



January 29, 2017

Kaminitz Law (Draft Planning and Construction Law)
(Amendment 109) 5776-2016

Position Paper

Background of the Draft Law

On June 1, 2016, Government Resolution No. 1559¹, concerning stronger enforcement of the planning and construction laws, was adopted. The Law is based, as set forth in the opening to the Resolution, on a report by the "team dealing with the phenomenon of illegal construction" (the "Kaminitz Report")². Pursuant to the resolution, a directive was issued to the various Government entities, at the political and professional levels, to act in various ways, inter alia, by amending legislation for "stronger enforcement of the planning and construction laws and dealing with breaches and intrusions on public land" in the State, particularly in the Arab towns/villages.

Accordingly, on June 30, 2016, a memo on the Planning and Construction Law was published, that contained a number of proposals to amend existing laws, which became, on August 1, 2016, the government Draft Law: **Draft Planning & Construction Law (Amendment No. 109) 5776-2016**³ (hereinafter - the "**Proposal**" or the "**Kaminitz Law**").

The purpose of the proposed amendments is, as aforesaid, to intensify enforcement and penalization of building offenses. To realize this purpose it is proposed, inter alia, to restrict the discretion of the court considering the enforcement of construction offenses; to expand the powers and discretionary boundaries of administrative entities, especially national planning entities, and planning enforcement entities, in connection with the enforcement of planning laws and dealing with construction without permit; increasing the amounts of fines and lengthening prison terms for construction offenses, as well as expanding the circle of penalization for these offenses.

Although the proposed amendments have implications on the enforcement of planning laws throughout the country, as set forth in the explanation to the Amendment, however one should not ignore their far-reaching effects on Arab citizens, and especially one should not ignore the context in which they were submitted: Government Resolution 1559 and the government's intention to fight the phenomenon of building without permit in Arab society.

In light of the aforesaid, the above organizations hereby present their position concerning the Draft Law, that will focus on the implications of the proposed

¹ Government Resolution No. 1559.

² The Kaminitz Report

³ Draft Planning & Construction Law (Amendment No. 109), 5776-2016 (the "Kaminitz Law")



amendments on the Arab citizens of the State and the Arab local authorities, and the connection between the need to find appropriate and proper solutions for the many years of planning problems in Arab towns and villages and the enforcement of the planning laws in those places.

Facts and Data

About 90% of the Arab citizens of Israel live in 139 Arab towns or villages. These places suffer from a very severe housing shortage which is a consequence of the deliberate long-term policy of which construction without permits is only one symptom.

Thus, since the establishment of the state, not even one Arab town or village⁴ has been built, and the area of jurisdiction of the existing places not only has not been expanded but has even been reduced. Today, their area of jurisdiction is less than 3% of the area of the State, and hardly any of the more than 50 applications submitted in the last two years to increase the jurisdiction area of Arab towns and villages has even been discussed in the Geographical Boundaries Committee⁵. As a consequence, the population density in Arab towns and villages has increased 11-fold without providing any solution for their needs.

According to the conclusions of the 120-day team appointed by the Finance Ministry "to deal with the housing shortages in the towns and villages of the minorities", up to the year 2000 the Arab towns and villages had no up-to-date outline plan⁶. As of 2000, the Ministry of the Interior commenced planning proceedings in some of the towns and villages but these partial proceedings have not provided appropriate solutions for the existing problem.

The unrevised plans do not resolve the needs of the towns and villages and do not provide solutions for the housing shortages. Even the revised plans have been criticized strongly since, in the opinion of the experts, they do not provide solutions for the residents' current needs, and certainly not for their future developmental requirements⁷. In addition, about 40% of these revised outline plans do not enable the issue of building permits directly, and obligate additional planning proceedings which to date have not been executed. So that in many of the Bedouin villages in the Negev, although they are included in outline plans, no housing construction permits are issued in them, and there is no development of infrastructure, roads and services there⁸.

