Dortmund Conference PLPR 10-12 February 2010
INTERNATIONAL ACADEMIC ASSOCIATION on PLANNING, LAW, AND PROPERTY RIGHTS

New rules for planning compensation rights in the Netherlands

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1. Introduction and research questions

Adoption of a new land-use plan can have major economic effects on land value. A new land-use plan can create developments rights that previously did not exist and thereby cause an increase in land value. On the other hand, a new land-use plan can take away development rights that previously existed and thereby cause a decrease in land value. Under certain circumstances, the loss as a result of governmental limitations of property rights by a land-use plan can be compensated under Dutch law.
Since the new Spatial Planning Act came into force in the Netherlands on July 1st 2008, new rules exist for the so called 'planning compensation rights'. Compared to the 'old' legislation, the new rules are based on a different principle. The questions that are addressed in this paper are:

- What explains the change in basic principles that underlie the new rules for planning compensation rights?
- What was the contents of the debate that arose when the draft of the new rules for planning compensation rights were released?
- How will the new rules for planning compensation rights work out in practice?
- To what extend are the Dutch rules for planning compensation rights in line with the legislation regarding planning compensation rights in other countries?

Since Dutch Planning Law, with its matured system of land-use planning, has always drawn attention from foreign countries, this paper may be of interest for international researchers or practitioners seeking information about new Dutch Planning Law.

2. Governmental interventions in property rights

Governments possess considerable planning powers. They can use their powers to regulate (private party's) land-use and to influence (private party's) building plans. This goes for the Netherlands, but for many other countries as well.

In main line, we can discern three governmental interventions in property rights: (1) pre-emption rights, (2) expropriation and (3) land-use planning. This paper concentrates on the limitations due to land-use plans and the right to compensation that follows from adoption of a new land-use plan. First, however, I shall briefly clarify the differences between pre-emption rights, expropriation and land-use planning.

Pre-emption rights

Limitation of an owner's property rights may arise from *pre-emption rights*. In the Netherlands pre-emption rights usually are established by municipalities, although provincial and national government also have the power to establish pre-emption rights. The power to establish pre-emption rights is laid down in a special act on this matter: the Municipal Pre-Emption Rights Act (Dutch: Wet voorkeursrecht gemeenten). Establishment of pre-emption rights means that the municipal authority appoints specific parcels of privately owned land on which the right is applicable. The consequence of establishment of pre-emption rights is that, if the owner of the appointed land is willing to sell his property, he must offer it to the municipality. Thus, the municipality is the first party to enter into negotiations with the landowner to buy the land (and buildings on it).

Expropriation

Expropriation is the extreme form of limitation of property rights. In fact, expropriation means that property is taken away from the owner. Sometimes 'absolute' governmental control of land is necessary in connection with intended developments, such as the construction of a new public motorway. In such cases, the government can purchase the land under private law. Another possible way to purchase land is the use of the earlier mentioned pre-emption rights. However, both ways of purchasing land will not apply if the owner is not willing to sell his property. Expropriation may be used as an instrument if the government needs 'absolute use' of real property for the general interest and no agreement with the owner can be reached.

Land-use planning

We must make a clear distinction between limitations regarding the use of one's land trough a land-use plan on the one hand and 'expropriation' on the other hand. A land-use plan does not take away the property of the owner. Nor does a land-use plan infringe on the owner's exclusive right of use of his property. This differs essentially from expropriation.

3. Land-use plans and planning compensation rights

Land-use plans can constitute a limitation of a landowner's property rights. In short, a land-use plan determines *what* can be built *where* and which *regulations* (such as maximum heights) apply to it. In this way a land-use plan can limit the use of the property. Although the

infringement on a property owner's rights by a land-use plan can be in agreement with the law, the landowner may, under certain conditions, be eligible for 'planning compensation'. In a sense, planning compensation is the 'counterpart' of government's power to put limitations on one's land by a land-use plan. Planning compensation means compensation for the damages that result from a land-use plan. An example of limitation of property rights can be found in a new land-use plan that takes away development rights that existed under the previous land-use plan.

> *Example*
> Suppose that A owns plot X. The land-use plan allows for the construction of two office towers of 20 floors each on this plot. A has not yet developed the plot. Suppose further that in the years following the adoption of the land-use plan, existing offices in the municipality show a rising vacancy rate. This causes the municipal council to adopt a new land-use plan for plot X, in which the height of the office towers is limited to 8 floors.

