Negotiated development in law and practice in the Netherlands

Case response from the Netherlands for the 13th Annual Meeting of the International Platform of Experts in Planning Law, Warsaw, Poland, November 20 – 23, 2019

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Case

The Developer is the owner of real property located on the outskirt of city (approximately 10 hectares). The real property is designated in the land use plan for agricultural use only. The developer purchased the land in 2017 and paid 20 Euros per 1m^2.
In 2019 the developer applied to the City for a plan amendment requiring extensive rezoning and the development of a housing project "Young City". The project includes construction of 1650 residential units, commercial space (5 % of the total space) and open space. The developer expressed the will to construct a small public park and 500 m of a public road. This "generosity" was based on the developer's prior knowledge that without the road, the planning authority was unlikely to approve the plan, and the park would meet potential buyers' expectations and enhance the value of the housing units.
During negotiations, the local authority requested additionally dedication of land (10 % of the area), construction of a public road (2km), construction of a kindergarten and provision of 80 affordable housing units. Because the new project would require destruction of a nice grove of trees, the developer is obliged to offset this by planting a grove of trees with a similar ecological value elsewhere. In addition, the developer is required to commit to maintain the park (trees, street furniture, children play facilities) for the next 10 years.
In the opinion of the developer, the local authority is imposing project requirements beyond what is financially feasible.
The Developer is planning to sell units at the price 3000 Euros per m2, which is a upper income development based on market standards.

1. Please explain briefly what are the tools for land-value capture in your country

Cost recovery vs. value capturing

For the Netherlands, it is useful to make a distinction between (1) *cost recovery (or cost recoupment)* (Dutch: kostenverhaal) and (2) *value capturing* (Dutch: baatafroming).

(1) *Cost recovery* relates to the recoup of costs which were made by the municipality. The costs will have to be recouped from developers, because they benefit from the municipal investments in infrastructure (and other amenities). Cost recovery, therefore, is directed

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towards initiators of a development. Cost recovery takes place through *developer contributions* (Dutch: exploitatiebijdragen). Developer contributions can be received on the basis of a private law agreement or a public law plan (named 'site development plan').

(2) *Value capturing* relates to imposing a levy on owners whose property rises in value due to public investments. Value capturing, therefore, is directed towards owners of existing properties.

Cost recovery

Land development is traditionally part of the public party's (predominantly municipalities') domain. The principle is that municipal costs for land development must be recovered (art. 6.17 jo 6.12, para 1 Spatial Planning Act). This includes costs related to facilities, for instance, public municipal roads, sewerage, bridges, public parking spaces, squares, public parks, public lighting, street furniture, public objects of art and bicycle paths. The parties who benefit from these services are in practice property developers. They are required to contribute to the costs of the municipal services and facilities by way of *development contributions*.

The Netherlands have a mixed system of cost recovery. This can be done either via

1. a partnership agreement (also called: development agreement) in which the municipality and developers agree the recovery of municipal development costs (art. 6.24 Spatial Planning Act), or

2. based on a public law figure called *site development plan* (Dutch: exploitatieplan)(art. 6.12 para 1 Spatial Planning Act).

Under Dutch law, cost recovery via the agreement in practice is preferred above the site development plan. So, both municipalities and developers prefer the agreement above the public law plan. [4] The law does not state a preference. Municipalities prefer development contributions through a contract, because drawing up a site development plan is a labour-intensive and costly activity. Developers prefer development contributions through a contract, because negotiating a contract implies influence on the contents of the contract (as opposed to a public law site development plan, where developers have no influence).

However there is no duty to make such an agreement. If developers and the municipal authority are not able to reach consensus on the cost recovery, a site development plan will be made by the municipality. Thus, the site development plan is a way to wield the big stick. Once the site development plan is made, a posterior agreement can be made. This agreement needs to be compatible with the site development plan and the legal framework for this plan (see next) and specifies cost recovery based on the site development plan.

Site development plan

The Spatial Planning Act, article 6.13, para. 1 contains requirements for site development plans. These include a map of the area developed, a description of the activities needed for the area of construction, the install of activities etc., a development budget, a cost

[4] Which is also in practice the case. In most area developments cost recovery is done via agreement: A.G. Bregman, J.J. Karens, E. Buitelaar, W.C.T.F. de Zeeuw, *Gebiedsontwikkeling in de nieuwe werkelijkheid*, IBR: 2018.

distribution between the lands to be allocated and when necessary a phasing of the execution of works and activities. A environmental permit must be refused if, for instance, the building plan is in conflict with the timetable (phasing) of activities for the area, as determined in the site development plan. The moment of obtaining an environmental permit for the activities is also the moment that the cost recovery sum needs to be paid.

