

## PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.

<http://hdl.handle.net/2066/67037>

Please be advised that this information was generated on 2019-09-19 and may be subject to change.

**Barrie Needham**

**The new Dutch spatial planning act:**

Continuity and change in the way in which the Dutch regulate the practice of spatial planning



**Working Paper Series 2004/12**

# **THE NEW DUTCH SPATIAL PLANNING ACT**

Continuity and change  
in the way in which the Dutch regulate the practice of spatial planning

**Dr. Barrie Needham**

Professor of spatial planning, Radboud University Nijmegen, the Netherlands

Dr. Barrie Needham  
Professor of Spatial Planning  
Radboud University Nijmegen, the Netherlands  
e-mail: [B.Needham@fm.ru.nl](mailto:B.Needham@fm.ru.nl)  
P.O. Box 9108  
6500 HK Nijmegen

ISSN 1507 - 1501

## 1. Introduction

In 1999 the Dutch volume was published in the series Compendium of Spatial Planning Systems in Europe. That volume contained a fairly detailed exposition in English of Dutch spatial planning - the regulations, the organisations and the practices. It has not been updated. This present paper can be regarded as a partial update.

In 2000 the Cabinet started a process, with the publication of a 'discussion note', to revise the Dutch spatial planning act 'fundamentally'. A draft (voorontwerp) of the new act was published, with an extended explanation (toelichting), in September 2001. As a result of political instability, the process slowed down and it was not until 23 May 2003 that a second draft was put before Parliament. The Cabinet intends to present half way through 2004 a definite version for debate, which can lead to amendments, followed by formal adoption.

One particular aspect of the version of 23 May 2003 has caused considerable controversy, namely the rules for allowing large-scale deviations from a plan. This is being worked on 'behind the scenes', but the content of the possible revision to this aspect is not yet known. And there is a chapter in the new act for a 'land-development permit' which is totally missing from the version of 23 May 2003, which has been drafted and discussed separately from the rest of the act, and which if necessary will be debated in Parliament at a later stage. What is also still unknown is how the act will be supplemented by means of administrative orders (algemene maatregelen van bestuur). It is a fairly common practice to add to an act detailed regulations which, according to the government, are not so important as the more general regulations contained in the act itself. The minister can add and change such orders without the assent of parliament. In the present act, the details are in the form of a spatial planning decree (besluit).

This present paper is based on the draft of the act as published on 23 May 2003, it makes use of publications explaining the intentions of the revision, and reference will be made to the possible changes and additions since the draft of 23 May 2003 where there is sufficient information to do so. We must remember that it is the Cabinet which is initiating this revision. The changes are being introduced in order to achieve what the national government wants. The municipalities are not dissatisfied with the present legislation.

This process of making a new spatial planning act must result in a 'fundamental revision'. This is understandable. The first comprehensive spatial planning act dates from 1965, and although there have been many revisions since then, they have all been marginal. The structure of that act has remained unchanged. Even the numbers of many of the clauses in the act have not changed: for example, exemptions from the provisions of a land-use plan (bestemmingsplan) have been regulated by clauses 15 and 19 for almost the last 50 years. The present version has become, in that way, a patchwork. The legal inconsistencies to which this can give rise have been a concern of the Council of State (Raad van State). So when the need was felt to revise it again, it was decided not to do that within the old 1965 framework but in a totally new one. Hence the decision to revise the act fundamentally.

An unavoidable limitation of this paper is that it can only describe and discuss the formal rules. The practice depends on how those rules are interpreted and followed. We know that the existing practice cannot be explained solely in terms of the existing rules. For example, some of the rules allow a public authority to take certain actions but do not require it to do so.

A striking example is the existing rule whereby the national government can give a directive to a municipality to change its land-use plan in a certain way. In the nearly 50 years during which this power has been available (??), national government has used it (between 10 and 20 times ??). We do not know how the new rules will be applied. We can expect that there will be much more continuity in the practices than in the rules. Where the new rules make new practices possible but not obligatory, we can expect that the old practices will continue unless the new rules forbid them.

## **2. The reasons for making a new spatial planning act**

According to the discussion paper which introduced the process in 2000, there are six reasons for the revision. These are:

- a) The position of the land-use plan (bestemmingsplan) must be strengthened. This refers to the fact that that plan is supposed to be legally binding, which means that a building permit (bouwvergunning) may not be granted for a proposed development which does not conform to the plan. Nevertheless, flexibility clauses allow many building permits to be granted which are contrary to the plan. This weakens the legal significance of the land-use plan. This latter had become so weak that in some circles the statement that a land-use plan was legally binding was referred to as ‘the big lie’ (de grote leugen).
- b) The position of interested parties must be better protected. This refers to the procedures for making objections and appeals against decisions of the public authority. It is the wish of the Dutch government that there be standard procedures for this, which apply to all decisions of the public authority, whether they be about spatial planning or about environmental permits or about schooling or whatever. Those procedures are regulated in one act (the Algemene wet bestuursrecht) which has not been completely incorporated into the spatial planning act.
- c) Procedures must be simpler and quicker. This refers to the relationships between the various legal procedures relevant to spatial planning (the plans and actions of the public bodies at different levels of government and for the different policy sectors which interact with spatial planning, such as transport planning, environmental policy, etc). It refers also to the procedures which determine the length of time for making and approving a spatial plan. The procedures have become very ‘sticky’ (to translate a Dutch term).
- d) There must be more consistency between planning decisions, so that there is more coherency in the physical development in a particular area (samenhang). This refers to the fact that many building permits are given for projects which are contrary to the land-use plan (see above) while one of the tasks of the land-use plan is to ensure coherent development in the plan area. It refers also the fact that very many land-use plans are hopelessly out-of-date and are very small (e.g. for the municipality of Nijmegen, with about 150,000 inhabitants, there are around 600 valid land-use plans). The result is that many land-use plans cannot fulfil the task of ensuring coherence.

