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## **LAND-USE PLANNING AND THE RIGHT TO COMPENSATION IN THE NETHERLANDS**

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### I. INTRODUCTION

This Article 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.<sup>1</sup> In addition, the Article explores several related forms of compensation for lawful government acts and discusses the government’s powers of compulsory expropriation for general use. How these government powers and compensation rights play out in practice is also examined.

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; however, 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 people 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

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1. Wet op de Ruimtelijke Ordening [Spatial Planning Act] art. 49 (Neth.).

authority if it conflicts with rules of public law,<sup>2</sup> which includes the SPA. However, the framework for discussing the specificities of Dutch law will draw upon the approach taken by European international law to protect property.

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

### A. *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.<sup>3</sup> 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 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.”<sup>4</sup> 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.”<sup>5</sup>

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.

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

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

4. *Id.*

5. *Id.*

## B. Dutch Law

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.”<sup>6</sup> 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.”<sup>7</sup> 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.<sup>8</sup>

Recently, the Department of Administrative Justice of the Council of State determined that such a limitation is justified. It stated:

Inssofar 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.<sup>9</sup>

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6. BW bk. 5, art. 1.

7. BW bk. 5, art. 1, para. 2.

8. 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 or construction rights cannot in the general sense be seen to be linked to property in the Dutch system of property and spatial administrative law).

9. 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.).

### III. 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.

#### A. *No Shared or Absolute Use*

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 scenario, 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.

#### B. *Shared Use*

The second situation is one in which the government requires some shared use of a private property for the general interest.<sup>10</sup> Such situations are specifically addressed by the Private Law Hindrance Act, which regulates indemnification 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 yields the following observations: (1) a temporary partial use or a permanent partial use can be imposed, and (2)

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10. The Dutch Constitution addresses this issue 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." 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](http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf).

the seriousness of the infringement and the duration of the limitation are both important.<sup>11</sup> 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 unable to reach an agreement on the installation and maintenance of works.<sup>12</sup> In contrast, an entitled party has a protected right to appeal a ministerial decision under article 4 of the Private Law Hindrance Act.<sup>13</sup>

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 the market value of 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.

### C. Absolute Use

The third situation is one in which the government believes that expropriation, or the absolute disposal 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 indemnification, according to regulations set forth under national legislation.<sup>14</sup> The national legislation that promulgates these regulations is known as the Expropriation Act.

Expropriation may occur in the name of, and for the benefit of, regulatory legal entities such as the State, provinces, municipalities, and water boards.<sup>15</sup> It is also possible, though rare, that expropriation takes 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.

Under normal circumstances, the most commonly applied expropriation statutes are infrastructure statutes and public housing statutes. Municipalities make considerable use of public housing statutes. The Expropriation Act and the SPA can be employed together by local

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

12. 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.

13. Belemmeringenwet Privaatrecht [Private Law Hindrance Act] art. 4 (Neth.).

14. Grondwet voor het Koninkrijk der Nederlanden [GW.] [Constitution of the Kingdom of the Netherlands] art. 14, para. 1 (2002), available at [http://www.minbzk.nl/contents/pages/6156/grondwet\\_UK\\_6-02.pdf](http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf).

15. BW art. 2.1, para. 1; Onteigeningswet [Expropriation Act] art. 1, para. 1 (Neth.).

governments to achieve their land-use planning objectives. The Expropriation Act compliments the SPA by allowing the possibility of expropriation for either (1) executing the land-use plan or (2) maintaining the status quo to be in accordance with the land-use plan.<sup>16</sup> 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.<sup>17</sup> 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 things that can be expropriated under Dutch law. If a property right is encumbered with a limited user's right, and the clear property right already belongs to the government, it is possible to impose a separate expropriation of rights. These rights can include the right of inherited strictures, usage, habitation, holding leases, usufruct, and placement of structures.<sup>18</sup> The Expropriation Act gives civil courts special authority to hear expropriation cases.<sup>19</sup> The courts determine the soundness of expropriation claims and the compensation that must be paid to the entitled parties. For the government, the rule is *nemo iudex in causa suam*.<sup>20</sup> 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.<sup>21</sup> 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. When the user-defendant objects to the expropriating party's actions, the court will disallow the expropriation

16. *Onteigeningswet* [Expropriation Act] art. 77, para. 1.

