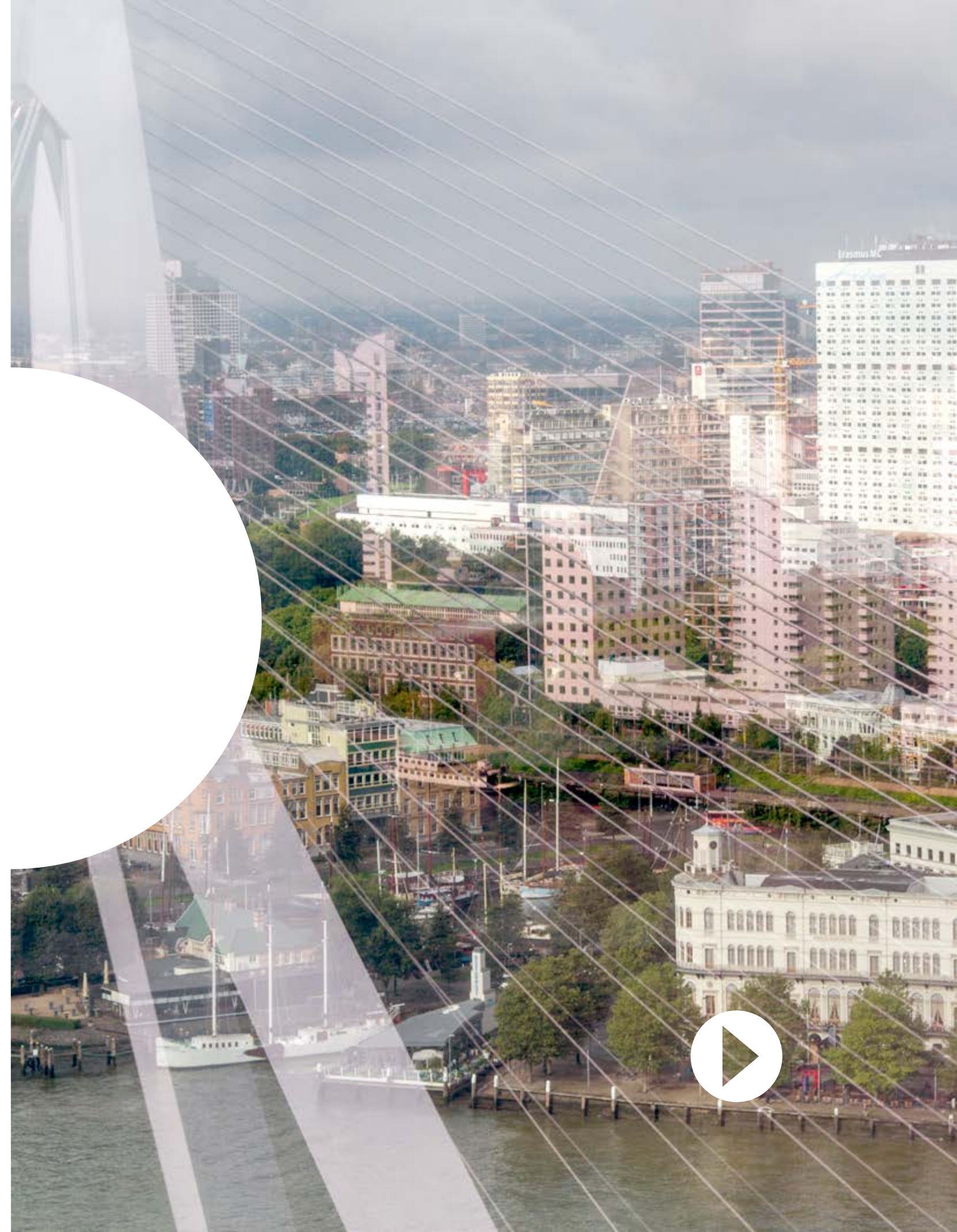


# LAND FOR DEVELOPMENT

LAND POLICY  
INSTRUMENTS FOR AN  
ENTERPRISING SOCIETY

JUNE 2017



### **About the Council for the Environment and Infrastructure**

The Council for the Environment and Infrastructure (*Raad voor de leefomgeving en infrastructuur*, Rli) advises the Dutch government and Parliament on strategic issues concerning the sustainable development of the living and working environment. The Council is independent, and offers solicited and unsolicited advice on long-term issues of strategic importance to the Netherlands. Through its integrated approach and strategic advice, the Council strives to provide greater depth and breadth to the political and social debate, and to improve the quality of decision-making processes.

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# SUMMARY



The Netherlands stands at the threshold of a number of major transitions (such as the energy transition and climate adaptation). While the big political decisions involved attract all the attention, it is often forgotten that the nuts and bolts of these transitions all come together in land development projects. The provisions for a renewed toolbox of land policy instruments have been presented in the consultation version of the Supplementary Act on Land Ownership (Environment and Planning Act) (hereinafter: the Supplementary Act), which will be incorporated into the Environment and Planning Act in 2019. The Council for the Environment and Infrastructure (Rli) attaches great importance to this Supplementary Act because the land policy instruments it makes available will be invaluable for taking development projects forward, and therefore also for tackling the major transitions.

Given the need for harmonisation, integration and simplification of the rules now in force across various pieces of legislation, the legislature is pressing ahead with drafting the Supplementary Act. The Council agrees wholeheartedly with the inclusion of land policy in the Environment and Planning Act with the aim of harmonising, integrating and simplifying the relevant policy instruments. However, in this advice the Council takes a different and more ambitious approach. It looks at the issues from the perspective of the challenges facing development projects. Are the instruments suitable for taking on the range of complex development tasks and will they work equally well during economic upswings and downswings, in areas with high and low market demand (such as urban regions and regions in decline), and at the local and regional scales?

