

Summary

The right of self-realization: land use regulatory instruments in relation to the right of ownership

This study is about the extent of the right of self-realization. As the extent of this right is not clear, I have defined it for the purpose of this study as the scope of the right of self-realization in general minus the restrictions that can be imposed in a particular case.

The extent of the right of self-realization has no fixed meaning both in the literature and in governmental publications. To the very least, though, it is assumed that the right is connected to the right of ownership. In addition, the right of self-realization links a right of development to the right of ownership. Following from this, a private landowner is – in principle – allowed to realize building plans, albeit within the boundaries of the zoning plan formulated by the municipal council. At the same time, the government (in this study usually the municipal government) often wants to monitor this realization. Several statutory instruments enable municipalities to do so. In the formulation and application of these instruments, tensions between the interests of the land owner and the interests of the government may come to light. An evaluation of the way in which legislatures (in the process of drafting the instruments) and the courts (in the settlement of disputes arising out of a particular decision by a governmental body) deal with this tension, is helpful in interpreting the extent of the right of self-realization.

The central question in this study is: what is the extent of the right of self-realization and how has it developed so far? In addressing this question, it is important to include the historical development of the extent of the right of self-realization. If the degree of influence which a municipality can exert on the realization of a building plan by a private land owner depends on the legal instruments formulated for this purpose, it can reasonably be assumed that the development of those instruments has influenced the extent of the right of self-realization.

The study is structured as follows. I first defined the scope of the right of self-realization on the basis of the right of ownership. Then, I examined different pieces of legislation that were likely to impose restrictions on the right of self-realization. I explored the legislative history (the parliamentary papers) and the case law with regard to the relevant provisions and I analyzed the arguments put forward in the legislative process and by the different judges concerning (possible) interferences. The statutes I subjected to investigation in this context are the Expropriation Act (*Onteigeningswet*), the Municipalities Preferential Rights Act (*Wet voorkeursrecht gemeenten*) and the Land Development chapter (*afdeling Grondexploitatie*) of the Spatial Planning Act (*Wet ruimtelijke ordening*). In these statutes, the main land use regulatory instruments are laid down.

SUMMARY

The right of ownership includes several elements arising from the legal provisions in which this right is enshrined.

In the former Dutch Civil Code ('DCC', *Burgerlijk Wetboek*), the right of ownership consisted of the rights to dispose of and to enjoy one's property (Art. 625). The section in the current DCC only implicitly recognizes the right to dispose of one's property. Furthermore, it distinguishes between the right to use one's property and the right to the fruits of one's property (Art. 5:1). The right to the fruits of one's property is to be considered an element of the right to use it. Article 1 of the First Protocol to the European Convention of Human Rights ('ECHR') stipulates that every natural or legal person is entitled to 'the peaceful enjoyment of his possessions'. Case law based on this article proved that the other elements (the right to dispose, the right to use and the right to the fruits) are also protected.

The current DCC stipulates that property is 'the most complete right one can have on an object (Art. 5:1). Article 1 of the First Protocol ECHR assumes a broader concept of property. Not only the possession of things ('physical goods') falls within the scope of art. 1 First Protocol to the ECHR, but also the possession of 'certain other rights and interests constituting assets'.

The right of self-realization attaches a development right to land ownership. The owner of a plot has the right to carry out building plans on his own estate. This leads to the conclusion that the self-realization right has to be regarded as a particular form of the right to use one's property. The use of the land by the owner in this special way – that is: carrying out building plans on his own plot – thus falls within the scope of the right of self-realization.

Property rights can be restricted through legislation. Expropriation is the most far-reaching restriction that an owner may face: his property is taken from him in the public interest. Less extensive restrictions are also possible. The owner needs to take these restrictions into account when exercising his right of ownership. Restrictions can affect all elements of the right of ownership. When they interfere with the right of a land owner to use his property, they may also interfere with his right of self-realization. Restrictions interfere with this right when they affect the authority of a land owner to develop a building plan on his own plot.

Restrictions of property rights – and therefore restrictions of the self-realization right – have to comply with both formal and material requirements.

Based on the formal requirements deriving from Art. 5:1 DCC and Art. 1 First Protocol to the ECHR, the right of self-realization can be restricted by acts of Parliament (formulated by the government in conjunction with the States-General, Art. 81 of the Constitution) and also by rules and regulations formulated by other legislative authorities (such as government decrees and municipal regulations). These restrictions, however, may not nullify the right of ownership or make it ineffective.

