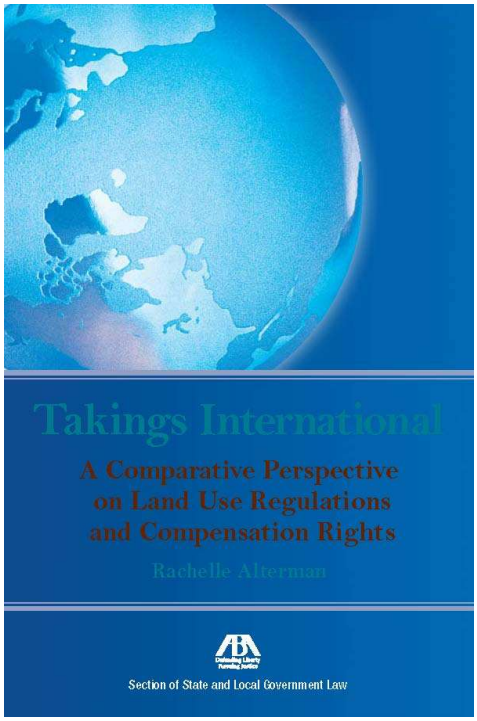

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 17

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CHAPTER 17

THE NETHERLANDS

In contrast with the image of the Netherlands as a country that emphasizes the public interest, Dutch law grants landowners the most generous set of compensation rights for reduction in property values due to planning decisions. These cover not only direct injuries, but indirect ones as well. A 2008 legislative change tempered these rights only slightly.

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This chapter primarily discusses governmental liability in the Netherlands for the consequences of land planning decisions made in the public interest. In general, "planning compensation rights" are established by the Spatial Planning Act (SPA) and can be triggered once certain municipal planning policies are implemented.[1] In addition, the chapter explores several related forms of compensation rights for other government acts[2] and discusses the government's powers of compulsory expropriation for general use. I also examine how these government powers and compensation rights play out in practice.

Under the SPA, the right to compensation for planning decisions applies to cases where the municipality desires to regulate land use and development. In the Netherlands, this right is quite broad. It is distinct from the right to compensation for the expropriation of property in its entirety or for the compulsory sharing of property through a public easement. The types of holders of interests within a relevant planning area who can claim compensation are owners, leaseholders, and tenants. Under the Dutch Civil Code, property users may not exercise their private law authority if it conflicts with rules of public law,[3] which includes the SPA. In addition, this paper will also draw upon the approach taken by European international law to protect property.

H1 . THE GENERAL FRAMEWORK FOR THE PROTECTION OF PROPERTY UNDER EUROPEAN INTERNATIONAL LAW AND DUTCH LAW

H2. European International Law

The protection of property is clearly established under the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms for signatory states.[4] The Convention was adopted in 1950 by the Council of Europe, an organization of forty-six European countries that promotes European unity, human rights, parliamentary democracy, and

1. Wet ruimtelijke ordening 2006 [Spatial Planning Act] art. 6.1 (Neth.).

2 The discussion in this paper refers to lawful government acts only. Compensation for unlawful acts is of course a different area of law.

3. Burgerlijk Wetboek [BW] [Civil Code] bk. 3, art. 4 (Neth.).

4. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 1, Mar. 20, 1952, Europe. T.S. No. 9, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/009.htm.

the rule of law. The Council of Europe is not part of the European Union.

Article 1 of the First Protocol to the Convention states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[5] However, it goes on to declare that "the preceding provisions shall not . . . impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[6]

Property rights are thus considered by the Convention both as a way to protect the private ownership and use of property, and as a right that can be limited for the general interest. Like the First Protocol, Dutch law incorporates both of these aspects of property rights, and this is the framework we will adopt as we set out to explore how the right to the protection of property is set forth in the Dutch Civil Code.

H2. Dutch Law

The Dutch Constitution addresses compensation rights generally by stating: "In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it. [7]"

The first paragraph of book 5, article 1 in the Dutch Civil Code declares: "Property is the most extensive right that a person can have over an object."[8] However, the second paragraph states: "The owner is granted the use of the object exclusive of all others, provided that this use is not in conflict with the rights of others and takes into consideration the limitations based on statutory rules and those of unwritten law."[9] Pursuant to paragraph 2, Dutch law allows many limitations on the property rights of land and building owners. The most important of these limitations is that land may only be developed in accordance with a land use plan. Specifically, the use of land and building plans must be in accordance with municipal planning policies, which are usually presented in municipal land use plans. Therefore, the right of property owners to develop exists only within the context of public law limitations, with land use plans playing the most important role.[10]

The Department of Administrative Justice of the Council of State determined, in a 2005 decision, that such a limitation is justified. It stated:

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5. *Id*.
6. *Id*.
7. Grondwet voor het Koninkrijk der Nederlanden [GW.] [Constitution of the Kingdom of the Netherlands] art. 14, para. 3 (2002), *available at* http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf.
8. BW bk. 5, art. 1.

[9] BW bk. 5, art. 1, para. 2.

10. J. de Jong, *Eigendom, bouwrecht en concurrentiebevordering op ontwikkelingslocaties* [*Property, Developments Rights, and Competition at Development Sites*], BOUWRECHT No. 6 (June 2005) (Neth.) (concluding that development rights cannot in the general sense be seen to be linked to property in the Dutch system of property and spatial administrative law).

> Insofar as the limitations on the use of the property as set forth in the land use plan can be interpreted as infringement of the right to unimpeded enjoyment of possessions, art. 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms leaves intact the application of laws that can be considered to be necessary to regulate the use of property in keeping with the public interest. As the Department determined in the judgment of 12 November 2003, in case no. 200301877/1 the locally applicable land use plan is such a regulation.[11]

H1. PLANNING COMPENSATION, OBLIGATION TO CONSENT, AND EXPROPRIATION

There are three situations in which the government may infringe on a property owner's rights. Each of these situations has its own set of regulations, which we will now explore.