From this more practical perspective, the Council comes to the conclusion that the Supplementary Act should meet three requirements:

- First, the Act should be compatible with the philosophy and broadened scope of the Environment and Planning Act. The Council concludes that on this score there is room for improvement: the Act does not provide sufficient instruments for implementation, and the instruments it does provide require detailed plans that are not appropriate for facilitative planning and 'organic', or incremental, area development.
- Second, the legislation should support all types of land policy (from active land policy to facilitating land policy) so that subnational players can choose the instruments appropriate to their own projects and the local planning and political contexts. Although the Supplementary Act takes this approach, in some areas it misses the mark, especially concerning the instruments for a facilitating land policy. For example, municipal councils should have the freedom to decide whether or not to make policy instruments available for use by implementing parties.
- Third, as financial shortfalls are a major constraint on taking projects forward in good time, the legislation should facilitate a better distribution of the costs and benefits of land developments to improve the chances of developments going ahead. Here, too, the Council sees room for improvement, especially on cost recovery and making regional agreements.



Given that these three aspects of the Supplementary Act need to be improved, the Council makes the following recommendations:

1. Make the land policy instruments more compatible with the Environment and Planning Act.
2. Give property developers and other implementing parties access to land policy instruments as well.
3. Make appeals to the right to develop conditional on a duty to develop.
4. Speed up the expropriation procedures.
5. Reconsider introducing urban land readjustment.
6. Expand and simplify the possibilities for cost recovery.
7. Broaden the business case.
8. Provide instruments for regional cooperation and redistribution of development gains.

The Council's recommendations are geared towards modernising the legislation. Parties involved in development projects should have access to a land policy toolbox that will enable them to implement sustainable solutions for the many planning and development projects in the natural and built environment, both now and in the future.

Finally, the recommendations are presented as a coherent package. However, judicious incorporation of several of them in the wording of the Act may take more time than allowed for in the current procedure. This means that serious thought should be given to postponing the introduction of the Supplementary Act by one or two years. It is also conceivable that the legislature will decide to amend the Act in stages by incorporating

'quick wins' in the text of 2019 and then making further amendments one or two years later. Moreover, the Council points out the need for careful consideration of how best to implement the new legislation.



# ADVISORY REPORT

## 1. Land for Development

### 1.1 Background: Reform of the legislation

The Netherlands faces major challenges in transitioning to a sustainable physical environment. Under the ongoing decentralisation of policy responsibilities, the task of making these transitions increasingly falls to subnational authorities, especially the municipalities, where they must take shape in the form of concrete developments. Getting these projects implemented depends to a significant degree on being able to use land policy instruments. These instruments should also be suitable for use by private developers, who play a key role in these development projects.

This land policy toolkit has not yet been included in the Environment and Planning Act (*Omgevingswet*), but will be adopted via the 'supplementary legislation track'. The consultation version of the Supplementary Act on Land Ownership (Environment and Planning Act) (hereinafter: the Supplementary Act) (*Aanvullingswet grondeigendom Omgevingswet*), which contains the instruments for land policy and cost recovery (see Box 1), was published in 2016. The Council for the Environment and Infrastructure (Rli) endorses the idea of including provisions on land ownership in environmental and planning law. The Council has taken the opportunity presented by the publication of this draft bill to advise the government on land policy on the understanding that the new legislation should not only consolidate and unify the existing legislation, but also provide a comprehensive answer to the challenges to be met over the

coming decades. The Council suggests improvements where the current proposals are found wanting.

### **Box 1: The Environment and Planning Act and the Supplementary Act on Land Ownership**

The recent reform of environmental and planning law will put an end to the existing fragmented legislation, with its multiplicity of laws and regulations, each with their own procedures and mechanisms. The Environment and Planning Act, which will come into force in 2019, is designed to provide an integrated policy framework and enable a consistent and comprehensive assessment of development initiatives. Another objective is to speed up and improve decision-making and broaden the scope for weighing up competing interests. Because government policies for soil, noise, nature conservation and land ownership were undergoing substantial change when the Environment and Planning Act was being drafted, and for various political reasons, a decision was made not to include these in the new Environment and Planning Act and to subject them to a thorough consultation process with stakeholders and in Parliament. These policies will be incorporated into the planning and environmental legislation via supplementary acts. The Supplementary Act on Land Ownership was put on public display in the summer of 2016 (Internetconsultatie.nl, 2016). The aim is for this law to come into force at the same time as the Environment and Planning Act in spring 2019, when it will be consolidated in the Environment and Planning Act (Tweede Kamer, 2016a).

### **1.2 Request for advice**

The Supplementary Act contains the provisions put forward by the minister of infrastructure and the environment to make land policy more suitable for managing the range of planning and development projects facing the municipalities now and over the years to come. It also brings together the land policy instruments that are currently scattered across a number of different laws to make it easier to coordinate their use more effectively. With these aims in mind and in response to the considerable problems facing municipal land development departments and property developers as a result of the financial crisis, the minister has decided to combine a supply-led model (with an active municipal land policy) with a more demand-driven, facilitating land policy better adapted to facilitative planning and 'organic', or incremental, area development. The Council agrees that the land policy instruments that have grown up over the years do not sit easily with these new developments.

