



E-1: It's Not Too Late

Executive Summary

With the statutory approval of E-1, a red line has been crossed, and the actual construction of the settlement has taken a quantum step forward. For now, there have been no consequences to Israel beyond the all too standard condemnations.

That said, there is still a window of opportunity when resolute international engagement can thwart the implementation of E-1. This window has an expiration date, ending with the completion of the tender process – a matter of months. If the states in the international community will caution those intending to take part or be complicit in the planning and construction of E-1 that they may be held personally or organizationally accountable, the deterrent effect has the potential of creating circumstances where the construction of E-1 is no longer possible. This is not entirely without precedent. Major Israeli projects beyond the Green Line have already stalled after international firms decided that involvement in such a scheme could entail serious consequences.

E-1: Where we stand

As anticipated, on August 20, the Higher Planning Committee of Judea and Samaria gave its final approval for the E-1 Plan, a step which completes the statutory approval of the settlement.

For close to thirty years, there has been a wall-to-wall consensus in the international community, warning about the dire implications of approving and building E-1. During those years, there was resolute international engagement which caused Israel to refrain from its approval.

Time and again, Israel was warned that E-1 would have such a devastating impact on the very prospect of a two-state solution, and that its approval would have grave consequences for Israel. E-1 became the ultimate, universally recognized “red line” that was not to be crossed.

Now that this red line has been crossed, it is time to take stock as to where matters stand.

The approval of E-1 plan has been roundly condemned by the international community - but nothing consequential has ensued beyond the rhetorical. For years, foreign ministries around the world have been examining possible responses to the approval of E-1, aware that words alone would prove to be grossly inadequate. However, in the end, nothing materialized.

While it is tempting to be judgmental in regard to this failure to act, the current circumstances in Israel and Palestine are such that taking consequential steps is currently so dire, that taking significant measures is highly problematic. International attention is rightly focused on ending the carnage in Gaza, securing the release of the hostages, delivering humanitarian assistance of a scope that would end the famine, and dealing with the daunting issues of recognition of Palestine and the possible annexation of the West Bank. Most of these issues put key players in the international community on an adversarial footing towards the Netanyahu government, with even Israel’s closest allies contemplating to the possibility of imposing some kind of sanctions. Under these circumstances, the de-prioritization of E-1 is virtually inevitable. Too much else is happening.

However, the current dire circumstances do not make the impact of the construction of E-1 less devastating. More than any other settlement scheme, E-1 alone will make the creation of a viable contiguous Palestinian state, and a Palestinian capital in East Jerusalem virtually impossible - and this at precisely the time when there is a concerted effort to breathe life into a moribund two-state solution.

Consequentially, nothing in the current geo-political circumstances makes stopping E-1 less important to the very possibility of a two-state outcome.

That said, **even at this late date, it is possible to thwart the implementation of the E-1 plan. It will not happen on its own, and it cannot be stopped “on the cheap.” However, there are measures available, difficult, but not impossible, that can still stop E-1.**

E-1 – What Happens Next?

What is the significance of statutory approval?

There are three distinct but interrelated stages in the creation of a new settlement:

The statutory planning stage, a process in which a plan is drafted and brought before the statutory planning committees, where the plan is deposited for public review. Interested parties are invited to submit objections to the plan, after which hearings are held. After deliberating on the objections, the Planning Committee may approve the Plan, reject it, or instruct that it be amended. Prior to final approval, no legal construction can take place; after approval construction becomes possible.

The tender stage, a process in which the government of Israel, by means of the Ministry of Construction and Housing and/or the Israel Lands Authority, publish tenders regarding the actual construction. In this process, the Government invites developers and contractors to submit bids to obtain rights to build a certain number of housing units in a designated area, and in accordance with the Plan approved of by the Planning Committee. The authorities then decide to award the tender to one of the competing bidders, after which a contract is signed with the developer that has been selected. The developer undertakes to carry out the construction on state lands and in accordance with the provisions of the statutory Plan, after which the developer will market the residential units built to the end customer on behalf of the government.

The licensing stage is the process whereby the developer submits a request for a building permit which is issued on the basis of the approved statutory Plan. It is only after the issuance of the building permit that actual construction can begin. It should be noted that after the statutory approval of a plan and the awarding of tenders, the issuance of a permit and the actual construction is a forgone conclusion.

The decision of the Higher Planning Committee concludes the statutory stage of the settlement construction process, and we are now entering the second stage, the tender process.

What is the next step?