⁴ Excluding the 7 Bedouin towns established by the State for the Bedouin from the "unrecognized" villages, as well as the 11 Bedouin villages that were recognized

⁵ The Economic Development Authority for the Minorities Sector in the Prime Minister's Office - "Proposed Solution for Planning and Housing in the Arab Sector" (submitted to the Housing Sub-Committee of the Committee for Economic and Social Change headed by Prof. Emanuel Trachtenberg, 2011) (hereinafter - the "**Economic Development Authority**").

⁶ Report by the 120-Day Team for Dealing with the Housing Shortages in the Minorities' Towns and Villages, p. 8 (2015) (hereinafter - the "**120-Day Team Report**").

⁷ **120-Day Team Report**, *ibid*, Footnote 6, p. 8.

⁸ A range of obstacles prevents the development and issue of building permits. These derive, *inter alia*, from the decisions of the Israel Land Authority and the policies and procedures of the Authority for the Regularization of the Settlement of Bedouin in the Negev.



The data further show that the Arab population requires 13,000 housing units a year, while in practice only about 7,000 are built, the majority of which is personal construction. The significance is that each year a shortfall of 6,000 residential units is recorded, in addition to the accumulation of decades of shortages the scope of which has not yet been assessed⁹.

Despite this shortage, the State still discriminates against the Arab towns and villages in the context of new construction. The 120-Day Team Report also shows that the government programs for affordable housing applied in the Jewish towns, such as "Target Price", "Tenant's Price" and "Rental Construction", do not offer real solutions for housing shortages in Arab society. The report also notes that 43% of all marketing conducted as a consequence of Government Resolutions 1539 and 4432 which, inter alia, were intended to promote the housing market in the Arab towns and villages, have failed. The report further shows that between 2005 and 2009 only 20% of the residential units planned in Arab towns and villages (about 30,000) were eventually marketed, compared with 70% of homes planned in the Jewish and mixed towns (about 140,000)¹⁰.

The data of the Knesset Research and Information Center show that the absolute majority of administrative demolition orders issued between 2012 and 2014 were in the Arab sector (97%). The absolute majority of these orders (87-81.7%) were issued in the Southern District, while the decisive majority (99%) was in the Arab sector¹¹. Similarly, the percentage of judicial demolition orders issued in the Arab sector out of all judicial demolition orders issued in the period between 2012 and 2014 was approximately 71.2% in 2012; 80.8% in 2013; 65.4% in 2014¹².

Today, also, out of 1,348 judicial demolition orders in force as at July 2015, 97% are in the Arab sector¹³.

⁹ State Comptroller - **Report on the Residential Crisis** 208 (2015) (hereinafter - the "Comptroller's Report").

¹⁰ 120-Day Team Report, *ibid*, Footnote 6, p. 8.

¹¹ Knesset Research and Information Center, **Illegal Construction and Demolition of Houses in Israel** 14 (2015).

¹² *Ibid*, p. 14

¹³ *Ibid*, p. 17



The Kaminitz Law - Analysis of Sections and Purposes

Increasing Demolition while Ignoring the Existing Situation

The explanatory notes to the Draft Law define the causes for the phenomenon of construction without permit thus:

"Lack of available and up-to-date information on construction offenses, failure to bring to trial, lengthy proceedings, lenient penalization, failure to enforce execution of demolition orders contained in judgments and the time required to implement judgments containing demolition orders. All these lead to serious negative impact on deterrence, with respect to both the offenders themselves, and to others who learn and see with their own eyes how offenders are rewarded and how illegal construction is worthwhile for the offender."

A building demolition policy such as that proposed in the Kaminitz Law is based on a misleading and erroneous reading of the planning reality in the State, and in the Arab towns and villages in particular. It ignores the long-term planning pressure in the Arab Sector, and the State's planning failures, which lead many citizens to commit offenses. It is not commensurate with the basic principles of justice and it stands in total opposition to the Basic Law: Human Dignity and Liberty, which establishes the right to a roof over one's head as a constitutional right¹⁴.