The question the Council asks is whether or not the new legislation really does offer subnational governments sufficient possibilities to shape land policy to meet the needs of the development projects in their territories. For example, will it be useful in areas of decline as well as in growth areas? Moreover, the Council believes it should be workable for a long time to come and not only when the economy is buoyant, but also in times of economic downturn. Is the package of measures complete, comprehensive and flexible enough? Are the measures compatible with other relevant legislation? Against this background, the Council's research question for this study was:





*Do the new land policy instruments offer sufficient opportunities to involved parties to meet the challenge of creating a sustainable physical environment? If not, what is still needed?*

The Council emphatically decided to answer these questions from the perspective of developments for which the use of land policy instruments is essential. Some of these projects are already known, but others are not. Major transitions (such as the energy transition, achieving sustainable rural communities, the circular economy and strengthening urban regions<sup>1</sup>) provide the framework for local and regional integration and adaptation tasks arising in development projects. Concrete examples include demolition and clearance in areas of decline, urban transformations, new housing developments, restructuring industrial estates, conversion of empty office buildings and maintaining attractive shopping areas. These tasks involve complex ownership situations. If they are to be taken forward efficiently, various coalitions of government and market players will have to work together at different scales. The land policy instruments should help to move this process along. Moreover, they should work not only when the economy is buoyant (market demand), but also in times of economic downturn (no market demand). In this advice the Council covers all these different contexts and draws examples from two ends of the development spectrum: urban transformations and managing areas of economic and demographic decline.

<sup>1</sup> Over the past four years the Rli has issued advice on five major challenges: the energy transition, achieving sustainable rural communities, strengthening urban regions, the circular economy and the transformation of urban real estate (Rli, 2016).

This advice has been prepared in response to the new regulations in the Supplementary Act, but this is not the sole focus of the advice. The toolkit is bigger than just the instruments in the Supplementary Act.<sup>2</sup> Moreover, selecting the right instruments to use is difficult because they are often interconnected. The Council also addresses wider issues relevant to the decisions that have to be made on land policy and the use of the land policy instruments. In line with the philosophy of the Environment and Planning Act, the instruments must support the ongoing decentralisation of policy tasks, deregulation, de-institutionalisation and the need for efficiency and for local and regional interpretation involving bespoke arrangements.

<sup>2</sup> Some instruments, or parts of instruments, have been included in the Environment and Planning Act itself, will be included in the Implementing Act, or are included in related regulations such as the Provinces and Municipalities (Budgets and Accounts) Decree.



## 2. Requirements to be met by the Supplementary Act

The Council believes the Supplementary Act must meet three requirements. This chapter discusses these three requirements and describes how far the Supplementary Act meets them. It also forms the basis for the recommendations in the next chapter.

### 2.1 Align land policy instruments with the philosophy and broadened scope of the Environment and Planning Act

It is important that the instruments in the Supplementary Act align with the philosophy and broadened scope of environmental and planning law.<sup>3</sup> As the Environment and Planning Act has already been approved by both houses of Parliament, in this advice it is taken to be a given. In addition to the technical review and streamlining of the existing instruments and legislation, the Council wants to see a more considered approach to providing instruments that can facilitate the integrated approach legislated for in the Environment and Planning Act. The Council is of the opinion that the new toolkit provided by the Supplementary Act should serve stakeholders better in tackling the planning agenda for the physical environment. The Council sees this as a key requirement.

First, the Environment and Planning Act aims to increase flexibility through the introduction of more broad-brush plans (such as the physical environment plan (*omgevingsplan*) for the whole municipal territory)

<sup>3</sup> In its advice 'Reform of Environmental and Planning Law: Realising the Ambitions' [Vernieuwing omgevingsrecht: maak de ambities waar] (Rli, 2015), the Council discusses four dimensions of the balance between protection and development in the Environment and Planning Act.

and environmental programmes (*omgevingsprogramma*). The Council supports this. At the same time, the Council sees that the way in which the expropriation powers and other land policy instruments have been designed forces government authorities to make detailed land use plans or subdivision plans. The Supplementary Act is therefore not yet fully aligned with the stated objectives of the Environment and Planning Act.

Second, the Council is of the opinion that the instruments in the Supplementary Act are still based too heavily on the former spatial planning instruments. Given the broadened scope of environmental and planning law, to the Council it seems logical that instruments such as expropriation and the right of pre-emption can also be used in the pursuit of environmental quality. The Council misses a discussion of this in the Explanatory Memorandum to the Supplementary Act.

Lastly, the Council misses consideration of a more self-reliant society. The Environment and Planning Act assumes a new relationship between government and society, between people and businesses and between businesses themselves, but the instruments in the Supplementary Act are still reserved for use by government. In that sense the Act makes no contribution to meeting one of the main purposes of the Environment and Planning Act: a more self-reliant society with minimal interference from government.



### Box 2: Land policy: active and facilitating

Land policy involves choosing a specific set of land policy instruments to make land available for development at the right time and to distribute the costs and benefits of this development among the involved parties. This is because spatial policy (planning and environmental policy) not only creates value, but can also sometimes lead to a loss of value. In this advice Rli takes land policy to be government policy, but of course private parties and developers also pursue their own form of land and planning policy. Land policy does not imply that land must necessarily be taken into public ownership before development can begin.

An active land policy is when the government develops the land. This means that the government acquires the land, services it and then sells it to developers, housing associations or private individuals to develop. Active land policy is a powerful steering instrument, but its use is risky in fluctuating economic circumstances. Some people raise the additional objection that a government authority that pursues an active land policy wears two hats, because it not only controls the market but acts as a market player at the same time (Raad voor de financiële verhoudingen, Rfv, 2015).

A facilitating land policy is when the whole development, including the land development, is left to private parties. Under such a policy the government needs supplementary instruments to steer developments to the areas and sites it wants, to ensure public infrastructure and facilities

are built, and to ensure a balanced distribution of costs and benefits. In practice, the involved parties often seek to establish cooperative arrangements to spread the risks. This usually leads to public-private partnership arrangements, which may contain elements of both active and facilitating land policy models (such as development rights, building claims, joint ventures and concessions).

