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DOI
10.1080/02697459.2016.1198556

Publication date
2016

Document Version
Accepted author manuscript

Published in
Planning Practice and Research

Planning reform beyond planning: the debate on an integrated Environment and Planning Act in the Netherlands

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Published : Planning Practice and Research. 31(4), pp. 420–434

http://dx.doi.org/10.1080/02697459.2016.1198556

Land use plans serve a dual function. On the one hand, they are programmes for future development, plans for action. On the other hand, they have a regulative function in relation to construction and land use. This paper investigates how the interplay between these functions is playing a role in the current debate about the new integrated Environment and Planning Act (*Omgevingswet*) in the Netherlands. Initially, the government proposed abolishing local land use plans and replacing them with a system of by-laws. However, this proposal did not survive the debate on this bill. This paper will shed light on the relationships between planning and regulation by analysing that debate.

Keywords: planning reform; planning system; development control; spatial planning; Netherlands

1. Introduction

Local land-use plans have a 'Janus head' (Mastop, 1991, 43) both providing legal security and being an instrument with which to manage and direct spatial development (Van der Ree, 2000). This paper investigates how views on these two functions relate to the debate about an 'All-in-one Law on the Physical Environment' (Van der Molen, 2015, 184), a new integrated Planning and Environment Act (known as the *Omgevingswet*) in the Netherlands.

This case is especially relevant because the Dutch Minister of Spatial Planning indicated in a letter to Parliament (dated 28/06/2011) that she was considering the abolition of local land use plans (*bestemmingsplan)* in the Netherlands and replacing these with a 'planning by-law' (MI&M, 2011). The idea is that this would be a simpler, cheaper system, as well as lighter and more flexible. To provide 'optimal flexibility' (MI&M, 2011, 6) the minister promised to exercise restraint in prescribing planning and procedural requirements and actualisations. This consideration has fuelled a new debate about the role of plans in relation to the setting of legal norms (Van Buuren, 2011). The aim of the current paper is to review this debate and discuss its wider relevance for other planning systems. Does the new *Omgevingswet* and the debate on regulation versus land-use planning show potential of resolving the issue of the dual nature of plans, that is, both regulating current land use and planning the future?

The second section of this paper reviews the literature on this dual function of providing legal certainty and directing development in the context of Dutch planning. The third section presents a debate on the role of local land use plans or by-laws in the *Omgevingswet* in four subsections that consider a report by the Council of State, an intervention by the Association of Netherlands Municipalities (VNG), debates on a draft bill and the debate on a new planning approach, known

in Dutch as '*uitnodigingsplanologie*', or planning-by-invitation, which is developed as an alternative way to resolve this tension, in relation to the new legislation. These sections are followed by a discussion and conclusion.

2. Planning versus regulation

On the one hand, particularly under plan-led systems, plans provide the legal grounds for the permission of construction activities; they function as a kind of by-law with which to regulate land use. On the other hand, plans are not only about current land use, but they also comprise an idea of change going forwards into the future. The land uses specified in the plan may be different from current land use as plans entail a programme for change, which the plan aims to bring about by guiding new development. This programmatic function, 'the proactive governance of urban and regional change' (Gurran, 2011, 8), may therefore conflict with the regulation of current land uses, which '"reacts" in a passive way to proposals put forward by the private sector' (Gurran, 2011, 8). This tension also comes into play in deliberative-planning processes of 'open and transparent forms of decision-making throughout the implementation process' (Legacy *et al.*, 2014, 37), which may conflict with fixed regulatory frameworks.

One way of resolving this tension, is by moving away from statutory planning to performance based planning, such as, in the New Zealand experiment of the Resource Management Act 1991. Swaffield summarizes the lessons of this experiment in a single phrase: 'don't throw out the baby with the bathwater' (Swaffield, 2012, 419). Without regulation by planning, there is no tension to be resolved. The negative effects in terms of peri-urban sprawl are undeniable, but

there is, according to Swaffield (2012) no proof that the expected positive effects in terms of more economic development actually have occurred.