The Spatial Planning Act and the order in council based on that act (Bro) also contain a limitative list of costs which can be recovered. In article 6.2.3-5 Bro costs which can be recovered include costs to make plans, prepare for construction and lay out of the public area, such as utilities, sewage systems, water systems, pavements, bicycle lanes, street lights, parking spaces, green zones, non-commercial sport facilities and playgrounds. These costs qualify as costs which are directly linked to the site development.

The list of costs which can be recovered on the basis of the public law site development plan will have 'consequential effect' (Dutch: reflexwerking) on the private law partnership agreement for cost recovery. That is, both municipalities and developers know which costs can be recouped under public law and will take that into account during the private law negotiations for the partnership agreement.

The legal system also includes the recovery of costs which are not primarily linked to the plan but which can be divided and recovered to developers of (several different) plans, such as roads which have a function for several residential areas (also ones not included in the development). Recovery of these costs via the site development plan has to fulfil the criteria of causality, profit and proportionality. This means there has to be a link between the realisation of the infrastructure and the development of the area, the area indeed profits from the infrastructure and costs only can be recovered as far as it is proportionate.

The limitative list of costs is meant for cost recovery under public law and is not binding for partnership agreements prior to the development, which gives broader possibilities for cost recovery based on partnership agreements. This means, in fact, that by way of a partnership agreement the municipality can recoup more costs than would have been possible by way of a site development plan.

A specific contractual possibility is to include costs for projects which are not part of the development area. In this way, developers contribute to so called 'spatial developments' outside the development area for which the contract is concluded. This has a basis in the Spatial Planning Act (art. 6.24). It serves as a kind of fund for (future) developments such as spatial improvements in neighbouring areas. These specific developments need to be laid down in the structure vision..
However legally permissible, this is somewhat politically controversial, because under no circumstance this may lead to municipal authorities imposing random financial payments with the threat of not granting the permit for building activities which are acceptable from a spatial planning perspective (as laid down in a structure vision). That might also fuel the idea that developers can buy the (amendment of the) land use plan when paying for activities which are in no way linked to their developments.

The case for this paper states that the developer owns the real property. It should be noted here that there is a third possibility for cost recovery in case the developer does *not* own the land that is intended for development. The third possibility of cost recovery is sale of land that has been prepared for construction (also called: serviced land) by a municipality. In this case the municipality is an actor in the development itself, because it has been actively acquiring,

preparing and selling the land needed for the development (active land policy=actief grondbeleid). If a municipality sells land that it has been prepared for construction (Dutch: bouwrijpe grond), it has made costs for several facilities, to the benefit of the area. In this case the costs for e.g. the sewage system will be included into the sales price.

Value capturing

The instrument for value capturing in the Netherlands is: real estate taxes (Dutch: onroerende zaakbelasting). Every property owner is taxed by the municipality. The revenues go to the municipalities. If the value of a property rises due to governmental investments in the vicinity, for example a metro train station, part of the rise in value is captured through the real estate tax. It must be noted though, that in the Netherlands real estate taxes are relatively low from an international viewpoint.

In case of ground lease (Dutch: erfpacht) another form of value capturing is possible. Periodically the ground rent will be recalculated. If the value of a property rises due to governmental investments, part of the rise in value is captured trough recalculation of the ground rent.

As pointed out in the previous section a specific contractual possibility is to include costs for projects which are not part of the development area. In this way, developers contribute to so called 'spatial developments' outside the development area for which the contract is concluded. This has a basis in the Spatial Planning Act (art. 6.24). This is sometimes stretched to include betterment.