This example shows how a new land-use plan can take away development rights that previously existed and thereby causes a decrease in land value. Note however, that the opposite may occur. A new land-use plan can create developments rights that previously did not exist and thereby cause an increase in land value. Take the example of agricultural land that obtains the land-use objective 'residential area'. Both opposites show that adoption of a new land-use plan can have major economic effects on land value.[1]

Under certain circumstances, the loss as a result of governmental limitations of property rights can be compensated under Dutch law. Compensation rights for land use regulations have been in existence for a long time in The Netherlands. However, recently a new Spatial Planning Act came into force (Dutch: Wet ruimtelijke ordening) on July 1st, 2008. This act contains a new Chapter 6.1, relating to 'Compensation for Loss' (Dutch: tegemoetkoming in schade). This chapter replaces the former regulation regarding planning compensation rights, which was laid down in the articles 49 and 49a of the former Spatial Planning Act.

4. Why the statutory rules for planning compensation rights were changed

Several factors contributed to the legislative change regarding planning compensation rights in the Netherland. The most important factors are:

Developments in case law

[1] For more details on this topic see B. Needham, *Planning, Law and Economics; The rules we make for using land*. London/New York (Routledge) 2006.

An analysis of case law under article 49 Spatial Planning Act demonstrated that *over the years* the scope of compensation was gradually broadened by the Dutch courts.[2] This resulted, under the former Spatial Planning Act (in force until July 1, 2008) in the main (case law) rule that aggrieved parties have the right to *full compensation* unless there is a substantial reason in a concrete case to make the damage the responsibility of the aggrieved party.[3] This (case law) rule deviated from the case law in the early years of article 49 Spatial Planning Act; in those early years compensation was relatively seldom rewarded.

Fundamental reasons: comparative research

Comparative legal research carried out in 2000 on behalf of the Minister of Housing, Spatial Planning, and the Environment (under the former Spatial Planning Act) showed that Netherlands had offered more extensive rights to planning compensation than neighbouring countries.[4] Professor D.A. Lubach, an expert in Construction Law and Comparative Law, has concluded that the Netherlands is "out of step" with Germany and France for "no good reasons."[5] In his view, the Netherlands shares an outlook with Germany and France in that "property is socially bound and the damage caused by government acts is a component of the social risk that individuals run as residents of those countries."[6]

Financial reasons

The Dutch national government was dissatisfied with the jurisprudence on article 49 of the former Spatial Planning Act (see subsection 'case law' above). The dissatisfaction was partly motivated by complaints of municipalities. Their complaint was that the number of requests for planning compensation had risen considerably. The municipal costs of dealing with the requests had, in their opinion, become unacceptably high. Bear in mind that – as a rule – in case of a request for planning compensation, the municipality has to ask advice from an independent expert. The expert has to be paid by the municipality. Another complaint of municipalities had to do with the rise of the volume of awarded compensations. All in all municipalities were of the opinion that article 49 Spatial Planning Act had become a financial burden to them.

5. The proposal for planning compensation rules and the subsequent debate

[2] See for instance Fred Hobma and Willem Wijting, Land-Use Planning and the Right to Compensation in the Netherlands, *Washington University Global Studies Law Review*,Volume 6, number 1, 2007, p. 1-26.
[3] P.J.J. van Buuren, Ch.W. Backes & A.A.J. de Gier, *Hoofdlijnen ruimtelijk bestuursrecht* (Main Lines in Spatial Administrative Law). Deventer (Kluwer) 2006 at 255.
[4] H.J.A.M. van Geest et al., *Vergelijking planschaderegelingen* (Comparison of Planning Compensation Schemes). Den Haag (Onderzoeksreeks Rijksplanologische Dienst, Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer) 2003.
[5] D.A. Lubach, Voorzienbaarheid en maatschappelijk risico bij planschade in rechtsvergelijkend perspectief (Forseeable Events and Social Risk in Planning Compensation in a Comparative Legal Perspective). *Bouwrecht*, 2005 at 513.
[6] Id.