In the Dutch context, these tensions between the planning system which provides binding legal rules and the practice of development planning has been considered to be a problematic situation which many authors (Thomas *et al.*, 1983; Van der Ree, 2000; Mastop, 2001; Verhage, 2003; Buitelaar and Sorel, 2010; Janssen-Jansen and Woltjer, 2010; Buitelaar *et al.*, 2011) have reflected upon. The current situation is what Struiksma (2012, 78) characterises as a 'dual-track policy' in which the local land-use plan designates the existing situation and deviations from that plan are used to accommodate new development. This implies that legal certainty about future development opportunities is a legal fiction because changing a local land use plan, for example, through a development-led 'postage stamp plan' (Buitelaar *et al.*, 2011), is a discretionary decision.

There are a few exceptions to this practice, such as on new industrial estates, where the land is not only owned and serviced by the local authority, but where the local land use plan also provides legal certainty for companies who are willing to build premises and create new employment opportunities (Buitelaar *et al.*, 2011). Another exception is the use of outline local land use plans that include an obligation for the executive to enact more detailed plans before building permits can be issued (Dembski, 2013). These plans often include procedures that allow the executive some discretion to allow developments that anticipate such a detailed plan. It is not unusual that such a detailed plan is only enacted after all the development has taken place.

Internationally, too, the role of plans in 'conforming planning systems' (Janin Rivolin, 2008) has been debated, particularly when it comes to comparing British and continental planning systems

(Thomas *et al.*, 1983; Booth, 2007; Janin Rivolin, 2008; Janssen-Jansen and Woltjer, 2010; Muñoz Gielen and Tasan-Kok, 2010; Cotella and Janin Rivolin, 2011). Often it is indicated that although the legal systems are very different as 'proto-planning theories' (Faludi, 1987), planning practice itself is finding ways to resolve these tensions. The situation in Britain, where planning permission is required for development, may in some respects not be so very different from that in the Netherlands, where plans prescribe current land use and development requires the plans to be amended, which is done at the discretion of the local authority. Both systems create legal certainty for existing land uses, and both systems allow local authorities the discretion to approve new developments, although in different ways (by granting planning permission or amending the land use plan). Both planning systems encounter challenges when it comes to directing development. The main difference appears to be that in the Dutch system the legal fiction of plans providing legal certainty for development opportunities is incorporated into planning law. The idea is that these legal norms are to be developed in local land use plans in a coherent manner in advance of development initiatives rather than being rooted in individual decisions, which is, as studies have revealed (Thomas *et al.*, 1983; Buitelaar *et al.*, 2011), another fiction since many decisions are taken on piecemeal basis.

The traditional idea of resolving this tension is the idea that development will be guided through the implementation of the plan, and since the plan is a set of legal regulations, "implementation, then, boils down to upholding the plans" (Mastop, 2001, 231). Even exemptions to the plan are bound by the plan itself. Thus all subsequent decisions are bound by the framework set out in the plan. However, one of the problems of legally binding planning systems in relation to directing spatial development is that the plans 'must normally be drawn up some time in advance of the operational decisions through which they take effect' (Thomas *et al.*, 1983, 245), which means

that decision-makers face situations that have ‘not been anticipated fully’ (Thomas *et al.*, 1983, 245) by the plan. Although this provides legal certainty to landowners about their rights, it also may harm private investment if the provisions of the plan constrain the parties too much. In Dutch planning the ‘solution’ to this uncertainty is to prescribe the current situation. Plan makers show a reluctance to prescribe future developments in a legal sense. There is a range of reasons that may account for this.

Firstly, plan makers may be uncertain about exactly how to formulate the requirements set out in the plan, and using open plans is problematic. Since changing the current land use may harm some interested parties (traffic noise as a result of new development, changes in parking or roads to accommodate new development, biodiversity values on green-field sites, etc.), sound argumentation is necessary to balance all the interests involved. Using a very open plan means that planners have to show that their plan provides this balance in *all* the alternatives allowed by the plan. The plan is the one shot that the authorities have, so it must be on target, which is difficult if the development is in the distant future. The option of prescribing a specific future situation is usually not taken since experience has taught that this may not be the alternative that is perceived to be best at the time of development. Moreover, amending such an early plan that includes development rights is difficult because if rights are granted, compensation must be paid if those rights are later withdrawn by the authorities. This is particularly relevant in the Netherlands because compensation is, relative to other planning systems, very generous (Hobma and Wijting, 2007; Alterman, 2010).