It refers also to the fact that the relationship between the spatial plans at the different spatial levels is not clear. The national report on spatial planning (nota ruimtelijke ordening) is supposed to provide a framework for the spatial policy of the provinces and municipalities,

and in that way ensure coherence in the development of the national area. The regional plan (streekplan) made by the province is supposed to provide the framework for the municipal plans, so that those municipal plans contribute to a coherent development within the region. And the structure plan made by the municipalities (structuurplan) is supposed to provide a framework for the municipality's own land-use plans. But it doesn't always work like that!

e) The plans made by the higher authorities must 'perform' better (doorwerking). This too refers to the relationship between the spatial plans at the different spatial levels. A spatial plan made by the national government should 'perform' by influencing in a desired way the plans made by the provincial and the municipal governments: and a spatial plan made by the provincial government should influence in a desired way the plans made by the municipal governments. But, as said above, it doesn't always work like that.

f) The regulations laid down in spatial plans should be observed more consistently (handhaving).

This refers to the fact that quite often development takes place illegally. That is, something is built without a building permit, or contrary to the building permit. These are not large projects, but modifications to buildings, changes of use, etc. It is felt that the ease with which this takes place undermines people's trust in the planning system. It is the task primarily of the municipalities to check developments to see if they are in line with the planning regulations. But many municipalities have not given priority to this (e.g. they take action only if someone complains about an illegal activity), and some municipalities have consistently turned a blind eye. Two disasters with much loss of life (the explosion of a fireworks factory in the middle of a housing estate in Enschede, and a fire in a cafe in Volendam) have focussed attention on this, for in both cases there had been illegal building and/or use.

### **3. Those reasons placed in the context of recent institutional changes in the Netherlands**

a) Changes in the relationship between the public and the private sectors. In the Netherlands, as in many other countries of Western Europe, the public sector has withdrawn from certain activities, leaving them for the private sector (privatisation). And where that is not possible because the activities are reserved for a public authority – for example the granting of building permits, or the approval of a land-use plan – the public sector has in many cases tried to make its decisions more in conformity with what it is assumed 'the market' would want. In that way too, the public sector has withdrawn, not from the activity but from trying to steer the actions of others along directions other than those which 'the market' would take. Those changes require a less directive approach to spatial planning from the public authorities and a greater responsiveness to 'signals from the market'. And they require speed, clarity, consistency and predictability in the way that public authorities make spatial planning decisions.

b) Changes in the relationship between the government and the citizen. The citizen (to the extent that one can speak of 'the' citizen) is demanding more say in decisions which affect him and her. There is less trust that the public authorities will make the best decision in the interests of the citizens. People want to be able to influence those decisions. Sometimes this is for social or ideological reasons, such as when people want to keep their neighbourhood small and friendly, or when people want to stop an industrial estate being built on land with a high natural value. And sometimes this is for private pecuniary

reasons, such as when people want planning decisions to be made which will benefit the value of their property. Under these changed circumstances, the relationship between the government and the citizen should become more businesslike and formal. This too requires clarity, consistency and predictability in the way that public authorities make spatial planning decisions, also that those decisions be fully and carefully justified.

c) Changes in the relationships between citizens.

Dutch society was until fairly recently remarkably homogeneous. In those circumstances, consensus could be reached quite easily about the content of spatial planning policy, for the particular form of the physical environment that one person wanted was similar to that wanted by most other people. So it was possible to find a policy content that reflected 'the public interest'. It is now much more difficult to find a form of the physical environment which everyone agrees would be good for them. The reason is that there is much more variety in values, tastes, wishes, etc. That has come partly because of immigration, but also because of the increasing variety among the native Dutch population. As a result, it has become more difficult for a planning authority to make a spatial plan which will gain the support of the majority of the voters. And those who do not like a plan do not keep silent (see above). Conflicts about planning decisions are increasing, with many more appeals having to be decided by the highest court (Raad van State). This calls once again for clear and unambiguous legal procedures. And it calls, it could be argued, for less directive spatial planning, that is it calls for spatial plans which allow the variety of physical environments which people want rather than plans which specify the physical environment which must be realised.

d) Changes in the relationships within the public sector.

One dimension of this relationship is vertical: between national, provincial and municipal authorities. Put bluntly, the national government has got fed up with municipalities obstructing and delaying the implementation of national policies. The Dutch rules for spatial planning reflect the general situation of great autonomy for municipalities. In particular, the fact that there is only one sort of spatial plan that is legally binding – the land-use plan – and that this is a responsibility of the municipality, gives that local government many possibilities for holding off national government policies which it does not want to accept. Before this current revision of the law, there have in the last 10 years been two revisions which have weakened that obstructive power of the municipality. The national government wants to go further. It argues that strengthening central powers is becoming increasingly necessary, because of the increasing scale of infrastructure works and because of the need for cross-boarder collaboration. The relationship between public bodies should become, it is argued, more businesslike and less informal.

A particular aspect of the vertical dimension is the position of the city region. This is bigger than the municipality, but smaller than the province. This scale has become more important for decisions about economic development, transport policy, housing policy, etc. But the Dutch constitution does not recognise a regional level, nor is there a political wish to create one. Municipalities within the same region do not want to co-operate in a structural and intensive way. And provinces do not want to hand over any of their planning powers to a regional authority. Nevertheless, there is clearly a need for some kind of spatial planning at the regional level. A fairly recent revision to the spatial planning act made it possible for regional public bodies to make spatial plans; but it did not give any powers for direct implementation to those regional bodies.

