LAND POLICY IN OTHER COUNTRIES: EXAMPLES AND INSPIRATION

CONTENT

The Dutch version of the advisory report contains an additional analytical section, which contains four chapters. Only chapter 4 of this analytical section has been translated, it gives an international overview of land policy approaches.

1 Facilitating land policy is the international norm

Given the widespread desire for a cultural shift in Dutch land policy and the need to broaden the scope of active land policy to include a facilitating land policy, the Council felt it would be useful to explore practices in other countries, where facilitating land policy is the norm. Dutch land policy forms an exception within international planning practice. Almost no other countries pursue active land policies, and in those countries where it does occur (such as Sweden and Finland) land has traditionally been in public ownership and development projects are usually much smaller than in the Netherlands, and therefore the risks associated with them are also smaller.

In this chapter the Council gives an account of the land policies and policy instruments used in other countries as a source of inspiration for Dutch legislation. What can the Netherlands learn from other countries? Given the challenges facing the Netherlands, the main questions to be answered are: How are urban (brownfield) transformations organised in other countries? How do they stimulate development in areas largely ignored by the market? How is the increase in the value of land distributed, are public costs recovered, and are development gains from profitable developments used to make up shortfalls elsewhere?

To answer these questions, in this chapter the Council examines examples of urban land readjustment, expropriation and the right to develop, development strategies and active land policies. Because many development projects are not profitable enough to cover all their costs and additional financing is needed from government, differences between local tax systems are also investigated (see Box 10).

Box 10: Caution is needed when importing foreign policy instruments

The idea that a successful policy instrument from another country could also be useful in the Netherlands should be treated with caution. Since the establishment of the European Union considerable effort has been devoted to comparing policies and practices on the assumption that experiences in one country can be a source of inspiration for others. This has led to many national policies being 'uploaded' to the EU level. An example of this is the Dutch national ecological network policy, which inspired Natura 2000 (although this has an entirely different legal basis, which has left the Netherlands lagging behind). Conversely, many European policy concepts are 'downloaded' to the national level, especially in countries where the national policies for the relevant topics are still in their infancy. The academic term for uploading and downloading policies is 'institutional transplantation'.

Uploading and downloading policies can be problematic because of the many differences in social, legal and policy contexts between countries. Due to these differences a policy instrument that is effective in one country may not be so in another.

2 Active land policy in other countries

Other countries have experience with active land policy, but in those countries the losses on land development suffered by local governments as a result of the financial crisis, and economic cycles in general, have not been as severe. This financial impact is not therefore purely the result of pursuing an active land policy, but rather it is more a consequence of differences in the system of mortgage interest relief and the functioning of the housing market. As stated above, Finland and Sweden are examples of countries that pursue an active land policy, an important difference being that in these countries land has traditionally been in public ownership. Another important difference is that development projects in these countries are smaller in scale than is usual in the Netherlands, and therefore the associated risks are also smaller.

There has always been international interest in the form of active land policy practised in the Netherlands. Van der Krabben (2011) describes what foreign commentators think of Dutch practice. Following the financial crisis, Alterman disqualified the Dutch system of public land development as a 'relic of the past', mainly because of the scale on which it was practised (Alterman, 2009, cited in Van der Krabben, 2011). Another example is the American professor George Lefcoe (Lefcoe, 1977, cited in Van der Krabben, 2011), who wondered whether or not the Dutch system of active municipal land policy could also be of use in American cities. His conclusion was that active land policy is an excellent instrument to support a pro-active planning approach, but that the financial risks are considerable, that when local governments enter the land market they wear 'two hats', and that private parties are just as good, if not better, at developing land.

Reasons for considering an active land policy

Although the risks of pursuing an active land policy are well known, other countries do consider the option of adopting such an approach. There are various reasons for this.

In England local authorities are not allowed to pursue an active land policy. Private parties own large land banks, dictate the planning agenda and thus have regional control over the release of land and the price of land. This situation is far from ideal and there are calls to allow local authorities to break free of the dictates of the market by pursuing active land policies (Van der Krabben, 2012).

Building social housing is considered to be an argument for pursuing an active land policy. EU state aid rules make it possible for governments to provide land for social housing at below market rates. In non-EU countries social housing can also be a reason for pursuing an active land policy (Alterman, 2009, cited in Van der Krabben & Jacobs, 2013).

Another reason for pursuing an active land policy is the redevelopment of brownfield sites (former industrial land). This can also be an option for American cities (Van der Krabben & Jacobs, 2013). A lack of transparency and benchmarks for the expected profitability of investments can make institutional investors less inclined to invest in existing urban sites.

International differences

In general, Van der Krabben (2011) concludes that on balance there are no clear indications that in other countries urban or rural developments do not get off the ground, are harder to realise or are of lower quality than in the Netherlands. In some countries (e.g. Belgium) it may be harder for governments to direct developments to the most desirable sites, but it does seem that private parties are just as capable of carrying out development projects. From that perspective there is every reason to be confident that the addition of a facilitating land policy to complement the active land policy in the Netherlands will not be problematic. However, other countries do have different (and often more elaborate) instruments for recovering the costs of public investments, such as urban land readjustment and making the building permit conditional on covering at least part of the costs.

Significance for this advice

The Council agrees with the observation by Van der Krabben that market parties are also perfectly capable of developing sites, but doubts whether this applies equally well to difficult sites (in areas of decline, run-down urban industrial or port sites, etc.), where development can be in the public interest. A number of instruments available in other countries that could provide inspiration for the Netherlands are described below.

3 Urban land readjustment

Two models

Urban land readjustment is a new instrument in the Supplementary Act, but has been used for some time in other countries. Examples are the German *Umlegungsinstrument*, the French *Association Foncière Urbaine* (AFU) and the Valencian model *Ley Reguladore de la Actividad Urbanística* (LRAU, which encompasses more than just land readjustment), as well as land readjustment instruments in Sweden, Japan, Mumbai, Bangkok and Turkey (Hong & Needham, 2007; De Wolff, 2013). All these instruments have their own specific features.