Secondly, in legal proceedings concerning plans, the courts do not emphasise the role of the plan in providing flexibility to direct future developments, but rather “the main characteristic of the ‘bestemmingsplan’ lies in the fact that it is a regulatory zoning instrument.” (Van der Ree, 2000,

623) Consequently, critics of spatial planning highlight the need for less-specific and more flexible rules, which are subject to change. Drafting less specific and more flexible rules is more easily said than done, especially if legal certainty must be upheld. In contracting, an overarching objective good-faith principle can structure relationships, allowing parties to be less specific when drafting agreements (Van der Veen and Korthals Altes, 2009). This is possible because the parties have a contractual relationship that is maintained over time by mutual exchanges that lend new meaning to the contract, and learning may be promoted in this way (Van der Veen and Korthals Altes, 2012). The principles of good governance (like participation, decency, transparency, accountability, fairness, efficiency (UNECE, 2008)) are much less relational, placing more emphasis on third-party interests, and it may thus be more challenging to produce the precise wording necessary to promote legal certainty. This is easier in the context of contracting, where shared meaning between a relatively small number of parties can be developed over time.

The tension between the two functions of the plan has contributed to 'turbulence' (Mastop, 2001, 241) in Dutch planning and its legal-organizational setting. Mastop formulated a solution to split the Janus head of planning into distinct regulative and strategic instruments:

> "The legal status of Dutch strategic planning has been debated since its inception. The only way to deal with this problem is to make strategic planning and planning documents non-binding (…) and to secure existing rights by a zoning ordinance, which would only state the current situation. Such a situation would integrate the two aspects of any spatial plan – the description of the current situation and the recognition of existing rights on the one hand, and the proposals for future developments on the other. The first would be legally dealt with in the zoning ordinance. The second would be brought to bear on

> existing rights when decisive measures need to be taken. Public control over the development of politics would be confined to the political system." (Mastop, 2001, 246)

It is this solution that the minister (MI&M, 2011) advocated when replacing the Dutch local land use plan with a by-law with the possibility of a structure vision. Separating different functions in different instruments would do away with tension between the different functions within one instrument.

3. Debating the dual function of planning

This review is based on four incidents in the development of this debate between the regulative and planning functions of the plan. The first incident is the initiative of this bill. The review is based on a critical reading of the report of the Advisory Division of the Council of State on this initiative and the response by the Minister to it. The second incident is the further development of the bill, marked by actions of the Association of Dutch Municipalities (VNG) to bring the local landuse plan back in the law. The third incident is the so called 'test version' of the bill, which has been sent to umbrella organizations and which has been debated intensively in the field. The fourth incident is the idea of a new type of relationships between authorities, landowners and developers, which is called planning-by-invitation (*uitnodigingsplanologie),* which aims to bridge these two functions of plans in a novel way. The idea is that this new relationship will be facilitated by the new law. The contributions of critics are discussed.

3.1 Initiative: the critical report by the Council of State

The motivation behind the *Omgevingswet* is the perception that there are too many laws, which makes bringing projects forward a highly complex business. Each law has specific procedures, specific requirements in relation to compiling evidence on which a decision can be based. The idea is that the integration of laws (see Table 1) and the simplification of procedures will result in a system of environmental and planning law which is 'simply better' (MI&M, 2011). The ambitions of this legislative process are much higher than simply enacting a new planning law (Verschuuren, 2010) because it moves beyond planning law. This consolidation of laws in the field of the environment and planning was preceded by the consolidation of various types of permits, such as those for construction, installations, the natural environment, water issues, into a single environmental permit (*omgevingsvergunning*), which can be split into partial permits for specific activities (Meijer and Visscher, 2009; Van der Molen, 2015).