H2. Fully private use and the right to planning compensation

The first situation is one in which the government itself has no need for shared or absolute use of real property for the general interest. In this situation the government restricts itself to regulating the use of property in a given planning area by means of a land use plan, justified by the general interest. The law that governs planning compensation rights ultimately determines the circumstances under which the damage done to owners from government regulation qualifies for compensation. The compensation rights under this category are the focus of the bulk of this paper.

H2. Obligation to consent (shared use as public easements)

The second situation is one in which the government requires some shared use of a private property for the general interest (American readers may recognize this category as including easements). Such situations are specifically addressed by the Private Law Hindrance Act, which regulates compensation rights in the case of shared use. Under article 1, public works undertaken either by a district water board, province, or the national government may impose permanent or temporary shared use of real property. Examples of these types of public works include the laying, installation, and maintenance of cables and mains. In addition, article 1 of the Private Law Hindrance Act is generally thought to allow for the possibility of the government assigning public works projects to private legal entities for the general good.

The application of the Private Law Hindrance Act necessarily involves balancing the severity of the infringement on the rights of the property user against the public benefits of expropriation. A sound interpretation of the Private Law Hindrance Act indicates that the partial use imposed may be either temporary or permanent. In assessing compensation, the seriousness of the infringement and the duration of the limitation are both important.[12] In the case where property is taken for public works, the Minister of Transport, Public Works, and Water Management can impose an obligation to consent if the government and affected parties are

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11. Afdeling bestuursrechtspraak Raad van State (Department of Administrative Justice of the Council of State), Sept. 28, 2005, 200409555/1, no. 539, 37 NEDERLANDS JURISTENBLAD [NJB] (Oct. 21, 2005) (Neth.).

12. Belemmeringenwet Privaatrecht [Private Law Hindrance Act] art. 1 (Neth.).

unable to reach an agreement on the installation and maintenance of works.[13] An entitled party has a protected right to appeal a ministerial decision under article 4 of the Private Law Hindrance Act.[14]

The damages faced by a user or owner of a property are not limited to the infringement on the uses of the property in question. Other possible kinds of damages include: (1) the loss in market value of the property when it becomes impossible to carry on construction, (2) the loss of income, (3) additional modification costs accumulated during and after completion of the work.

H2. Absolute Public Use (expropriation)

The third situation is one in which the government believes that expropriation, or the absolute taking of real property, is in the public interest. The Constitution establishes that expropriation may occur only when it is in the public interest and only after prior assurance of compensation, according to regulations set forth under the Expropriation Act[15].

Expropriation may occur in the name of, and for the benefit of, regulatory legal entities such as the State, provinces, municipalities, and water boards.[16] It is also possible, though rare, that expropriation take place in the name of and for the benefit of "concessionaires -" individuals or private legal entities that are assigned work for the general public good.

The most commonly applied expropriation statutes are the infrastructure statute and public housing statutes. Municipalities make considerable use of the public housing statute. The Expropriation Act and the SPA can be employed together by local governments to achieve their land use planning objectives. The Expropriation Act compliments the SPA by allowing the possibility of expropriation for either to implement the land use plan or to preserve the current land use and development in accordance with the land use plan.[17] The land use plan is the only planning instrument of the SPA that can serve as a basis for expropriation.

In addition, the Expropriation Act allows for the execution of construction plans, construction works, the clearing of areas in the interest of public housing, the removal of unoccupied dwellings that have been declared uninhabitable, and other specific purposes.[18] This part of the Expropriation Act provides strong legal support for municipalities when they undertake necessary expropriations.

Moreover, clear property titles are not the only rights that can be expropriated under Dutch law. If the clear title already belongs to the government but it is encumbered with limited user rights of some type, government may expropriate these partial rights. These rights may include the right of inherited strictures, usage, habitation, holding leases, usufruct, and placement of structures.[19] The Expropriation Act gives civil courts special authority to hear expropriation cases.[20] The courts determine the soundness of expropriation claims and the compensation that

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13. See Willem Wijting, *De gedoogbeschikking ingevolge de Belemmeringenwet Privaatrecht, I and II* [*Obligation to Consent in Keeping with the Private Law Hindrance Act*], BOUWRECHT Nos. 1, 2 (1999) (Neth.), for more information on the obligation to consent under the Private Law Hindrance Act.
14. Belemmeringenwet Privaatrecht [Private Law Hindrance Act] art. 4 (Neth.).
16. BW art. 2.1, para. 1; Onteigeningswet [Expropriation Act] art. 1, para. 1 (Neth.).
17. Onteigeningswet [Expropriation Act] art. 77, para. 1.
18. *See id*.
19. *See id*. art. 4, para. 1.
20. *See id*. art. 18.

must be paid to the entitled parties. For the government, the rule is *nemo iudex in causa suam* - "No one can be judge in his own case." Once expropriation occurs, the expropriating party receives a new, completely unencumbered right of property, which is the functional equivalent of an original right of title.

Expropriation is the remedy of last resort. The party with authority to expropriate must attempt to acquire the property by agreement, which in practice almost always involves a purchase-sales transaction.[21] When the user of a property has a limited right, such as a lease-hold, and the right of ownership already resides with the expropriating party, the expropriating party will usually attempt to achieve an amicable release of the user's limited right. If an amicable release cannot be achieved, the expropriating party may litigate the issue in court. If the user-defendant objects to the expropriating party's actions and the court finds that the expropriating party did not make a proper good faith effort to reach an amicable agreement, the court will disallow the expropriation.

The Expropriation Act determines what types of damages or injuries to property rights will be compensated[22]. More than a century ago, the Supreme Court ruled in 1864 that the premise of the Act, in which owners could only be compensated for capital losses,[23] conflicted with the constitutional principle of complete compensation. The court ruled that landowners should also be compensated for business and income losses.[24] Today, property owners and users have the right to be compensated for numerous damages and injuries, so long as these are a direct result of the expropriation. Direct damages may include capital losses, reinvestment damage to be capitalized for new buildings, loss of a company's annual income as a result of liquidation or being forced to move, and incidental costs such as moving expenses.