De Wolff (2013) identifies two main models in international land readjustment practice. The first model, of which the German *Umlegungsinstrument* is an example, focuses on regrouping individual plots. The government uses this instrument to redraw plot boundaries and release land for public facilities. The second model, of which the French AFU is an example, focuses on cooperation. Owners are temporarily given joint control over the land and property so that a plan can be drawn up and implemented.

The Valencian model for urban development is described separately. It is similar to the second model of urban land readjustment, but covers more than just the exchange of property rights. This section closes with a number of general characteristics and conditions derived from the

international comparison that are required for the successful use of urban land readjustment models.

Umlegung: land exchange under pressure[1]

The local government can use the *Umlegung* instrument to unilaterally alter the existing plot layout to assemble new parcels for a public or private sector development (usually buildings), while at the same time releasing land for public facilities. The existing owners of the land and property remain owners, but of a new parcel. If the local government decides to use the instrument (see below), the owners of the land are required to participate in the project and the potential benefits of this *Umlegung* to the owners are distributed among them. Use of this land readjustment instrument is initiated by the municipality, which is also responsible for the procedural aspects (the municipality may decide to establish a committee to take on the implementation tasks if it so wishes).

An owner can ask for the instrument to be used, but has no legal right to demand its use. The reason for this is that it allows for a public appraisal of whether or not to use the instrument. Moreover, the *Umlegung* option can only be used after an attempt has been made to come to a private law agreement. A voluntary solution is the preferred route and expropriation only becomes an option if *Umlegung* fails to produce a satisfactory outcome. *Umlegung* does not include the possibility of an opt-out; owners who do not want to participate in the property exchange and in the cooperative project cannot choose to be bought out. An important aspect of German practice is the threat of government intervention, which encourages stakeholders to reach a voluntary agreement. In many cases there is no need to use of the formal instrument at all.

AFU: exchange of property rights under private and public law, with a buy-out option[2]

The French AFU is based on the *Loi d'orientation foncière* of 1967. The AFU is a government approved syndicated owners' association with a legal personality. It can be commissioned by a local administration to carry out specific land and property development tasks, depending on the AFU's objectives.

The law sets out various objectives for which an AFU may be established. Besides the subdivision of land, these may include the assembly of parcels to carry out a joint development project, the construction and maintenance of communal facilities (e.g. garages or district heating schemes) and the conservation, restoration and repair of urban conservation areas, as well as renovation projects and urban restructuring.

AFUs can be established at the initiative of the local government or the land and property owners. There are three ways in which these cooperative arrangements can be established: by independent voluntary initiative, at the request of a majority of the owners, and imposed by government.

1 This section is based largely on De Wolff (2013).

2 This section is based largely on De Wolff (2013).

The voluntary type of undertaking can be established when the land and property owners have reached a unanimous agreement to do so. The association is then established under private law. In the second and third types, an *association autorisée* is established in an official approval procedure. These are associations established under public law and may be requested by a majority of the owners or by the local government. Before the decision is taken a vote is held among the owners. In general (depending on the purpose of the AFU), at least two thirds of the owners and owners who together hold at least two thirds of the land area must vote in favour. Finally, in certain cases an AFU can be established outright by the local government, even if there is no majority in favour.

In contrast to the German *Umlegung*, owners who do not wish to take part in the second and third types of association have the right to withdraw by opting for expropriation with full compensation. This means that someone is obliged to buy their property. A buyer then has to be found before the AFU is established. The buyer may be a company or individual person or the owners' association (AFU) itself.

The operating methods of the different types of AFUs are not prescribed in detail in the law. To fulfil their duties, the second and third types of AFU have several powers at their disposal. These include the right – within the usual public law restrictions – to sell land and expropriate land (for example, if buildings are demolished or uses are ended and the owners are not willing to come to an agreement), and, as a public law body, to levy taxes from its members. The last power enables AFUs to recover the costs of infrastructure and public facilities from the individual owners. As in Germany, there are tax advantages for the owners.

The Valencian model: market parties take over when the economy is booming

In the Valencia region, under the L*ey Reguladora de la Actividad Urbanística* (LRAU) it has been possible since 1994 to initiate a development project that involves the regrouping of plots. In 2006 this instrument was incorporated into the *Ley Urbanística Valenciana* (LUV). The model is based on a number of straightforward ground rules, makes a clear distinction between the roles of the public and private parties, and requires that investments in public facilities are made by an 'urbanising agent' (developer). The model works particularly well when the economy is growing or overheating, because these conditions lead to rising land and property values.

In Valencia, development planning can be initiated by the local government, landowners or even third parties interested in urban development. Land ownership is not a condition for submitting a plan, but the local government does take support for the plan by landowners into account when selecting plans. If the local government decides that the initiative is compatible with its planning policy, it can start a public selection procedure.

The Valencian model makes a distinction between land development and property development. Land development activities are called

‘urbanisation’ and the party making and implementing the ‘urbanisation plan’ (including all the infrastructure and public space) is called the ‘urbanising agent’. The urbanisation process is completed when the serviced building plots are ready for development by the landowners.

The selected urbanising agent carries out all the works, which are paid for during the process by the landowners in cash or by transferring building rights. In principle, no land is transferred or expropriated, but the land is consolidated, resubdivided and the resulting plots reallocated among the landowners. The urbanising agent makes the land readjustment plan, which is adopted by the local government. Landowners can choose between participation in the land readjustment process or expropriation with compensation, which consists of the use value plus expenses (Van het Hul, 2013). In practice, the unfavourable expropriation conditions mean that landowners almost always take part in the land readjustment process because this is financially more attractive. However, if they do choose not to cooperate, the local government can enforce the land readjustment (Muñoz Gielen & Korthals Altes, 2007; Van het Hul, 2013). The urbanising agent then has the power to seize the land to ensure that the works can go ahead. At the end of the process all the landowners are allocated serviced building plots, even if they did not take part in the land readjustment voluntarily.