At the start of the legislative process, the Advisory Division of the Council of State (CoS, 2012) was critical of the way in which the *Omgevingswet* had been justified. The Division noted the lack of evaluations of previous attempts to improve legislation (sometimes made very recent, such as the Spatial Planning Act of 2008) and suggested that the government should organise the process in such a way that the evaluations could be taken into account. It is interesting that the last evaluation report published by PBL (Buitelaar *et al.*, 2012) does not indicate that major changes are effective and that fine-tuning actually has a greater impact in practice as local authorities stick to established instruments.

With regard to the emphasis on simplifying the relevant legislation, the Division pointed out that this complexity relates to the specific geographic, demographic, economic and ecological characteristics of the Netherlands, which means that within a confined territory justice must be done in the face of diverse and often divergent interests, needs and preferences.

> "Inherent to this complexity is the need for a system of rules that guides, harmonises, assesses and protects in order to bring about socially satisfactory decision-making. That system cannot but be a reflection of the reality of societal dynamics and the multiformity of interests, and a certain amount of complexity is thus inevitable. Even the new *Omgevingswet*, therefore, will not be able to provide a set of simple and transparent statutory regulations by which any desired spatial development can be realised" (CoS, 2012, 13 (translation by author)).

In relation to the planning system, the Division recalled the parliamentary discussions relating to the Planning Act in the 1950s, indicating that spatial planning implies that the State should manage territorial development to the advantage of the community. The Division described this as a process of balancing the need for sufficient space for societal needs, such as housing, work and transport, with the preservation or improvement of the usage of space in relation to experience, sustainability and vulnerable interests, such as socially vulnerable groups and biodiversity.

> "The basic principle of spatial planning is therefore an integrated assessment of spatial developments in an area. The central function of the municipal land use plan within spatial planning law is the expression of this integrated assessment" (CoS, 2012, 5 (translation by author)).

The role of local land use plans has been diminished through centralisation, the larger role for project decision-making and the demand for swifter decision-making without integrated assessment.

The Division explored the debate between plan-led versus project-led decision making extensively. The concept of project-led decision-making is different from development-led decision-making since it may also entail decision-making on government projects. Referring to a letter from the minister in which she stated that she was considering replacing the local land use plan with a by-law, the Division indicated that with the local land use plan, the 'planning and steering function' (CoS, 2012, 22) of municipal spatial policies may also be lost. A legally binding plan is produced according to a procedure that provides legal protection to citizens. If, under procedures in this plan, exceptions are decided on, the local land use plan functions as a frame of reference within which these decisions can be judged in relation to the interests of stakeholders.

> "The direction of spatial development through project decision-making, without a legally binding spatial plan as a frame of reference, would have to include a separate and relatively elaborate justification of all the effects of the project on the physical environment. This would, from the perspective of policy consistency, involve significant disadvantages" (CoS, 2012, 22 (translation by author)).

The Division noted the lack of a link to land policy and land policy instruments, such as development agreements, pre-emption rights, compulsory purchase and a discussion of the impact of European single-market regulation. Land policy instruments are often founded on a plan-based approach and deviating from this approach would impact on these land policy

instruments severely. Furthermore the Division indicates that no legal changes are necessary to accommodate a place-based approach since this can be pursued by combining different decision-making procedures.

In March 2012, the minister informed Parliament about the progress being made in relation to the *Omgevingswet* (MI&M, 2012a). On several occasions she referred to the advice of the Division, but not to the issue which is at the core of this paper: the critical remarks made by the Division regarding planning, legal certainty and flexibility. This was, however, not the end of the debate on these issues. Others participants in the debate were also critical of the idea that a place-based approach might necessitate substituting the plan for a by-law.

3.2 The development of the law: the intervention of the VNG

The Association of Netherlands Municipalities (VNG) commissioned a report on the challenges of the new *Omgevingswet* for municipalities (De Zeeuw and Hobma, 2012), which was published with an accompanying managerial memorandum by Peter Noordanus (2012), currently mayor of Tilburg, but who previously had many functions in the field.

