

A Layman's Guide to the Approval Process Governing Construction in East Jerusalem

The approval process governing new construction in East Jerusalem is far from straightforward. The arcane nature of the process is further complicated by unclear and often inconsistent terminology. To help interested parties make sense of things, we have compiled this brief layman's guide to the process. By necessity, this guide presents the issue in a simplified form; while it accurately depicts how the process generally works, the actual legal vagaries are far more complex. The guide is accurate for the purposes of an overview of the process – but an over-simplification for the purposes of any detailed legal analysis. It should in no way be construed as legal advice on such a complex issue.

Q: When people talk about a plan for construction in East Jerusalem, what do they mean?

A: There are a number of different kinds of plans that might be mentioned in connection with an initiative for new construction in East Jerusalem.

Generally, what is referred to in this context is a Town Plan (with the various projects denoted as TP, followed by the plan number). Town Plans pertain to construction projects within a specific area. In principle, there are two subcategories of town plans, Master Plans and Specific Plans, defined as follows:

Master Plans: Master Plans lay down the broad planning designations and principles for construction in a given area. They are necessary but not sufficient for the issuance of building permits for a given project. There is a three-leveled hierarchy of Master Plans – National, Regional and Local, all as defined under the Planning and Construction Law - 1965. At the top, there are National Master Plans. At the next level down, there are Regional Master Plans that must be compatible with the National Plan. And finally, there are Local Master Plans, which must be compatible with the relevant National and Regional Plans. As a rule, Master Plans are filed by Municipal or Governmental authorities, but there are exceptions.

Specific Plans: A Specific Plan (which must be compatible with the relevant master plan) provides more details of planned construction than a master plan. Once a Specific Plan is approved, a building permit may be issued in accordance with the provisions of the Plan.

In addition, in our ongoing analyses of construction schemes in East Jerusalem we also refer to "**Future Plans.**" Unlike the previous two categories, which have specific statutory definitions, this is a term of our own invention. It refers to cases where we have verified information confirming that a project is being prepared by one of the relevant authorities, but the project has not yet progressed to the point where it has any statutory status..

With the exception of these Future Plans and one other exception, all of the plans we have reported in the context of Post-Annapolis Construction have been specific plans. The exception is Givat Ha-Matos, where we are principally dealing with master plans, meaning that additional planning will be required even when these plans are approved before a significant number of building permits may be issued.

Since the focus of our attentions is on construction, and given the complexities of the planning process, the analysis below is limited to Specific Plans unless we state otherwise.

Q: Where do plans come from?

A: Any party with an interest (owner, developer, lessee, etc.) in a piece of land may file a Town Plan (also known as a Town Planning scheme). In East Jerusalem, most of the larger town plans have traditionally been initiated by the Government or the Municipality. Customarily, these are for the construction of residential units in the new Israeli neighborhoods/settlements built on State Land expropriated from the East Jerusalem residents. 35% of the land of East Jerusalem has been expropriated in East Jerusalem, and close to 50,000 residential units have been built on this land for Israelis. The extreme settler organizations have become more active in the initiation of town plans in East Jerusalem, particularly in Silwan, Sheikh Jarrah, Ras el-Amud and Abu Dis (some of these are also government sponsored as well). These plans, which pertain to construction within or near existing Palestinian neighborhoods, are by definition smaller in scope than the traditional Governmental Plans.

One need not be the landowner in order to file a plan. For example, Elad (the private settler-run organization developing projects and property in Silwan) has recently filed a plan which pertains, at least in part, to State-owned land. (The Planning Committees - discussed below - do not deal directly with issues of ownership, but the opinion of the landowner figures prominently in the decisions of the Committees).

Town plans filed by the Palestinian residents of East Jerusalem are customarily much more limited in scope, geared to legalize a building violation or to develop a specific site. On rare occasions, a privately-initiated plan has been approved for tens (and in one case hundreds) of residential units.

Q: What is the first stage of the approval process?

A: As a rule, plans are first submitted to the *Local Planning Committee* (comprised of elected members of the City Council). The Local Planning Committee's role is, in essence, advisory. It examines a given plan and makes a recommendation to the Jerusalem Regional Planning Committee that the plan be (a) rejected, (b) approved, subject to specified amendments; or (c) approved as-is. If the Local Committee recommends "approving" the plan, this means it is recommending to the Regional Committee that the plan be moved to the next stage of the approval process: deposit for public review. If the Local Planning Committee recommended that the plan be rejected, the plan's initiator may challenge this by appealing to the *Jerusalem Regional Planning Committee*, which is empowered to accept or overturn the recommendation of the Local Planning Committee. That said, the recommendation of the Local Planning Committee generally bears heavily on the decisions of the Regional Committee. However, it does not bind the Regional Committee. It is the responsibility of the Local Planning Committee to deliberate and make its recommendations within sixty days. If the Local Planning Committee fails to deliberate on a given plan within the allotted 60-day period, the initiator of the plan may bring it directly before the Jerusalem Regional Planning Committee.

