Towards a new legislative framework for spatial planning – the Environment and Planning Act

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Key words: spatial planning, planning reform, digital information system, legislation

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SUMMARY

The Dutch government aims to simplify and align all legislation in the spatial and environmental planning domain by integrating the existing set of rules and legislation into one Act: the Environment and Planning Act. It will merge 26 laws from the environment, water, nature, spatial planning, and housing domains into a single Act, and reduces the number of regulations and decrees from 240 to 14.
The Environment and Planning Act comes with a new digital system to allow equal access to information for all stakeholders. By one click on the map the initiator, citizen and government alike can retrieve relevant information about current planning rules and regulations and can find out if additional investigations are required for certain spatial developments or activities. The digital system combines geo-information and administrative data and is organized by theme: air, soil, noise, water, waste, heritage, nature, external safety, construction, and space.
It is contested by some whether the proposed Act and its decree will live up to the expectations. The dualistic nature of the land use plan is criticized as it is meant to regulate existing land uses on the one hand and to direct new developments on the other hand. A point of concern with respect to the land policy instruments relates to the tension between providing legal certainty for land right holders and simultaneously providing flexibility for spatial developments, i.e. no blueprint planning but organic development based on public-private initiatives.
The aim of this paper is to reflect on where we stand now and on the way forward with respect to the new Environment and Planning Act, its land policy instruments, and the digital system that has to support the spatial planning processes.

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1. WHY NEW LEGISLATION

Spatial planning is about governing land use in relation to spatial developments. Apart from specific legislation for spatial planning, legislation from other domains demarcates possibilities and impossibilities for certain spatial developments. Environmental regulations for example may restrict land use next to vulnerable nature areas, because of the expected negative impact of carbon dioxide emissions on the protected nature values. Contemporary complex spatial issues demand a flexible and coherent approach towards initiatives from society (Vereniging Nederlandse Gemeenten, 2016). Or in terms of planning: from planning-by-permission towards planning-by-invitation.
Over time, the legislative framework for the environment and for spatial planning expanded and turned into a complex system of over 40 laws, 120 general administrative orders and hundreds of regulations, which hinders a coherent approach towards governing land use and spatial developments. As of the year 2021, all legislation and regulations in the environmental and spatial planning domain will be bundled into one Act, into one 'point of contact' and into one procedure, thereby reducing the procedure period from 26 weeks to 8 weeks.

The aim of the new Environment and Planning Act, as described in the act itself (art. 1.3), is twofold. It has to contribute to: (1) achieve and maintain a safe and healthy physical environment and environmental quality, and (2) to manage, use and develop the physical environment to fulfil societal functions (Staatsblad, 2016).
This is to be achieved by the following four improvements (Ministerie van Infrastructuur en Milieu et al., 2016):

- Increase insight in, predictability and ease of use of the environmental law
- Effectuate a coherent approach towards the physical environment in policy, decision-making and regulations
- Increase the discretionary power of governments to enable a flexible and active approach.
- Speed up and improve the decision-making about projects.

The Act comes with a digital information system to retrieve relevant data as this is considered to be a condition for a successful implementation of these improvements.

In the following chapter the new Environment and Planning Act and its legislative framework will be elaborated further. Chapter 3 focuses on the various planning instruments and documents that the national, regional, and local government authorities have at their disposal. The digital system that will support the information need in the environment and planning arena is explained in Chapter 4. The foreseen land policy instruments that will govern land

tenure in relation to spatial planning are described in Chapter 5. At last, we will discuss and reflect on the proposed planning reform and its impact on practice.

2. STRUCTURE OF THE ENVIRONMENT AND PLANNING ACT

The proposed legislation for the environment and spatial planning domain entails a system of law, general administrative orders and other regulations (Ministerie van Infrastructuur en Milieu, 2017a). The first legislative tier consists of the Environment and Planning Act (Staatsblad, 2016) itself. Later, the Act will be supplemented by specific law for the themes land tenure, soil, nature and sound (Figure *1*). The supplementary law is based on current legislation for these sectoral themes.