The results of the research report do not indicate that a by-law system would have any advantages over the continuation of the local land-use plan practice, because it would not contribute to addressing the challenges currently faced by local authorities in relation to legal bottlenecks (De Zeeuw and Hobma, 2012). The managerial report indicates that there is a significant concern

> "…about the introduction of the environmental by-law [*omgevingsverordening]* as a univocal instrument to replace the local land-use plan. […] The local land-use plan must be retained in the new environmental regulations. Where necessary, the area development function of the local land use plan should be enhanced, which would enable this plan to have a full and proper position in the new *Omgevingswet*." (Noordanus, 2012, 1-2 (translation by author))

Noordanus (2012) also expressed his concern about project decisions made by higher tiers that could undermine the balanced consideration of interests in the local land use plan and indicated that the replacement of the local land use plan by a by-law would be an unnecessary, expensive and complicated operation.

The first response by the minister was to reiterate the importance of replacing the land use plan with a by-law, and she also represented this as a *fait accompli* (MI&M, 2012b). A few weeks later the minister, in a letter to parliament, left the issue rather more open and stressed that it was in the interests of both the VNG and herself to produce effective legislation. She also indicated that, based on these shared interests, there would be constructive talks on testing the municipal *omgevingsverordening* in a 'digitally designed and geometrically referenced working model' in order to address the VNG's questions about the new instrument and reach a better consensus (MI&M, 2012c, 3). In mid-February 2013 this course resulted in an agreement with the local authorities that a plan (and not a by-law) would be the central document in the system (VNG, 2013a). The changes would be not so much in the form (from plan to by-law) but in the scope of the plan, which would incorporate environmental issues as well as physical planning.

The VNG's intervention resulted in an emphasis on the planning function over that of providing legal rules. There was an acceptance of the idea that urban area development is a process in which local authorities face challenges which need to be addressed and that land use plans have an important function in this process.

3.3 Discussing the Bill with professionals: the test version

The next step was that the ministry sent a 'test version' of the new bill to a selection of stakeholder umbrella organisations for feedback. In addition to the reactions of these umbrella organisations, such as the VNG (2013b), the test version was also reviewed and debated in professionals journals.

In the test version of the bill, the '*omgevingsplan*' was formalised as a legal principle: a plan (as a decision of general application) is subject to objections and appeals by affected parties; there is no recourse to such procedures in the case of a by-law, which is a generally binding regulation (De Groot *et al.*, 2013). The other difference lies in the fact that the *omgevingsplan* has a clear planning function - for example, the plan may contain area development rules to guide development.

In the explanatory memorandum, the imbalance between certainty and flexibility was highlighted as one of the challenges that the new legislation must address (MI&M, 2013). One of the problems of the old system was that if an outline plan was chosen, leaving the executive with some flexibility, the municipality must show that in all permitted circumstances the plan would meet all the requirements - in relation to noise for example. This requires a large investment in

order to study all the possible alternatives. Many alternatives would not ultimately be chosen. Alternatively, a blueprint plan to limit the evidence base to one option may not fit with future contingencies. The explanatory memorandum indicates that, on the one hand, by taking an integrated approach and, on the other hand, by extending administrative discretion, this tension could be resolved and the new legislation would enable an active and flexible approach to achieving environmental goals. It is not, however, entirely clear how this will be realised. One of the options presented is the decoupling of environmental values from separate decisions. Traditionally, Dutch land use plans "cannot be approved if environmental conditions are below legal standards" (Van Rij and Korthals Altes, 2014). Decoupling would thus imply that the plan is no longer an integrated framework in which all decisions come together, but that even if a plan says that a certain land use is acceptable, this may not in fact be acceptable on environmental grounds (MI&M, 2013, 21). So although the law had become more integrated and the name of the plan suggests that its scope is broader, it was in fact less integrative, bringing an extra paradox to the process - namely, the disintegration of the plan was promoted as an answer to the quest for integrated decision making. The idea that there are limits to this decoupling was indicated in the explanatory memorandum, which states that decoupling 'is not possible for norms that most directly affect specific activities' (MI&M, 2013, 21). As such, a plan promoting a development that would destroy the habitat of endangered species may not become statutory. Critics indicated that it was unclear how this system would operate in practice (De Groot *et al.*, 2013).