Finally, if an expropriation would leave a property owner with only bits and pieces of land that have nearly no economic value, the owner can request a court order to oblige the government to take over any remaining land. Technically, this is not expropriation for the general good but rather a form of compensation only relevant in this limited situation.

H2. Similarities and Differences

The three types of government powers - land-use regulation, obligation to consent, and expropriation, all entail legally regulated forms of administrative compensation. In addition, there is also a system of extralegal government compensation that is based, not on any particular legislative act, but on justice – but that is outside the scope of this paper.[25]

There is an important difference between the three areas of regulation. The system of consent requirements in the Private Law Hindrance Act and the Expropriation Act is based on the principle of complete compensation. In contrast, the system of planning compensation rights set forth in the Spatial Planning Act is based on a principle of partial compensation to cover damage that cannot reasonably be expected to be borne by the interested party. Thus, under the

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21. *See* Onteigeningswet [Expropriation Act] art. 17.
22. *See id*. arts. 40–45.
23. Capital loss is the property's market value plus any loss of remaining value.
24. Defensive Works Case, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 23 December 1864, W.v.h.R. 2652 (Neth.).
25. See P. DE HAAN, TH.G. DRUPSTEEN & R. FERNHOUT, BESTUURSRECHT IN DE SOCIALE RECHTSSTAAT [ADMINISTRATIVE LAW IN THE SOCIAL CONSTITUTIONAL STATE] 530–71 (1998), for a survey of legal and extralegal forms of administrative damage compensation..

SPA, a share of the damage will remain the responsibility of the aggrieved party. The following part of this chapter expands on this principle.

H1. The Law Regarding Planning Compensation Rights

Compensation rights for land use regulations have been in existence for a long time in The Netherlands. Recent legislation (in 2005 and 2008) made some minor amendments to these rights (introducing a time limit and a fee) but compensation rights remain rather extensive.

Chapter 6.1 of the 2006 Spatial Planning Act, which came into force on July 1st, 2008, relates to 'Compensation for Loss'. This chapter replaces the former regulation regarding planning compensation rights, which was laid down in articles 49 and 49a of the former Spatial Planning Act. Article 6.1 of the new Act repeats the previous rules and reads as follows[26]:

> 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 from 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

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[26] Wet ruimtelijke ordening 2006 [Spatial Planning Act] art. 6.1 (Neth.).

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. An interested party could also be someone whose home value has declined or whose income has fallen either as a result of new construction on a neighboring property or nearby infrastructure works. The plot need not be immediately adjacent. 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, 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 business turnover.

Third, the damage that is considered for compensation is not limited to damages caused by the regulations in land use plans. Other types of damages that are considered for compensation include damages that result from a project decision,[27] and from deferment of a decision 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 has already been approved and is no longer open to appeal (or the appeal has been dismissed).[28]

Fifth, 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. This time limit was introduced by a 2005 amendment; previously, there was no time limit.

Sixth, the planning compensation rights under the SPA are not founded on the premise of complete compensation. But on the principle that only damages that cannot reasonably be borne by the aggrieved party are compensable. Of key importance, of course, is how this principle has been interpreted in jurisprudence – to be discussed late.

Seventh, 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.

H1 . SOME FACTS ABOUT CLAIMS IN PRACTICE

Although no systematic research has been carried out regarding the quantitative aspects of compensation rights, some data is available.[29] Since the latter 1990s, the number of claims has increased sharply. This seems to be related to three factors. First, the jurisprudence of the

27. *See* Wet ruimtelijke ordening [Spatial Planning Act] art. 3.10 (Neth.).

28. P.J.J. VAN BUUREN, CH.W. BACKES & A.A.J. DE GIER, HOOFDLIJNEN RUIMTELIJK BESTUURSRECHT [MAIN LINES IN SPATIAL ADMINISTRATIVE LAW] 260 (2002).

29. W. Kuiper, *Planschade snel goed regelen* [*Dealing with Planning Compensation Quickly and Appropriately*], Vastgoedrecht 2004-4.

Department of Administrative Justice of the Council of State has become more generous to claimants. Second, as a result of the spatial policy, development is of higher density than before, with the consequence that more plots may encounter negative externalities or hindrances from neighbors. Third, an increasing number of professionals have been soliciting potential clients on a contingency basis, proposing to undertake compensation rights procedures for them. Yet, more than fifty percent of the compensation claims are rejected. The average amount of compensation that is approved is about € 10,000, while the total amount of compensation awarded in the Netherlands is estimated to be € 20 million a year.[30]

Figures are also available on the costs of handling claims by municipal governments. Handling a claim costs roughly € 1750, which includes the cost of required expert advice. These figures were the impetus for Dutch legislators to limit the planning compensation scheme.[31] On September 1, 2005, legislators introduced the statute of limitations on claims for the first time and imposed a € 300 fee for submission of claims. However, the cost figures are much higher than the fee that petitioners are required to deposit.

To anticipate possible planning compensation claims, municipalities increasingly conduct a risk analysis of the likelihood of such claims before they decide to modify an existing land use plan or to grant an exemption. Such assessments are frequently to be arranged and paid for by the party requesting a land use modification or exemption. The analysis is carried out by an independent expert. The conclusions from this risk analysis can even lead to modifications of the urban design, thus reducing the likelihood chances of "unpleasant surprises".

H1 . PROCEDURAL ASPECTS

The Spatial Planning Act contains few procedural rules as to how parties should submit requests for compensation pursuant to article 6.1 of the Spatial Planning Act and how municipal executives should handle these requests. Article 6.7 SPA reads as follows:

> Rules regarding the preparation and handling, and more detailed rules regarding the submission, justification and method of assessment of an application for compensation for loss may be issued by or pursuant to an Order in Council. These rules may contain the obligation for the Municipal Council and Provincial Council to adopt a regulation in this regard.