The LRAU contains an allocation formula for the recovery of costs from the profits earned by the developers to pay for the public open space and facilities. This is done differently from standard practice in the Netherlands: these costs are not recovered by the local government, but by the urbanising agent. The advantage of this is that the situation is clear right from the start of the initiative and so the negotiation of the cost recovery arrangement is usually relatively short (according to Gelinck and Muñoz Gielen, 2006, shorter than the negotiations on anterior development agreements in the Netherlands). As the local government does not buy any land, it does not run any risks arising from fluctuations in land values. The local government is given the serviced plots for the development of public infrastructure and facilities, which are built by the relevant local government departments. Once the ‘urbanisation’ is complete, the landowners can develop their plots. At the same time, the local government maintains control over the final outcome.

This instrument has been criticised on several points, including the position of the landowners, compliance with EU procurement legislation and the fact that the buildings take up too much of the land. The role of the local government and the care with which it operates has also not gone unquestioned. In answer to these criticisms, the Valencian government adopted a revised LUV in December 2015 which amends various aspects, but leaves the model intact.

The model has worked well for Valencia for more than fifteen years. The time taken to complete developments has been reduced while the quality of the developments has been maintained. The model is not intended to stimulate the economy, but rather to manage new development in an overheated economy (SKBN, 2012). During economic upswings it is

an attractive proposition for the participating parties to take part in the land readjustment because the resulting development usually results in a considerable increase in the value of their land. However, when the economic crisis hit the Spanish housing market it wiped out any possibility of land prices rising and market interest collapsed.

Participation in land readjustment

The main incentive for landowners to participate in land readjustment schemes is the resulting increase in the value of their land. In Japan and South Korea urban land readjustment is an accepted method for urban restructuring among private landowners, who usually sell their land to a major developer. Payment sometimes takes the form of an apartment in the new building complex. Research by Sorensen (2012) in Tokyo shows that landowners are prepared to take part in urban land readjustments when they can benefit from the increase in land values resulting from the development of a transport hub or station or a major property development. Even so, the process of consolidating land holdings and reallocating building plots can still take a long time. In Roppongi Hills in Tokyo, for example, it took seventeen years to get 400 households to sell their land (The Guardian, 2017).

If owners want to exit the process, buying them out has proved to be difficult because of the problem of deciding who should buy their land. With the exception of the AFU (De Wolff, 2013), in most countries this issue has not been satisfactorily addressed. In the French, Swedish and Japanese land readjustment schemes, it is possible for private owners to come to a voluntary arrangement and ensure a land readjustment project takes place (Geuting, 2011).

Cases are known in which large areas of land have been resubdivided even though there was no legal instrument available. An extreme example of this in the Netherlands is the post-war reconstruction of Rotterdam (Schilfgaarde, 1987). Another example is the transformation of Times Square in New York in the 1980s, also known as the 42nd Street Development Project (42DP). Sagalyn (2007) gives a detailed description of how, in the public interest (expansion of the business district), a run-down area of more than 50,000 m^2 was literally wiped clean with the help of the legal power of eminent domain – the right of a sovereign authority (nation, state or municipality) to take private property for a public use, in this case urban development. Under this power, just compensation must be paid to the landowner based on the market value of the land. However, partly for speculative reasons the 42DP involved a record 47 lawsuits (in three rounds) and the expropriation process only came to an end in 1990. Sagalyn comes to the conclusion that the process could have been shorter if there had been a land readjustment instrument available. The most important reason put forward by Sagalyn is that a land readjustment instrument could have brought all the parties together in a negotiated process and prevented speculation. Nonetheless, the author points out that in areas where not only land ownership but also property rights and interests are fragmented, land readjustment will inevitably be a tortuous process.

As a possible alternative to the approach taken in the 42nd Street project, Sagalyn (2007) suggests an organisational structure known as *Solidere*,[3] which functions as a public limited company in which all the landowners have a share. The concept was developed in Beirut (Lebanon) to prepare for the rebuilding of the souk. *Solidere* is a land readjustment model supported by the Lebanese state based on share ownership (by both landowners within the area and outside investors). It turned out to be much more successful than expected. In fact, the model of shareholder interests in an area under private law (in various forms) has been used on various occasions for development projects, and the aims of such schemes go beyond just the resubdivision of the land and reallocation of building plots.

A complicating factor in land readjustments can be the economic situation. If the owners have little to gain – which may be the case in areas of economic or demographic decline and for redundant industrial sites, for example – land readjustment is not a useful means to achieve a better use of property, but simply a means to limit or spread out the losses. In areas of decline, therefore, the potential significance of a land readjustment type of instrument needs to be examined in more detail (De Wolff, 2013).

Significance for this advice

Land readjustment is a process that takes place between landowners in which various methods can be used to bring the various parties to the table. Without the prospect of an increase in the value of their land, the landowners will have little incentive to exchange property rights. In countries which have land readjustment instruments, the added value of the process lies in the involvement of government, such as lending a formal status and certain powers to an association of landowners or cooperative, and in specific arrangements for things like buy-out and expropriation. There are no such arrangements in the current proposal for a voluntary land readjustment instrument in the Supplementary Act.

3 Solidere stands for Lebanese Company for the Development and Reconstruction of Beirut Central District.

4 Decentralised tax systems

The Netherlands has one of the least autonomous tax systems of all OECD countries, particularly at the local government level (OECD, 2016). Dutch municipalities raise just 3.4% of the total tax revenue in the Netherlands, whereas 25% of all public expenditure is by local government. This is a clear mismatch. The Netherlands is also out of step with most other Member States of the EU in this regard (Van Arendonk, 2015).

In this advice the Council examines the tax structure from the perspective of the many development projects that fall under the responsibility of provincial and local government, and in particular the ability of municipal councils to cover any shortages from general funds or temporary charges.

Municipalities have very limited tax-raising powers

There has long been a call in the Netherlands for increasing the scope for subnational governments to raise taxes, but except for an expansion of provincial tax-raising powers in 1996 it has not been met with any response

(Groenenendijk, 2011). Studies and arguments for further fiscal devolution have been made recently by, among others, the Council of State (2016), the Netherlands Bureau for Economic Policy Analysis (CPB, 2015), the Financial Relations Council (Rfv, 2015) and a commission appointed by the Association of Netherlands Municipalities and headed by Alexander Rinnooy Kan to look into municipal revenues (Commissie-Rinnooy Kan, 2015). The studies make the case not only for giving the municipalities more fiscal autonomy, but also show that in general municipalities spend local tax revenues more effectively than the funding they receive from national government.