17. *See id.*

18. *See id.* art. 4, para. 1.

19. *See id.* art. 18.

20. "No one can be judge in his own case."

21. *See* *Onteigeningswet* [Expropriation Act] art. 17.

if it finds that the expropriating party did not make a proper good faith effort to reach an amicable agreement.

The Expropriation Act determines what types of damages or injuries to property rights will be considered for expropriation and compensation.<sup>22</sup> Thirteen years after the enactment of the Expropriation Act, the Supreme Court ruled in 1864 that the premise of the Act, in which owners could only be compensated for capital losses,<sup>23</sup> conflicted with the constitutional principle that complete compensation must be made for expropriations, which included compensation for business and income losses.<sup>24</sup>

Today, expropriation law can compensate property owners and users for numerous damages and injuries. One of the major rules governing compensation is the requirement of a causal relationship: only damage that is a direct result of expropriation will be considered for compensation. Direct damages can 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 independent economic significance, the property owner can request a court order to force the government to take over any remaining land. Technically, this is not expropriation for the general good and is only relevant in this limited situation.

#### *D. Similarities and Differences*

The three areas of regulation that have been considered, planning compensation rights, obligation to consent, and expropriation, are all legally regulated forms of administrative compensation. However, there is also a system of extralegal government compensation that is based, not on any particular legislative act, but on justice.<sup>25</sup>

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.

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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. Extralegal government compensation is outside the scope of this paper.

In contrast, the system of planning compensation rights set forth in the Spatial Planning Act is based on the following principle: compensation for damage that reasonably should not be the responsibility of the interested party. This principle may not guarantee complete compensation in all cases. Thus, under the SPA, it is possible that a share of the damage will remain the responsibility of the aggrieved party. In practice, it is often difficult to determine which share ought to be considered for compensation. Nevertheless, the phenomenon of planning compensation rights is relatively well defined compared to other forms of administrative compensation.

#### IV. THE LEGAL REGULATION REGARDING PLANNING COMPENSATION RIGHTS

Article 49 of the Spatial Planning Act, which was updated on September 1, 2005, outlines the payment scheme for planning compensation rights. The article reads as follows:

1. Insofar as an interested party as a result of:
  - a. the determinations of a land use plan;
  - b. the decision regarding exemption, pursuant to articles 17 or 19;
  - . . . .
  - d. the stay of a decision regarding the issuing of a building or planning permit . . . ;

suffers or will suffer damage, which cannot reasonably be left or completely left to his responsibility and for which payment resulting from purchase, expropriation or other means is not assured, or insufficiently assured, the municipal executive will extend compensation to him upon request and in an equitable fashion.

2. A request for damage compensation as set forth in the first paragraph, sub a, b . . . must be submitted within five years after the relevant determination of the land use plan or decision, respectively, has become irrevocable. In the case of damage resulting from a stay as set forth in d . . . the request for compensation is only submitted after the established land use plan has been made available for inspection, however no later than five years after the land use plan has been made irrevocable.

3. The municipal executive will charge the petitioner a fee of € 300, which amount can be raised or lowered by a maximum of two thirds upon ordinance of the municipal council. They will notify him of the required fee and inform him that the amount must be deposited either in an account of the city or in a place indicated within four weeks after the fee notification was sent. If the amount is not deposited within this period, they will declare the petition inadmissible unless it cannot be reasonably ascertained that the petitioner was in arrears. If there is a complete or partial positive decision on the request, the municipal executive will reimburse the fee.