The Order in Council article 6.7 refers to is the Spatial Planning Decree which, in Article 6.1.2.2, specifies the requirements of a request for compensation. The request should hold:

(a) An indication of the cause of the damage. This means that the claimant must indicate which plan or decision (from the list of article 6.1, para. 2 Spatial Planning Act, see section IV above) caused the damage;

(b) a statement of the nature of the damage;

(c) a description of the way in which, according to the applicant, the damage can be compensated if he does not want to be compensated in money.

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30. *Id*.
31. *Id*.

It is not necessary for the applicant for compensation to submit an official appraiser's statement.[32]

An important element of procedure is stated in Article 6.1.3.2 of the Spatial Planning Degree, which obliges the municipal executive to appoint an independent expert to evaluate each claim and advise whether there is any actual damage as defined by article 6.1 of the SPA, and what amount of compensation should be paid. Initially, the independent expert allows the claimant, any interested third-parties, and the municipal executive the opportunity to express an opinion on the planning compensation claim. Once the independent expert has drawn up a draft report, the petitioner and the interested third-parties are given the opportunity to respond. After receiving the responses, the independent consultant prepares a report, which forms the basis for the municipal executive's decision on the compensation claim. An interested party can challenge the decision by submitting an objection to the municipal executive body. If the municipal executive body rejects the challenge, interested parties can then appeal to the administrative law division of the courts. Until 1988, the Crown was directly responsible for rulings regarding planning compensation. Today the competence lies with the administrative sectors of the courts. A final appeal may be submitted to the Department of Administrative Justice of the Council of State.

H1. THE EVOLUTION OF CASE LAW

Before delving into the jurisprudence of planning compensation, we should note that the role of legal precedents in countries with a continental judicial system such as the Netherlands is less important compared with Anglo-Saxon countries. On the Continent, comprehensive systems of legislation are in place. Another reason is that in the Netherlands, lower courts are not formally bound to rulings of the Supreme Court.[33] However, in practice they will normally follow the rulings of higher courts.

The jurisprudence regarding planning compensation has interestingly progressed from restrictive to very extensive. Historically, it began in 1965, the year when article 49 of the former Spatial Planning Act came into effect. The debate in Parliament over article 49 (the predecessor of the current article 6.1 of the new Spatial Planning Act) was comprehensive but confusing. The debate often intertwined two separate questions: (1) whether compensation should be left to the discretion of the municipality or be considered a legal right; and (2) whether individuals should be compensated fully for their injuries or only for excessive damages.

What became clear were the differences in intention between the government that proposed article 49 on the one side and legislators in Parliament on the other side. The government's intention was to grant only a limited right to compensation for declines in property values. However, the majority of legislators in Parliament disagreed. They wanted more

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[32] C. van Zundert, *Planschade onder Wro en Bro* [*Planning Compensation Rights under SPA and SPD*], VASTGOEDRECHT 6 (2007) (Neth.).

[33] *See* Fred Hobma & Loes Schutte-Postma, *Casuistry Resulting in Laws: Judicial Aspects of Design Research*, *in* WAYS TO STUDY AND RESEARCH URBAN, ARCHITECTURAL AND TECHNICAL DESIGN (T.M. de Jong & D.J.M. van der Voordt eds., DUP Science 2002).

extensive grounds for compensation. The discussion in Parliament resulted in the rather long-winded formulation for damages in the first paragraph of article 49. The legislators purposely chose a general formulation, which stated that damage "which cannot reasonably, or completely, be left to [the property owner's] responsibility . . . ." will be compensated. In the legislators' opinion, it was impossible to establish clearly defined grounds for compensation. As a result of this confusing debate in Parliament, the legal foundation for planning compensation was not clear.

During the 1960s and 1970s, the courts interpreted compensation rights very narrowly. Only in very exceptional cases was compensation awarded. We must conclude that the Crown took the original French principle of "*égalité devant les charges publiques*" as the legal foundation for its rulings.[34] The *égalité* principle is based on the conception that a citizen should be left responsible for damages that may fall on everyone or on a large group of people. If the risk of suffering damages falls within the normal societal risks, there are no grounds for compensation. Everybody, or every person in a certain category of persons, should take such risks into account.

The restrictive jurisprudence caused severe criticism by scholars. In 1978, De Haan, among others, concluded that article 49 was ineffective in practice.[35] In 1977, Wessel, a professor of administrative law and public administration, characterized the rulings of the Crown in a set of two decisions called the *Moerdijk* cases as "petty" and "short-sighted." In these cases, the land use plan titled "Industrial Area Moerdijk" caused the conversion of 2500 hectare of agricultural land into an industrial zone. Suppliers of cattle fodder and other agricultural businesses submitted claims for compensation for damages due to lost business income. However, in the first *Moerdijk* case, the Crown observed that "constantly serious changes in society and shifts in the structure of society occur" in part due to industrialization.[36] "However, this characterizes life itself. In the chain of facts and circumstances the land use plan does not have a dominant role."[37]

The veterinarians also requested compensation for the decline in the number of clients and income. They argued that because veterinarians are tied to a locality, they cannot easily move or increase their service area. Once again, the Crown ruled in the second *Moerdijk* case that "societal changes are part of the normal risk of entrepreneurs."[38]

However, very gradually, and without any specific ruling that one can point out as

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[34] The Crown was, in this period, the highest court to evaluate claims for planning compensation. In 1988 the Department of Administrative Justice of the Council of State became the highest court to judge claims for planning compensation.

[35] P. DE HAAN, TH.G. DRUPSTEEN & R. FERNHOUT, BESTUURSRECHT IN DE SOCIALE RECHTSSTAAT [ADMINISTRATIVE LAW IN THE SOCIAL CONSTITUTIONAL STATE] 469 (1978).