In mid-2016 these studies and recommendations (in response to the devolution of many government responsibilities) elicited a response from the minister of housing and government and the state secretary for finance (Tweede Kamer, 2016b). Their letter sets out a number of principles for a renewed tax system with greater local autonomy. The main component, derived from the recommendations by the Rinnooy Kan Commission, is a 4 billion euro 'revenue shift' from national income tax to local taxes. This could be achieved, for example, by reintroducing municipal property taxes on tenants and the water authority charges. At the macro level the tax burden would remain neutral on balance and the effects on individual household incomes would be limited.

There is a widespread awareness that local tax-raising powers in the Netherlands are very limited and out of step with the international trend. A recent comparative study by CPB Netherlands Bureau for Economic Policy Analysis (CPB, 2015) notes that local governments in unitary states like Sweden and Denmark, and even highly centralised countries like England, have more tax-raising powers than Dutch municipalities. In Denmark, currently more than 50% of total local government income comes from local taxes. The most important local tax is the local income tax, which accounts for more than 90% of local tax revenues (in Sweden as much as 95%).[4] Also in federal countries like Switzerland, Belgium and Germany the share of local taxes in the total tax revenue is much higher than in the Netherlands.

Danish municipalities collect local income tax and two local property taxes, a land tax and a building tax. Municipalities are free to set their own rates for the land tax,[5] which all owners of residential property have to pay. The building tax is a levy on commercial property.[6] Sweden also has a local tax on residential property, with different rates for owners and tenants. The tax rates and ceilings are laid down by law, which means that the municipalities have no influence over this tax.

Freedom and 'fiscal power'

The Council points out that in addition to wider tax-raising powers, two other factors are important: the freedom municipalities have to determine

4 There are differences in the levels of local government autonomy in Denmark and Sweden. Danish law states that the local income tax must be levied at a flat rate. In Sweden, local governments have a greater degree of autonomy and are able to levy progressive taxes. In 2012 the lowest local income tax rate was 28.9% and the highest 34.3% (CPB, 2015).
5 In 2013 the lowest rate was 1.6% of the official land value and the highest 3.4% (CPB, 2015).
6 This may not be more than 1% of the value of the buildings. Many local governments levy the maximum rate of 1% (CPB, 2015).

the tax rate and tax base, and the degree to which tax revenues are distributed between municipalities (either via the national government or directly). Giving municipalities wider tax-raising powers, which the Council would welcome, will only lead to greater political choice at the local level if it is linked to a certain degree of discretion in setting tax rates and as long as any surpluses are not immediately creamed off or offset against national grants.

Groenendijk (2011) calls this combination of tax-raising powers and discretion in setting the rate of taxes and the tax base 'fiscal power'. Although local tax-raising powers in the Netherlands are marginal, the municipalities do have considerable freedom to set the level of their taxes. The countries with the highest local fiscal power are Denmark and Sweden, where about 16% of the gross domestic product is levied in local taxes and local government has virtually 100% freedom to set tariffs (Groenendijk, 2011).

Fiscal equalisation between local governments

In addition to the relative freedom of local governments to set taxes, the level of fiscal equalisation is also important. Fiscal equalisation is the evening out of income disparities between municipalities via national payments. This already occurs to a certain extent in the Netherlands, where an increase in the municipal property tax leads to a reduction in income from the Municipalities Fund. Researchers at the CPB conclude that this has an undesirable side-effect (Kattenberg et al., 2017): it denies municipalities the full benefits of higher property tax revenues resulting from investments which raise property values. In other words, they are not fully rewarded financially for their efforts.

Some countries, such as Sweden, use indicators to help determine national payments to local governments. There is a considerable degree of both revenue and cost equalisation between Swedish local governments. Local governments with disproportionately high per capita costs, for example because their populations contain high numbers of older or younger residents or high numbers of unemployed, receive additional support from the national government. Local governments with low per capita costs have to make payments to the national government. At the national level this cost equalisation is budget neutral (CPB, 2015).

Significance for this advice

The Council argues for an increase in local tax-raising powers, giving municipalities a certain degree of discretion in setting tax tariffs and providing some room for manoeuvre in the fiscal equalisation arrangements. This would create a better balance between the duties of the municipalities and their ability to generate income. With regard to planning and development activities, local autonomy gives municipalities the ability to make more considered choices about the use of active or facilitating land policy instruments (particularly concerning the financial implications) and allows them to reap the rewards (via the property tax) of investments made to improve the quality of the living environment. It does require safeguards in the tax system and the democratic decision-making process to prevent

municipalities taking unacceptable risks and passing on any resulting costs to their residents.

5 Financial instruments

In this section the Council discusses facilitating land policy instruments that can be used to redistribute costs and benefits and to finance public facilities: cost recovery. Various countries work with forms of partial profit capture and betterment taxes, which both go further than simple cost recovery.

One of the challenges of a facilitating land policy is arranging for the recovery of the costs of building public infrastructure and facilities. In the Netherlands cost recovery is regulated by the Land Development Act, a supplement to the Spatial Planning Act (Wro, 2008). Dutch legislation assumes that new or upgraded facilities are fully paid for, or at least solely paid for, by the new developments. In practice, cost recovery works well in planned developments and within a foreseeable time frame. However, cost recovery becomes much more difficult for 'organic', or incremental, developments in which it is not clear when and to what extent public facilities will be built. When it is not clear in advance how the area will be developed in detail, it is difficult to meet the obligation under the 'PPA criteria' (profit, proportionality, accountability) to provide a clear account of the costs attributable to each of the facilities.

For these reasons, and with reference to practices in other countries, some argue for relaxing the ties between urban development and cost recovery for public facilities or services (Hobma, 2014; Hobma & Van der Heiden, 2015; Sorel et al., 2014). In such a system, public facilities could be paid for from various sources, not just from cost recovery mechanisms, such as forms of betterment tax and instruments for sharing the profits arising from a change of land use (rezoning), collectively referred to as 'value capturing'. These mechanisms essentially draw funds from the expected or real increase in property values in an area to pay for investments in public facilities within that area. A number of such instruments used in various countries are discussed below, making a distinction between instruments for cost recovery, partial profit capture and betterment tax.