It must be noted that many of the current requirements for the local land-use plan are based on case law where, on the basis of legal certainty and principles to ensure the quality of decision making, the courts have ruled that extra requirements were necessary. The current text shows

that the same process may also happen with the new *omgevingsplan*. Indeed, the interpretation of 'norms that most directly affect specific activities' certainly implies that this may affect decisions relating to major changes in land use. Thus if rural land is to be built upon, a survey of biodiversity values must be carried out. Since there are no formal rules relating to road capacity, the local land use plan is the last chance for interested parties have to raise their issues, so it seems likely that courts will rule that the potential congestion caused by the largest development programme permitted is an interest that must be taken into account. In short, legal certainty would bring the decoupling of decision-making to a halt.

These considerations, which suggest that the *omgevingsplan* will not integrate all policies, are contradictory to other statements which suggest that all the requirements of the local authority can be found in a single *omgevingsplan*, for which critics indicate that it may not always lead to the simplification and clarification that is desired: "Merely the consolidation of regulations can, if accessibility has not been considered fully, (…) have precisely the opposite effect" (De Groot *et al.*, 2013, 635 (translation by author)). These critics indicate that the practice of the all-in-one permit (*omgevingsvergunning*) has shown that many people request partial permits, suggesting that the demand for 'one-stop shopping' when it comes to approval from the authorities is lower than expected (De Groot *et al.*, 2013; Hillegers *et al.*, 2013).

Given the comments above, it is not surprising that the VNG (2013b), using the challenges formulated earlier (De Zeeuw and Hobma, 2012), indicated that, in view of the uncertainties that currently exist, it was too early to provide a definite answer to the question of whether the new legislation truly would promote flexibility, which is what local authorities want. The ministry thus came under pressure to take further steps to ensure this.

3.4 Planning-by-invitation

One concept that emerged during the debate on the *Omgevingswet* is *uitnodigingsplanologie,* a compound of the Dutch nouns for 'invitation' (*uitnodiging)* and 'planning' (*planologie*), which can be translated as planning-by-invitation. The concept was launched in a recommendation by three advisory councils (RLI *et al.*, 2011). The idea is that planning-by-invitation can be used to facilitate the development of local interests as an active approach within the idea of organic development (Van Baardewijk *et al.*, 2013; Van Baardewijk and Hijmans, 2013a; 2013b). The concept of planning-by-invitation can also be described as 'planning by request for proposals', which implies that the authorities would still retain a crucial role in evaluating the proposals brought forward by societal actors when current land uses are changed. It does not facilitate private development based on classical 'permissive planning' (*toelatingsplanologie*) (Needham, 2005), whereby the authorities adopt plans and enforce them by establishing whether a private initiative conforms to them, because the approach of planning-by-invitation leaves some discretion to assess these initiatives.

The idea of the advisory councils is that private parties "will increasingly want to (and will) take the initiative for developments which were formerly the exclusive domain of local, regional and national government," (RLI *et al.*, 2011, 3) and "that private parties and civil society can be challenged to come up with creative and innovative solutions which enjoy community support. (RLI *et al.*, 2011, 3) The councils advised to incorporate planning-by-invitation in the *Omgevingswet.* With regard to balancing flexible planning and a commitment to legal certainty, the advisory councils lean towards the former. "The councils recommend adopting more flexible

provisions for dealing with established rights in environmental and planning law." (RLI *et al.*, 2011, 13) Forward-looking private initiative is valued higher than previously established private-property rights.

The concept of planning-by-invitation was discussed extensively in the memorandum of explanation in the test version of the *Omgevingswet*. The situation has been defined as follows:

> "Planning-by-invitation involves the organic development of areas and locations, i.e., with no precisely defined blueprint, but with a preferred development direction based on a vision for the area. This vision may be incorporated into an area programme or be part of the municipal environmental and planning vision [*omgevingsvisie*]. Organic development planning does not pretend to anticipate all the potential development initiatives and the exact desirability of each. It requires a type of plan whereby no rigid blueprint is defined, but that enables a range of interpretations, realisations and constructions. This allows for a proper balance between, on the one hand, providing freedom and, on the other hand, the need for predictability and (legal) certainty" (MI&M, 2013, 165 (translation and italics by author)).