The financial risks run by government authorities that pursue an active land policy are limited by the new rules in the Provinces and Municipalities (Budgets and Accounts) Decree, which set clear restrictions on the financial management of land development projects and so help to raise awareness of these risks.

### 2.2 Provide instruments for both facilitating and active land policies

Until recently many Dutch municipalities pursued an active land policy, but a growing number of municipalities now work with a facilitating land policy (see Box 2). This turnaround is a consequence of the improved possibilities for cost recovery (via the introduction of the Land Development Act (*Grondexploitatiewet*) in 2008) and of the financial crisis, which caused municipalities to lose money on their land holdings. Facilitating land policy is also better suited to the upcoming 'organic' or incremental model of development. The Council is of the opinion that the difference between active and facilitating land policy is not black and white, but that they are the two ends of a continuum with a range of mixed types in between. The Council takes the same view as expressed in the draft bill, that all types





of land policy should be supported by an appropriate set of effective instruments. This position differs from the advice by the Financial Relations Council (Rfv, 2015), which argues for a ‘facilitating land policy, unless’ approach. The Rli argues that subnational governments should be able to choose for themselves which type of land policy is most appropriate to the local or regional context. The Council sees this as a key requirement to be met by the Supplementary Act.

Land policy should facilitate cooperation between the parties working on a development project. If the community<sup>4</sup> wants to take an initiative, facilitating land policy may be a suitable option, but the implementing parties must be able to use the policy instruments. The development process will then be more efficient and the outcome more certain. If the community does not take an initiative and the development is in the public interest, the government can take on an active role. The Council therefore does not want to dismiss active land policy altogether and argues that all types of land policy should be supported by an appropriate set of policy instruments. The specific situation in each case will determine the choice of instruments to be used (‘situational land policy’). The Council observes that the instruments in the Supplementary Act more or less satisfy this requirement. Nevertheless, the draft bill falls short on a number of points, particularly on instruments for a facilitating land policy (see Box 3).

<sup>4</sup> The Environment and Planning Act consistently uses the term ‘initiators’. These may be private parties such as developers, construction companies and housing associations, but also private individuals and community self-build groups.

### Box 3: Land policy terminology

Land policy is a fairly terminology-laden field. Some important terms are explained below.

- *Land development (grondexploitatie)*

Land development is acquiring and preparing land for construction and use, and then selling it to developers, housing associations or private individuals to develop.

- *Land Development Act (Grondexploitatiewet)*

The Land Development Act was consolidated in the Spatial Planning Act in 2008. This law makes it easier for government authorities to recover the costs of building public infrastructure and facilities from private developers, because they no longer have to pursue an active land policy.

- *Cost recovery (kostenverhaal)*

Cost recovery is when public bodies recover the costs of building public infrastructure and facilities in an area from the private developers active in that area.

- *Recoverable cost categories and ‘PPA criteria’ (kostensoortenlijst and PPT-criteria)*

The recoverable cost categories describe which costs a government authority may recover from private parties. The costs that may be recovered are limited by the ‘PPA criteria’: profit, proportionality and accountability.



- *Anterior development agreement (anterieure overeenkomst)*  
In development projects, public and private parties often voluntarily make advance agreements on the planning brief, the development timetable and cost recovery. These agreements are set down in an anterior development agreement.
- *Right to develop principle (zelfrealisatieprincipe)*  
The principle that the right to develop land belongs to the landowner.

### 2.3 Instruments must facilitate balanced cost recovery and profit redistribution

The Council concludes from an analysis of projects that financial shortfalls are a major constraint on development projects. Negative balance sheets and weak business cases are the biggest stumbling blocks to completing new developments. Stakeholders are always on the lookout for ways to limit costs and attract profit-making elements to the development. Land policy instruments should help to achieve this as much as possible. The Council sees this as the third key requirement to be met by the Supplementary Act.

In the past – before the introduction of compulsory cost recovery – the persistent problem of loss-making plans was a reason for municipalities to switch to an active land policy. An active land policy offered more options for managing costs and benefits and could break the deadlock if the market took no initiative. Although the cost recovery provisions in the Supplementary Act are simpler, cost recovery in ‘organic’ area

developments remains difficult and could therefore encourage the use of an active land policy.

In practice, the parties involved pursue various strategies to improve the profitability or economic viability of land development projects by adding value and restricting uncertainties. A number of these strategies are discussed below, looking at how the land policy instruments can support them.

An important strategy is speeding up the development process, because most of the losses are made in the initial preparatory phases. The sooner the development gets under way, the sooner the benefits can be realised and interest losses minimised. Speeding up developments is also in the public interest, an example being the need to meet the rapidly growing demand for homes in parts of the Randstad. In principle, the Environment and Planning Act provides good opportunities to speed up procedures, but the Council is of the opinion that the Supplementary Act could do more in this regard, especially because the distribution of land ownership proves to be a major stumbling block in practice.

An alternative to speeding up development is to extend the timeframe of the development. This can be advantageous if the benefits of a development are only reaped over time, as is often the case in more incremental developments. However, the new rules in the Provinces and Municipalities (Budgets and Accounts) Decree (BBV) limit the accounting



period of land development projects to ten years. Exceptions are only permitted if a valid argument can be made.<sup>5</sup>

Another much used strategy is to vary the brief for the development. A common approach is to 'pack more in', for example by increasing the number of homes or adding other developments (e.g. offices). In practice, though, the opposite approach is also sometimes taken and the development is 'stripped down', for example by cutting back or (indefinitely) postponing investments in the quality of the area, such as the quality of the public open space. The Council would prefer to see the Supplementary Act provide more opportunities to balance the books by capitalising values.