Cost recovery: agreements and public law instruments

Cost recovery is the recovery from private developers of costs incurred to build the necessary public infrastructure, service the land for construction and for facilities such as public open space and parks. The idea is that these costs are recovered in part or in full from new private sector initiatives. In the Netherlands and some other countries (France, Germany, Belgium) it is possible to make arrangements for cost recovery in private law agreements between the developer and the government authority, or under public law through the use of instruments available to the relevant government authority to obtain contributions from the developer. There are two main types of public law instruments for cost recovery: a flat-rate charge and conditions attached to the building permit.

Private law agreements for cost recovery[7]

Private law agreements for cost recovery are made in almost all countries. Often private developers prefer private law agreements to the use of public law instruments for cost recovery. In many countries, as in the Netherlands (via anterior development agreements), it is now common practice for private developers to enter into private law agreements with the relevant government authority. In some cases, as in Germany, this is actually encouraged by the legislation, which requires the local government to make a 10% contribution if it uses public law cost recovery mechanisms.

In a number of countries private law agreements take the form of a covenant. The German *Städtebauliche Verträge* make a distinction between agreements on infrastructure and on other facilities. The most important is the *Erschliessungsvertrag* on infrastructure, under which private developers are responsible for building the infrastructure themselves. This agreement may be followed by a *Folgekostenvertrag* on recovering costs for facilities other than infrastructure, such as schools and hospitals. In France, the private law agreements for cost recovery are the *Projets urbain partenarial,* in which the public party to the agreement is responsible for building the facilities.

In England, for decades the usual practice has been for developers and local authorities to negotiate planning obligations and conditions, including contributions by the private developer towards facilities needed for the development. Under these planning obligations, the developer builds the facilities and/or pays a financial contribution to the local authority. The percentage of the costs recovered under these agreements depends on the outcome of the negotiation.

Public law instruments: flat-rate charge, permit charges

Some countries recover costs through conditions attached to building permits. In Flanders cost recovery under public law is possible by making the permit conditional upon a charge or fee, particularly for the *verkavelingsvergunning* (subdivision permit). An example is charging the costs of the construction or renovation of public roads, green space and public space to the permit holder. Instead of a cash transfer, the owner of the land on which the facility is to be built may transfer ownership of that land to the municipality (Hobma, 2014).

In Germany, if no private law agreement is made, there is still the option of cost recovery under public law via the *Erschliessungsbeitrag*. The *Erschliessungsbeitrag* is for infrastructure and, as in the Dutch system, the sum is fixed at the actual costs of the works, although the system is less complex than the Dutch land development plan (*grondexploitatieplan*).

In England and Wales, the community infrastructure levy (CIL) was introduced in 2010 to supplement or replace planning obligations. The CIL allows the local planning authority to levy a charge to help deliver infrastructure. In contrast to planning obligations, the CIL is non-negotiable. The CIL can only be charged on new development, but local authorities

7 This passage is based largely on Hobma (2014).

have considerable freedom to determine the types of development liable for the levy and the rates to be applied. They can use the revenue to create a fund to cover the costs of infrastructure, in principle anywhere within the local authority (Hobma, 2014). The instrument is intended to provide local government with greater financial resources to support development. Developers should not be required to pay twice for the same item of infrastructure, both under a planning obligation and via the community infrastructure levy (Gov.uk, 2017).[8]

France and Canada both have public law instruments for cost recovery, the rate being calculated either on a flat-rate basis or as a fixed sum or tariff. In France, in the absence of an agreement, cost recovery under public law is by a recently introduced development tax, the *taxe d'amenagement*, which replaces a complex system of multiple taxes. The *tax d'amenagement* is linked to the building permit and is calculated according to a simple formula. Local governments have the ability to set different tariffs for different areas by varying, within a given range, the value of one of the variables in the formula (the tariff) for its territory (Hobma, 2014).[9] The simplicity of the French system stands in stark contrast to the complexity of the Dutch cost recovery system, with its requirement to demonstrate that the money is used only to cover the actual costs of the public works to be carried out.

8 https://www.gov.uk/guidance/planning-obligations
9 These rates apply to the whole of France, except Paris, where a slightly higher rate applies.

The Canadian community development levy (CDL) prescribes precise contributions for a development and is similar to the French system, but reflects the actual costs in a transparent manner. The levy is intended to provide the local government with funds to cover the costs of the further growth of the city (City of Prince Albert, 2016),[10] which may be in the form of planned extensions or 'organic' area development. When determining the rate of the levy a distinction is made between different areas and land uses (City of Prince Albert, 2010).[11] For example, Vancouver identifies five types of areas (central to regional). Levies can also be introduced for specific areas and the charges may vary according to land use (housing, industrial, commercial, temporary, etc.) (Vancouver, 2016). The CDL is laid down in a by-law. The legislative requirements for development levies and service fees are contained in the Planning and Development Act 2007.

Significance for this advice

Almost all international examples of cost recovery mechanisms under public law are less complex than the arrangements in the Netherlands. Several of these types of cost recovery are suitable for situations in which the final details of the development are not known in advance, such as in 'organic' area developments. These types of cost recovery are aimed

10 For example, until 2034 in the case of the City of Prince Albert (2016).
11 In the peripheral City of Prince Albert a distinction is made between 'full serviceable land' ($98.372/ha) and 'low residential area' ($45.850/ha or $4.584/lot), where certain infrastructural facilities such as water, sewerage and drainage cannot be delivered. The tariffs are annually indexed (the amounts stated here are for 2016) and how they are arrived at is clearly explained in the Land Development Study (City of Prince Albert, 2010). Following a comparison with other local authorities, local governments can decide whether or not the levy should cover the full costs or just some of them. Any remaining costs are made up from general funds.

at generating funds for the development of an area and are not, as in the Netherlands, based on the actual costs of planned public infrastructure and facilities. Accountability requirements for public law cost recovery schemes area not equally clear in each country. The Canadian system clearly states how the levy is to be calculated and could serve as a model for the proposed allocation formula in article 13.14 of the Supplementary Act.