The horizontal dimension within the public sector concerns the relationships between the various policy sectors. For clarity in the exercise of public powers, it is desirable that regulations created for one policy sector be used only for that sector and not for others. On the other hand, activities within the small area of the Netherlands are intensifying, and technological changes are creating more spill-over effects, so the inter-relationships between the activities which the separate sectors are supposed to regulate (for example, between transport and land, between agriculture and water quality, between noise nuisance and residential areas, between employment and nature areas) are growing and becoming more complicated. This means that the horizontal dimension is becoming more important. This gives more problems at the national level, between ministries, than at the provincial and municipal levels, where lines of communication are shorter. Public impatience with poor co-operation between sectors focuses on the ministries. At the scales of the provinces and municipalities there is a particular complication, namely the relationship between spatial planning and the local water boards. The latter are old and established and have a lot of autonomy. But it has become clear that decisions about land use and about water management must be much better co-ordinated with each other.

This co-ordination must be consistent with a principle in Dutch public administration called 'détournement de pouvoir'. This means that legal powers granted for implementing the policies of one sector may not be used to implement the policies of another sector. This causes problems for spatial planning, for that concerns the use of all land in a particular area, and many other policies too have implications for the use of land (they are 'spatially relevant'). Spatial planning should take account of land for education: but may not say anything about what types of school may come where. Spatial planning should take account of land for housing: but may not say anything about what types of housing should come where. And so on. The working out of this principle is regulated in two ways. First, in clause 10 of the existing act, secondly in jurisprudence built up over the years. The relationship between the two sectors spatial planning and environmental policy has become particularly problematic in recent years. More has become known about the spatial dimension of environmental pollution (e.g. how pollution disperses from its source). And it is sometimes difficult to use the spatial planning law to prevent development which would transgress the environmental norms from the EU.

e) Changes in the relationship between the Netherlands and the European Union. European policy for spatial development is growing in importance, even if it is at this moment not very significant for the member states. It is clear that some aspects of that European policy can be implemented only by the national governments of the member states. Examples are the TEN's and the international networks of nature areas. This requires that the national government has the powers to impose planning decisions on the lower levels of government.

At the same time, much European policy is implemented through the structural funds, and these are made available to municipal, regional or provincial governments. This requires that those levels of government have sufficient autonomy to be able to accept and use those structural funds. And that can work against national policies for spatial planning.

The European guidelines which are important for spatial planning are another issue. The Bird and Habitat guidelines, for example, can have a great effect on where spatial development may and may not take place. The national government is responsible for seeing that those guidelines are followed. Another example are the more recent guidelines for water

management. So it is necessary that the national government can – if necessary – impose planning decisions on local governments.

Finally, we mention the European norms for matters such as environmental pollution and safety. Experience has shown that, especially in a densely populated country such as the Netherlands, implementing those norms can have a great effect on physical development. For example, the norms for exposure to particles in the air can require that no housing be built near to busy roads. Experience has shown also that if those norms can be implemented flexibly, then the required end result can be achieved with a better form of the physical environment. The question is then: what possibilities does the national government have for allowing European norms to be implemented flexibly at the local level?

#### **4. What are the main changes?**

- a) The planning system will become clearer with a sharper distinction between 'indicative plans' (visies) and plans for implementation.

In the existing system, all three levels of government can make indicative plans: the national level with spatial planning key decisions (PKB's), the provincial level with a regional spatial plan (streekplan), the municipal level with a structure plan (structuurplan). In all cases, the authority making the plan may do this for all or just a part of its area. This sort of plan will be retained, but all the varieties will be called the same (structuurvisies). In the existing system, the indicative plans at national and provincial levels can contain binding decisions also (concrete beleidsbeslissingen), either binding on all persons and agencies or binding just on the agency which made the plan. In the new system, that implementation function of indicative plans has been scrapped and they can bind only the authority that made them. If national and provincial governments want to make implementation plans, they have new possibilities for doing that (see below).

Because the indicative plans will have no direct implementation function, it is not necessary to specify the procedures for how they should be made, approved, etc. For the same reason, those plans can be broad, encompassing more than the traditional 'spatially relevant' issues. And – for the same reason – no appeal is possible against these indicative plans.

The plan for implementation retains the name of 'bestemmingsplan' (which has been translated throughout with 'land-use plan').

- b) The land-use plan will become stronger and more important.

This will be achieved by requiring municipalities to make land-use plans for the whole of their jurisdiction. At the moment, it is possible for parts of the built-up area not to be covered by a land-use plan. Also, the possibility for allowing big deviations from the land-use plan (the 'article 19-1 procedure') will be withdrawn. (We return to this point.) The possibility of granting minor exemptions remains.

Under the existing rules, the land-use plan is supposed to be revised every 10 years, but it does not lose its legal force if it is older than that, and some are 30 to 40 years old. The result is that land-use plans are not revised regularly. Under the new rules, the land-use plan will lose its legal force if it is older than 10 years. This means that the municipality will not be able to grant a building permit for development in an area covered by a land-use plan which is older than 10 years. The province can grant an exemption to this rule, for a maximum of 10

years. In order to protect people from the consequences of having their development applications frozen by a municipality which does not revise its land-use plan on time, it will be possible for a legal person to require that the land-use plan be revised.

The possibility of granting temporary exemptions will be retained, but tightened up: the maximum duration will be reduced from 5 to 3 years, and this period may not be extended.

A technical change which should allow quicker and more frequent revisions is that a digital version of a land-use plan will be legally recognised.

c) The legal procedures will be simplified and speeded up.

The procedures for making and revising a land-use plan will be speeded up. At the moment, the minimum duration is 39 weeks, the maximum is 58 weeks (excluding the obligatory participation procedures and if there are no legal appeals): it will become minimum 22 weeks, maximum 34 weeks (again, without participation procedures and if there are no legal appeals). One of the reasons for wanting to reduce the duration is to increase the flexibility of the planning system. Under the old rules, if someone wanted to develop something which was not in conformity with the land-use plan, and if the municipality wanted to give its approval, it could either revise the plan or use the exemption procedure (article 19). The first took between 39 and 58 weeks, the second took at most 24 weeks (not counting the obligatory participation procedures). By reducing the time for revising a land-use plan towards that for the exemption procedure, it is no longer necessary to retain that latter. And it was the frequent use of the exemption procedure for large deviations that weakened the legal significance of the land-use plan.