In the Memorandum accompanying the proposal of the new Spatial Planning Act, the government stated its intention to go back to the "original point of departure". The basis idea behind this is the aim to reduce the extent of claims for compensation:

> (A)n individual who suffers damage as a result of developments occurring in society, in principle, should be left responsible for this damage. This also applies to disadvantages caused by an administrative body where individual interests are disadvantaged in order to further weighty society interests. In the eyes of the government there only can be a reason for compensation if the disadvantage cannot reasonably be left to the responsibility of the individual.(…) Only damage which goes beyond (…) the societal risk every citizen should bear will be compensated.[7]

One element of the new regulation (chapter 6 Spatial Planning Act) is the introduction of the rule that 'losses falling within standard social risk' (article 6.2, para 1, SPA) 'shall be borne by the applicant'. Furthermore, article 6.2, para 2 introduces a deductible two percent threshold, under which the damage would not qualify for reimbursement. These new elements will be further explained in section 6 of this paper.

Originally, the Minister of Spatial Planning proposed a deductible rule of five percent. Opinions on this proposal were divided in societal, parliamentary, and scholarly circles.[8] Among the social proponents are the Society of Dutch Municipalities, the Netherlands Council for Housing, Spatial Planning and the Environment,[9] the Society of Housing Corporations (Aedes), and the Society for Developers (NVB). The Society of Homeowners (*Vereniging Eigen Huis*), on the other hand, disfavoured the proposed limitation.

In Parliament, the three coalition parties initially responded that they would not support the proposed percentage. They felt that 5 percent would mean that the burden on the individual would be too high. The three parties therefore proposed the two percent deductible clause.[10] This amendment was supported by a majority of legislators. Commenting on the amendment, the Minister of Spatial Planning wondered if the two percent clause would be sufficient to limit compensation claims. The Minister let it be known that future evaluation will have to clarify this, and depending on the results of the evaluation, the percentage may have to be raised.[11]

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[7] Memorie van Toelichting Wet ruimtelijke ordening (Memorandum on the Spatial Planning Act from the Minister of Housing, Spatial Planning and the Environment) (2003).

8. See Lubach, *supra* note 5**Fehler! Textmarke nicht definiert.**, for scholarly support for the proposal. For scholarly criticism see G.M. van den Broek, *Het wetsontwerp voor een nieuwe planschaderegeling (*Proposed Legislation for a New Planning Compensation Regulation). *Bouwrecht*, 2004 at 648.

9. The Council is charged with advising government and Parliament on the main aspects of policy regarding the sustainability of the environment. The Council also advises on other main elements of policy relating to housing, spatial planning, and environmental management. It also provides advice on the government's international environmental policies.

[10] Amendement van het lid Lenards c.s., 7 februari 2006, TK 28 916, nr. 17 (Amendment of Legislator Lenards and Others, Feb. 7, 2006, Second Chamber of Parliament 28 916, nr. 17).

[11] Minister van VROM, Brief aan de voorzitter van de Tweede Kamer, 13 februari 2006, TK 28 916, nr. 31 (Minister of Spatial Planning, Letter to the chairman of the Second Chamber, Feb. 13, 2006, Second Chamber of Parliament 28 916, nr. 31).

6. The new statutory rules for planning compensation rights

In this section the eventual new statutory rules for planning compensation rules will be discussed. As said before, the rules went into effect on July 1st, 2008.

Under the new act, the payment scheme for planning compensation rights is included in article 6.1. The article reads as follows:

> *1. The Mayor and Aldermen may on request grant compensation to those parties who have suffered or will suffer a loss in the form of loss of income or reduction in value of real property as a result of one of the causes listed in paragraph 2, insofar as the loss cannot reasonably be expected to be borne by the applicant and insofar as sufficient compensation is not insured form another source.*
>
> *2. A cause as referred to in paragraph 1 is:*
> *a. provision of a local land-use plan or integration plan not being a provision as referred to in article 3.6 paragraph 1, or of a management regulation as referred to in article 3.38;*
> *b. a provision of an amendment or implementation of a plan or an exemption or more detailed requirement as referred to in article 3.6 paragraph 1 a. to d.;*
> *c. (…);*
> *d. (…);*
> *e. the deferment of a decision on the granting of a building, demolition or construction permit in accordance with article 50 paragraph 1 of the Housing Act or article 3.18 paragraph 2 or 4 and article 3.20 paragraph 5;*
> *f. (…);*
> *g. (…).*
>
> *3. The application shall include justification as well as substantiation of the level of the compensation requested.*
>
> *4. An application for compensation for loss as a result of a cause referred to in paragraph 2 a., b., d., f. or g. must be submitted within 5 years of the date on which the cause referred to in paragraph 1 becomes irrevocable.*
>
> *5. An application for compensation for loss as a result of a deferment as referred to in paragraph 2 e. may only and must be submitted within five years of the opening for public inspection of the adopted local land use plan.*