The approval of E-1 constitutes the end of the statutory planning process, and the beginning of the tender process. Generally, there is a period of at least several months after statutory approval takes place and before tenders are published. It often takes more than a year. However, this might not be the case with E-1 tenders. E-1 has been in the planning stage for so long that there are already E-1 tenders “on the shelf”, merely requiring minor updates. There are indications that the prioritized E-1 is being fast-tracked.

It is wise to assume that the E-1 tenders will be published within a few months at the most.

Once the tenders are published, developers will have the opportunity to examine the terms under which construction takes place. At times, there is a sponsored visit to the site. Generally, the tenders require the submission of bids within a period of sixty days after publication.

Once the bidding period is over, the bids are opened and examined. The Government authority then might award the bid to a specific contractor or decide that none of the bids meet minimal requirements. If so determined, the tender may be reissued or shelved, at the government’s sole discretion. The decision to re-issue a tender generally is caused by the bids being considerably lower than expected.

After a contract is awarded to a specific contractor, there are negotiations between the contractor and the Government towards finalizing the signing of a Development Agreement, which allows the contractor to build and to market the units.

The licensing stage takes place after the development contract is signed, after which the contractor may proceed to submit requests for building permits. While there are numerous requirements that need to be fulfilled, the approval of a building permit is a forgone conclusion. The procedure generally takes several months.

A number of observations are in order:

- It is reasonable to anticipate the publication of the E-1 tenders within a matter of weeks, or several months.
- Construction relating to infrastructures may commence immediately, based on already existing master plan.

- The Government is at liberty to freeze the tender process, or to indefinitely put it off, at any point prior to the signing of the Development Agreement with the developer. Prior to the publication of the tenders, there are no impediments whatsoever in freezing the plan. Netanyahu can halt the plan with one word to the relevant government authorities. It can even take place without notice to the public.

Once tenders are published, the political price of freezing E-1 is significantly higher (it cannot be done discreetly) , but the legal authority to do so remains intact. The plan can be frozen, but doing so would be significantly more difficult and remain so until the Development Agreement is signed.

- **Once the Development Agreements are signed, third party rights come into play - those of the developers – and it then becomes virtually impossible to prevent the implementation of the plan.¹**
- In sum, prior to the publication of tenders, the E-1 Plan can be abandoned simply by Netanyahu instructing not to publish the tenders. After the publication of the tenders, a decision to abandon the plan becomes more difficult – the authority remains but the political costs go up. After the signature of the Development Plan, it becomes virtually impossible to stop construction at E1.

Consequently, there is still a window of opportunity during which international engagement can elicit a decision to freeze the construction of E-1.

As long as this window of opportunity remains open, E-1 can still be stopped.

How can E-1 be stopped?

The proposal at hand is not punitive, but rather one of “anticipatory accountability,” not about “punishing’ Israel for approving E-1, but rather about taking actions that will create an effective deterrent making it impossible to proceed further.

¹ There is one precedent of a plan being stopped after Development Agreements were signed. It was in 1994, and under the Rabin Government.

We advise putting on notice all those who are contemplating taking part in the E-1 project. Anyone who, from this date on, is actively taking part in, or becoming complicit in the expediting or implementing of E-1, must consider the very real possibility that this involvement will entail the risk of serious. Any such involvement in E-1, whether personal – planners, architects engineers, government officials etc. – or bodies corporate – contractors, financial institutions, etc. – will be seen as those who, in spite of advance warning, have elected to act in defiance of the values and vital interests of each state that chooses this path, and will be treated accordingly.

While these measures can be effective even when taken by individual states, they will be far more effective if taken together by a number of states. Seeking an EU consensus on is likely futile, but also unnecessary.

There is no doubt each individual state will need to deal with certain internal issues, legal and administrative, regarding what measures can be taken, if and when the time comes. **At the moment, there is no need to commit to taking any specific action here and now. The coming months will provide ample time to examine what measures are feasible, and if and under what circumstances to apply them.**

That said, individuals and organizations in Israel will be deciding in the coming weeks and months about taking an active part in the construction of E-1. It is imperative that this deterrent be announced prior to their decisions. The proposed declaration of intent will no doubt have a sobering impact on their respective decisions. For example, the decision by banking institutions to refrain from extending construction loans to contractors and mortgages to individual buyers, or for town planners to provide services to the developers, could have a decisive impact on the construction of E-1. The prospect of not being able to carry out business abroad will no doubt factor in their decisions.

This is not beyond the realm of the possible, and it is not without precedent. Certain foreign engineering firms have opted out of lucrative projects such as the Jerusalem Light Rail and the Old City Cable Car, for fear of the ramifications this might have on their ability to do business in Europe.

These measures are unprecedented. But these are extraordinary circumstances that require extraordinary measures.