The legal protection given to the citizen (the right to participate, the object, to appeal) with respect to the decision making about the land-use plan will be made consistent with those for other types of public decision making, as regulated in the general legislation (algemene wet bestuursrecht). Decision making about the other types of spatial plans (the 'structuurvisies') does not need to contain legal protection for the citizen, because those plans will have no legally binding force: as we have seen, the revision includes no obligatory procedures for making those plans.

d) New rules for how the national and provincial governments can influence the content of municipal land-use plans

Under the existing system, a municipal land-use plan does not have any legal status until it has been approved by the province. That plan does not have to be approved by the national government. If however that government is not satisfied with the approval given by the provincial government, it can replace that provincial approval with its own decision. The procedures are clumsy, and they allow the intended decision of the municipality to be corrected only after most of the procedures have already been followed. Under the new system, the national and provincial government have the right to check the intended content of the municipal land-use plan while it is still being made. If those higher levels of government consider that a municipality wants to pursue a planning policy which is not consistent with their policies, they inform the municipality. If the municipality does not take sufficient account of those comments and decides formally to adopt its own plan unchanged, the legal working of that decision is suspended. This can be the occasion for the national or provincial government itself to make a land-use plan for that area.

e) There are more possibilities for making legally binding plans

At the moment, the only public authority which can make a legally binding plan is the municipality. This means that if the national or provincial government wants to implement a project (a road, a prison, a waste incineration plant, etc.) it is dependent on the municipality. If that project would be not in conformity with the existing land-use plan, it would be illegal to build it. So the national or provincial project cannot be built until the municipality has changed that plan. If it does not want to (because it does not want the project proposed by the national or provincial government), then those higher levels can oblige the municipality to make a land-use plan with a certain content. But the municipality has many possibilities for delaying compliance with that directive. Those tactics have finally exhausted the patience of national government and the provinces. So those latter are being given the power to make land-use plans with the same legal significance as the land-use plans of the municipalities. Moreover, in order to avoid the possibility of municipalities sabotaging national and provincial projects by refusing to grant the necessary permits for building etc., national and provincial governments will be given those regulatory powers too for the locations covered by their land-use plans.

If a municipality, province or the national government wants to allow a project to be realised which would not be permissible under the existing land-use plan, it will first have to revise that plan (see above). Realising the project might require taking other decisions also, such as an Environment Impact Assessment. At present, those decisions are taken separately from the revision of the land-use plan, and appeal is possible against those extra decisions separately. Those rules delay the implementation of projects. Under the new rules, the planning authority will be able to follow a 'project module'. The procedures for revising the land-use plan can be combined with the procedures for making other related decisions, and there will be only one possibility of appeal.

f) National and provincial governments can set the constraints within which municipalities make their planning policy

It has already been said that national and provincial planning policy often does not 'perform' well, as it filters down to the municipal level. The municipalities sometimes use their considerable autonomy to ignore the policies of the higher levels. The new rules give the national and provincial governments stricter powers for requiring a municipality to follow their policies. These directives (instructies) can be general or particular. The general directives will apply to all land-use plans, or to all policy situations of a particular sort, irrespective of the municipality. They can be made by both the national government and by the province. They will be used when these authorities check the intended content of a municipal land-use plan while it is being made (see above). There will be no appeal against a general directive.

National and provincial governments can also give a specific directive to a specific municipality. If a municipality ignores this when revising its land-use plan, or if it does not revise a land-use plan which is not in conformity with a specific directive, then the national and provincial governments can freeze the legal validity of the land-use plan and can themselves revise it (see (d) above). There is no appeal against a specific directive, but the usual appeal procedures apply against a land-use plan which has been made to incorporate that directive.

g) Stricter observance of the regulations.

Municipalities remain responsible for ensuring that no development takes place which is not in conformance with the planning regulations. They will be given stronger powers for

punishing illegal developments. The national government (in the person of the minister) supervises whether municipalities are controlling illegal development sufficiently, and can place a municipality under surveillance in order to ensure this. If a building permit has been given which is not in conformity with the land-use plan, it can be declared null and void. And if necessary, the minister can replace the municipality in the performance of this function, charging the costs to the municipality concerned.

h) Compensation for financial loss suffered as a result of planning decisions.

If a land-use plan is changed, as a result of which someone with an economic interest in land in the area suffers a loss of value, that person can apply for financial compensation. This applies not only when the designation of a plot of land is changed to a use with a lower value (the owner of the plot is entitled to compensation), but also when the designation of a plot is changed, which results in the value of another plot falling (e.g. a house was on the edge of a built-up area, it has an outlook over fields, the land-use plan is changed to allow those fields to be built upon, as a result the value of the house falls: then the municipality is required to compensate the house owner). This is a curious interpretation of a particular principle in Dutch public affairs (*égalité devant les charges publiques*), and in the last few years it has put many municipalities to considerable costs, even causing some of them to reconsider making otherwise desirable revisions to a land-use plan. Technical changes will be introduced with the aim of reducing appeals for this sort of compensation and of reducing the amount of compensation paid.

i) It will be possible to widen the scope of what may be covered in spatial plans.

The limitations on what may be regulated by the spatial planning legislation (what is 'spatial relevant') are fairly strict. This makes co-ordination between spatial planning and some other policy sectors (in particular environmental policy) difficult. In the new act those limitations will be reduced. This will be done by not retaining the clause (number 10) in the old act which restricted what may be regulated in a land-use plan, and by creating the possibility of specifying later, by administrative orders, that indicative plans (*visies*) and land-use plans may fulfil their function (a 'good spatial development of the area') by taking account of the policy wishes of other sectors. For example, those orders can make it obligatory to include in the land-use plan certain environmental norms. Those changes should make it easier to integrate spatial planning with the policies for other sectors.

j) The possibilities of lodging an appeal against a decision by the planning authority will be reduced.