Of course, we recognize the importance of a strong enforcement system as part of the mandatory basis for the rule of law and, consequentially, the importance of provisions in the law concerning varied and appropriate means of enforcement. At the same time, we are very disturbed by a situation where strong and offensive methods of enforcement are taken while ignoring the existing planning situation, the planning failures and the part taken by the planning system itself in the responsibility for the situation on the ground, and the policies of other authorities who prevent the development of the Arab towns and villages. The Arab citizens of the State are trapped in a situation where they are unable to build legally, although they have no interest in being involved in criminal activity and becoming exposed to administrative and criminal means of enforcement on the part of the authorities, which come at a very high cost. Since it is obvious that the general public prefers to conform to the law and it has no desire to become involved with building offenses, the broad phenomenon of building without a permit clearly indicates a structural failure in the planning system, as well as in additional State entities, which must be taken into account when exercising discretion concerning enforcement of the law.

¹⁴ This policy is also in opposition to the obligations of the State and the planning authorities pursuant to public law, and particularly their obligation to behave fairly and reasonably in preparing and approving outline plans. The State's duty is, first and foremost, to diligently prepare appropriate construction and development programs, to provide solutions for the residential needs of the Arab population in the Arab towns and villages and mixed towns. Where the State fails in performing this duty, it is morally precluded from initiating enforcement measures against the victims of that failure due to building without a permit, without taking account of the planning and factual circumstances under which the construction was executed.



In light of the aforesaid, we shall already state that, in our opinion, there is no justification for promoting the Kaminitz Law, which seeks to exacerbate the demolition policy. Instead, we believe that the best method would be to hold talks with the heads of the Arab local authorities and other representatives of the Arab public, with a view to approving plans enabling them to obtain lawful building permits in the Arab towns and villages, as well as regularizing existing construction.

A worthy and just policy of the planning authorities is one which first and foremost examines the causes of the illegal building phenomenon in the Arab population, deals with them and provides appropriate and legal possibilities for residential construction and solutions for the legalization of this construction. Building without permits would not have developed in the Arab towns and villages if that had been the case from the start.

The serious and long-term lack of planning in the Arab towns and villages in Israel, as described above, is a direct consequence of long-term institutional negligence and discrimination, the seriousness and character of which have been noted by the government, the courts, researchers and various public and State entities. It is rooted in the land policy of the State of Israel, which has consistently ignored the needs of the Arab population in the areas of housing, land and services, while giving clear preference to Jews over Arabs in the use of space and allocation of public lands for construction. This preference has been given various faces and forms over the years¹⁵. Recently, active measures have been initiated (but have not yet produced any actual change) by the government of Israel to find appropriate solutions for the many years of housing shortage in Arab society, in recognition of the uniqueness and immediate need to deal with the situation, and the far-reaching impact of the phenomenon of construction without permit.

The most recent and most significant action for the promotion of the Arab population in the planning area as well, was Government Resolution 922 which was adopted at the end of 2015, on "Government Activity for Economic Development in the Minority Population in the years 2016-2020"¹⁶, which included a series of important resolutions allocating government resources and funds for the development of the Arab towns and villages and for reducing the long-term discrimination from which they suffer in all areas of life, particularly in the areas of planning and housing. At the same time, the said Resolution has not yet been fully implemented, and even implementation of parts of it were made conditional, under Government Resolution 1559, on allocation of funds to execute the provisions of the Kaminitz Law.