4. The amount named in the third paragraph can be modified by Order in Council insofar as the price index for family consumption allows this.<sup>26</sup>

Article 49 clarifies a number of matters. First, the right to compensation is for “interested parties.” 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<sup>27</sup> or nearby infrastructure works. 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.

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 odors from garbage dumps. A loss in income may be the result of something such as diminished turnover.

Second, the damage that is considered for compensation is not limited to damages caused by the determinations of a land-use plan. Other types of damages that are considered for compensation include (1) damages that result from exemptions of land-use plans,<sup>28</sup> and (2) damages that result from the stay of a decision regarding the issuance of a building permit.

Third, because municipal governments are the administrative bodies that decide compensation requests, there will be times when other government entities request that municipalities decide to either establish or

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26. Wet op de Ruimtelijke Ordening [Spatial Planning Act] art. 49 (Neth.).

27. The plots need not be immediately adjacent.

28. See Wet op de Ruimtelijke Ordening [Spatial Planning Act] art. 19 (Neth.).

exempt a land-use plan. For example, a regional government may request that a regional garbage dump be included in a local land-use plan, or the national government may ask for the municipality to approve of a national highway project. In these types of situations, a municipality can attempt to come to an agreement with the higher government to ensure that the municipality will be paid “article 49 compensation.” If the municipality and the higher government fail to reach an agreement, the municipality can request the Provincial Executive to order the higher government to make the payment.<sup>29</sup> Damages are not extended as a matter of legal course, but must be claimed by the injured party.

Fourth, compensable damages must have resulted from an irrevocable land-use plan or an irrevocable exemption decision. An irrevocable land-use plan is one that satisfies two conditions: (1) the land-use plan must have been approved, and (2) the plan is either no longer open to appeal, or the appeal has been dismissed.<sup>30</sup> Compensable damages resulting from an irrevocable land-use plan are subject to a five-year statute of limitations, which starts running on the date that the land-use plan or relevant decision becomes irrevocable.

Fifth, the scheme of planning compensation rights under the SPA is not founded on the premise of complete compensation. The only damages that are compensated are those that cannot reasonably be borne by the aggrieved party. Due to the difficulty of determining which portions of damages are eligible for compensation, the courts have developed a large body of jurisprudence on this topic.

Sixth, interested parties may receive either monetary compensation or in-kind compensation, in which another piece of property is made available. In addition, the determination of the amount and type of compensation takes into account reimbursements that have been made to the interested party through purchase, expropriation, or other methods. If partial expropriation results in damages to the remaining share of the property, insofar as it is not reimbursed as part of the expropriation, then this too comes under article 49.

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29. *See id.* art. 31.

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

## V. A FEW FACTS

Although no systematic research has been carried out regarding the quantitative aspects of compensation rights, some data is available.<sup>31</sup> In the past ten years, the number of claims has increased sharply. This seems to be related to three factors. First, the jurisprudence of the 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 more condensed than before, with the consequence that more plots may encounter hindrances from neighbors. Third, some advisors approach potential clients on a contingency basis, proposing to undertake compensation rights procedures for them. Yet, more than fifty percent of the compensation claims are not honored.<sup>32</sup> 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.<sup>33</sup>

Figures are also available on the costs of handling claims by municipal governments.<sup>34</sup> Handling a claim costs roughly €1750, which includes the cost of required expert advice.<sup>35</sup> This is much more than the €300 that petitioners are required to deposit.<sup>36</sup> These figures were the impetus for Dutch legislators to limit the planning compensation scheme.<sup>37</sup> On September 1, 2005, legislators introduced a statute of limitations on claims for the first time and required the payment of a €300 fee.<sup>38</sup>

Parliament recently debated a proposal that requires a deductible proviso of five percent. In other words, whenever the value of a property decreases, or related income declines, by five percent or less as a result of a planning decision, the damage would not qualify for reimbursement. This is substantially different from a scheme where a percentage of the damage remains at the expense of the aggrieved party, as is the case in Belgian Flanders.<sup>39</sup> The proposal is a clearer limitation on the right to compensation than the recently enacted statute of limitations and fee