At the moment anyone may make an objection or an appeal (*actio popularis*). This scope is being reduced to include only those with a legally protected interest in the outcome (e.g. property owners). It is intended that this speed up the process of plan making.

k) Planning authorities will have to publish an annual report about their planning activities

The planning authorities are all those which make planning policy, that is not just the municipalities but the provinces and national government also. The aim is to require them to justify and explain their activities publicly and regularly. In particular, municipalities will have to give a report of how they have controlled illegal building.

## **5. To what extent do those proposed changes satisfy the stated needs for change?**

In section 2 we set down the six reasons given in the discussion paper for a fundamental revision. These are:

- the position of the land-use plan must be strengthened;
- the position of interested parties must be better protected;
- procedures must be simpler and quicker;
- there must be more consistency between planning decisions, so that there is more coherency in the physical development of a particular area;
- the plans made by the higher authorities must perform better;
- regulations laid down in spatial plans should be observed more consistently.

It will be seen that the proposed changes have been designed to realise those aims. There is one qualification that must be made, namely the expressed wish to protect better the position of interested parties. The proposed changes will make the procedures for objections and appeals clearer, but will reduce the scope of who is an interested party and thereby entitled to appeal. That has been done to speed up the planning procedures.

A related question is: to what extent are those proposed changes a response to recent institutional changes in the Netherlands, as described in section 3?

We said that many of those changes require that the procedures for spatial planning be clearer, more consistent, more predictable and quicker. It can be expected that the proposed changes will achieve this. We discussed also changes in the relationships within the public sector, in particular the tension between municipal spatial planning on the one hand and provincial and national spatial planning on the other. It is clear that the proposed changes give more powers to those higher authorities at the expense of the autonomy of the municipality. That should make it easier to respond to another of the institutional changes described, namely in the relationship between the Netherlands and the European Union. Another of the institutional changes relates to horizontal co-ordination: the inter-relationship between spatial planning and other policy sectors which affect the physical environment. Widening the scope of the spatial planning 'visions' so that they can incorporate more than strictly land-use issues should help this, as should the intention to widen the scope of land-use plans so that they take account better of environmental norms.

However, there are some other changes in the institutional context to which the proposed revision of the spatial planning act gives no response. One of these is the public sector withdrawing from some activities and carrying out other activities differently, so as to give more room to the private sector. The fundamental revision should make it possible that planning decisions are made more clearly, more consistently, more predictably and more quickly: but other and additional responses are possible. We return to this point. Another change to which the proposed revision does not reply is the increasing importance of the region. Indeed, the possibility in the existing law for regional structure plans is no longer available. We return to this point also.

## **6. What other changes might be introduced?**

a) It is rumoured that one of the main reasons why the Cabinet has still not put the proposed legislation before Parliament is because of a powerful lobby against dropping the possibility of giving exemption from the land-use plan in order to enable a non-conforming project to be built. We have seen that this possibility has been very widely used in the past,

giving rise to the statement that it is a 'big lie' that the land-use plan is legally binding. That extensive use of the 'article 19-1 procedure' has been to the great advantage of municipalities and developers, for it has enabled them to collaborate to realise projects that both of them want, without having to go to the trouble of revising the land-use plan. The national government in particular is not happy with that practice, for it sees itself as being responsible for guaranteeing the legal certainty that a land-use plan is supposed to give. Legal certainty is – apparently - much less important to the municipality, and to developers it means inflexibility and delays.

National government is saying, in the published version of the draft act, that shortening the procedures for revising a land-use plan will remove the necessity for the exemption procedure. But even if that were to be true, it might not give an alternative which would satisfy municipalities and developers. For they want not only speed but also procedures which enable them to negotiate privately, which is the opposite of giving the citizen legal certainty. It is rumoured that municipalities and developers have mounted a concerted lobby to get some sort of exemption procedure re-introduced. The decision that is finally made will affect the way in which the revision of the spatial planning act responds the changes mentioned above in the relationship between the public and private sectors.

b) Chapter 5 in the present version of the draft act is called 'Inter-municipal co-operation in urban areas': and it is empty. Perhaps it will fill later the gap which the provisions for regional structure plans fill in the present legislation. As said above, the issue of the regional level of government is very thorny in the Netherlands, and has been for many years. At the moment there are regional public bodies in seven city regions. But these were created temporarily, they are currently being evaluated, and they will probably be wound up. The technical necessity for spatial planning at the scale of the city region remains. That chapter 5 is empty reflects the political tensions around this subject, with provinces not wanting to lose their powers, with municipalities in the centre of the city region wanting to annex adjacent municipalities, with those adjacent municipalities wanting to retain their independence. We do not know how this tension will be resolved.

c) Chapter 6 in the present version of the draft act deals with financial provisions. Section 4 is called 'land development' (grondexploitatie); and it too is empty. This is a subject with a long and complicated history. The land-use plan is the only plan which is legally binding, and by legally binding is meant: if someone applies for a building permit which is in accordance with the plan, that permit must be granted. There is no possibility of granting the permit conditional upon the applicant meeting requirements which are not specified in the plan. The importance of that restriction depends on what can be specified in the plan. And there are several matters which a municipality would like to include in its land-use plan, but which the current legislation does not allow.

One of these matters is a financial contribution to the costs of making the plan and to the costs which the municipality makes for infrastructure etc. Another financial matter is the possibility of cross-subsidisation within a plan area, with a contribution from areas with high value uses to the costs of land or infrastructure in other areas. The present legislation regulates this very inadequately. Another of these matters is the mix of housing to be built in a plan area. A municipality might want housing of a special type to be built there, such as for renting or for owner-occupation, or housing in the social sector or for handicapped people, or it might want some of the building plots to be made available for people who want to build their own house. Another such matter could be the wish that the building materials which are used be

compatible with sustainable development. And another is the phasing of development within a plan area: in which sequence should the parts be built? But – to repeat – it is not possible to include these matters in the land-use-plan.