Finally, the boundaries of the development area can be adjusted.

Sometimes it can help to increase the size of the development area if a more profitable location can be added to a loss-making area, or when profitable sites can be used to compensate for loss-making sites within the municipality or the wider region. The Council also sees possibilities to use the instruments in the Supplementary Act to strengthen this strategy.

## 2.4 Conclusion

The Council is of the opinion that the Supplementary Act should be more compatible with the philosophy and broadened scope of the Environment and Planning Act. From the perspective of the planning agenda, it

<sup>5</sup> In principle the BBV allows extensions, but in practice the ten year period is taken to be the limit.

is important that the land policy instruments can be used in various different contexts: during economic upswings (higher market demand) and downturns (lower market demand), in the short and long term, and at the local and regional scales. The instruments in the Supplementary Act must fit into the broader toolkit that stakeholders need to make their land developments more profitable, otherwise many physical planning objectives will only be partly achieved. In short, the toolkit must contain a range of instruments to enable a flexible approach adapted to suit the local political and legal context and plans for each specific area, including bespoke arrangements. In the next chapter the Council gives its recommendations for making the instruments in the Supplementary Act more compatible with the requirements formulated in this chapter.

## 3. Recommendations: proposals for adapting the legislation

In the previous chapter we described three requirements that should be met by the instruments in the Supplementary Act. In this chapter they are used to structure the recommendations. How can the instruments facilitate the changes intended by the Environment and Planning Act (Requirement 1)? Given the need for local interpretation and bespoke arrangements, how can the instruments provide optimal support to stakeholders for both active and facilitating land policies (Requirement 2)? And how can the instruments contribute to better financing of the complex planning agenda for the physical environment (Requirement 3)?





### 3.1 Recommendations for better compatibility between the Supplementary Act and the Environment and Planning Act

In the discussion about the requirements to be met by the land policy instruments in the previous chapter, suggestions were made for further consideration of the relation between the Supplementary Act and the Environment and Planning Act. That is the subject of the Council's first recommendation, which aims to make the new legislation more compatible with the Environment and Planning Act.

#### *1 Make the land policy instruments more compatible with the Environment and Planning Act*

The main conclusion of this advice is that the instruments in the Supplementary Act as they now stand are not yet fully in tune with the philosophy and broadened scope of the Environment and Planning Act. The Council recommends a further analysis, argumentation and strengthening of various aspects of the instruments to make them more consistent with the philosophy and purpose of the Environment and Planning Act. In the Council's view, making the instruments as fit for purpose as possible is more important than meeting a deadline for their introduction.

The Environment and Planning Act promotes facilitative planning and 'organic' area development, more broad-brush plans (such as the physical environmental plan for the whole municipal territory) and introduces environmental programmes. However, the updated instruments, particularly those for expropriation, still require the preparation of detailed land use plans or subdivision plans. It is not at all clear whether or not land

can be expropriated for the implementation of environmental programmes. Neither is it clear if expropriation can be used for non-spatial qualities (environmental quality objectives). The instruments therefore do not sufficiently support the stated objectives of the Environment and Planning Act and so they need to be brought up to date.

In this regard the Council would like to raise two points about land policy in the light of the broader legislation. First, the Environment and Planning Act implies further integration of environmental and planning policy. Development projects would be completed more quickly and to better effect if sectoral budgets and contributions from third parties could be included in the plans. But just as important are the 'softer values', such as sustainability, health, safety and avoided maintenance costs. Because soft values are hard to quantify and cannot be expressed directly in monetary terms, they are often only token considerations in the decision-making; they are left to be decided at a later date and not included in the development budget. Much research has been done in the academic, business and financial communities (also internationally) into the objectification of social values and impact valuation,<sup>6</sup> but little or no use is made of this knowledge or of a broader approach to urban and rural development using life cycle costing and total cost of ownership methods. Even an instrument such as social cost-benefit analysis (Romijn & Renes, 2013) is not yet helpful enough. Developing more index numbers could

<sup>6</sup> An example is the Impact Centre Erasmus. This institute uses its academic expertise to help various organisations become more effective in achieving their social goals by thinking in terms of impact, measuring their impact and steering their activities to maximise impact.



be useful, but making soft values more measurable is just the first step; the second step is deciding who is going to pay for them, otherwise it will still not be possible to balance the development budget. The Rli therefore proposes that consideration be given to incorporating these soft values into the political decision-making on development projects. For example, the municipality of Eindhoven (2017) considers both the financial and social return on investment to allow more comprehensive and balanced decisions on development projects (and a better comparison of projects).<sup>7</sup>

The second point is that the Council is in favour of wider local tax-raising powers to support greater local autonomy. The possibilities for Dutch municipalities to generate and use their own financial resources are limited, certainly from an international perspective. The Council of State (Raad van State, 2016) and the Financial Relations Council (Rfv, 2017) recently made renewed calls to give the municipal councils greater tax-raising powers.

The Council sees the recent proposal by the minister of security and justice, Stef Blok, and the state secretary for finance, Eric Wiebes, for reducing the Municipalities Fund by four billion euros and giving subnational authorities powers to raise this amount in regional and local taxes as a step in the right direction, even if it is a cautious one (Tweede Kamer, 2016b). The Council wants to see the provincial and municipal authorities given greater financial autonomy for planning and development projects, partly because the choice of land policy instruments depends to a certain extent on financial considerations. The Council argues strongly for this because experience

<sup>7</sup> [The Manifest Binnenstedelijke Gebiedstransformaties](#), signed by seven parties, makes a similar case: 'bring social benefits into the business case' (Stedennetwerk G32 et al., 2017).

shows that many physical developments, especially urban transformations and projects in areas of decline, do not usually pay for themselves and depend on additional external funding.