Capturing development profits: area charges

Capturing development profits involves capturing part of the profit arising from the increase in value of the area arising from a change in land use ('unearned increment'). This is the case, for example, in urban extensions where the change from agricultural to residential use leads to an increase in the value of the land, but it also occurs in existing urban areas. Capturing part of these profits is entirely separate from the realisation of public infrastructure or facilities in the area to support the new development.

In the Netherlands there are no legal instruments for partial profit capture. After the fall of the Den Uyl government in 1977 on the issue of land policy, this topic was put on ice. There are political differences of opinion about whether increases in the value of land resulting from a change in zoning or other land use designations should accrue to private developers (as a reward for the risks they have taken) or should be captured for the benefit of society as a whole (which, after all, has made the development possible via democratic and legal processes), as the then Council of Housing, Spatial Planning and the Environment argued at the time (2009). Nevertheless, the discussion about land use levies is gradually being resuscitated in the wake of the financial crisis. The NederLandBovenWater (Netherlands Above Water) programme states that the instrument is a means to prevent land speculation and proposes legislating for returning 50% of the value increase to the local government to ensure the increase in value does not leak out of the area (Van Wijland, 2011). Such instruments exist in other countries.

Belgium: planbatenheffing

Belgium – or more accurately, Flanders – is one of the few countries in the world that operates a centrally collected planning gain levy, the *planbatenheffing*. This is linked to a specific and legally enshrined change of designated use in a *ruimtelijk uitvoeringsplan* ('land use plan') or *bijzonder plan van aanleg* ('particular development plan') from a less profitable to a more profitable use, such as woodland to housing. The levy is based on an assumed increase in value per square metre. The value increase of a parcel is divided into bands, each with its own levy rate. The planning gain levy does not apply to brownfield developments, which are a political priority, and there are a few other exceptions, such as for small plots. The revenues from the *planbaatheffing* are distributed via a central fund to municipalities where the changes of use have occurred. The uses to which the income from the fund may be put are laid down by law and include things like flood prevention and land funds, which are used to activate large and complex development projects. Municipalities may not use the levy to fund public facilities, but are allowed to use it to compensate for financial losses resulting from planning decisions and for

land readjustment. The *planbaatheffing* in its current form is therefore not an instrument for cost recovery (Verbist, 2014).

Canada: community amenity contribution

Canadian local governments have the power to levy a community amenity contribution (CAC) from developers, either in money or in kind, if the local government approves the granting of development rights by adopting a rezoning. The idea is that changes of use and new developments attract new residents and employees, creating an additional demand for community amenities, such as libraries, parks, crèches and neighbourhood centres. CACs can be used to provide additional facilities to meet the increased demand.[12]

CACs are supplementary to the CDLs described above. The local government can decide to ask for CACs for facilities for which a CDL has already been imposed. However, unlike CDLs, CACs may also be levied to fund a broader range of unspecified facilities and may be used to bridge the gap between the revenue from CDLs and the amount required for 100% cost recovery.

Significance for this advice

There are international examples of area charges to use value increases resulting from changes in zoning or designated land uses to fund community facilities. The Netherlands does not have any such instruments. The Council would like to see further research into the possibilities for introducing this type of instrument in the Netherlands.

Value capturing: tax increment financing, betterment tax, business investment zones

*V*alue capturing involves recovering some or all of the value increase resulting from public decisions or investments. In contrast to the cost recovery and partial profit capture mechanisms described above, value capturing applies to existing initiatives. Value capturing is therefore relevant both for 'organic' development in which new initiatives and public investments lead to rising property prices and for existing areas where government investments have led to an increase in value.

The Advisory Council for Transport, Public Works and Water Management (Raad voor Verkeer en Waterstaat, 2004: p. 74) used the following definition taken from Offermans & Van de Velde (2004: p. 2): 'Value capturing is an umbrella term for instruments that make it possible to directly or indirectly capture increases in the value of land and immovable property – resulting from government actions – and use them to fund the activities that cause the increase in value.' The Netherlands Enterprise Agency (Rvo, 2017b) refers to this as 'ploughing back' future revenues to cover current deficits.

These public activities may include the construction of facilities (infrastructure, green space, parks, museums, public transport) and policy decisions that deliver unearned benefits to private landowners (rezoning

12 Depending on the area, the contributions may be fixed or negotiable. In Vancouver the contributions vary from $32/m² for changes in standard areas to $656/m² in the Cambie corridor, a specific area of downtown Vancouver (Vancouver, 2016b).

or changes to land use plans). Value capturing is therefore not the same as capturing part of the profits from a development and not the same as cost recovery. This is because values may increase without the development of public facilities and they may also result from the addition of public facilities without a change in the zoning or land use plan (Van der Krabben & Needham). There is no legal basis for value capturing in the Netherlands, with the exception of the betterment tax (baatbelasting), which may be abolished (Tweede Kamer, 2016b, Act Implementing the Environment and Planning Act) and the recently introduced Business Investment Zones Act (BIZ-wet).

Germany: Ausbaubeitrag

Germany has a special levy or betterment tax to fund public works called the *Ausbaubeitrag* (development charge). The *Ausbaubeitrag* is for the renewal, improvement and extension of infrastructure (including public open space). It is a levy for recovering the costs of building this public infrastructure from the owners of land and property and requires the local government to make a percentage contribution (Hobma, 2014). It is essentially a betterment tax levied on the owners of land and immovable property. The underlying principle is that the greater the use made by the general public of the infrastructure paid for from the tax, the greater the percentage contribution from the local government. The *Ausbaubeitrag* is comparable to the Dutch betterment tax and faces similar implementation problems. Well-known examples are the many lawsuits on the size of the local government contribution as well as the procedural problems surrounding the German equivalent of the Dutch municipal funding decision (Hobma, 2014).

United States: tax increment financing

Another form of value capturing is tax increment financing (TIF). Almost all cities in the United States make use of this instrument. TIF is 'a technique for financing a capital project from the stream of revenue generated by the project' (Healey & McCormick, 1999, p. 27). The government has enacted legislation to designate TIF development areas.