Article 6.1 clarifies a number of matters. *First*, the right to compensation is for 'those parties who have suffered or will suffer a loss'. This is a broad concept that is not limited to typical examples, such as owners who face new construction restrictions on their properties due to new or modified land-use plans (see the example above). We call this type of damage: direct damage. An interested party could also be someone whose property value has declined or

whose income has fallen as a result of new construction on a *neighboring property* - the plots need not be immediately adjacent - or *nearby* infrastructure works. We call this type of damage: indirect damage. In fact, the vast majority of claims for compensation relates to indirect damage.[12] A tenant may also be an interested party. It makes no difference if the party responsible for the damage is a private or public party.

Second, both capital losses and income losses can be compensated. For example, a loss in value may be attributed to a reduction of light, an obstructed view, noise nuisance, air pollution, a reduction in parking, or the onset of offensive odours from garbage dumps. A loss in income may be the result of something such as diminished turnover.

Third, the damage that is considered for compensation is not limited to damages caused by the determinations of a land use-plan. Other types of damages that are considered for compensation include (1) damages that result from a project decision[13], and (2) damages that result from the stay of a decision (Dutch: aanhouding) regarding the issuance of a building permit.

Fourth, compensable damages must have resulted from an irrevocable land-use plan or an irrevocable project decision. An irrevocable land-use plan is one that satisfies two conditions: (1) the land-use plan must have been adopted, and (2) the plan is either no longer open to appeal, or the appeal has been dismissed. Compensable damages resulting from an irrevocable land-use plan are subject to a five-year statute of limitations, which starts running on the date that the land-use plan or relevant decision becomes irrevocable.

Fifth, the scheme of planning compensation rights under the SPA is not founded on the premise of complete compensation. The only damages that are compensated are those that cannot reasonably be borne by the aggrieved party. Article 6.2 SPA holds an important limitation on the right to compensation. This paragraph (art. 6.2) is new and reflects government's intention to limit claims for planning compensation.[14] It reads:

> *1. Losses falling within standard social risk shall be for the account of the applicant.*
>
> *2. The following shall in any event be for the account of the applicant:*
> *a. loss in the form of loss of income: a proportion equivalent of two percent of the income immediately before the occurrence of the loss;*
> *b. loss in the form of value of real property: a proportion equivalent of two percent of the value of the real property immediately before the occurrence of the loss, unless the reduction is the consequence of:*

[12] Van Ravels reports that 85% of all cases relating to planning compensation that have been brought before the highest administrative court (the Administrative Jurisdiction Division of the Council of State) relate to indirect damage. See B.P.M. van Ravels, Planschade; Van vergoeden naar tegemoetkomen ('Planning Compensation; From Compensation to Contribution'). In: R.W.M. Kluitenberg (ed.), 40 jaar Instituut voor Bouwrecht. Den Haag (Instituut voor Bouwrecht) 2009.

[13] See Spatial Planning Act (Dutch: Wet ruimtelijke ordening) art. 3.10.

[14] The other elements listed in this section ('first', 'second', 'third', 'fourth' and 'sixth') are more or less similar to the former regulation of planning compensation rights in article 49 Spatial Planning Act.

1° the use of the land belonging to the real property, or
2° the rules relating to the real property as referred to in article 3.1.

This article implies a deductible proviso of two percent. In other words, whenever the value of a property decreases, or related income declines, by two percent or less as a result of a planning decision, the damage would not qualify for reimbursement.