The reason for such limitations is that a land-use may regulate only matters which are ‘spatially relevant’. If the interpretation of ‘spatially relevant’ excludes a certain matter (such as finance), then that matter may not be included in the land-use plan and the building permit must be granted even though the application does not meet the municipality’s wishes regarding that matter.

Until about 10 years ago, those limitations did not attract much attention. The reason is that it was common and uncontested practice for municipalities to supply the serviced land on which developers would build. The shortcomings in the spatial planning legislation could easily be compensated by clauses in the deed of conveyance by which municipalities sold their land to the developer. Then that practice changed, not because of public policy but because developers took the initiative and bought development land before municipalities did. It was only then that the limitations in the legislation began to attract political attention. That culminated in a policy document on land policy issued by the Cabinet in 2001.

Most parties want to find a solution, municipalities because they want to be able to realise their wishes, and developers because the current uncertainties lead to long-drawn out negotiations with unpredictable outcomes. One of the ways of reducing the limitations would be to widen the interpretation of the term ‘spatially relevant’. The Cabinet is not proposing doing this radically (widening the permissible scope to include more environmental issues has been mentioned above), possibly because it could not foresee the consequences, including the consequences for other policy sectors. Instead, the Cabinet has proposed making a second type of permit compulsory under certain circumstances. For all building works, the building permit is and will remain compulsory (except for exemptions such as, for example, minor works). For building works which require that land first be serviced, an additional ‘land-development permit’ (exploitatievergunning) will be required. This can be used to stipulate that the development meet certain conditions (including financial conditions) which cannot be regulated by the land-use plan in combination with the building permit. It is not an elegant proposal, but it might be the best that is possible.

Why is the section regulating this in the draft plan still empty? The answer is that it is proving very difficult to find a content which meets the wishes of all the parties, and especially the parties most concerned, namely municipalities and developers. Both want a solution to be found to the problem, and both agree that introducing a land-development permit is the best way. But there is still no agreement about what should be included in that permit, nor about the procedures by which the application should be tested and the permit granted. The solution chosen will affect how the revision of the spatial planning act responds to the changes in the relationship between the public and the private sectors, discussed above.

d) Other changes in the draft act are, of course, possible. During the debates in Parliament amendments will undoubtedly be proposed and some will be adopted. We cannot foresee this. What also cannot be foreseen is how the Cabinet will use the opportunity offered by the act to fill in certain details later. This is offered in several places and concerns matters such as the clause that administrative orders (algemene maatregelen van bestuur) can be used to regulate how ‘structuurvisies’ be prepared and the form they should have, also the form and content of land-use plans and the written statement accompanying them.

## **7. What is explicitly not being changed?**

a) It remains a curiosity of Dutch spatial planning law that the all-important permit, the building permit, is regulated not in planning law but in the housing act. There are good historic reasons for this, and it is not felt necessary to change it, for that would require radical changes in the housing act too.

Incidentally, it should be mentioned – because it is not widely known, neither in the Netherlands nor outside – that there is another sort of permit for controlling development, and that this is regulated in the spatial planning act. This is the ‘aanlegvergunning’, which can be required for works which change the land or the land use but which are not building works (which are regulated by the building permit). These are works such as digging ditches and changing ground levels. Unlike the building permit, which is required in all cases irrespective of the land-use plan, an ‘aanlegvergunning’ is required only in the area covered by a land-use plan which explicitly states that for that area that permit is necessary. This regulation is largely unchanged in the revised act.

b) It has been said above that much spatial planning actually takes place in the form of negotiations with other public authorities and with private actors about development projects. These are sometimes so determining that making the land-use plan is little more than legitimising the agreements reached. For this reason there has been talk of regulating the procedures for making those agreements, such as a PPP-agreement, for example in order to make them more transparent. It has been decided not to do that, partly because it could delay the plan making, but also in order to keep separate the stages of: drawing up the proposed land-use plan and; formally adopting that plan. It is the formal adopting of the plan that gives it its legal significance, so it is the procedures for that only which need to be regulated.

c) A similar argument is put forward for not regulating more aspects of the plan making, such as rules for open plan processes, for including stakeholders, etc. The public authority is the only agency which can be legally responsible for the content of a spatial plan, and that must remain so and unaffected by how the plan is made. The legislation must keep this clear.

d) It remains the case that the spatial planning act regulates procedures and says nothing about the content of the planning policy that should be pursued. So, in contrast with the spatial planning in some other countries, the revision does not say anything about the goals of achieving sustainable development, or equity between citizens, or protecting the countryside, and so on. It says that ‘structuurvisies’ should set down the main lines for the physical development which is intended for the area concerned, and that the land-use plan should set down the land-use designations considered necessary for a good spatial planning. That is, the revision specifies, just as the existing law does, what the functions of those plans are, but nothing about the nature of the physical development which the powers should be used to achieve, nor what is meant by ‘a good spatial planning’. The law must enable a ‘good spatial planning’ to be achieved, but the planning authorities must be free to specify what this is.

## **8. How fundamental are those changes?**

Those people in the middle of a change perceive the scale of the change differently from those on the outside. In particular, those in the middle often see the change as ‘fundamental’ or ‘radical’, when those on the outside see much more clearly the continuity. Those responsible for this new spatial planning act see the revision as ‘fundamental’: but if we look at it from outside, are the changes perhaps no more than adjustments to an otherwise unchanged approach to regulating the practice of spatial planning? What are the fundamentals of the Dutch approach to regulating that practice, and to what extent are they being changed by the new act?

We can identify certain principles, formal and informal, on which Dutch planning law and practice are based. And we have to recognise that these principles sometimes contradict each other.

a) The principle of restricting spatial planning to matters which are ‘spatially relevant’. This principle (*détournement de pouvoir*) applies not just to spatial planning but to other policy sectors also. It refers to the idea that powers which have been given to implement the policy for one sector should not be used to realise the policies of another sector. We have seen how it has limited what can be achieved with land-use plans. And we have seen that there are proposals for introducing a land-development permit (*exploitatievergunning*) to overcome some of those restrictions.