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

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. G.M. van den Broek, *Het wetsontwerp voor een nieuwe planschaderegeling* [Proposed Legislation for a New Planning Compensation Regulation], *BOUWRECHT* 648 (2004) (Neth.).

requirement. While, there were disagreements about this proposal in society and in parliament, the deductible rule will clearly not apply to a situation where a land-use decision entails development or use limitations on the aggrieved party's own premises and thereby causes a decrease in value. The concern for the government is that otherwise there would be a conflict with article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

To gain insight into possible planning compensation claims, a risk analysis of such claims is often carried out before the land use plan is modified or before an exemption is extended. This is frequently arranged and paid for by the petitioner (developer) for land-use modification or exemption. The risk analysis is carried out by an independent expert advisor who provides insights into the likelihood and possible extent of planning compensation claims. The risk analysis can even lead to the modification of the urban design, which reduces the chances of unpleasant surprises.

#### VI. A FEW PROCEDURAL ASPECTS

The General Administrative Law Act and the Spatial Planning Act contain few procedural rules as to how parties should request for compensation pursuant to article 49 of the Spatial Planning Act and how municipal executives should handle these requests. However, municipal executives have the authority to establish supplementary procedural rules and frequently make use of this authority. Although the law does not require the establishment of such procedural compensation schemes, they are still worthwhile because they provide a smooth process to receive, handle, and conclude planning compensation claims.<sup>40</sup> Another benefit of these schemes is that they assign time periods that must be respected.

An important element of a planning compensation procedural scheme is the municipal executive's assignment of an independent consultant to evaluate the claim. An independent expert advises (1) whether there is any actual damage as defined by article 49 of the SPA, and (2) what amount of compensation should be paid. Initially, the independent consultant allows the petitioner, 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

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40. Letter from the Vereniging van Nederlandse Gemeenten (Soc'y of Dutch Municipalities) to the Members of the Councils, Planschade nieuwe stijl (New Style Planning Compensation) (June 7, 2005) (on file with authors).

the interested third-parties are given the opportunity to respond. After receiving the responses, the independent consultant makes a definitive report, which forms the basis for the municipal executive's decision on the compensation claim. An interested party can challenge a municipal executive's 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. A final appeal to the Department of Administrative Justice of the Council of State is possible.

The use of independent consultants is consistent with jurisprudence that requires municipalities to obtain objective and expert advice on the handling of planning compensation claims. However, an independent consultant is not necessary in exceptional cases where the claim appears to be disallowed or clearly has no basis.

In all situations, an aggrieved party only has to claim damages and is not required to submit summary facts or an appraisal. In addition, the aggrieved party has no burden of proof to meet.

## VII. 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.<sup>41</sup> 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 Spatial Planning Act came into effect. The debate in Parliament over article 49 was comprehensive but confusing. The debate often intertwined two separate questions: (1) whether compensation should be left to the discretion of the municipality or 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

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41. See Fred Hobma & Loes Schutte-Postma, *Casistry 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).

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 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 be left, or completely 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.<sup>42</sup> The *égalité* principle is based on the concept 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 in the literature. In 1978, De Haan, among others, concluded that article 49 was ineffective in practice.<sup>43</sup> In 1977, Wessel, a professor of administrative law and public administration, characterized the rulings of the Crown in the *Moerdijk* cases as "petty" and "short-sighted." In the *Moerdijk* cases, the land-use plan titled "Industrial Area Moerdijk" caused the conversion of 2500 hectares of agricultural land into an industrial zone. Suppliers of cattle fodder and other agricultural businesses requested 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.<sup>44</sup>

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42. Until 1988, the Crown was responsible for rulings regarding planning compensation. Today the competence lies with the administrative sectors of the courts and, through a final appeal, the Department of Administrative Justice of the Council of State.