TIF can be used to make public funds available for local projects that are not considered to be feasible without government intervention. The method assumes that the development or redevelopment of an area will cause property values to rise. Future increases in tax revenues resulting from this increase in property values can then be put back into the area in the form of new investments. The expected revenue increase is the 'increment'[13] that can be used, for example, to cover shortfalls in the land development budget, which makes it more interesting for private developers to invest. The expected increase in the property tax revenues resulting from the development can be invested 'up front' to make the development possible. In addition, local authorities can use TIF in support of their strategic development plans to stimulate developments without having to pursue an active land policy.

13 'Increment' is just another word for increase (Barnes & Thornburg LLB, 2014).

TIF schemes are based on the capitalisation of future additional property tax revenues over a period of twenty to thirty years within the boundaries of the designated TIF district, or urban renewal district. Proposed schemes must meet the 'but-for criterion': they must show that the desired development of the area would not be possible without TIF. In this respect, TIF fits in well with the philosophy of the Dutch Environment and Planning Act.

Other countries, such as Great Britain, are considering introducing and experimenting with this instrument as a way of compensating developers for a negative return on their investment. The local authority would pay this amount out as a loan, with the risk (of the increase in property tax revenue not being realised) remaining with the developer (who can take out insurance to cover this). In the Netherlands some experience has been gained with the use of a TIF-like scheme in the Waal riverfront project (Van der Krabben et al., 2013).

Canada, United States, England: business improvement districts
An Assessment District or investment zone is a designated area where a special tax is levied on property belonging to owners in the area who profit from a public investment. These areas are designated for various reasons, such as financing the construction of a sewerage system, water supplies or roads in an area. The owners indirectly pay for the benefits they will receive from the improvements in the built environment and public open space, which makes it possible to link together individual projects within a wider development that includes infrastructure and transport works (Van der Krabben et al., 2013). The Dutch Business Investment Zone Act is a similar instrument. Apart from a few promising cases, the Council is not yet sure what real effects this law will have.

Significance for this advice
The Council considers value capturing instruments to be part of the recommendation to broaden local tax-raising powers. The Business Investment Zone Act provides concrete mechanisms for capturing value increases in industrial and business parks for reinvestment in the area. The Council also wants to see possibilities to use this mechanism in other areas as well and suggests a study of the possibilities of using TIF when value increases are expected in urban (brownfield) developments.

6 Expropriation and the right to develop

This section is about expropriation practices in Europe and is based largely on Sluysmans et al. (2015). The topics covered are the grounds for expropriation, procedures, compensation and the right to develop. In all European countries, property rights are protected by Article 1 of the First Protocol to the European Convention on Human Rights (A1-P1, ECHR). This gives European countries the same legal basis for expropriation, although there are differences between the various legal traditions in Europe. Nevertheless, when national expropriation practices are examined in detail, several countries appear to have a similar legal history and body of case law.

There are two types of legal systems: customary law and civil law. In customary law, judgments are based on a fragmented body of precedents built up over time (England, Ireland). In civil law, the core principles are codified in a set of laws. Civil law systems can be classified into the French system (e.g. in Belgium, the Netherlands, Sweden and Spain), the German system (e.g. in Austria and Switzerland) and the system in the former socialist countries.

Grounds for expropriation

Even before the ECHR there was a widespread conviction in European countries that expropriation, or compulsory purchase, should be considered as a last resort (*ultimum remedium*) that can only be pursued in the public interest under conditions provided by law and with reasonable compensation. These conditions are also stated in the ECHR and in the Takings Clause of the Fifth Amendment to the Constitution of the United States in relation to eminent domain (see also the description of the 42DP project above).

In European countries expropriation is only permitted when there is a clear public interest at stake. An interest is 'public' when a decision has been taken by a government authority or when the interest is stated in a law. How a public interest is defined differs between countries. In some countries it is described in general terms in the law or has to be derived from legal precedents in the case law (England and Ireland), whereas in other countries the law and additional provisions specify exactly for what purposes property may be expropriated (e.g. in Norway and Sweden).

The Netherlands belongs in this second category. The grounds on which property may be expropriated are stated in various places in the Expropriation Act (*Onteigeningswet*). They mostly concern public interests such as national defence, water engineering works, waste management, minerals extraction, land redevelopment, infrastructure, land use planning and social housing, public order and also enforcement of the Opium Act. In the common law system of England and Ireland there is no comprehensive legal framework and decisions are based on individual judgments, which are often rather vaguely formulated in broad terms, for example in the interests of permitting 'urban renewal' or 'development'.

Expropriation by private parties

Unlike the Netherlands, some countries have instruments that permit private parties to pursue an active land policy, giving landowners the option of initiating measures for the development of designated areas. Examples include the French AFU and the Valencian LRAU. Under these arrangements, if the legal safeguards are comparable to the situation in which the local government carries out the development itself, there is no objection against expropriation by a private party. De Wolff (2013) states that the local government should be able to consider whether or not to grant a request for expropriation (in connection with the issue of democratic legitimacy).

Other countries also offer non-governmental parties the option of instigating expropriation proceedings. In the Czech Republic and Norway this is open to private individuals as well as businesses. In England the

Town and Country Planning Act (1992) gives private parties and public-private partnerships opportunities to exercise compulsory purchase powers. The highest legal body in Germany, the Federal Constitutional Court (*Bundesverfassungsgericht*), also permits private parties to instigate expropriation as long as it serves a public interest, such as the establishment of a private school or a utility. In such cases government supervision is required to ensure that the social objective is served.

Dutch legislation makes it possible for semi-governmental organisations and executive agencies such as Rijkswaterstaat (the government agency responsible for the country's main road and water infrastructure) and former state-owned companies like ProRail (the national railway infrastructure operator) and TenneT (national electricity transmission system operator) to initiate expropriation proceedings. However, the Council is of the opinion that where a local government decides to let a private party or consortium develop an area, it could be argued that these parties should be given expropriation powers. This would increase the likelihood of the development being completed.

Expropriation procedure

The procedures for expropriation differ considerably from country to country. All countries have regulations stating that owners must be informed in detail and well in advance of any pending expropriation procedure and that they must be able to contest the decision. In the Czech Republic, for example, the expropriation decision must be put on public display for six months. In all other countries the decision must also be publicly announced.