We can conclude that the principle will not be applied so strictly. The land-development permit, which allows matters to be regulated which according to the existing legislation are not spatially relevant, is being introduced into the spatial planning act. There are other ways in which the principle has been weakened (e.g. that ‘*structuurvisies*’ may include matters which go beyond the traditional spatial planning limits), but those changes are less radical.

b) The protection of private property  
This is the principle that people who own (landed) property should be able to exercise all the rights included in that ownership, except when that exercise is explicitly restricted by laws specified in advance. This is what is meant by ‘the rule of law’. A land-use plan coupled with the requirement to obtain a permit before carrying out development is one of those possible restrictions.

This found expression in the existing law in the assumption that it is private parties which initiate and undertake development and that the building permits which they must apply for will be tested against the land-use plan. This is the classical ‘passive planning’ (*toelatingsplanologie*) and it embodies an idea about the desired relationship between the public and the private sectors. This assumption, which dates from the 1965 act, is incorrect. We know that very often it is the municipality which initiates development and which, in many cases, takes the first steps to realise that development by buying development land and servicing it. The result is that for most large-scale developments in the last 50 years, the land-use plan has not guided development but legitimated it.

This situation is changing: private developers are taking the initiative much more often, municipalities are providing building land much less often. The assumption is now becoming more correct. It is ironic that it is now becoming clearer that the spatial planning act is in fact inadequate for passive planning. For passive planning requires that financial matters be well regulated, also matters which are broader than a narrow ‘spatially relevant’. Now that passive planning is becoming the norm, and it has been discovered how inadequate the 1965 act is for

this, the occasion of the fundamental revision has been used to add clauses which make the new act better suited for passive planning. That is the purpose of the ‘land-development permit’.

We can conclude that the revised act is more consistent with this principle than the existing act.

- c) The principle that all public authorities should follow the unwritten rules of responsible public administration.

These rules (ongeschreven beginselen van het behoorlijk bestuur) refer to actions such as: the public administration should treat equally all people in the same legal situation, all decisions should be rational and well motivated, the actions needed to implement policy should not be disproportionately powerful, the powers granted for implementing policy in one sector should not be used to implement policy in another sector, etc. Although those principles are unwritten, many of them are incorporated into formal legislation (such as in the Algemene wet bestuursrecht which regulates how people may participate, may make objections and may make appeals), and the judge takes them into account if there is an action against a public authority. Clearly, the rule of law mentioned above in relation to how property rights are restricted is a ‘meta-principle’ behind the unwritten rules.

This principle is one of the bases of the existing legislation, but has not always been respected in Dutch planning practice. We have referred several times to the way in which municipalities have used the exemption procedures (article 19-1) as a way of side stepping the requirement to revise the land-use plan, although that latter would have satisfied the unwritten rules better. And there are other municipal practices which are much less transparent. These involve negotiations with developers, the selecting of developers, making financial agreements, buying and selling land.

For many years, national government has been unhappy with the way in which municipalities have transgressed those unwritten rules and has tried to reduce the transgression by revising the law. And municipalities have tried to avoid the consequences so as to be able to continue their practices.

It will be seen that this proposed revision is yet another attempt by the national government to get municipalities to follow the unwritten rules in their planning practices.

- d) The principle that a municipality should take responsibility for the physical development within its area.

This found expression in the existing law which gives municipalities the sole power to make a legally binding plan, and in the practice that municipalities use their legal powers to try to prevent developments which they do not want and to allow developments which they do want. The practice has just been described, including the way in which some municipalities have used the rules creatively where this was necessary in order to achieve the result (the physical development) which they wanted.

This principle has resulted in some very good practice. Most municipalities feel a deep responsibility for what takes place within their boundaries, and it is that wish rather than the arrogance of power that has led them to cut corners with the legislation and interpret it in ways that the legislator did not intend. The end result – the built environment – is often very good and has quite rightly attracted international approval.

With this proposed revision of the spatial planning act, the national government wants to restrict severely many customary practices. Municipalities must work more openly, and they must accept more binding guidelines imposed by the national government itself and by the provinces. This is a political decision, for this principle (d) can clearly be contradictory to the principles (b) and (c). If the revised act is approved and comes into power, it is to be hoped that municipalities will not be discouraged from pursuing their traditional aim of achieving a good physical environment in their area, and that they will be able to find ways of doing that without transgressing the principles (b) and (c).

e) The principle that the physical environment is important.

The Dutch attach great importance to certain qualities of the physical environment. They want it to be neat and tidy. They want the spaces which they see and share to be attractive. They want decisions about the use of land to be taken carefully. In order to achieve this, the Dutch want their public authorities to be able to exert a great influence on the development of the physical environment. Dutch spatial planning is in that respect ambitious. For this, there is a detailed system of plans and planning policies, a lot of public money is spent on making plans, and a lot of public money is spent on making and maintaining those parts of the physical environment which the public sees and shares (public spaces, natural areas, etc).

The Dutch want that public involvement in development even if it should go against certain other principles, such as the protection of private property rights. The idea is implicit, that those with an interest in physical development are not just the owners of landed property in the location, but also other citizens concerned with the how that location looks and how it is used. Indeed, the rule that nothing may be built without a building permit has the sole purpose of protecting the interests of third parties. The physical environment is a 'public good', of concern to many people and in which many people have an – indirect – interest. This principle can be in conflict with the principle of the protection of private property.

The proposed revision to the spatial planning act does nothing to weaken the principle that spatial planning is an important public activity, even though the revision strengthens in some respects the position of the property owner against the public authority

f) Administrative pragmatism.