The idea is that the government does not dictate a plan, but invites other players to put their ideas forward. The minister indicates that planning-by-invitation will be facilitated by the new legislation. For example, certain obligations relating to evidence and determining development obligations can be postponed until the first permit (*omgevingsvergunning*) for construction is issued. In short, the idea is that players in the area are invited to contribute to the planning processes by providing them with a more open local land-use plan. The downside of this extra flexibility is that such a plan provides less legal certainty upfront.

As such, planning-by-invitation makes a manifest appeal to the trustworthiness of the government since parties willing to join the process at the invitation of the authorities wish to have a degree of certainty before they are willing to invest time and money in the process (Van Baardewijk and Hijmans, 2013b). Based on an analysis of case law, they show that this certainty can only be based on their knowledge of the informal 'user's manual' of government, because a judge will rarely rule that a promise by a government official, whether it is a civil servant or a politician, is valid (see also Hijmans and Ürper, 2012). The best that a private player can usually get is commitment by officials to perform to the best of their ability, which can be resolved by submitting a proposal to the decision-making body including what has been promised, but without any guarantee that this body will decide in conformity to this proposal. Planning-by-invitation must therefore be based on extra-legal relational assets.

4. Discussion

There has been criticism about the claim that the new law caters for a 'simply better' planning system. Although some have taken a positive attitude and indicate that the law could potentially contribute to better regulations, the claim of 'simplification' would seem to be baseless: it remains a very complex issue.

The legislative plans failed to make a clear distinction between the regulative function and the directing function of planning and environmental law. The idea that the tension between legal certainty and flexibility can be resolved turned out to be a *fata morgana*. The *omgevingsplan* combines both of these functions and, given the criticism of the 'test version' of the bill, there

are still many issues to be addressed before the system can justify the claim that it is indeed better than the previous one.

Since the Council of State (CoS, 2012) has already indicated that the *Omgevingswet* project is not based on any evaluation of previous legislative changes, the normative basis for what is a better legal system appears to rest on gut feeling rather than on a rigorous comparison of the functioning of the current system and the future system by the ministry. In this sense, the VNG follows a different strategy. By formulating the challenges that the present legal system creates for local authorities (De Zeeuw and Hobma, 2012), the VNG is able to assess whether the bill may help to face these challenges (VNG, 2013b). However, the answer, at least on the issue addressed in this paper, is inconclusive. This is an issue because the Cabinet has now sent the bill to Parliament after receiving critical formal advice from the Council of State (TK, 2014). Many of the issues have not been addressed in the law itself, but are to be addressed in Royal Decrees and Ministerial Regulations, which do not require parliamentary consent, but, at best, parliamentary consultation. This raises issues relating to quality of legislation as critics indicate that key matters relating to the rule of law must be decided on in Parliament and not be based on a hollow law that gives discretionary powers over major issues in the system to the executive (De Groot *et al.*, 2013).

Renewing planning law to incorporate this into environmental law may not resolve the tension between legal certainty and flexibility. It may even exacerbate the issues because not only will questions of land use be at stake, but all kinds of environmental aspects will add to this tension. Legal certainty relating to, for example, noise levels would thus come into play. However, these issues relate to the integrative nature of Dutch planning (Runhaar *et al.*, 2009), which may currently already be impacting on development decisions, as shown by the impasse reached on

air quality regulation in Dutch planning a few years ago (Van Rij and Korthals Altes, 2014). In other systems, such as in Britain where planning permission and environmental permit proceedings 'are separate but closely linked' (Environment Agency, 2012, 8), the step towards the full integration of environmental and planning law may be an even larger one and have an even larger impact on the balance between legal certainty and flexibility.