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

44. 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).

“However, this characterizes life itself. In the chain of facts and circumstances the land use plan does not have a dominant role.”<sup>45</sup>

The veterinarians also requested compensation for the decline in the number of clients and income. They argued that 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.”<sup>46</sup>

However, very gradually, and without any specific ruling that one can point out as 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 today can no longer be found in the *égalité* principle; it must be found in the principle of “material legal security.”<sup>47</sup> This principle implies that, although landowners and holders of limited property rights do not have the right to demand that desirable land-use plans be continued indefinitely, they do have the right to compensation when land-use plans change and damage the values of their properties.

An example involving trailer camps will demonstrate the progress from a restrictive interpretation of the law to a 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 assumed damage and the designation of the new land-use plan. For many years, the Crown’s guiding rationale was the following: “It can not be assessed that establishment of a trailer camp in general causes damage, which can be seen to be the result of the determinations of a land use plan.”<sup>48</sup>

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

46. 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).

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

48. 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 authors).

A change in the Court's interpretation began with the 1987 ruling in the *Elst* case.<sup>49</sup>

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.<sup>50</sup>

Since then, many rulings have held the same considerations. One example is the *Breda* case,<sup>51</sup> 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."<sup>52</sup>

To determine whether 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,"<sup>53</sup> and (2) whether "from a spatial viewpoint, the trailer camp has a negative effect on its surroundings."<sup>54</sup>

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 was not regarded as grounds for compensation.<sup>55</sup> Even a one-year's loss of rental income from a company's building was ruled as not constituting grounds for compensation.<sup>56</sup> The Crown ruled that the damages to the appellant's

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49. 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 authors).

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

51. 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 authors).

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

53. *Id.*

54. *Id.*

55. Dantumadeel/De Boer, Crown Decision [KB], 5 April 1973, nr. 39 (on file with authors).

56. Enschede/Rabbers, Crown Decision [KB], 14 November 1975, nr. 35 (on file with authors).

property value were not such that the damage could not reasonably be left to his responsibility.

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.<sup>57</sup>

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 the current main rule is that aggrieved parties do 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.

#### VIII. STEPS AND CRITERIA FOR DETERMINING A COMPENSATION CLAIM

There are three main steps relevant to evaluating a planning compensation claim,<sup>58</sup> which have developed from a long line of case law.

##### A. *Step One: Is the Damage Really Attributable to Planning?*

The issue is whether the damage claimed is indeed a result of the planning measures set forth in article 49 of the SPA. According to the jurisprudence, there is no 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. In connection with this, there is no room for compensation for "planning shadow damage." This refers to damage from a decline in property value prior to, or in anticipation of, the actual planning decision.<sup>59</sup> This could include a negative financial

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57. Baarn/Köhler, Crown Decision [KB], 5 August 1982, nr. 69 (on file with authors).

58. DE HAAN, DRUPSTEEN & FERNHOUT, *supra* note 25, at 549–52.

59. Assume, for example, that a person owns a piece of land with certain development rights. It is well known that the municipality has the intention to change the land-use plan, which will partially or totally take away this person's development rights. The result of the intention of the municipality is that the value of this person's property diminishes. If this person, prior to the establishment of the changed land-use plan, sells the land, no compensation can be claimed. This is called "planning shadow damage." If, after selling the land, the modified land-use plan becomes irrevocable, this person cannot claim planning compensation either. The reason is that the damage is not attributable to the land-use plan.

influence under the threat of plans to modify a land-use plan or proposed infrastructure plans.

*B. 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 49, the second step is to compare the old and new planning stipulations. When looking at the old 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.<sup>60</sup>

For example, suppose a new land-use plan allows the construction of houses on plot X, which is located across from a plot owned by Y. 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 construction was allowed on plot X under the old land-use plan. It is irrelevant that plot X may not have been built up to its full construction potential under the old land-use plan. There is a possibility of compensation for Y only when the new plan allows new development possibilities not offered by the old plan.