In terms of land value capture, in which case the added value of the realization of public infrastructure on the property has to be captured, theoretically a betterment tax can be taxed by the municipal authority. Theoretically, because since the change of the Spatial Planning Act in 2008 the principle is that in case of development costs of public infrastructure are only recovered from developing parties and not from property owners who already owned real estate before the public infrastructure was realized. This also has a political motivation: it is highly unusual to recover costs to owners who are not part of the development. Whenever there is an agreement or site development plan, this will take the place of a betterment tax. Otherwise it would be possible to recover costs from developers on the one hand and tax the risen value on the other hand. Article 222 Municipal Act sets rules for turning the costs of the public infrastructure over to the owners of the property which benefit of the realization of public infrastructure. As pointed out above, a betterment tax is theoretically only possible when cost recovery via agreement is not possible (which will, due to the mixed system, never occur); a mixed cost recovery based on a betterment tax and agreement is not possible.

From development agreement to public private partnership

The partnership agreement as described in this section concerns cost recovery and the possibility to include other contractual obligations. The Netherlands also have a specific form of partnership, called a public-private partnership, which was used for relatively big urban extensions (thousands of dwellings). Public-private partnerships go further than partnership agreements, because the parties involved consulted and agreed on the program to be

realised and the spatial quality to be achieved in the future area. Public-private partnerships exist in different forms, from which the joint venture is the most far-reaching model because parties enter into a . The choice for one of the alternative models depends on some variables, most important ones being: (a) the division of land ownership between municipality and project developer(s) in the area to be developed, (b) desired degree of control by the municipality, (c) division of risks between municipality and developer(s), (d) complexity and duration of the project[5].

In case of public private partnership, the development agreement will not be restricted to the recoupment of costs of infrastructure, but will include many other topics such as: the program which will be realised, the prizes of the houses that will be built, phasing and planning, the public law powers the municipality will deploy to advance the development of the area, arrangement of financial nature.[6] In such ppp agreements, the recoupment of costs will only be a small part of an elaborate partnership agreement.

2. Does the law permit to negotiate plan amendments and impose on the developer obligations to provide public infrastructure?

No. Under Dutch law the developer cannot be forced to provide public infrastructure. The Dutch system takes departure from the idea that the municipality takes care of the public infrastructure and that the *costs will be recouped* from developers who benefit from it. It is part of the Dutch cultural tradition that public infrastructure is provided by government.

That being said, a partnership can impose on the developer the obligation to realise and provide public infrastructure, whenever such on obligation is agreed upon. The obligation to realise public infrastructure usually is part of a specific type of public private partnership agreement, in Dutch called 'concessie'. This is a private sector-led type of urban development.[7] These contracts typically hold the stipulation that after construction, the ownership of the infrastructure will be transferred to the municipality. There is experience with this type of ppp in the Netherlands, but it is not the dominant form of urban development. The dominant form is that the municipality take care of the construction of the infrastructure and recoups the costs from developers.

3. Does the law explicitly permit development agreements and defines elements of contract ? What are the specifics of the relevant clauses?

The Dutch Spatial Planning Act does explicitly permit development agreements in art. 6.24. However, the law does not give any specifics of relevant clauses. Development agreements are based on the regular rules for contracts based on the Civil Law Code. Since there are no specific requirements for development agreements, it is not useful to include relevant clauses here.

Since the municipality will be regarded by civil law as a regular contracting party, the rules for making agreements will need to be followed. However, based on art. 3:14 Civil Code the freedom of contract for government authorities is limited by the general principles of proper

[5] F.A.M. Hobma, P. Jong, *Planning and Development Law in the Netherlands*, Den Haag: 2016, section 5.7.3.
[6] F.A.M. Hobma, P. Jong, *Planning and Development Law in the Netherlands*, Den Haag: 2016, section 5.7.3.
[7] E. Heurkens, *Private sector-led urban development projects*, Delft: A+BT Publishers, 2012.

administration such as equality and confidence. These principles give guidance to the pre-contractual phase such as the selection of developers and the fact that the government should honour legitimate expectations of the contracting party.

Another important limitation is set by the WindMill-jurisprudence of the Supreme Court (26-1-1990). The principle that the government has the freedom to choose between public law and private law instruments to realize its policies can't be applied when the use of private law instruments such as contractual freedom unacceptably intersects with specific public law guarantees included in a public law act (so called thwarting doctrine). If the same result can be realized with public law instruments, use of private law instruments is not allowed.

4. Does the law regulate negotiation procedures and the time these may take?

No. As specified before, the law does not regulate the procedures in terms of length. This is different when the development is part of a procurement procedure, a scenario which will not be discussed in this paper.