### **3.2 Recommendations for better instruments for both active and facilitating land policy**

The philosophy of the Environment and Planning Act implies that local government should have wider decision-making powers. The Council is of the opinion that the parties involved in development projects should have a wide range of instruments at their disposal – for both active and facilitating land policy – so that they can choose the instruments most suited to the task at hand. In this respect the Council is in agreement with the reasoning behind the Supplementary Act. Below the Council gives four concrete recommendations to improve the functioning of these instruments.

#### *2 Give implementing parties access to land policy instruments*

The instruments in the Supplementary Act are now reserved for use only by government authorities. This ignores the changing relationship between government and society, whereas the Environment and Planning Act was specifically designed to adapt to this changing relationship. People and businesses have to become more self-reliant and work together (without too much government intervention).

Municipal councils should therefore have greater powers to bring in parties such as housing associations, healthcare providers, developers and building cooperatives to implement urban development projects.



These parties should then be free to work together – within the limits set by the government authority. It therefore makes sense to make land policy instruments available to these parties to use, as long as this does not prejudice the position of government authorities and landowners, and safeguards are in place to protect the public interest.

The Council is therefore of the opinion that the municipal councils should be able to let these parties employ policy instruments such as expropriation, right of pre-emption and cost recovery.<sup>8</sup> At the moment, semi-public bodies like TenneT (the national electricity transmission system operator), Rijkswaterstaat (the government agency responsible for the country's main road and water infrastructure) and ProRail (the national railway infrastructure operator) also have expropriation powers. The use of such instruments by non-governmental parties is conceivable if a government authority has reached an agreement with the implementing parties (such as a developer or housing association) about the details of the development and gives those parties full responsibility for managing the development process. This should be set down in an administrative decision that contains safeguards to protect the public interest. Chapter 4 of Part 2 discusses examples from other countries in which private parties can, under certain conditions, make use of instruments for active land policy, such as expropriation.

<sup>8</sup> In principle, this is possible under the current legislation, but no use is made of it.

Persons whose land is to be expropriated by an implementing party must have the same legal protection they would have if the expropriation were by a government authority. The valuation of the land must also be the same. The advantage of making land policy instruments available to implementing parties is that it engenders greater confidence in the outcome, it reduces dependence on government authorities (which are often seen as unreliable), and it gives the implementing parties greater control over progress with the project.

As a corollary to this recommendation, it seems logical to enable implementing parties to arrange for cost recovery between themselves. In the current situation, only government authorities can recover costs from parties that are unwilling to pay towards public infrastructure and facilities. In the interests of efficiency, it should be possible for parties working together on a publicly approved development to share these costs between themselves without government intervention, but only when this has been agreed in advance with the government authority.

### *3 Link appeals to the right to develop to an obligation to develop*

When landowners successfully appeal to their right to develop based on their ability and willingness to carry out a development proposed by the municipal government, their land cannot be expropriated. However, if they then do not take action to realise the development, it is difficult for the municipality to force them to do so. This can hold up progress with the development to the disadvantage of both the public and private parties involved. The Supplementary Act should therefore make it possible to





resolve this problem and speed up the development process on privately owned land. The Council is of the opinion that appeals to the right to build must be conditional on the willingness of the landowner to enter into an agreement with the local government to carry out the development (to a certain standard) and to complete the development by a specified date. This would also prevent speculation on serviced building land. Given the public interest in completing the development on time, not meeting these agreements should be grounds for expropriation.<sup>9</sup>

As it currently stands, the Supplementary Act actually strengthens the position of landowners under pre-emption law. It proposes an exemption from the obligation to offer land for sale to the municipality if an owner can sell their land to a private party who agrees to develop the land as planned. The Council can agree to this principle, but believes that this improvement in the legal position of the landowner should be accompanied by better safeguards to ensure the desired development goes ahead and should not slow down progress with the development, and that the new owner should also sign the development agreement with the municipal council. The relevant article (11.6.2) can be amended by including a provision on the obligation to sign a development agreement with the municipal council.

#### *4 Speed up the expropriation procedure*

The Council is aware that the expropriation regulations proposed in the Supplementary Act – and the amendments contained in the letter of 20

January 2017 (Tweede Kamer, 2017a) – have provoked many reactions. The Council expects that in response the legislature will look for a more satisfactory solution for the expropriation procedure and will not enter into the discussion about the technical details. In general, the Council thinks that the committee proposed in the Supplementary Act is unnecessary now that, as stated in the letter, the administrative courts will always have a role in the procedure.

The Council places great importance on a diligent procedure and certainty for the party to be expropriated. Under the current legislation, procedures take too long and those involved are kept in the dark about the expropriation and the amount of compensation for far too long (the expropriating party often initially offers too little at the start of negotiations for a voluntary settlement). The expropriating party must be absolutely clear about the possible use of this instrument right from the start of any negotiation on a voluntary settlement. The Council is of the opinion that the landowner has the right to receive a reasonable offer from the expropriating party within six months of the start of negotiations, and that to ensure proper and fair treatment of parties to be expropriated this should be required by-law. A right of direct appeal to the Council of State, with a decision within six months, should also be considered to speed up the pace of proceedings and provide certainty for the party to be expropriated (which means in practice that the district courts will be bypassed).