[36] Crown Decision [KB], 13 maart 1974, Gemeentestem [GS] [Municipality Voice] 1974, 6300 (Borssele). *See also* O.A. DIJKSTRA, E.J.M. KOPERDRAAT & W.A. DE WEIJER, INLEIDING RUIMTELIJKE ORDENING EN VOLKSHUISVESTING [INTRODUCTION TO SPATIAL PLANNING AND HOUSING] 201 (1989).

[37] Crown Decision [KB], 13 maart 1974, Gemeentestem [GS] [Municipality Voice] 1974, 6300 (Borssele).

[38] Crown Decision [KB], 24 mei 1977, BOUWRECHT 1977, 759. *See also* O.A. DIJKSTRA, E.J.M. KOPERDRAAT & W.A. DE WEIJER, INLEIDING RUIMTELIJKE ORDENING EN VOLKSHUISVESTING [INTRODUCTION TO SPATIAL PLANNING AND HOUSING] 201 (1989).

responsible for the change, court decisions became more and more attentive to the property owners' arguments. Compensation rights broadened gradually, until they reached their current extensive state. Van den Broek has concluded that the legal foundation for planning compensation could no longer be found in the *égalité* principle, but in the principle of "material legal security."[39] This principle implies that, although landowners and holders of more limited property rights do not have the right to demand that desirable land use plans be continued indefinitely, they do have the right to expect legal security and therefore to be awarded compensation when land use plans are altered and damage the values of their properties.

An example involving trailer camps will demonstrate the progress from the restrictive interpretation of the law to the current, broad interpretation. Assume initially that a court has denied requests for compensation regarding the decline in property values resulting from the construction of a trailer camp nearby. The court ruled that there is no causal relationship between the designation of the new land use plan and the assumed damage. For many years, the Crown's guiding rationale was that: "It cannot be said that erection of a trailer camp in general causes damage that can be attributed to the site designation in a land use plan."[40]

A change in the Crown's rulings began with the 1987 ruling in the *Elst* case.[41] The Crown ruled that:

"Construction of the trailer camp has created a disadvantage—from the planning point of view—for the appellants' land. The question of whether the altered planning situation has caused damages that should not reasonably be left or completely left to the landowner's responsibility should be answered in the positive. One should take into account the short distance between the houses of the appellants and the trailer camp".[42]

Since then, many rulings have held the same view. One example is the *Breda* case,[43] in which the Crown ruled, 'The establishment of a trailer camp in or near the built-up part of municipality, taking into account the national governments spatial policy, should be considered a normal societal development."[44] However, to determine whether

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[39] G.M. VAN DEN BROEK, PLANSCHADEVERGOEDING [PLANNING COMPENSATION RIGHTS] 219 (2000) (on file with author).

[40] Crown Decision [KB], 7 November 1984, nr. 12, Administratiefrechterlijke Beslissingen [AB] [Administrative Decisions Reports] 1985, 224 (Nuth); Crown Decision [KB], 7 November 1984, nr. 13, BR [Construction Law] 1985, 452; Crown Decision [KB], 14 February 1985, nr. 36, BR [Construction Law] 1985, 455. *See* J.A.M. VAN DEN BERK, SCHADEVERGOEDING VOOR RECHTMATIG TOEGEBRACHTE SCHADE DOOR DE OVERHEID [COMPENSATION FOR RIGHTFULLY CAUSED DAMAGE BY THE GOVERNMENT] 98 (1991) (on file with author).

[41] Crown Decision [KB], 17 June 1987, nr. 49, BR [Construction Law] 1987, 843. *See* J.A.M. VAN DEN BERK, SCHADEVERGOEDING VOOR RECHTMATIG TOEGEBRACHTE SCHADE DOOR DE OVERHEID [COMPENSATION FOR RIGHTFULLY CAUSED DAMAGE BY THE GOVERNMENT] 99 (1991) (on file with author).

[42] Crown Decision [KB], 17 June 1987, nr. 49, BR [Construction Law] 1987, 843.

[43] Crown Decision [KB], 22 maart 1989, Administratiefrechterlijke Beslissingen [AB] [Administrative Decisions Reports] 1989, 324 (Breda). *See* J.A.M. VAN DEN BERK, SCHADEVERGOEDING VOOR RECHTMATIG TOEGEBRACHTE SCHADE DOOR DE OVERHEID [COMPENSATION FOR RIGHTFULLY CAUSED DAMAGE BY THE GOVERNMENT] 99 (1991) (on file with author).

[44] Crown Decision [KB], 22 maart 1989, Administratiefrechterlijke Beslissingen [AB] [Administrative Decisions Reports] 1989, 324 (Breda).

there was damage pursuant to article 49 of the SPA, the Crown asked two questions: (1) whether "the establishment of the trailer camp has been enabled by an amendment to the planning at that site,"[45] and (2) whether "from a spatial viewpoint, the trailer camp has a negative effect on its surroundings."[46]

Other examples of the transformation in jurisprudence can be found in cases concerning "temporary damage." During the 1970s, a one-year freeze in permission to use land for pig-raising site was not regarded as grounds for compensation.[47] Even a full-year's loss of rental income from a company's building was ruled as not constituting grounds for compensation.[48] The Crown ruled that the damages to the appellant's property value were not such that the damage should not reasonably be left to his responsibility. But since the 1980s, the Crown has recognized that the fact that damage is temporary is no reason to reject a claim for planning compensation. In *Baarn v. Köhler*, the Court ruled that a temporary loss of income caused by reduced accessibility to the company's building should be compensated.[49]

Since the 1980s, there has been a gradual but constant shift by the courts toward an interpretation of the statute as offering extensive compensation rights. As a result, we must conclude that under the former Spatial Planning Act (in force until July 1, 2008) the main rule was that aggrieved parties did have the right to full compensation for the decline in property values due to planning decisions. Deviations from this rule would require substantial reasons why, in a particular concrete case, the damage in whole or in part should be the responsibility of the aggrieved party.