The material requirements for the restriction of the right of ownership and the right of self-realization are always the result of a balancing of interests: is the infringement of the right of ownership (or self-realization) justified by the objective

of the required legislation? In the first instance, it is the legislature that needs to balance the relevant interests. On one side is the private landowner's interest, who has the right to decide how to use his plot based on his right of ownership. On the other is the government's, which has to advance desirable land use in the public interest. When a dispute arises in a specific case, courts will have to on the matter.

In answering the question whether the material requirements for the restriction of the right of ownership and the right of self-realization are met, the legislative history of the legal provision on which the restriction is based must be consulted.

Mid-nineteenth century, the Netherlands had few formal laws regulating the use of land. The Expropriation Act did already exist, but its purpose was very limited. Due to the increasing industrialization, it was important that large infrastructural projects (such as railways, which land owners could not realize on their own plots) could be built more rapidly.

That same industrialization led to migration to the cities. Increasing unemployment forced many people to leave the countryside and take up factory jobs. The cities were not designed for such an influx, which led to abominable living conditions and deterioration. Initially, local authorities were trying to solve these problems themselves. In several local ordinances (*gemeentelijke verordeningen*) a basis for condemnation was created, but it was difficult to formulate provisions in such a way that they could withstand scrutiny to higher legislative provisions in court.

During the second half of the nineteenth century, the central government became increasingly aware of the urban housing problem. This culminated in the Housing Act (*Woningwet*) of 1901. The Housing Act not only contained provisions that were intended to regulate housing problems, but also provisions concerning spatial planning. Instruments that were introduced in the Housing Act and relevant to the extent of the right of self-realization included the building permit, the building ban and the expansion plan. The introduction of the building permit was particularly important for the development of the extent of the self-realization right. Under the Housing Act, local authorities were authorized to attach the building permit to provisions in their local ordinances. Before the introduction of the building permit, the right of self-realization stemmed naturally from the right to ownership. After that, the exercise of the right of self-realization became – in some cases – dependent on the approval of the local government. In those cases, the right of self-realization became conditional.

After the Second World War, housing problems reemerged. as many houses were destroyed and large numbers of people had to be (re)accommodated. New houses had to be built rapidly. For the first time, reconstruction measures were placed in a national, spatial context. This way, spatial planning emerged as a separate policy area. The expected growth of the population was of great importance to this development. In 1949, the first report on this subject, initiated by the Government Office for the National Plan (*Rijksdienst voor het Nationale Plan*), was published. Until the publication of the Government's Third National Policy Document on

SUMMARY

Spatial Planning (*Derde nota Ruimtelijke Ordening*) in 1973, the (expected) population growth played an important role in spatial policy. Policy was developed to stimulate geographical distribution of the growing population. Initially, this was based on a strong urbanization towards the *Randstad* metropolitan area. Later on, policy was aimed at (sub)urban regions surrounding the major cities (*gebundelde deconcentratie*).

In 1965, the Spatial Planning Act (*Wet op de Ruimtelijke Ordening*) came into force. Provisions related to land use planning that were formulated in the Housing Act, were transferred to the Spatial Planning Act. The main land use regulatory instrument created in this act was the zoning plan, which was very important for the development of the extent of the right of self-realization. A zoning plan was intended to include detailed rules on how a certain plot or area could be used. The building permit was linked to the zoning plan: only building plans in accordance with the zoning plan were allowed. When a landowner wanted to realize a building plan on his own plot, he could only obtain the permit if his plan was in line with the zoning plan regulations. Only then was he able to operationalize his conditional self-realization right.

The adoption of a zoning plan by a municipal council led to the situation where the use of the plots or areas covered by the plan had to be brought in accordance with its provisions. This requirement also applied to privately owned plots that were included in the plan. A zoning plan, however, could not oblige private land owners to realize the building plans. The only way for a government to realize the desired building plans on those plots, was by becoming the owner of the plots itself. To that end, the municipal council was entitled to make an expropriation decision (after having tried to buy the land amicably) based on the provisions formulated in the Expropriation Act. The land owner could challenge this decision with a self-realization defense. He then had to show that he was willing and able to realize the building plan, resulting from the zoning plan, himself. He also had to show that he was willing to comply with the plan execution form (*vorm van planuitvoering*) as proposed by the municipal council.