5. What is the legal relationship between development agreements (in private law) and public planning law instruments? Is there any obligation for the public authority to incorporate the development agreement into a land use plan or other public planning rules ? What if the public authority fails to do so?

There is no real legal relationship between agreements and public planning instruments. It is common that the municipal executive as contracting party will make effort to provide the required (change of the) spatial plan. However, adopting a new or changed land-use plan is the competence of the municipal *council*, whereas the development agreement was concluded between the municipal *executive* (not municipal council) and developer. Whatever is agreed upon in the contractual phase is not directly binding for the political considerations within the municipal council, but the council has to weigh all interests, also the developer's to have the planning permit. There is extensive case-law on this topic. Thus, it is possible that the municipal authority fails to have the plan amended or newly drafted by the council. In that case, based upon the exact circumstances, e.g. the question whether there are unforeseen developments within the sphere of the contract, the authority might be held liable and is obliged to reimburse the damages.

6. Are there any provisions for involvement of third parties within development agreements?

No. In the pre-development phase, the municipal authority can make agreements with different parties when this is needed to acquire the land or recover costs for the development. However, agreements are only enforcing duties to the parties within the agreement and the interests of third parties will not (primarily) be taken into account, although one of the contracting parties is the municipal authority. This means that whenever a third party, e.g. an individual living close by or a commercial party will only be entitled to dispute the area development within the procedure for the land-use plan or environmental permit. However, in that phase of the area development, the spatial characteristics will have been specified between developer and de municipality, e.g. via masterplans etc. As a result

one could argue whether the interest of the developer (and the municipal authority backing the plan, including the costs already made), will weigh heavier than the interests of third parties who were not involved until the formal procedure for the plan or permit.

General rule is that when the government chooses to exercise its competence via the agreement, third parties can't be denied legal guarantees that they should have when the competence is exercised via public law. Under circumstances, a development agreement as a private law contract, can harm third parties in their interests, but case law is very rare. Only in more extreme cases when the execution of the agreement brings unreasonable consequences to the interests of third parties, the agreement could get nullified.

7. Are there special rules about environmental offsetting? What happens in common practice?

Environmental offsetting is a specific part of many development agreements. When environmental offsetting is needed in order to make the development acceptable from an environmental protection viewpoint, the land-use plan of permit should include the contractual obligation of the developer to compensate impacts of the development.

The (private law) contractual obligations to offset environmental damage, usually will be made to be able to comply with (public law) requirements for environmental damage. Several public laws require compensation of environmental damage causes by the proposed project. The site development plan may include compensation of nature conservation areas or water areas. Concluding a contract in which the developer agrees to offset the damage to nature, is a way in which the public law obligations can be fulfilled.

8. Are there special rules or procedures for housing projects or for urban regeneration compared with, say, industrial/ office construction or regeneration?

No. In the framework of negotiated development there are no special rules for housing or urban regeneration, offices or industry.

9. What kind of services and infrastructure may be exacted through development agreements? Are there types of services that may not be imposed? (for example, to supply non-physical services such as maintenance costs. In urban regeneration projects, to pay for socio-educational services such as adult employment training).

There is no limitation of the kind of services and infrastructure that may be exacted through development agreements. In the Dutch system this means that there is no limitation to *the costs of municipal services and infrastructure* that can be recouped from developers by way of a development agreement. In theory, costs of maintenance and costs of socio-educational services such as adult employment training could be part of a development agreement. In practice, they are not.

So, there are no limitations to recoupment of costs under *private law*. However, if the *public law* route to cost recoupment is chosen, there *are* limitations to the costs which can be recouped. The Spatial Planning Decree (Dutch: Besluit ruimtelijke ordening) in article 6.2.4 holds a list of costs which can be recouped from developer under public law. That is: if a site development plan is adopted instead of concluding a development agreement. The list of

costs which can be recouped is called in Dutch 'kostensoortenlijst'. The character of the list is limitative: no other costs can be recouped. The kostensoortlijst holds, among other things, the costs of:

- environmental research, soil quality research, archaeological research, acoustic research
- soil decontamination, closing of surface waters
- infrastructure
- compensation for environmental damage
- drawing up land-use plan and other plans
- civil servants
- planning compensation (to be paid to those parties who experience a loss in value of their property due to the proposed development)
- interest

Maintenance costs and socio-educational services such as adult employment training are *not* on the list of costs that can be recouped under public law.