Clearly, the national government was dissatisfied with the jurisprudence on article 49 of the former Spatial Planning Act. Therefore, in the new Spatial Planning Act, chapter 6.1 aims at reducing the claims for compensation. One element of the new regulation states that 'losses falling within standard social risk' (article 6.2, para 1, SPA) shall be borne by the applicant. The next section will elaborate on this. In addition, the new SPA implicitly excludes some temporary damage from compensation. Article 6.1, para 1 of the amended SPA determines that only loss of income or reduction in value of real property should be compensated. This will exclude compensation of damages pertaining to, for instance, temporary disturbance such as noise and dust due to extensive construction activities.

H1 . Steps and Criteria for Determining a Compensation Claim

A long line of case law has established three main steps relevant to evaluating a land-use planning compensation claim[50].

H2. Step One: Is the Damage Really Attributable to Planning?

The issue is whether the damage claimed is indeed a result of one of the types of planning measures enumerated in article 6.1 of the SPA. According to the jurisprudence, there is no

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[45] *Id.*
[46] *Id*.
[47] Dantumadeel/De Boer, Crown Decision [KB], 5 April 1973, nr. 39 (on file with author).
[48] Enschede/Rabbers, Crown Decision [KB], 14 November 1975, nr. 35 (on file with author).
[49] Baarn/Köhler, Crown Decision [KB], 5 August 1982, nr. 69 (on file with author).
50. De Haan, Drupsteen & Fernhout, *supra* note 25, at 549–52.

requirement to prove direct causality; thus, there need not be an indisputable direct relationship. The damage merely has to be *attributable* to the planning decision.

However, there is no room for compensation for what is called "planning shadow damage." This refers to decline in property value prior to, or in anticipation of, the actual planning decision. This could include a decline in property value or income due to a threat that the existing plan would be modified or that a new plan for infrastructure will be proposed. For example, a person owns a piece of land with development rights not yet implemented. It is well known that the municipality has the intention to change the land use plan, so as to partially or totally take away the development rights. The market value of the property diminishes. If the landowner sells the land prior to the approval of the revised plan, no compensation can be claimed for this "planning shadow damage." After all, compensable damages must be the result of an *irrevocable* land use plan (or some other administrative decision listed in article 6.1, para. 2 Spatial Planning Act). In this case the anticipated amendment of the plan has not yet been made. Nor can the former landowner claim compensation if and when the modified land use plan comes into force. This is because, according the courts, the damage was not attributable to the land use plan but rather, to the rumors about an anticipated amendment. Neither can the new landowner claim compensation because the new plan was foreseeable at the time he decided to buy the land. The issue of forseeability will be further explained under C.

H2. Step Two: Is the New Plan More Damaging than the Old Plan?

If the damage is determined to be the result of a measure named in article 6.1, the second step is to compare the old and new planning regulations. When looking at the old land-use plan, the relevant inquiry is what the stipulations of the old plan *allowed* to be carried out, not what actually was carried out. This, in turn, is compared to what may be carried out under the new plan. It is quite possible that in some situations, the new plan may create a worse situation than the old one.[51]

For example, suppose a new land use plan allows the construction of buildings on plot X, which is located across from a plot owned by Y and is expected to diminish the view. The new plan does not in itself give Y the right to compensation for his diminished view. The first question asked is what type of development was allowed on plot X under the old plan. It is irrelevant that plot X may not have been built up to its full construction potential under the old land use plan. Y has the right to compensation only if the new plan allows new development possibilities not offered by the old plan. It is irrelevant whether the development rights offered by the new plan are actually carried out because the buyer of Y's plot will consider the construction *possibilities* of plot X in determining his price.[52]

H2. Step Three: Can the Damage Reasonably Be Borne by the Aggrieved Party?

The final step is to determine what part of the damage cannot reasonably be left to the responsibility of the aggrieved party. The mere fact that there is damage is not sufficient; one must specifically evaluate the share of the damage that is eligible for compensation. (The financial situation of the petitioner should not be taken into consideration as a mitigating

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51. J.W. VAN ZUNDERT, HET BESTEMMINGSPLAN [THE LAND USE PLAN] 266 (2001) (on file with author).

52. VAN BUUREN, BACKES & DE GIER, *supra* note 28, at 257.

effect.)[53]

Article 6.2 SPA states the principle of social risk, and adds a new and important limitation on the right to compensation in the form of a threshold level. However, this limitation applies only to indirect injuries to adjacent land, not to direct injurues.

The Article reads:

> 1. Losses falling within standard social risk shall be borne by[54] the applicant.
> 2. The following shall in any event be borne by the applicant:
> a. loss in the form of loss of income: a proportion equivalent to 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 to two percent of the value of the real property immediately before the occurrence of the loss, unless the reduction is the consequence of:
> 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 threshold of two percent. In other words, whenever the value of a property or related income decreases by two percent or less as a result of a planning decision, the damage would not qualify for compensation. This implies that only a very low share of the damage is to remain with the aggrieved party.[55]

Paragraph 2 of article 6.2 can be seen as an elaboration of paragraph 1. Paragraph 1 sets out the principle. Anticipating that authorities would often find it difficult to determine what is a 'standard social risk', the legislators in paragraph 2 provided a specific percentage of 2% as a default deductible threshold. However, the words 'in any event' of paragraph 2 (art. 6.2) make it clear that there can be reason for the municipal executive to decide that losses bigger than two percent of the value of the property must be borne by the applicant. Although there is no case law on this topic yet, we can think of some special situations in which it may be appropriate to let the total losses to be borne by the applicant.