This example also shows that for compensation purposes it is irrelevant whether the construction possibilities of the new plan are actually carried out. A buyer of Y's plot must consider the construction *possibilities* of plot X in determining his price.<sup>61</sup>

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

If the comparison shows that the interested party has indeed been put in a worse situation, the final inquiry is to determine what damage cannot reasonably be left or completely 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 reimbursement. Depending on the findings of the evaluation, that damage, whether capital damage or income damage, may be eligible for complete

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

61. VAN BUUREN, BACKES & DE GIER, *supra* note 30, at 257.

compensation. The financial situation of the petitioner has no mitigating effect on the evaluation.<sup>62</sup>

The most important reason not to assign compensation is when a worsened situation caused by the planning change was foreseeable and yet the aggrieved party continued either to work actively or wait passively, all the while experiencing damage.<sup>63</sup> The principle of risk acceptance dictates that an aggrieved party has no right to damage reimbursement if the damage is at least partially the result of the aggrieved party's action or lack of action, insofar as the taking of reasonable measures could have avoided or limited the damage.<sup>64</sup>

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. These individuals are considered able to accept foreseeable government decisions that could be disadvantageous for them. Thus, individuals who, at the time of their investment decisions, could have reasonably expected a damaging future government decision are assumed to have taken into account the possibility of this government decision and implicitly accepted the accompanying harm that may result from their actions.

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. 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 claim cannot be transferred to the new owner of real property. The claim is bound to the individual; no qualitative responsibility is linked to the property interest itself.

According to the doctrine of passive risk acceptance, individuals have no right to compensation when they either (1) take no action or remain passive when they reasonably could be expected to take into consideration

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62. *Id.* at 266.

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

64. 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 authors).

government actions, or (2) fail to take timely and appropriate measures to limit damage. Jurisprudence is cautious on this point. One condition for passive risk acceptance is that the planning changes causing the damage were expected or otherwise foreseeable by the interested party.<sup>65</sup> This is hard to determine. Moreover, compensation is not forfeited if the building right is not used within a fixed time period.

An example of passive risk acceptance is found in the recent decision of the Department of Administrative Justice of the Council of State of September 28, 2005.<sup>66</sup> A land-use plan modification resulted in the owner's plot being designated as "farmland area of scenery and nature value."<sup>67</sup> This modification eliminated the zoning of the plot for "Hotel and rural house" as under the old land-use plan. The owner had not made use of the construction possibilities under the old plan. The Department of Administrative Justice concluded that the owners accepted the risk that the construction possibilities for the plot would be removed. The Department of Administrative Justice found it significant that there had been signs for some time indicating a likely change in the planning. The owners could have concluded that construction on the grounds for a "Hotel and rural house" was no longer desired. In addition, the owners had not taken any concrete steps to build under the old land-use plan. Consequently, the owners' request for compensation was denied.

#### IX. AGREEMENTS BY DEVELOPERS TO REIMBURSE COMPENSATION CLAIMS

Planning Compensation Rights Agreements are instruments that have been developed to shift the onus for payment of compensation from the municipality to the developer that proposes a plan amendment, exception, or the like. A Planning Compensation Rights Agreement is an agreement between a developer and a municipality in which a developer agrees to indemnify the municipality for planning compensation claims that the municipality approves. Such agreements are often set as a condition to be met before a municipality agrees to approve an amendment to a land-use plan or a related planning instrument. These agreements are applicable wherever the developer needs that approval in order to be able to implement the project.

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65. VAN BUUREN, BACKES & DE GIER, *supra* note 30, at 263.

66. Case number 200409555/1, 37 NEDERLANDS JURISTENBLAD [NJB] (Oct. 21, 2005) (Neth.) (on file with authors).

67. *Id.* at 1953.