With the Spatial Planning Act in force, spatial planning policies expanded rapidly. In 1985 – after rather difficult parliamentary proceedings – the Municipalities Preferential Rights Act came into force, which enabled municipalities to impose a pre-emptive right on the plot of a private owner. This gave the municipality the first right to purchase the land, in case the private owner wanted to sell it. Imposing this pre-emptive right didn't force land owners to sell their land: if they wanted to keep it, they were allowed to do so. The Municipalities Preferential Rights Act also created the possibility for municipalities to invalidate legal actions, performed by the land owner, that could devalue the interest of the municipality in the pre-emptive right. These legal actions were listed exhaustively in the Municipalities Preferential Rights Act.

Imposing a pre-emptive right on the plot of a private owner did not affect his right of self-realization. The possibility to *dispose of* his land was influenced by the provisions in the Municipalities Preferential Rights Act, but the right to *use*

it was not restricted. When a zoning plan required the realization of a building plan on the plot of the land owner, he could operationalize his conditional right of self-realization by applying (and getting granted) a building permit. If the municipality decided to use the instrument of the invalidation of a legal act, performed by the land owner, his right of self-realization wasn't limited either. As the performance of the legal acts mentioned in the Municipalities Preferential Rights Act did not fall within the scope of the self-realization right, the invalidation of such acts could not limit the self-realization right.

The right of self-realization became important under the Municipalities Preferential Rights Act after the act was amended in 1996. In addition to the objective that was already mentioned in the parliamentary papers accompanying the 1985 bill (creating a preferred position for municipalities in the purchase of land), a new target was introduced: the imposition of a pre-emptive right could contribute to the realization of spatial policy. During the parliamentary proceedings the notion took hold that this realization was not exclusively to be pursued by municipal authorities through active land policy, but that realization by private land owners was also possible. In addition, the municipality's power to invalidate certain legal actions performed by the land owner was amended, too: the number of legal acts of which the annulment could be invoked, was extended.

Between 1985 and 1996, the land market had undergone substantial changes. More and more private land owners had become active on the market, among whom were a growing number of professional property developers. After 1988, when the Government's Fourth Policy Document on Spatial Planning (*Vierde nota Ruimtelijke Ordening*) was published, it became government policy to actively encourage private initiatives on the land market. The Government's Fourth National Policy Document on Spatial Planning Extra (*VINEX*), published in 1991, even stated that the building of 485,000 new homes was to be carried out by 'the market'. While economic performance in 1985 was rather poor, outlook, this began to improve around 1994. In addition, interest rates were dropping. This allowed private parties to purchase plots easily and relatively risk-free. Housing shortage and the fact that the plots on which building plans would be created in a zoning plan, were listed in the *VINEX*, encouraged this trend.

Sometimes, private owners of plots on which a municipality had imposed a pre-emptive right lacked the knowledge and financial resources to realize the building plan that was created by the municipal council in the zoning plan. They often concluded cooperation agreements with professional developers, in which the land owner would transfer the right to dispose of the land as well as (part of) the economic interest in the land to the developer. The developer would then realize the building plan. After the building plan had been completed and the use of the land was brought in accordance with the zoning plan, the pre-emptive right the municipality imposed on the plot of the landowner would lapse and the land owner could transfer the plot to the developer.

Municipalities often invoked the nullity of such an agreement, claiming that it devaluated their interest in the pre-emptive right because the agreement thwarted their preferential position in the purchase of land. Land owners would challenge this because in their view the agreement was aimed at realizing spatial policy. The

SUMMARY

district court and the court of appeals disagreed on the appropriate solution to this dispute. In 2001, the Supreme Court ruled that cooperation agreements were acceptable. When a municipality wanted to fulfill a co-ordinating role (*regierol*) in the realization of the building plan by an land owner and his partner, it had to be given this opportunity.

In its ruling, the Supreme Court formulated a well-considered compromise between the conflicting objectives of the Municipalities Preferential Rights Act, but the real question that had to be answered when a municipality assessed an application for annulment (was the legal action, performed by the land owner, subservient to his right to *use* his property? or did the cooperation agreement qualify as a veiled attempt to *dispose of* his property?) was somewhat overlooked.

In 2002, the Municipalities Preferential Rights Act was amended again. Cooperation agreements concerning plots on which a pre-emptive right is imposed were no longer allowed.

Just before the amendment of the Municipalities Preferential Rights Act, in 2001 the Government's National Land Policy Document (*Nota Grondbeleid*) was published. As mentioned earlier, more and more private land owners were active on the land market. However, the legal instruments were still focused on the government as the main landowner and therefore had to be adjusted. One of the suggestions in the Land Policy Document was to adapt the Spatial Planning Act to the factual circumstances.