Van Buuren et al. give an example of a home owner who currently has an open view over the green meadows.[56] I added some figures to this example. Suppose that under the former land use plan the home had a value of € 300.000. Due to a new land use plan, residential developments will take place in front of his home. The free view will be taken away. The value of the home declines to € 280.000. The deductible clause of 2% implies that 2% of € 300.000 = € 6.000 must be borne by the home owner. That would mean that € 20.000 minus € 6.000 = € 14.000 should be rewarded to the claimant. However, the municipality may decide that in this case, all losses must be borne by the claimant. The argument may be that in The Netherlands, it is a normal social risk that an open view to the landscape will at some moment in time be limited

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53. *Id.* at 266.

[54] This is a free translation from the Dutch. A literal translation would have read "be for the account of…"

55. G.M. van den Broek, *Het wetsontwerp voor een nieuwe planschaderegeling* [*Proposed Legislation for a New Planning Compensation Regulation*], BOUWRECHT 648 (2004) (Neth.). In Belgian Flenders a much larger share is to be borne by the landowner.

[56] 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] 191 (2008). The Hague: Instituut voor Bouwrecht.

because of some new residential developments.

Yet, in the absence of any case law as yet, there are no criteria on which municipalities may at present base their policies if they wish to differentiate among different types of injuries to property values when interpreting what is a standard "social risk".

As noted, the deductible rule applies only to compensation claims pertaining to injuries from land use changes in *neighboring* properties. Where direct injuries are concerned, there is no compulsory deduction (art. 6.2, para 2, under b, SPA). The reason is that legislators were concerned that such a deduction, when applying to direct injuries to property, would be a conflict with article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The major reason for rejection of a compensation claim is when the aggrieved party continues either to act actively or wait passively despite a foreseeable planning change (art. 6.3, under a, SPA).[57] The principle of risk acceptance dictates that there would be no right to compensation if the damage is at least partially the result of the aggrieved party's action or inaction, and that party could have taken reasonable measures to avoided or limit the damage (art. 6.3, under b, SPA).[58]

There are two forms of risk acceptance, active and passive. In the case of active risk acceptance, individuals making investment decisions are expected to consider the risks that they reasonably may face on those investments, including foreseeable government decisions that could be disadvantageous for them. A municipality's commencement of procedures outlined in a land use plan offers the clearest example of a foreseeable event that could cause damage. A planning change may also be deemed foreseeable if there are municipal structure plans, extralegal plans, or policy documents that have some bearing on the future of the property in question Real property buyers have the responsibility to research their purchases. Although the government must provide notification of the start of a land use plan procedure or structure plan procedure in a local newspaper, it has no other responsibilities to furnish information. The principle of active risk acceptance implies that a compensation claim cannot be transferred to the new owner of real property, so if the property is sold off, the right to compensation is forfeited. The claim is bound to the individual, not the property.

According to the doctrine of passive risk acceptance, individuals have no right to compensation when they either take no action or remain passive when they reasonably could be expected to take into consideration government actions, or when they fail to take timely and appropriate measures to limit the damage. Jurisprudence is cautious on this point. A landowner will not be regarded as passively accepting the damage if the damaging plan amendment was not foreseeable by the interested party.[59] This is hard to determine. The doctrine of passive risk assessment, however, does not translate into an obligation to implement the development rights within a specific period of time. Under Dutch law, there is no fixed time period, within which development rights should be implemented.

However, if, for a period of time, there are clear signs indicating a likely change in

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57. B.P.M. VAN RAVELS, GRENZEN VAN VOORZIENBAARHEID [LIMITS OF FORESEEABLE EVENTS] (2005) (on file with author).

58. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, Memorie van Toelichting Wet ruimtelijke ordening [Minister of Housing, Spatial Planning and the Environment, Memorandum on the Spatial Planning Act], 64 (2003) (on file with author).

59. VAN BUUREN, BACKES & DE GIER, *supra* note 28, at 263.

planning, and the landowner remains passive, a request for compensation will be denied. For example, several public municipal documents and newspaper reports indicated that a change was on its way yet the landowner remained passive. Under these circumstances the change was foreseeable and the landowner was aware, or could have been aware, of the pending change.

This type of situation was the essence of a decision of the Department of Administrative Justice of the Council of State of September 28, 2005.[60] An amendment to the land use plan changed the use category from "Hotel and rural house" to “farmland area of scenery and nature value”. [61] The court ruled that the landowner was aware, or should have been aware, of the fact, that the municipality was considering changing the land-use plan. Several public municipal documents and newspaper reports indicated this intention. Still, he remained passive and did not take steps to use the development rights under the old plan. The Department of Administrative Justice concluded that the owners accepted the risk that the previous development rights could be removed, and did not have the right to compensation.

H1 . Agreements by Developers to Reimburse compensation Claims

Planning Compensation Rights Agreements are instruments that have been developed in practice, initially outside the statutory framework to shift the onus for payment of compensation from the municipality to the developer. In a Planning Compensation Rights Agreement, the developer agrees to indemnify the municipality for planning compensation claims that the municipality may approve. Such agreements are often set as a condition to be met before a municipality agrees to approve an amendment to a land-use plan, grant an exception or a related planning instrument. These agreements are applicable wherever the developer needs the municipality's approval in order to be able to implement the project.

The principle behind the Planning Compensation Rights Agreements is supported by both developers and municipalities. ,

However, in May 2005, the Supreme Court heard the *Nunspeet* case[62] (the first Supreme Court decision on the legality of Planning Compensation Rights Agreements). The Court ruled that without an express basis in the SPA, such agreements were null and void. In response, Parliament inserted article 6.4a into the SPA, which expressly authorizes the municipal executive to draw up such a contract with the party requesting a land use plan modification or a project decision.

H1 . Practical Example: Compensation Rights for the Expansion of Amsterdam Schipol Airport

Planning compensation rights can play a role, not only in relatively small municipal plans and projects, but also in large national projects, such as the expansion of the national airport near Amsterdam. The expansion of the airport involved a number of government echelons, including

60. Case number 200409555/1, 37 Nederlands Juristenblad [NJB] (Oct. 21, 2005) (Neth.) (on file with author).

61. *Id.* at 1953.

62. Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 2 May 2003, Bouwrecht 610 (2003).

the national government, the provincial government of Noord-Holland, and several municipalities. The prospect of coordinating the decisions of all of these governments regarding planning compensation claims was daunting; however, a creative solution was found.

In the 1980s, the national government decided that Amsterdam's Schipol Airport required significant expansion. The decision necessitated many changes in land-use planning and new infrastructure projects: construction of a fifth runway and installation of noise and safety zones, a new national road, a provincial road, and a restricted non-public road for a modern, rapid bus connection. The Act, along with the Airport Layout Resolution and the Airport Traffic Resolution that implement it, provide a new system for reducing negative externalities and safety risks.[63]

However, the authorities realized that the mitigation measures may not suffice to prevent reduction in the value of residential and business properties in the surrounding areas. The national government and the province of Noord-Holland, along with a number of municipalities surrounding the airport, therefore established the Schipol Airport Compensation Board.[64] The administrative bodies participating in the scheme gave up their authority to handle damage claims for the period that the scheme remained valid.

The Compensation Board was a legal entity, and its technical purpose was to be a clear, expert, and efficient mechanism for interested parties to bring their compensation claims related to the expansion of the Schiphol airport area.[65] The General Board of the Schiphol Airport Compensation Board had exclusive authority to handle compensation claims. An Assessment Committee and a number of Advisory Committees issued reports on the proper application of basic principles to the submitted claims. Public officials made the initial decision on each damage claim. If the claimant challenged the initial decision, the Committee would then hold a hearing and decide on the challenge. The Assessment Committee also represented the Compensation Board in appeals heard both by the administrative law sector of the District Court of Harlem, and also by the Department of Administrative Justice of the Council of State.

A total of 3951 claims for compensation were submitted by December 1st, 2007. A total sum of € 9,949,880 has been awarded to claimants. The major grounds for awarding the claims were an increase in noise and a reduction in the quality of the view from the claimant's house. Both grounds related to the construction of the new runway and associated works.

H1 . EVALUATION AND DEBATE

While the complex issue of planning compensation rights is laid down in a relative simple chapter in the SPA, chapter 6.1 'Compensation for Loss', the principle has nevertheless evolved considerably with time. It will undoubtedly continue to do so in the future, owing to the great amount of literature and jurisprudence on the subject (only partially covered in this chapter).

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63. Administrative decision-making on airport expansion issues is a multi-track process. *See generally* FRED A.M. HOBMA & F.H.J. DUENK, LUCHTVAARTTERREINEN EN GELUIDSZONERING [AIRPORTS AND NOISE ZONING] (1988) (on file with author).

64. Wet van 20 December 1984 [Act of 20 December 1984], Staatsblad van het Koninkrijk der Nederlanden [Stb.] 667 Articles 94 and 95 of the Jouni Regultaions Act.

65. Joint Regulation Schiphol Airport Compensation Board (on file with author).

Although the topic is attracting significant scholarly interest, the compensation claims have had a rather limited financial impact. As mentioned above, the total amount of compensation paid annually in the Netherlands is estimated at € 20 million. That is actually a very small sum compared with the total investment in construction in the Netherlands, which amounted to € 55 billion in 2004.[66]

The scope of compensation was gradually broadened through case law. This resulted, under the former Spatial Planning Act (in force until July 1, 2008) in the main 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.[67]

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 neighboring countries.[68] 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."[69] 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."[70]

The Dutch government was dissatisfied with the jurisprudence on article 49 of the former Spatial Planning Act. 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":

> [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.[71]

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66. Bouwend Nederland [Netherlands Construction], *De bouw in cijfers 2000-2004* [*Building in Numbers 2000-2004*] 33 (2005) (on file with author).

67. VAN BUUREN, *supra* note 28, at 255.

68. H.J.A.M. VAN GEEST ET AL., VERGELIJKING PLANSCHADEREGELINGEN [COMPARISON OF PLANNING COMPENSATION SCHEMES], Onderzoeksreeks Rijksplanologische Dienst, Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer [Research Series National Planning Service, Ministry of Housing, Spatial Planning and the Environment] (2003) (on file with author). In this report the regulations of Flanders, Germany, France, Sweden, England, and the Netherlands are compared by means of a quick scan. *See also* T.E.P.A. Lam & P.J. Hödl, *Article 49 WRO in rechtsvergelijkend perspectief* [*Article 49 of the Spatial Planning Act in a Comparative Legal Perspective*] BOUWRECHT 548–54 (2001).

69. D.A. Lubach, *Voorzienbaarheid en maatschappelijk risico bij planschade in rechtsvergelijkend perspectief* [*Foreseeable Events and Social Risk in Planning Compensation in a Comparative Legal Perspective*] BOUWRECHT 513 (2005).

70. *Id*.

[71] Memorie van Toelichting Wet ruimtelijke ordening [Memorandum on the Spatial Planning Act from the Minister of Housing, Spatial Planning and the Environment] 62 (2003) (on file with author).

Therefore, the new Spatial Planning Act, which came into force on July 1st, 2008, aims to reduce the extent of claims for compensation. One element of the new regulation (chapter 6/1) 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'. Article 6.2, para 2 introduces a deductible two percent threshold, under which the damage would not qualify for reimbursement.

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.[72] Among the social proponents are the Society of Dutch Municipalities, the Netherlands Council for Housing, Spatial Planning and the Environment,[73] the Society of Housing Corporations (Aedes), and the Society for Developers (NVB). The Society of Homeowners (*Vereniging Eigen Huis*), on the other hand, disfavored 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.[74] 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.[75] We can be sure that the interest of scholars and the broad public in planning compensation rights will be bolstered by the recent legislation.

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72. See Lubach, *supra* note 69, 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 648 (2004) (Neth.).

73. 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.

[74] 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] (on file with author).

[75] 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] (on file with author).