The Dutch often feel uneasy with hierarchical forms of regulation. In particular, it is desired to avoid situations in which the province imposes decisions on the municipalities and in which the national government imposes decisions on the provinces and municipalities. So although under the existing legislation it has been possible for the national government and the provinces to work hierarchically, they have preferred not to do that. If there have been differences between their policies and the policies of municipalities, all parties have tried to resolve them by negotiation and discussion rather than by applying the hierarchical rules.

The Dutch are prepared to be pragmatic in the relationships between the various sectors of public policy also. Spatial planning attempts to improve the physical environment, but that latter is affected also by many other sectors of public policy. So co-ordination between those sectors is required. This is difficult to achieve: but a lot of time and money is spent on it. Solutions are sought by discussions rather than by applying rules.

What is the relationship with the proposed revision of the spatial planning act? If you read that proposal, you see legal rules: that is the nature of legislation. The first question is: will

those new rules rule out, or seriously reduce the possibilities for, administrative pragmatism? The answer is mixed. It is precisely in order to reduce the possibilities for some forms of administrative pragmatism that some of the rules are being introduced. The new legislation is being introduced so that relationships between organs of the public administration become more businesslike and 'distant'. On the other hand, many of the new rules create powers which do not necessarily have to be applied, such that national government and provinces can give directives to municipalities which have to be incorporated into land-use plans.

The second question is: where administrative pragmatism is still possible, what can we expect about how the rules will be used? There is a Dutch expression: 'the soup is not eaten as hot as it is served'. And rules are sometimes referred to as a 'stick behind the door'. Both expressions refer to the practice of not imposing rules if the desired result (or something near to it) can be achieved by agreement. We can expect this practice to continue. So it is difficult to predict how the radically new powers given to national and provincial government will be used. Will they be used as a stick behind the door, as an implicit threat which those higher levels would rather not use, in the 'negotiations in the shadow of the law' (to use the well known term of Scharpf)? Or will they be applied ruthlessly, if that is considered necessary for clarity and speed, even at the risk of hardening the relationships between the levels of government?

We can conclude that some of the rules in the proposed revision are fundamentally very different than in the existing legislation, but that they might not be used to change practice fundamentally. Many of the new rules allow the practice of administrative pragmatism to continue.

**Governance and Places (GAP) Working Papers Series**  
**The following titles have recently appeared in the series:**

*2003*

- 2003/01 Marisha Maas: *Migrant Wage Workers and Migrant Entrepreneurs Affecting their Region of Origin*
- 2003/02 Peter Vaessen: *Organization structure, networks and the conception of potential spin-offs*
- 2003/03 Olivier Kramsch: *Postcolonial Ghosts in the Machine of European Transboundary Regionalism*
- 2003/04 Arnoud Legendijk: *'Global lifeworlds' versus 'local systemworlds' : how flying winemakers produce global wines in interconnected locals*
- 2003/05 Martin van der Velde & Henk van Houtum: *The threshold of indifference; rethinking the power of immobility in explaining crossborder labour mobility*
- 2003/06 Andreas Faludi: *Territorial Cohesion: Old (French) Wine in New Bottles?*
- 2003/07 Edwin Buitelaar: *How to coordinate changes in land use? A performance analysis of user rights in the Netherlands and England*
- 2003/08 Raffael Argiolu: *ICT-based innovation of transport: the links with spatial development*
- 2003/09 Wouter Jacobs: *Property Regimes in Territorial Competition*
- 2003/10 Justus Uitermark: *The multi-scalar origins of urban policy: towards a policygenetic approach*

- 2003/11 Roos Pijpers: *Bordering migration: Socio-spatial bordering processes of labour migration in an enlarging European Union*
- 2003/12 Bas Arts: *Verslag ISEG Heidagen; Soeterbeek, Ravenstein, 28 en 29 augustus 2003*

#### **2004**

- 2004/01 Olivier Kramersch: On the "Pirate Frontier": Re-Conceptualizing the Space of Ocean Governance in Light of the Prestige Disaster.
- 2004/02 Elmar Willems: Environmental Sociology and the Risk Debate: Insights from the Brazilian and British Biotechnology Controversy.
- 2004/03 Andreas Faludi: Territorial Cohesion: A Polycentric Process for a Polycentric Europe.
- 2004/04 Justus Uitermark, Ugo Rossi, Henk van Houtum: Urban citizenship and the negotiation of ethnic diversity: an inquiry into actually existing multiculturalism in Amsterdam.
- 2004/05 Edwin Buitelaar, Wouter Jacobs & Arnoud Lagendijk: Institutional change in spatial governance. Illustrated by Dutch city-regions and Dutch land policy.
- 2004/06 Roos Pijpers, "Help!The Poles are Coming". (narrating a contemporary moral panic).
- 2004/07 Olivier Kramersch, Roos Pijpers, Roald Plug en Henk van Houtum, Research on the Policy of the European Commission Towards the Re-bordering of the European Union. Exlinea Project Study Report.
- 2004/08 Marisha Maas, Filipino entrepreneurship in the Netherlands. Male and female business activity compared.
- 2004/09 Raffael Argiolu, Rob van der Heijden, Vincent Marchau: ITS policy strategies for urban regions: a creative exploration.
- 2004/11 Henry Goverde: US hegemony and the new European divide: The power of complex territorial governance.
- 2004/12 Barrie Needham: The new Dutch spatial planning act. Continuity and change in the way in which the Dutch regulate the practice of spatial planning.

#### **Contact details:**

More information and copies are available from the website:  
[www.ru.nl/gap](http://www.ru.nl/gap)  
[www.ru.nl/fm](http://www.ru.nl/fm) (Faculty Research Programme)

Dr Arnoud Lagendijk  
 Nijmegen School of Management  
 PO Box 9108  
 NL-6500 HK Nijmegen  
 The Netherlands  
 Tel. (+31/0)24- 3616204/3611925  
 Fax: (+31/0)24 - 3611841  
 E-mail: A.Lagendijk@ru.nl