The principle behind the practice of the Planning Compensation Rights Agreements is supported by both developers and municipalities. It has recently even been enshrined in legislation in a new article 49a of the SPA, which has been in effect since July 22, 2005. This amendment to the statute expressly authorizes the municipal executive to draw up such a contract with the party requesting a land-use plan modification or an exemption.

The amendment to the SPA became necessary as a result of a Supreme Court decision in the *Nunspeet* case, decided in May 2005.<sup>68</sup> This was 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. The government responded quickly. With the support of the organization of developers and the Society of Dutch Municipalities, the government drew up an emergency law to give these agreements a legal basis in the SPA. This law was codified as SPA article 49a.

#### X. PRACTICAL EXAMPLE: COMPENSATION RIGHTS FOR THE EXPANSION OF AMSTERDAM SCHIPOL AIRPORT

Planning compensation 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 governments, including 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. A joint regulation established a Compensation Board that had its own authority and powers.

In the 1980s, it was decided at the national level that Amsterdam's airport, Schiphol, required significant expansion. The national government began the expansion planning process by issuing "Planning Key Decision Schiphol and Surrounding Area," pursuant to article 2a of the SPA.<sup>69</sup> This became effective on January 8, 1996. The resolution, along with several later decisions, involved many infrastructure and spatial planning modifications at the airport and in the surrounding area.

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

69. Planning Key Decision Schiphol and Surrounding Area Official Report of the Second Chamber 1994–95, 23552 (on file with authors).

This expansion included a considerable number of projects, such as the construction of a fifth runway and the installation of noise and safety zones. It also included the building of a national road, a provincial road, and a restricted non-public road for a modern, rapid bus connection. Side projects included a nature area, bike paths, and modification of area hydraulics through the creation of watercourses and additional infrastructure. The Schiphol Act regulated the use of the fifth runway and the rest of the airport's runway system at the national level.<sup>70</sup> The Act, along with the Airport Layout Resolution and the Airport Traffic Resolution that were based on the Act, provide a new system of limiting conditions for things such as noise hindrance and safety risks.<sup>71</sup>

Because of foreseeable negative effects that this expansion-related project may cause for nearby residents and businesses, the Schiphol Airport Compensation Board was created. The Dutch State, the province of Noord-Holland, and a number of municipalities around the airport's periphery crafted a joint regulation pursuant to articles 94 and 95 of the Joint Regulations Act that established the Compensation Board.<sup>72</sup> The result was that administrative bodies participating in the scheme were blocked from handling damage claims for the period that the scheme remained valid.

The Compensation Board was a legal entity, and its technical purpose, according to article 2 of the regulation, was to be a clear, expert, and efficient mechanism for interested parties to further compensation claims related to the expansion of the Schiphol airport area, as set forth in the Planning Key Decision.<sup>73</sup> In other words, the Compensation Board provided a place for people to bring their compensation claims related to the airport expansion.

The General Board of the Schiphol Airport Compensation Board had exclusive authority to handle compensation claims under article 9 of the scheme. Pursuant to article 19, the Assessment Committee and a number of Advisory Committees issued reports on the proper application of basic principles to the submitted claims, determining damage when necessary. The Assessment Committee communicated with the claimants through public servants, who sent the initial decisions on damage claims. If the

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70. Aviation Act ch. 8, effective Feb. 20, 2003 (on file with authors).

71. 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 authors).

72. Wet van 20 December 1984 [Act of 20 December 1984], *Staatsblad van het Koninkrijk der Nederlanden* [Stb.] 667.

73. Joint Regulation Schiphol Airport Compensation Board, art. 2 (on file with authors).

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.

## XI. EVALUATION AND CONCLUSION

While the complex issue of planning compensation rights is laid down in two relatively simple articles in the SPA, articles 49 and 49a, the principle has nevertheless developed considerably. It will undoubtedly continue to do so in the future, owing to the great amount of literature and jurisprudence on the subject, to which only limited attention can be given in this Article.