<sup>9</sup> [Attaching a time limit to a building permit is another way of preventing unwanted delays.](#)



### 5 *Reconsider introducing urban land readjustment*

In theory, urban land readjustment is when private parties agree among themselves to resubdivide their land and property. The Council is of the opinion that the proposed regulations for urban land readjustment will have little or no additional benefit due to their voluntary, non-compulsory nature. Compulsory land readjustment, as in the rural land consolidation schemes, is not necessarily a satisfactory answer either, because landowners who are forced to participate tend to drag their heels and hold up proceedings. In the proposed arrangement, urban land readjustment is really just another name for a complex negotiation between private parties about a development project, often also involving the government authority. If a landowner refuses to cooperate and the development is in the public interest, the government authority has no other option but to expropriate the land. This is already provided for by the current instruments. Inclusion of this instrument in the Supplementary Act therefore has no additional value.

### 3.3 **Recommendations for better financing**

The Council observes that the decentralisation operations over the past ten years have been accompanied by considerable budget cutbacks. This has included the paring down of government grants such as the site-specific funding (*Besluit locatiegebonden subsidies*) and the Urban Renewal Investment Budget (*Investeringsbudget Stedelijke Vernieuwing*). In effect, subnational governments have to do more with less money, which is why parties involved in development projects often ask for financial assistance from central government, and in some cases this is indeed necessary.

However, the Council prefers to find fundamental solutions that will create the necessary financial resources at the local level and makes three recommendations for this.

### 6 *Expand and simplify the possibilities for cost recovery*

The Council agrees with the simplification of the cost recovery procedure and the wide range of possible arguments that can be made for cost recovery as proposed in the Supplementary Act, but would like to see more possibilities for context-specific and bespoke arrangements. The Council therefore makes the following suggestions.

a) Give municipalities the option of choosing between cost recovery through an anterior agreement and land development plan, and cost recovery via a flat-rate charge. Facilitative planning and ‘organic’ area development imply the use of more open-ended, outline plans that do not specify the details of the final development in advance. Working with plans of this type makes it difficult, if not impossible, to produce a realistic estimate of the development content and completion rate. However, the current public law procedure for cost recovery from the profits of land development is linked to the ‘PPA criteria’ (profit, proportionality and accountability), which mandates that the costs to be recovered must always be allocated to the new development. This in turn requires detailed planning and calculations that do not reflect the new reality. The Council therefore argues that thought should be given to adopting simpler arrangements for cost recovery that are not so strictly tied to the PPA criteria, and points to interesting examples of cost recovery in other



countries that are not tied to the provision of planned public services or infrastructure within an area (see Part 2, Chapter 4). A flat-rate or standard charge, as used in other countries, may be more appropriate in view of the uncertainties mentioned above. Such a cost recovery mechanism would allow the government authority to build up financial reserves and take action more appropriate to the composition of the development as it takes shape on the ground. Moreover, it would also minimise the costs of determining the amount of funding to be recovered. However, safeguards would be needed to ensure that contributions made by developers are in fact spent on improving the area. This means that the flat-rate charge should be included in the physical environmental plan (*omgevingsplan*) so that any objections made to the size of the contribution can be properly assessed by the courts.

b) The choice will often be for an anterior agreement, as in current practice. For the limited number of cases in which cost recovery is the chosen option, it would be logical to maintain the ‘macro-capping’<sup>10</sup> requirement and not to abolish it as proposed in the Supplementary Act. In the case of cost recovery via a flat-rate charge, the principle of macro-capping can be applied retroactively once it is clear exactly what facilities are needed.

c) Finally, the Supplementary Act proposes that under certain conditions cost recovery should be waived. The Council understands this proposal

<sup>10</sup> Macro-capping means that the total costs recovered must amount to no more than the revenue potential of the area concerned. This means that it must be possible to calculate what these costs are in advance.

in light of the decentralisation of government tasks and the desire for bespoke local arrangements, but does not support it because it does not solve any existing problems. The current practice of compulsory cost recovery works well. The proposal weakens the position of municipal councils in negotiations with developers and can lead to undesirable competition with neighbouring municipalities. Developers would be able to play municipalities off against each other, with the risk of a ‘race to the bottom’ as a result. The most common approach at the moment is to work with anterior development agreements containing location-specific arrangements. If the Council’s proposal for allowing the option of choosing a flat-rate charge is followed up, this would provide sufficient flexibility for local interpretation and bespoke arrangements for cost recovery.

#### *7 Broaden the business case*

The Supplementary Act only provides instruments for recovering costs from developers. Sitting owners and neighbouring residents and businesses who profit from new infrastructure or facilities are not required to make a payment towards the costs of those facilities. In theory it would be possible to impose a form of betterment levy, but this has become unworkable in practice in the Netherlands (Schep, 2012; Hobma, 2014).<sup>11</sup> Another possibility could be a temporary or permanent broadening of the tax base for development projects by raising the rate of local property tax,<sup>12</sup>

<sup>11</sup> Consideration is being given to abolishing betterment tax (Tweede Lamer, 2016b).

<sup>12</sup> It is also conceivable that in some areas the local property tax is first reduced to entice developers into the area.



but the Municipalities Act does not permit higher local property tax rates that apply only to specific areas within a municipality.

As a means of attracting finance for a development, the Council favours a value capturing regulation to permit the imposition of a tax on the unearned increment, or value increase, due to public decisions or actions. The Council has studied several examples of value capturing and betterment levies in other countries that go beyond pure cost recovery, such as levies in anticipation of an expected increase in value resulting from the construction of district or regional level facilities (see section 4.5 of Part 2).