Q: Does the government (the Prime Minister and his cabinet) have any influence at this stage?

A: The answer depends on what kind of project we are talking about. If a plan relates to a government-initiated project or pertains to construction on State Land (as is generally the rule in Israeli projects in East Jerusalem), the national government can intervene to have the

government agency involved simply withdraw or block the plan prior to the plan being taken up by the Local Planning Committee.

The State does not have such authority in the case of wholly private initiatives. However, informally, in cases of particularly sensitive plans, high-level governmental intervention has at times resulted in even private plans dying or becoming dormant.

Once a plan is under consideration by the Local Planning Committee, the influence of the national government depends on politics. As noted above, the Local Planning Committee is comprised of elected members of the City Council; their votes depend largely on their partisan affiliations (so a City Council whose members are from parties that are not members of the Prime Minister's coalition, for example, would be unlikely to act based on the desires of the Prime Minister).

Q: What is the Jerusalem Regional Planning Committee?

A: The *Jerusalem Regional Planning Committee* (sometimes referred to as the *District Planning Committee*, the *Regional Planning Board*, or other similar formulations) is a statutory body with pivotal authorities in the approval of most town planning schemes. It operates within the framework of the Ministry of Interior, and a professional planning office is attached to it. Almost all of the members of the committee are civil servants: the majority of its members are representatives of the various relevant ministries in the Israeli government; a minority of its members are of representatives of the Jerusalem municipality; and two may be deemed "representatives of the public." Based on the composition of this Committee, the government position on town plans is almost always decisive.

Q: Is the Jerusalem Regional Planning Committee obligated to consider a plan?

A: Yes. Once a plan arrives at the Jerusalem Regional Planning Committee, it is examined by the professional echelons for preliminary approval. Only when the plan fulfills the technical requirements is it brought before the Committee itself. The Committee must then deliberate on the plan.

Q: In considering a plan, what options does the Jerusalem Regional Planning Committee have?

A: The Committee then has three options: reject the plan, instruct that it be amended, or approve it for deposit for public review.

If the Committee rejects a plan, the plan's initiator may challenge the decision in court.

If the Committee instructs that the plan be amended, the plan's initiator must make the requested changes and re-submit the plan, at which point the Committee has the same options (reject, ask for more amendments, or approve for deposit for public review).

If the Committee approves a plan for deposit for public review (either following initial consideration or after necessary amendments have been made), the plan is automatically deposited for public review.

Q: Once a plan has been submitted for public review, what is the public review process?

A: When a plan is deposited for public review, the decision is published in local newspapers and in the Public Record and the plan is (for the first time) made available for public scrutiny. The public may then inspect the proposed plan. Once a plan is deposited for public review there is a 60-day period in which to file objections. Anyone who sees himself or herself adversely affected by the plan may file an objection to the Jerusalem Regional Planning Committee. Hearings are then held (usually one session suffices) and after the Committee considers the objections, the plan is either rejected, amended, or approved. As a rule the process is resolved within about a month (after the end of the 60-day public review period). A final decision about the plan is taken the same day or immediately thereafter. In some cases (like the Mughrabi Gate), where the sensitivity of the plan makes the Committee especially cautious, the process may take significantly longer.

Q: Once the public review is complete and the plan has been approved by the Jerusalem Regional Planning Committee, what happens next?

A: At this point an announcement of the plan's statutory approval is published in the Public Record (gazette and the press), after which the plan enters effect. The Minister of Interior may notify the Regional Committee that a given plan requires his approval in order to enter effect, in which case the publication of the plan's approval will take place only after the signature of the Minister. It is rather common for the Minister to exercise this authority in East Jerusalem construction schemes (like Har Homa and Ras el Amud).

Once a plan enters effect, it is possible for developers or contractors to obtain building permits and commence construction. With respect to private construction plans, this is the final stage of the approval process.

With respect to Government-initiated construction, which involves the issuance of tenders to private contractors to carry out construction, building permits are generally not issued until after tenders have been issued and contracts have been awarded. It is then left to the private contractors to obtain the permits.

Q: How long does the entire planning process take, from the date a plan is first filed with the Local Planning Committee, to the date that it enters into effect?

A: There is no single answer to this question. In general, a routine town plan takes at least two years to work its way through the approval process. However, if the relevant authorities are eager to have the plan approved, the approval process can be accelerated. On the other hand, if the relevant authorities are so inclined, a plan can almost "disappear." We are aware of a number of such cases where sensitive plans (for both Jewish and Palestinian construction in East Jerusalem) have been held up for more than a decade, or lost in the bureaucratic pipeline.

Q: Are tenders automatically issued after the approval process is complete?