The notion of planning-by-invitation is another way to resolve the tension between planning and regulation. The idea is that in planning-by-invitation, the initiatives of private actors go beyond what is currently considered to be the activity of private parties. This is in addition to old-style facilitative planning, which is based on legal certainty in which the authority sets the rules and waits for market parties to come up with initiatives. The authority then provides permits if these proposals conform to the plan. It is also in addition to a style based on initiating public-private corporation in which there is considerable mutual exchange when designing new developments. These private-party activities may also extend to the construction of highways, for example. The difference with old-style facilitative planning is that authorities have full discretion to turn initiatives down, but the idea is that the private sector will come up with such fascinating and convincing projects in response to the invitation issued by the authorities that this issue was not prominent in the memorandum of explanation. The same holds for the position of third parties. The minister indicates in the memorandum of explanation that the bill is facilitating planning-by-invitation, and by 'removing legal barriers' (MI&M, 2013, 98; TK, 2014, nr.3-263), governmental discretion is expanded. In relation to the balance between the guiding function of planning and the principles of legal certainty, planning-by-invitation is fully committed to the guiding function, but will take more of a backseat in this. It will not guide by example, it will not guide by initiative, but it will guide by a wait-and-see approach in relation to private initiative

and the discretionary weighting of these initiatives on their actual merits. Under this approach, private initiative is not promoted by legal certainty, because authorities cannot foresee what innovations are to come; rather it is based on trust that executive authorities will come to a decent decision.

All in all, if the bill is accepted by Parliament in its present form, it will be agreeing to the guiding principles of this act: to make the legal system more integrative, more flexible and more open to private initiative. However, Parliament will have insufficient means by which to judge whether this will be the result in practice. The bill operates as a guide to administrative operations. It creates plenty of scope for discretion on the part of administrative bodies, but this does not necessarily mean that they will be able to exercise this discretion. Interested parties going to court may find a judge who is willing to uphold the rule of law and the fiction that at any given moment there is full certainty about the material nature of one's rights. Earlier experiences of the haphazard incorporation of environmental law into spatial planning law, such as air quality regulations (Van Rij and Korthals Altes, 2014), have demonstrated that courts can only apply the emergency brakes by nullifying decisions, and so on, bringing the system to a standstill and that careful legislative planning is necessary to rectify these issues. It may not be the case that many critics (De Groot *et al.*, 2013; VNG, 2013b) are inconclusive about what the law will mean because it is not detailed enough. Royal Decrees and ministerial regulations cannot amend law, and putting a large part of planning law in such documents may produce legal uncertainty. This issue is especially relevant as the current legislative process is not being informed by a sound assessment of previous legislation. The experience of the first evaluations of the 2008 law, a process that was halted in 2012, showed that local authorities may fall back on known instruments (Buitelaar *et al.*, 2012), and so planning reform itself may result in a loss of

confidence in planning expertise (see also Gunn and Hillier, 2014). Consequently, the effectiveness of the new law in terms of changing practice may be limited.

5. In conclusion

Dutch planning reform originally was aiming to strengthen the principles of a conforming planning system (Janin Rivolin, 2008), that is, development proposals must comply with pre-set rules, by replacing the plan by a by-law. The return to the plan, i.e., the 'omgevingsplan' as integrated local land-use and environment plan, involved a step back to the current situation of a plan with a Janus head. The, consequent, step towards planning-by-invitation seems to be an even more complex mix of a conforming and a performing planning system. On the one hand, the plan-as-invitation provides certainty to landowners that development may commence, but on the other hand, the step from this invitation to a plan involves a performance-based evaluation by the authorities, which leaves the question whether this invitation will be more than the legal presumption in favour of sustainable development in the English planning system, which is heavily criticized because its incoherence and which results in many legal issues (Lees and Shepherd, 2015).

The wider relevance of this case is that it shows that it is very complex to navigate between the regulative and programmatic functions of planning. Just as the doubtful solution of moving from statutory planning to resource management in New Zealand (Swaffield, 2012) has not resolved this issue, as it involved an abolishment of planning values in resource management, the Dutch example does not provide an easy solution to make planning simply better.

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