### *8 Provide instruments for regional cooperation and redistribution of development gains*

The Council is of the opinion that municipalities that cooperate on building new developments need a mechanism for redistributing development gains at the regional level, because the boundaries of new developments rarely respect administrative borders (jurisdictions). Although regional arrangements, such as the transfer of financial surpluses from developments in suburban municipalities to a central city within a metropolitan region, have proved to be very tricky in practice,<sup>13</sup> the Council argues that given the functioning of the housing and labour markets, it makes sense for municipalities to agree to phase the allocation of housing, retail and employment to achieve an appropriate market segmentation and balance of supply and demand. Such agreements should also prevent

<sup>13</sup> In declining areas with a structural lack of demand, the aim of such arrangements is more likely to be to limit financial losses and spreading the 'pain' rather than to achieve a profitable development.

undesirable competition between municipalities. At present, municipalities can only make voluntary agreements (including under the Joint Arrangements Act).<sup>14</sup> In more urgent cases it is currently possible to work with a provincial by-law on issues affecting multiple municipalities, but this is only possible when the province and the municipalities have shared interests. The Council therefore recommends drafting a model agreement that can be incorporated into provincial by-laws to prevent one or more municipalities declining to enter into binding agreements on regional development issues. Financial incentives could also help, for example by making regional grants dependent upon binding cooperation agreements between municipalities.<sup>15</sup>

The creation of a common fund can also be seen as a means of redistributing development gains between multiple sites and developments. An adequate legislative basis for setting up regional funding arrangements would be useful, particularly where the fund will be used for more than one development plan.<sup>16</sup> The province of Limburg is experimenting with this in clearance areas. The money for this clearance fund comes from a fixed percentage of the local property tax on the new housing, which is in effect a contribution towards the costs of demolition. Such 'old for new' arrangements have in the past been applied in rural areas for clearing obsolete greenhouse complexes and livestock sheds.

<sup>14</sup> These joint arrangements may include conditions for withdrawal from the agreement.

<sup>15</sup> This recommendation follows from the call by Secretary General Van Zwol of the Dutch foreign ministry to the new government to make money available to the regions for regional development. This money should be in addition to the Municipalities and Provinces Fund (Binnenlands Bestuur, 2017).

<sup>16</sup> This is now based on Article 6.24 of the Spatial Planning Act, which is not included in the Environment and Planning Act.





The idea is that if a developer makes a social problem worse (for example by building new homes in an area of demographic decline where there is already an oversupply of homes), the developer can be forced to make a payment into a regional demolition fund.

#### 4. In conclusion

The recommendations form a coherent package. However, judicious incorporation of several of them in the wording of the Act may take more time than allowed for in the current procedure. This means that serious consideration should be given to postponing the introduction of the Supplementary Act by one or two years. It is also conceivable that the legislature will decide to amend the Act in stages by incorporating 'quick wins' in the 2019 text and then making further amendments one or two years later. In any case, the Council sees quick wins in the recommendations for better compatibility between the Supplementary Act and the Environment and Planning Act, for making appeals to the right to develop conditional on a duty to complete the development, and for speeding up the expropriation procedure. Abolishing urban land readjustment and maintaining the requirement for macro-topping and cost recovery can of course also be enacted soon.

The Council also draws attention to the need for careful consideration of how best to implement the new legislation, points to the pressing need for information among stakeholders and expects that the required change in culture will not happen automatically. For all parties – governments

authorities, market participants, housing associations and individuals – the new legislation will present quite a challenge. Regarding the implementation of the new legislation, the Council wishes to make a few final comments. First, misunderstanding about land policy often frustrates the effective use of the policy instruments. A lesson from the financial crisis is that there is still a need for more knowledge and know-how in provincial and local government, for one thing to better manage the risks (VROM-raad, 2009).<sup>17</sup> A municipal council or executive councillor who rules out expropriation in advance, for example, could delay by many years a development that would benefit the community.

Both active and facilitating land policy require a thorough knowledge of the interests of the different parties involved, the policy toolkit, the market, etc. Government authorities still need this knowledge even if they contract out much of the work to consultants. The Council is of the opinion that facilitating land policy does not mean the government should pursue a passive land policy; it means a land policy without active land acquisition. As the manager or facilitator of developments, government authorities do play an active role that requires knowledge and expertise of development projects and the financial and commercial aspects of land development.<sup>18</sup> If a municipal council decides to end its active land policy, this certainly

<sup>17</sup> In 2009, the Council of Housing, Spatial Planning and the Environment observed that government authorities, particularly the smaller municipalities, often lacked sufficient expertise, as a result of which instruments were often underused. At that time, bundling expertise in regional estates departments and a land development information centre were proposed as possible solutions.

<sup>18</sup> For example, the incidental acquisition or expropriation of land (for example from an unwilling owner) can be part of a predominantly facilitating land policy. Limited government intervention can act as a catalyst for further private development. Buitelaar calls this reactive land policy (2015: 2).



does not mean that the local authority officials concerned no longer need to know about land policy.

The Council emphasises that in many cases the key thing is being able to use land policy instruments, not necessarily putting them into practice.

The *ability* to use these instruments (the threat of their use) puts the government authority in a position of power and encourages stakeholders to negotiate and come to an arrangement. Expropriation is a striking example of this. Of the many procedures started each year, just a small number reach the point of actual expropriation. In most cases the parties agree on a settlement.

Finally, the Council points out the importance of checks and balances between administrative, planning, financial (municipal land development department) and political ambitions. This also requires the provinces and municipalities to have transparent land policy budgets so that the municipal and provincial councils can politically justify their planning and development policies. National government should join with the Association of Netherlands Municipalities (VNG) and Association of Provinces of the Netherlands (IPO) in paying close attention to this during the implementation of the new rules.



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2 March 2017, The Hague**

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# OVERVIEW OF PUBLICATIONS

## 2017

Assessing the value of technology. Guidance Document. ['Technologie op waarde schatten. Een handreiking']. January 2017 (Rli 2017/01).

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