A: No. The issuance of tenders derives from a government decision to pursue a project – in this case, a decision of the Ministry of Construction and/or the Israel Land Authority, which are responsible for issuing tenders for governmental construction in East Jerusalem. Approval of a project by the local and regional planning boards does not obligate the government to proceed. Certainly the government can elect to hold off on issuing tenders for a given project, based on political, economic, or other considerations.

However, approval of a plan creates a situation in which issuance of tenders is likely and can happen very quickly. While issuance of tenders is not a legal obligation once the approval process is complete, it is the way things almost always work. If we look at what is happening in East Jerusalem at the present time, we observe that tenders are being issued for development of any government-owned state land which has gone through the planning process. It is precisely this fact which enables us to predict what is coming next.

We should also note that sometimes tenders are issued prior to planning approval. In such cases, the contractor awarded the bid is required to get a town plan approved before he can proceed. This is rare in East Jerusalem, but not unheard of. One recent example is the Gilo tender published post-Annapolis. Under the approved town plan, the site was designated for the construction of a hotel. However, the terms of the tender empowered the winning contractor to seek to re-zone the site for residential units. In this case, the contractor would have the contract to develop the site, but would have to go through the approval process (from the beginning) to obtain approval of a specific plan to develop the site for residential use.

Q: Can the government freeze a plan after tenders are awarded?

A: Technically, perhaps. For all intents and purposes, no.

The government of Israel has the power to freeze a plan up until the point when tenders are awarded and third-party equities are involved. The statutory approval of a plan is the last step in the approval process, clearing the way for the issuance of tenders, but the actual award of tenders is the final “Rubicon” of the process.

A tender is technically an invitation by the government for the private sector to submit bids to carry out a project. If a bid is accepted, a contract then signed between the relevant government authorities and the contractor. Once tenders have been issued and contracts awarded (i.e., signed), third-party rights – those of contractors, developers, investors, etc. – come into play. At this point, any effort by the government to freeze a plan would open up the government to legal action by these parties. This makes a rescission of the contract highly unlikely, perhaps impossible. Our caution on this issue derives from a single precedent (which took place in the West Bank rather than East Jerusalem): In the early 1990’s, the Rabin government imposed a settlement freeze in the West Bank, which included freezing construction already under way. The government’s right to rescind the contracts was upheld – but this required payment of considerable compensation to contractors, etc.

It should be noted that under the standard terms of governmental tenders, there is no obligation to award a contract to any of the bidders. Until such time as the contract is signed, the government is at liberty to rescind the tenders.

The conclusion: until bids are awarded and contracts signed at the end of the tender process, the government may, at its discretion, freeze or abandon a given construction project. Thereafter, and even when ignoring considerable legal obstacles, the financial and political costs to the government are so high that a freeze is highly unlikely, if not impossible.

Q: Do tenders or building permits dictate what can and cannot be built?

A: According to Israeli law, a building permit dictates what may and may not be built. In addition, the contract between the developer and the authority issuing the tender imposes

its own requirements. Construction at a site must comply with both the building permit requirements and the contract requirements.

As a rule, the government issues a tender to enable a private firm to carry out construction on state land and market the new units to the public. As discussed above, such tenders are usually issued in the context of an approved town plan, and it is left to the contractor to obtain the building permits once he/she has been awarded the tender. However, it is not uncommon for units to be marketed by the contractor prior to the issuance of the building permit. This requires some legal sleight-of-hand, since Israeli law requires that a sale relate to a specific unit with a specific design. Thus, under these circumstances, the sale contract includes the unit and design that the contractor anticipates will be approved in the building permit. The money paid up front is put in escrow, and if the design approved in the building permit deviates from that in the contract, the purchaser is entitled to rescind the agreement and receive full reimbursement.

On rare occasions in Jerusalem (more common elsewhere, but still infrequent) the tender will not fully specify what may be built. For example, the tender may state that the land in question is not planned and that the contractor must get plans approved and building permits issued before starting construction. This rarely happens in East Jerusalem, where the government holds a tighter rein on what may or may not be built.

The nature of the permit that the contractor may apply for is limited by the provisions of the town plan and the terms of the tender. For example, the contractor will know that on a given plot he may build 980m of floor space in four floors and for residential purposes only – he will include the specific design in the application for the building permit.

Q: Once tenders are published is there a set timeframe within which they must be awarded?

A: Usually the period in which bids may be submitted after publication of tenders is 60 days. The timeframe in which bids may be submitted is an essential component in any tender. Failing to include it, or deviating from that timeframe, would likely invalidate the tender.

Q: Once tenders are awarded, is there a set timeframe within which construction must commence?

A: Once a tender is awarded, a contract, generally known as a *Development Contract*, is signed between the contractor and the Israel Lands Authority or Ministry of Construction. Generally, a failure to commence and/or complete construction within an allotted period is a breach of this contract, for which the consequence is loss of the contract or monetary penalties, or both.