Failure to Distinguish between Types of Offenses

Building offenses are not uniform. There are different types of offenses, very different in motive and character. Thus, for instance, there is construction without permit that is of an economic character, such as construction of a commercial center

¹⁵ Adv. Auni Bana, "Planning Policy in Arab Towns and Villages, Discrimination and Obstructions", Association for Civil Rights in Israel, April 2014

¹⁶ Government Resolution 922



on agricultural land and, on the other hand, construction of residential buildings without permit, which is usually done on a background of absence of appropriate planning infrastructure. There are also cases where construction without permit relies on explicit government promises of ongoing "looking the other way" - from which it may be inferred that the government authorities have accepted or agree to the situation.

Over the years, the courts have also recognized the specific character of various offenses, and have given this matter weight, mainly in determining penalties and extensions for execution of demolition orders¹⁷.

As set forth above in detail, building without permits in Arab towns and villages does not occur in a vacuum and is not a matter of choice or desire to break or belittle the laws of the State. This construction is usually due to absence of options, and is designed to provide a roof over the heads of Arab young people and families, who have been left by the government and planning authorities for many years with no housing solutions or even planning solutions. It is in fact a consequence of the authorities' planning omissions, which are expressed inter alia in a lack of or defective planning, which does not resolve the basic housing needs of the Arab population.

It is clear that the rule of law should not be ignored. However, the circumstances of construction without permit should also not be ignored, since it is usually done in a situation of no choice and due to the absence of appropriate outline plans.

The Draft Law, just like the law presently in force, does not distinguish between the various types of construction offenses, and proposes an identical arsenal of tools (administrative and judicial) for all types of offense. **At the same time, the Draft Law aggravates the existing situation, because it intensifies the means of enforcement and provides for heavier penalties without leaving room for discretion regarding the circumstances of the case, so that the problematic situation already existing with respect to enforcement will also be exacerbated.**

Until an appropriate solution is found for the planning problem for the Arab population, a clear mechanism should be specified to distinguish between the types of offenses and to establish an appropriate judicial policy that will help to structure judicial discretion for the severity of penalization for certain offenses, alongside less strictness in other cases, in which such severity constitutes an additional blow for a weakened population that is unable to act otherwise.

Extended Penalization, Longer Prison Sentences and Larger Fines for Planning Offenses.

One of the clear characteristics of the new law is more severe penalties for planning offenses¹⁸, and expansion of responsibility for those offenses to people who, it is

¹⁷ Criminal Appeal 3162/08, **State of Israel v. Jihad Ibrahim Sawaad**, and see also similar circumstances in Criminal Appeal 3205/08 **Ahmed Sawad v. the Northern Region Planning and Construction Committee**.



reasonable to assume, had nothing to do with the construction without permit and had no ability to affect or prevent it, such as "all joint owners of the land when the offense was perpetrated (see in this matter, Section 4 of the Draft Law, and in particular - the draft amendment of Sections 222-223 of the original law).

This approach is unjustified and could lead to the incrimination of a wide circle of innocent persons. It is well known that, in Arab society, ownership of land is mostly jointly held ("Musha"), and the ownership in the Land Registration Bureau is not always up to date. In fact, a situation could be created where a large number of heirs of small parts of a plot or parcel on which a forbidden building is built by only one of the owners will be liable to heavy penalties without their having the smallest idea of the unlawful construction.

In addition, making the penalties more severe uniformly and sweepingly with respect to all kinds of buildings without permit, without distinguishing between types of the various offenses and their motives, and without taking account of the planning circumstances pursuant to which the construction without permit was performed, adds insult to injury and turns normative persons into unintentional criminals.

The Planning and Construction Law consists of two levels: the first regularizes the establishment of the various planning institutions and their preparation of the basic plans of all kinds. The second deals with building permits under those plans, and methods of enforcement and penalization that are intended to maintain the planning framework, as determined by the arrangements of the first level. The second level of the Law, especially the part dealing with penalties, relies on the first level and has no independent existence without realization of the first level. The duty to draw up outline plans is imposed on the planning institutions, not on the residents. It enables lawful construction. Therefore, there is no room to apply the penalization part of the Law to those concerning whom there is no appropriate planning and administrative framework for legal construction, due to the failure of the State authorities to enforce the obligations of the planning institutions.