As noted before, this is the limitation of costs which can be recouped in case a site development plan is drawn-up. The list does not apply to development agreements. However, the list will have a 'shadow effect' on the negotiations between municipality and developer in the framework of a development agreement. Parties will make an estimation of the costs which can be recouped under public law on the basis of the kostensoortenlijst. They will keep this in mind when negotiating (under private law).

Nevertheless, it is very well possible (and not uncommon) that under private law (i.e. a development agreement) more costs are recouped than would be possible under public law (i.e. a site development plan).

10. May development agreements be used to finance affordable housing? What are the rules regarding quantity, location (within the project or outside), in actual construction or in money, and are there rules about degree of integration within the main project ?

Yes, development agreements may be used to realise affordable housing. That is, the development agreement may include the obligation for the developer to take care that a certain percentage of the houses that will be realized in the development is affordable housing. This may be sale or rental. If the development agreement holds such a stipulation, the developer usually will enter into a contract with a housing association. In this way, the developer makes sure that the affordable houses, which will be developed by the property developer, will be purchased by a housing association. The housing association, subsequently, will rent out the houses.

So, the obligation stemming from the development agreement relates to *actual construction* of the social houses, not to paying a sum of money to the municipality. Furthermore, the obligation relates to the project, not to an area outside the project.

To be complete, under public law there are possibilities to include affordable housing in statutory plans:

1. Municipalities have the power to lay down in a land-use plan that a certain percentage of the land is designated for affordable housing (sale or rental).
2. The site development plan (based on art. 6.2.10 Bro and 6.13, 2nd section under c Spatial Planning Act can include provisions about the amount and sites of social housing, housing for mid-market rental and parcels for individual housing and rules to combat price speculation with social housing. Based on the change of article 3.1.2 1st section of the Bro in 2017, a land use plan can include rules about social (affordable) housing, housing for mid-market rental and parcels for individual housing.
   Before 2017, municipal authorities would include this into development agreements. Because of the thwarting doctrine (see answer to question 3) it is questionable whether they could do this. From 2017 onwards, there is a legal basis for specifications for housing categories in the land use plan. For this reason, specific stipulations in the development agreement are not necessary anymore.

11. May development agreements be used for social-redistribution purposes outside the immediate zone of the project – for example, to finance a public swimming pool in the poor area of the city. The justification would be that new, lucrative development occurs only in the better-off part of the city, and it is just to share some of the value uplift not only with those who already benefit from good public services, but also with those who do not benefit from any developer obligations.

It is possible, under certain conditions, for development agreements to have effect outside the development area. See the answer given to question 1 under 'site development plan':

> *A specific contractual possibility is to include costs for projects which are not part of the development area. In this way, developers contribute to so called 'spatial developments' outside the development area for which the contract is concluded. This has a basis in the Spatial Planning Act (art. 6.24). It serves as a kind of fund for (future) developments such as spatial improvements in neighbouring areas. These specific developments need to be laid down in the structure vision, and are based on mutual consent.*

However, the justification for this contribution is not 'social redistribution'. Rather, the justification is that of 'compensation' or 'offset' for negative consequences of the development.

12. How can one ensure that the promised commitment is realized as agreed? Is there a monitoring mechanism? Are there financial or legal remedies?

The development agreement is a ‘normal’ agreement under private law. This means that all the regular way to ensure enforcement are in place. If a party does not act in agreement with the contract (or too late, or wrong) it may be qualified as default (breach of contract) (Dutch: toerekenbare tekortkoming). It may lead to a ruling by the district court.

Also, the contract may hold penalties if a party does not act in accordance with the agreement. These will be financial remedies.

New developments

In the new Environmental and Planning Act which will come into force in 2021 the instruments for cost recovery are included. The Act also includes chapters on expropriation, pre-emptive buying rights for the municipalities, provinces and the Minister of the Interior, and land readjustment in agricultural areas.

In the case of cost recovery the mixed system with development agreements and a obligaratory contributions based on a plan or environmental permit will be continued.

However a new municipal instrument is added which comes close to betterment. In the environmental plan (successor to the land use plan and site development plan) an extra provision can be added for the recovery of some costs which are not included in the cost recovery. These costs are costs for the following purposes:

- restructuring of areas
- adding spatial quality to the environment
- financial compensation for not building enough affordable housing on the site

The list of costs will be included in an order of council, which has not yet been published.