Example
For instance, suppose a home has a value of € 400.000,- prior to the adjustment of a land-use plan. The homeowner enjoys a free view over the meadows. Due to the new land-use plan residential developments take place in front of his home. His free view is lost and the value of his home decreases to € 375.000,-.[15] The 2%-rule implies that 2% of € 400.000,- = € 8.000,- of his damage will not be compensated. The rest (€ 25.000,- minus € 8.000,- = 17.000,-) would qualify for reimbursement. However, as Van Buuren et al. point out, article 6.2, para. 1 leaves intact that the municipal executive decides that a loss of more than two percent of the value of the property in this case must be borne by the applicant.[16] The argument of the municipal executive can be that, in a densely populated country like the Netherlands, it is a standard social risk that an open view to the landscape at some moment in time will be limited because of some new residential developments. Certainly, if the open view concerns a protected nature conservation area, things would be different. In such a case, one could say, it is not a standard social risk that an open view will be taken away by new residential developments. In that case merely € 8.000,- must be borne by the homeowner.[17]

The deductible rule will clearly not apply to a situation where a land use decision entails development or use limitations on the aggrieved party's own premises and thereby causes a decrease in value (art. 6.2, para. 2, under b SPA). Take the example of the reduction of the height of office towers earlier in section 3 of this paper. The concern for the government is that otherwise there would be a conflict with article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Sixth, interested parties may receive either monetary compensation or in-kind compensation, in which another piece of property is made available. In addition, the determination of the amount and type of compensation takes into account reimbursements that have been made to the interested party through purchase, expropriation, or other methods. If partial expropriation results in damages to the remaining share of the property, insofar as it is not reimbursed as part of the expropriation, then this too comes under article 6.1.

Legal protection

[15] This is an example of 'indirect damage', as defined above.
[16] P.J.J. van Buuren, A.A.J. de Gier, A.G.A. Nijmeijer, J. Robbe, *Van WRO naar Wro* ('From Spatial Planning Act to Spatial Planning Act'). Den Haag (Instituut voor Bouwrecht) 2008 at 191.
[17] Van Buuren et al. 2008, p. 191.

Of course, it is possible that Mayor and Alderman do not grant compensation on a request from a party who claims to suffer loss as a result of a land-use plan. It is also possible Mayor and Alderman do grant compensation, but the claimant is not satisfied with the awarded sum. In both cases the claimant has the right to lodge objections with Mayor and Alderman (the municipal executive). Should the result of that be unsatisfactory, the claimant has the right to lodge appeal with the court of justice (Dutch: rechtbank). Should the judgment of the court of justice be unsatisfactory, than higher appeal is possible with the administrative Jurisdiction Division of the Council of State (Dutch: Afdeling bestuursrechtspraak van de Raad van State).

7. Conclusions

New legislation regarding planning compensation rights came into effect on July 1st, 2008. The most important factors that contributed to the legislative change were:

- Developments in case law: court decisions gradually resulted in the rule that *full compensation* had to be rewarded, unless there is a substantial reason in a concrete case to make the damage the responsibility of the aggrieved party. Government was unhappy with these developments in case law.
- Fundamental reasons: comparative legal research showed that Netherlands had offered more extensive rights to planning compensation than neighbouring countries.
- Financial reasons: the municipal costs of (a) dealing with the grown number of requests and (b) the rise of the volume of awarded compensations, had, in the opinion of government, become unacceptably high.

To reduce compensation claims, the new legislation – contrary to the former legislation – stipulates that *losses falling within standard social risk shall be for the account of the applicant.* This implies a fundamental change in the foundation of planning compensation rights compared to the previous case law. Furthermore, a standard deductible proviso of two percent was introduced.

Despite the fundamental change in the foundation of planning compensation rights, many elements of the former article 49 Spatial Planning Act have been left unchanged under the new chapter 6.1 Spatial Planning Act.[18] Therefore, we can expect that major parts of the case law under article 49 remain of importance under the new chapter 6.1.

All in all the legal regime has changed from: 'full compensation, unless …', to: 'a contribution in compensation of damage'. Expectations are this will result in a decrease of the right to compensation.[19] However, case law has to be awaited. In a few years' time, court decisions will throw light on the interpretation of the new rules.

[18] See footnote 14.

[19] See for instance B.P.M. van Ravels, Planschade; Van vergoeden naar tegemoetkomen ('Planning Compensation; From Compensation to Contribution'). In: R.W.M. Kluitenberg (ed.), 40 jaar Instituut voor Bouwrecht. Den Haag (Instituut voor Bouwrecht) 2009 at 156.