In addition, there is room for concern about selective use of this system, the result of which is unequal enforcement. Such a reality already prevails today; however, should the enforcement be intensified, as proposed by the Draft Law, the inequality might be greater.

Our position is that amendments to the Planning and Construction Law and other laws that are intended to intensify and strengthen the enforcement of the planning and construction laws must express the purpose of the Planning and Construction Law, the essence of which is not just to penalize. They must also express the close relationship between the exercise of enforcement and penalization powers by the authorities (including the issue and execution of

¹⁸ Even under the existing Planning and Construction Law, heavy fines are imposed on families living in structures built without permit in Arab towns and villages. The fines, which are renewed again and again, create a heavy economic burden on the families, and lead to a situation where they are forced to choose between two bad alternatives: to remain in their homes and suffer serious economic hardship, or to give up the house - the basic right to a roof over one's head.



administrative demolition orders) and the fulfillment of the initial lawful obligations of the planning institutions and other administrative entities to construct an appropriate planning framework that will enable legal construction for the population's housing needs. Given such a planning framework, it is the duty of the State authorities, including the planning authorities and the law enforcement entities, to see to it that all construction is executed within the boundaries of these frameworks.

Reduction of the Court's Discretion in the Enforcement Proceedings

One of the tendencies in the proposed Amendment is to reduce judicial involvement in the enforcement proceedings of the planning laws (see in this matter, Section 3 of the Amendment, particularly the amendments to Sections 204-205; 209-217; 233-235; 237-238 of the original law), and expansion of the administrative powers to enforce the law against construction without permit, and actual demolition of buildings. Thus, for instance, it is proposed to limit the court's discretion when considering an application to cancel an administrative Cease and Desist Order, and to define in the Law the grounds for cancellation that do not distinguish between the various types of construction, as set forth above, and do not take into account the personal circumstances of the alleged "perpetrators", or the general planning circumstances in the framework of which the construction without permit was executed.

The court's discretion with respect to planning enforcement proceedings must not be restricted. We also consider it obligatory to allow the judicial instance broader discretion to take account of the appropriate cases in the general planning circumstances. The court should examine whether it is a planning omission that is the cause of the illegal construction, particularly when determining the severity of the penalty and when examining applications to postpone the date of execution of demolition orders.

An amendment such as the one we propose does not negate in any situation the possibility of initiating proceedings or to exacerbate the penalty for perpetrators of offenses against the Planning and Construction Law, but settles for statutory establishment of the possibility of exercising discretion in cases that are found appropriate by the court. Thus, the proposal is a proportionate and balanced one, always leaving discretion with the court.

Adopting such a proposal will make it possible to penalize more severely and heavily in appropriate cases, in all sectors of the population, while exercising the measures of enforcement flexibly and considerately in other cases, justifying use of consideration and common sense.

Delegation of Enforcement Powers - Reducing Discretion by Local Planning Entities and Imbalance in Transferring Powers to Regional Authorities

The mechanism proposed in Section 5 of the Draft Law (Amendment to Section 257A of the original Law and addition of Sections 257B - 257-F), is a centralistic mechanism in which almost all enforcement powers (determining procedures and enforcement directives, training and activating supervisors, monitoring and



controlling the enforcement mechanism, and actual demolition of construction without permit) might be transferred to the director of the national unit for enforcement of planning laws.

Thus, it is proposed to determine that, if the director of the national unit and the director of the department for enforcement of land laws find that a local committee is not fulfilling the enforcement obligations imposed on it, they will be able to take from it all or some of these powers, in the whole or part of the local planning region, for a time to be determined by them, and on terms to be determined by them. That is an invalid mechanism.