In 2005, a bill for a new Spatial Planning Act was introduced in parliament. Included in the bill was a chapter on Land Development (*afdeling Grondexploitatie*). The purpose of these provisions was to address the main problems municipalities faced when a private owner wanted to realize a building plan on his own plot. Those problems were mainly related to the distribution of the exploitation costs and the provision of location requirements. Under the existing legislation, exploitation expenses could only be recovered through an exploitation agreement based on the local Exploitation Act (*Exploatieverordening*) or through a tax benefit assessment. Both instruments came with major disadvantages. An instrument to enforce location requirements did not yet exist.

When a land owner had successfully challenged an expropriation decision (i.e. he was willing and able to realize the building plans included in the zoning plan himself), he was allowed to operationalize his conditional self-realization right on the basis of a building permit (provided he would comply with the relevant statutory requirements). During the realization of the building plan, the owner had to comply with the form of plan execution (*vorm van planuitvoering*) determined by the municipal council. In the context of this form of plan execution (or in the context of the co-ordinating role of the municipality under the Municipalities Preferential Rights Act), municipalities were not allowed to require a contribution in the exploitation costs. Enforcing location requirements was possible, but only after an attempt to purchase the plots of the private owner.

The Land Development chapter in the Spatial Planning Act provides a private law track and a public law track. Under the Act, the private law track is the pre-

ferred route. When a municipality succeeds in concluding agreements with every private land owner in a certain exploitation area, there is no need to use the public law track. The main instrument that has been added to the land use regulatory instruments available to municipalities is the so-called development plan (*exploitatieplan*). The Land Development chapter also amended provisions on the zoning plan and the building permit. The extent of the right of self-realization is influenced by all three instruments.

Under the new Spatial Planning Act, local requirements can be included in the zoning plan and in the development plan. The building permit is linked to both plans: when a land owner wants to operationalize his conditional self-realization right and applies for a building permit, the zoning plan and the development plan play a role in reviewing the permit application. Distribution of the exploitation costs is based on the development plan. When no agreement can be reached between the municipality and a land owner, settlement of the costs occurs when the permit for the building plan is granted.

As said, I studied the Expropriation Act, the Municipalities Preferential Rights Act and the Land Development chapter of the Spatial Planning Act. I explored the legislative history (the parliamentary papers) and the case law under the relevant provisions and I analyzed the arguments put forward by the legislator and the different judges concerning (possible) interferences in the right of ownership and the self-realization right.

In the process of adopting the Expropriation Act, the the right of ownership was explicitly taken into account. The question of how the realization of infrastructural projects and building plans could be reconciled with the need to protect ownership was frequently addressed during the parliamentary proceedings. This was different when the bills for the Municipalities Preferential Rights Act and the Land Development chapter of the Spatial Planning Act were under consideration. Even though it was generally acknowledged that the imposition of a pre-emptive right restricted the right of ownership of a land owner, such a restriction was deemed necessary in the public interest. During the parliamentary debates on the Land Development chapter, the relation between the regulatory instruments and the property rights of land owners evoked hardly any discussion. A possible explanation for this lack of attention could be that self-realization of building plans by land owners was the starting point in the proposal.

When an expropriation decision leads to a dispute between the municipality and a land owner (who wants to exercise his self-realization right), the question to be answered in both administrative (appeal to the Crown) and judicial proceedings is whether expropriation is necessary in the public interest, or whether the land owner is willing and able to realize the building plan himself (and the necessity to expropriate the land owner is lacking). The Crown decisions and judgments of the courts show that a self-realization defense against an expropriation decision only succeeds if the land owner is willing and able to realize the building plan; that is, if he argues convincingly that he has the desire to exercise his right of self-realization and has the knowledge and financial resources to actually do so.

SUMMARY

In addition, the position of the plots of the land owner must not stand in the way of self-realization. Furthermore, the land owner has to be willing to comply with the form of plan execution as formulated by the municipality and has to inform the municipality about his plans for realization in a timely manner.

Disputes between municipalities and land owners in the context of the Municipalities Preferential Rights Act have to be settled by answering the question whether the agreement which a municipality has proposed to be invalidated by the court actually has the effect of undermining the imposition of the pre-emptive right. Agreements transferring the right to impose the plot and (part of) its economic interest from the land owner to a third party are invalidated. The land owner is allowed to practice his right of self-realization in case a pre-emptive right is imposed on his plot, but he will do so entirely at his own risk.

Under the Land Development chapter of the Spatial Planning Act, disputes do not concern the actual exercise of the right of self-realization by the land owner, but focus the conditions regarding cost recovery and location requirements. Case law is mainly concerned with the relationship between the private law track and the public law track.