Various countries, including the Czech Republic, Sweden, Norway and France, have a two-track procedure with private law and public law tracks. This is also proposed in the Supplementary Act for the administrative review of the expropriation decision and a judicial review of the compensation. Exceptions are England and Ireland, where almost the whole procedure is governed by public law.

Although in theory the ECHR protects owners against expropriation, in practice there are different interpretations of the text of the Convention. In Spain, Sweden and Italy, for example, the owner has virtually no chance of successfully challenging an expropriation order. In Sweden, when land is expropriated under the planning and building legislation, the owner can only make a defence during the period when the plan (the grounds for an expropriation) has not yet been formally adopted. This is also the case in Italy. There are exceptions, though, and in most countries there are sufficient opportunities to oppose the expropriation order itself, the level of compensation and, in some countries, also to defend the landowner's right to develop.

Right to develop

The right to develop can be seen as a consequence of the undue impact of expropriation on landowners. One argument against expropriation is the question of whether or not the social objective could also be achieved

by the owner. In the Netherlands this topic has generated considerable discussion, because owners who invoke their right to develop cannot be forced to build the public facility when the area is developed (if applicable, if a landowner fails to respect a phasing of the development, the government can initiate an expropriation procedure) or may build a facility that does not meet the specification in the original plan. In Poland and Germany this has led to a legal denial of the right to appeal to this principle, because evidence has shown that the right to develop leads to uncertainty about the eventual success of the project.

The Netherlands, Spain, Belgium and Norway accept appeals based on the right to develop, under certain conditions, for situations in which the legal grounds for expropriation are not precisely defined. If owners are considered to be capable of realising certain social objectives, their land is not expropriated. In the Netherlands there is a relatively well established culture of development by the landowner, who has to demonstrate a willingness to carry out the development and possession of the expertise and capital required to do so.

In Belgium there has always been a right to develop, but it has only been used as grounds for appeal against expropriation systematically and on a large scale since 2010 (based on Dutch experiences) (Verbist, 2015), and almost always for commercial and lucrative developments. In 2014 the Flemish government decided to formalise the right to develop principle (for housing and industrial and business development) and expects that this will lead to a reduction in the number of expropriation orders. Spain takes a different approach and landowners have always been able to appeal to the right to develop. However, the expropriation system is being replaced by a system of compensation to give government authorities more chance of achieving the desired development outcome. In Norway, where the possibilities for opposing expropriation are very limited, the right to develop can be appealed to where the planned developments are for individual parcels of land. In such cases the owners must first be given the opportunity to carry out the development before the expropriation option can be exercised.

More generally, it can be concluded that where appeals to the right to develop have taken root in national case law, they have been based largely on the pragmatic argument that the owners in question are capable of carrying out the development themselves, and almost exclusively relate to small, potentially profitable projects. In countries where the right to develop is dismissed in advance, the arguments used are that it is not suitable for the proposed development and that previous experience supports this contention.

Compensation

An important aspect of expropriation is compensation. There are no international examples in which the two are treated separately. In many countries the provision of compensation has led to a complex set of precedents and regulations. The key question is how the value of the land and buildings is determined and what level of compensation is given. Determining value is heavily influenced by the perspective taken and when

the valuation is made. The value of a piece of land to an organisation like Rijkswaterstaat expropriating land to build a road may be different from its value to the landowner, who may have to find a new home or business premises. The date of the valuation is also important, because expropriation procedures can take a long time and in the meantime market conditions may change considerably.

In England, where the case law on compulsory purchase is hundreds of years old, the underlying principle for compensation is that of equivalence. Judges have decided that owners must be financially no better or worse off as a result of the expropriation of their property. They aim to settle on fair and full compensation for the loss of property, based on the value it had for the owner, not for the public body acquiring the land.

Sluysmans et al. (2015) observes that the approach to fixing compensation is heavily influenced by ideological factors. From a liberal perspective, ownership is inviolable and so compensation tends to be generous. From a more social democratic perspective, private property is viewed in relation to the public interest and compensation is generally more modest. In Italy and Germany, this social democratic perspective is anchored in the constitution and compensations levels are set below market value.

The general tendency in Europe is to set compensation levels in line with the principle of equivalence – the Dutch term is *verkeerswaarde*, which is more or less equivalent to market value – and award compensation in money and not in kind. This reflects the Dutch situation.

Exceptions are the Valencian model, in which the use value plus expenses are paid, and the Finnish system. In Finland compensation is set at the value of the expropriated land based on its use and this use is 'frozen' for seven years if the change in use leads to a higher market value (Valtonen et al., in preparation). This avoids any value increase resulting from a change of use accruing to another owner and being removed from the area. It makes it less attractive for owners to resist expropriation and thus helps to speed up the development of an area or function (infrastructure). However, this in effect amounts to a more or less forced participation in land readjustment projects, as in Valencia, because it is financially attractive for owners to have their land expropriated and so they will usually choose to participate in an urbanisation project. The disadvantage of this construction is that projects consist of owners with different interests and motives, which is not always good for the procedural aspects.

A more important aspect of compensation, according to the Council, is having a transparent process and creating the right expectations among the owners who are going to be bought out. Making it clear at an early stage that the land will sooner or later be expropriated and putting a realistic bid on the table can prevent owners from resorting to lengthy procedures and appealing to the courts. The Council believes that improving this practice presents a major challenge.

Significance for this advice

The Council recommends making it possible for private parties to expropriate land in development projects. Where a democratic decision

has been made to develop an area, the Council argues, with reference to practices in other countries, that there is no good reason not to hand over the implementation to private developers. According to the Council, this would help to make the development process much more secure and manageable, which in turn would increase the likelihood of achieving the social objectives. Expropriation by private parties should meet the same conditions, follow the same procedures and award the same compensation as the public expropriation process.

The Council is looking into possibilities to speed up the expropriation procedures while at the same time safeguarding legal certainty. The Council therefore proposes including deadlines in the law and offering owners the immediate right to appeal to the Council of State.

In cases where it can reasonably be assumed that the owner is capable of achieving the development objective, the Council proposes linking the right to develop to an obligation to enter into an agreement with the expropriating party. This would provide greater assurance that the development will be completed.