First of all, it will adversely affect the discretion of the local planning entities, who are more familiar with the local needs and the order of preference in enforcement; secondly, it will negate the possibility of using other legitimate methods for fighting construction without permit in the Arab population in particular, such as preparing outline plans and detailed plans for the Arab towns and villages, expanding jurisdictions and giving permits to buildings that were constructed without permit where possible, without interfering with other planning considerations. These alternative proceedings could lead to a significant reduction in construction offenses in the Arab population and could resolve the institutional land and housing discrimination against the Arab citizens of the State without actually demolishing the buildings.

A centralized mechanism whose only goal is to expand enforcement is problematic and will lead to disproportionate infringement of the basic rights, particularly the rights to a roof over one's head and to personal dignity.

Furthermore, Sections 247-251 of the Draft Law enable the Minister of Finance to empower a local authority that is part of a Regional Committee, which seeks to assume enforcement powers, as the "Competent Local Enforcement Authority". The very idea of imposing responsibility for enforcing planning and construction laws on a local authority without delegating planning and licensing powers to that authority in its jurisdiction is quite cynical. The proposal will probably remain as an "unturned stone".

As an alternative to this proposal, it is suggested to examine the implementation of the proposal of the Committee of Heads of Local Arab Authorities concerning a tri-partite treaty between the planning and construction and enforcement institutions, the local Arab authorities, and the residents. It is proposed that the planning institutions shall act to freeze proceedings and demolitions against houses without permit, and shall act to increase the pace of approval of regularizing outline plans. The authorities shall act to take forward-looking supervisory and enforcement responsibility within the boundaries of the authority. The residents shall undertake to refrain from construction without permit. The proposal of the Committee of Heads of Local Arab Authorities was published a few years ago, but was never paid any serious attention on the part of the government and the planning institutions.

Granting Enforcement Powers to the Nature and Parks Authority



The law grants administrative enforcement powers to the Nature and Parks Authority within the boundaries of the nature reserves (Section 217 of the Draft Law).

The power to exercise administrative enforcement powers is special and sensitive, and is exercised with broad discretion, giving weight to various grounds. As a policy, the circle of those holding enforcement powers should not be extended to additional entities which are in charge of narrow public interests, which might not grant weight to other relevant considerations.

The Nature and Parks Authority is an organization in charge of important matters but, as aforesaid, the enforcement of planning and construction laws concerns many additional aspects that deviate from the field of this Authority's pursuit or expertise. On the other hand, there is nothing to prevent the Authority's supervisors from exercising their enforcement powers by means of reports, as is the case at present. If the local committees' work load is too heavy, the solution is to increase manpower within the committees, and not to "outsource" enforcement powers.

Retroactive Enforcement Compared with Future Implementation

Except for the provisions stipulated in Sections 204-208 of the Draft Law, which restrict the issue of administrative demolition and the cessation of work orders for buildings whose construction was completed no more than six months ago, or alternatively, 30 days after the date of population thereof, the Draft Law contains no reference to the period of implementation.

In this context, it is important to emphasize that any intention to exercise and implement the colossal penalization measures against the large reservoir of buildings that were erected without permit in the Arab towns and villages which, as aforesaid, developed as a result of the land shortage and the ongoing failures to promote development-promoting outline plans, or against tens of thousands of residents presently living in buildings that were built without permit, with no other choice, and which could find themselves responsible, pursuant to the new amendment to the law, for committing the offense of "forbidden use", will be perceived as vengeance and could be detrimental to the implementation of Government Resolution 922.

In this context it is important to emphasize and clarify beyond all doubt that all measures proposed to increase penalization against construction offenses, if adopted pursuant to the Draft Law, will not apply retroactively to existing buildings but will constitute a forward-looking measure for enforcement and deterrence.

Signed:

The Association for Civil Rights in Israel
The Arab Center for Alternative Planning
Massawa Center
Sikkuy - the Association for the Advancement of Civic Equality
Mizan Center



Bimkom - Planners for Planning Rights