Although the topic is attracting significant scholarly interest, planning compensation itself has 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.<sup>74</sup>

The right to compensation has been considerably broadened through a legislative change. Before 1985, the right to compensation was interpreted as applying only to damages resulting from a new or amended land-use plan. A 1985 legislative amendment to article 49 of the SPA extended the article's sphere of applicability to encompass many other types of planning decisions, such as exemptions and the stays of decisions regarding building permits.<sup>75</sup>

The scope of compensation was further broadened in a gradual manner through case law. Today the main rule is 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.<sup>76</sup>

Comparative legal research carried out in 2000 on behalf of the Minister of Housing, Spatial Planning, and the Environment showed that the Netherlands had more extensive rights to planning compensation scheme than neighboring countries.<sup>77</sup> However, Professor D.A. Lubach, an

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

75. J.W. VAN ZUNDERT, *supra* note 60, at 266.

76. VAN BUUREN, *supra* note 30, at 255.

77. H.J.A.M. VAN GEEST ET AL., VERGELIJKING PLANSCHADEREGELINGEN [COMPARISON OF PLANNING COMPENSATION SCHEMES], Onderzoeksreeks Rijksplanologische Dienst, Ministerie van

expert in construction law and comparative law, has concluded that the Netherlands is “out of step” with Germany and France for “no good reasons.”<sup>78</sup> In his view, the Netherlands share an outlook with Germany and France in that “property is socially bound and the damage caused by (legal) government acts is a component of the social risk that individuals run as residents of those countries.”<sup>79</sup>

Recently the Dutch government has taken steps to limit compensation rights somewhat. The 2005 change in legislation established a €300 fee to submit a compensation claim as well as a five-year statute-of-limitations.<sup>80</sup> A much more far-reaching limitation, a five percent deductible clause proposed by the government, was recently under discussion in Parliament. In the Memorandum accompanying the proposal, the government has shown its dissatisfaction with the jurisprudence on article 49 of the Spatial Planning Act and has shown an intention to go back to the “original point of departure”:

[A]n individual who suffers damage as a result of developments of society, in principle, should be left responsible for this damage. This also applies to disadvantages caused by an administrative body where in favour of weighty interest of society, individual interests are disadvantaged. In the eyes of the government there only can be a reason for compensation if the disadvantage reasonably cannot be left to the responsibility of the individual. . . . Only damage which goes beyond financial disadvantages that belong to the societal risk every citizen should bear will be compensated.<sup>81</sup>

Opinions on this proposal were divided in societal, parliamentary, and scholarly circles.<sup>82</sup> Among the social proponents are the Society of Dutch

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Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer [Research Series National Planning Service, Ministry of Housing, Spatial Planning and the Environment] (2003) (on file with authors). 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).

78. 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).

79. *Id.*

80. See *supra* Part V.

81. *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 authors).

82. See Lubach, *supra* note 78, at n.28, for scholarly sympathy for the proposal. See van den Broek, *supra* note 39, at n.9, for scholarly criticism.

Municipalities, the Netherlands Council for Housing, Spatial Planning and the Environment,<sup>83</sup> 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 legislation. They felt that too much damage would be left to the responsibility of the individual. The three parties proposed an amendment holding a two percent deductible clause.<sup>84</sup> This amendment was recently 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.<sup>85</sup>

The new legislation also includes a requirement that, contrary to the current law, petitioners will have to submit rationales for their claims as well as substantiations for the amounts of the claims. This requirement will make it more necessary for petitioners to engage expert consultants, thus raising the de facto cost of compensation claims. We can be assured that the public interest in planning compensation rights will be bolstered by this new legislation, which will come into effect in 2008.<sup>86</sup>

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83. 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.

84. Amendment 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 authors).

85. 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 authors).

86. Wet Ruimtelijke Ordening 2006 [Spatial Planning Act 2006] art. 6.1 (Neth.).