supply facilities. Based on this so called "water-supply-atlas", an assessment of municipal or regional water catchments has to decide on appropriate sites for such facilities and on the necessary protective measures to secure quantity and quality of the groundwater resources.

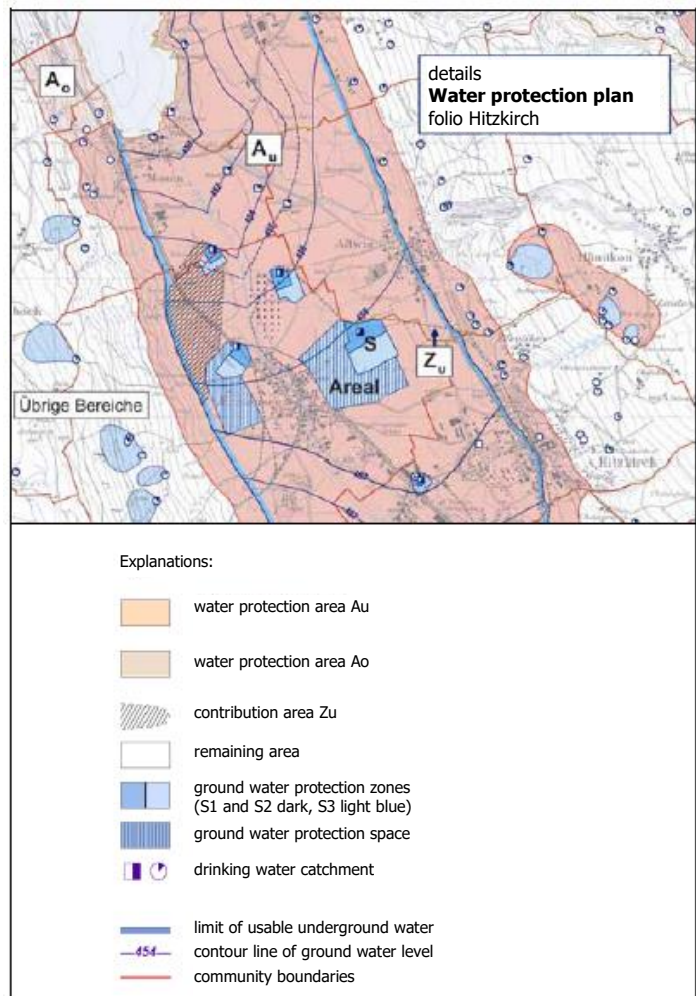
### Protective zones:

Considering hydrological data, the cantons designate specially endangered areas and differentiate between water protection sectors ("Gewässerschutzbereich" = A) and water contribution sectors ("Zuströmbereich" = Z), and for both sectors make a difference between necessary protection of surface water ( $A_o$ ,  $Z_o$ ) or underground water ( $A_u$ ,  $Z_u$ ).

Located within these water protection sectors are the proper ground water protection zones, designed to guarantee the quality of the drinking water. They are placed around the water catchments of public interest and necessity and divide into zone S1 (catchment sector), S2 (inner protection zone) and S3 (outer protection zone) and shall ensure that

- S1: the catchment facilities are not damaged and direct pollution of the water
- S2: contamination of drinking water with pathogenic microorganisms is prevented and groundwater flows are not adversely affected or obstructed as they approach the well"
- S3: in the event of an accident, sufficient time and space are available to ward off any hazards to drinking water (buffer zone for S2 and S1)

The installation of the ground water protection zones is based on the hydrological report, the protection zone plan and the protection zone regulations defining the protective measures.



**Ground water protection space (Grundwasserschutzareal):**

Defined areas where the future groundwater management (utilisation or accumulation) is secured in advance. In this areas building and the extraction of gravel, sand and other material is prohibited.

**Protective measures:**

- A<sub>u</sub>: cantonal permit for buildings and facilities, no facilities that are particularly hazardous for water, special requirements for the extraction of gravel, sand and other material  
→ *no compensation*
- Z<sub>u</sub>: the cantons decide on the necessary water protection measures (application restrictions for pesticides and fertilizers, restrictions of agricultural and horticultural production)  
→ *no compensation*
- S3: no extraction of gravel, sand and other materials, no landfill sites, no industrial operations with potential dangers for groundwater, no installations below the highest groundwater level  
→ *compensation possible (depending on gravity of interference)*
- S2: in addition to S3: ban on construction (with exceptions), no digging nor modifications of the terrain, no activities prone to endanger the quality or quantity of the drinking water, no mobile and persistent pesticides, no liquid manure (with exceptions)  
→ *compensation possible when a developed building zone is touched; but restrictions of agricultural production are usually not compensated*
- S1: only activities for the management and use of drinking water allowed  
→ *compensation necessary (material expropriation) – but as a rule the area of S1 is purchased by the owner of the water catchment*

**Fieldday-example: Situation in Schlossrued:**

Visit to a farm owner Ruedi Bolliger, who's farm is situated in water protection zone S2, right at the edge of zone S1 (see plan below). He has construction plans, but gets no permit and is in difficult negotiations with the authorities of the municipality of Schöftland (neighbouring community and owners of the water catchment) about eventual compensation for the property right restrictions he has to accept.