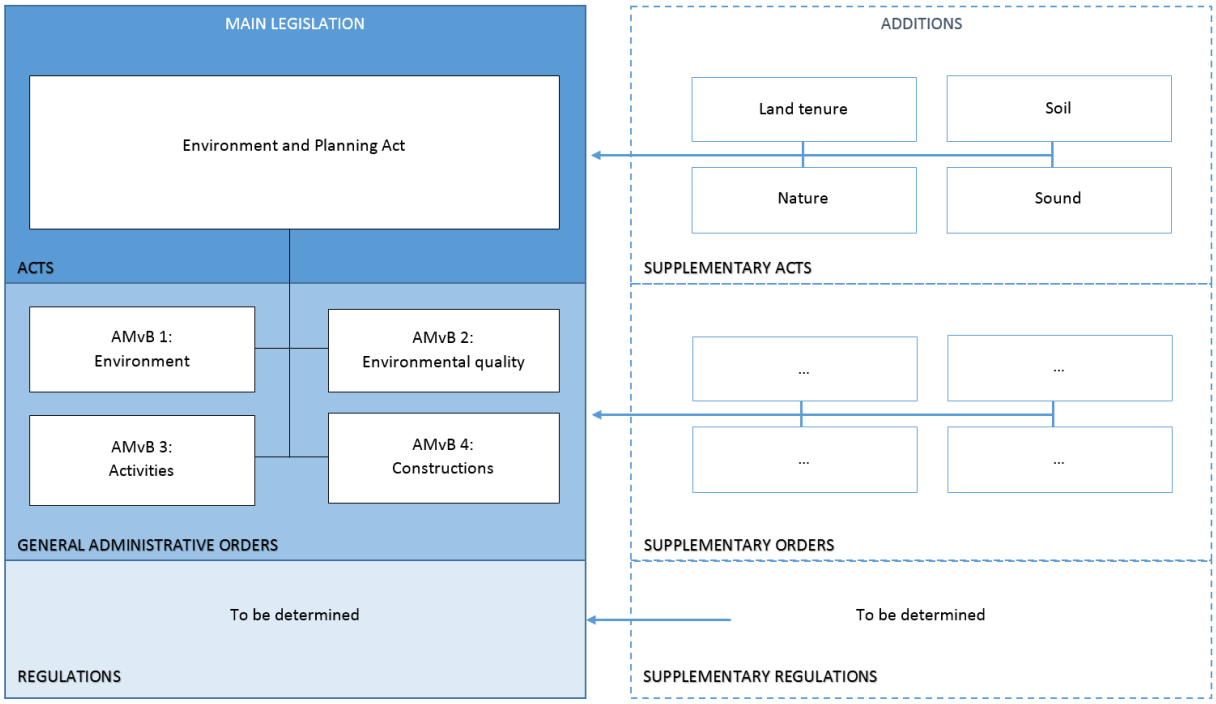

Figure 1 Structure of the Environment and Planning Act, its Administrative Orders and Regulations, based on 'infographic renewal environmental law' (Ministerie van Infrastructuur en Milieu, 2017a)

The second legislative tier consists of a set of General Administrative Orders (AMvB). Currently, four General Administrative Orders are specified according to four themes: (1) the environment, (2) the environmental quality, (3) the activities, and (4) the constructions (Ministerie van Infrastructuur en Milieu, 2017b).The environment order distributes responsibilities among government authorities, procedures, the involvement of other authorities and advisory bodies in the decision-making process, and the environmental assessment among others. The environmental quality order sets norms for municipalities, provinces (regional government), water boards and the national government to meet the national goals and international obligations. The activities order describes general rules to

which citizens and businesses must comply when employing activities in the physical environment. The rules aim to protect the environment, infrastructure, water bodies, and heritage among others. This order also determines which activities require a permit.
The constructions order describes rules regarding safety, health, durability and sustainability when renovating, constructing, using or demolishing buildings and constructions.
The third legislative tier consists of regulations regarding the domain of environmental and spatial planning. Such orders and regulations further elaborate legislation and provide a higher level of detail than the Act itself.

3. PLANNING INSTRUMENTS AND DOCUMENTS

Several planning instruments form the pillar for the environmental and spatial policy of the multi-tiered government (national, regional and local). Available instruments in the toolbox are, for example, the environmental and planning vision, environmental plan, project decision, environmental by-law, water board by-law and environmental permit (Table 1).
All government tiers have to have an environmental and planning vision. The concrete environmental and spatial approach at the local level is specified in the environmental plan. Each municipality has to develop and approve one environmental plan with rules and regulations for the physical environment (art. 2.4 in the Environment and Planning Act). Likewise, each water board and each province has to develop and approve a by-law (respectively the waterboard by-law and environmental by-law) with rules and regulations for the physical environment (art. 2.5 and 2.6 in the Environment and Planning Act). The authority for taking a project decision is reserved for the national government, province or water board. It allows them to directly intervene in the environmental plan from the municipal, and thereby can overrule their policy in the interest of the complex project.
All government tiers can designate certain activities that require an environmental permit. The national government has to do so in either the general administrative order 'activities' or 'constructions'. The province has to specify activities that require a permit in their environmental by-law, the municipality in their environmental plan, and the water board in their water board by-law. For the procedure for granting permission is referred to the General Administrative Law Act (Staatsblad, 1992). It is recommended that the applicant preliminary consults the responsible government to discuss if a permit is required or that a notification will suffice.

Table 1 Overview of planning instruments and documents (source: Aan de slag met de omgevingswet, 2018)

Planning instrument or document	Explanation
Environmental and planning vision	A long-term strategic vision for the physical environment, including the coherence between space, water, environment, nature, landscape, traffic and transportation, infrastructure, and heritage.
Environmental plan	Describes the rules and regulations for the physical environment set by the municipality.
Programme	Elaborates a specific topic or area from the environmental and planning vision.
Project decision	Gives authorisation to execute a complex project in the physical environment, and can overrule the rules and regulations in the environmental plan.

Environmental by-law	Describes the rules and regulations for the physical environment set by the province.
Water board by-law	Describes the rules and regulations for the physical environment set by the waterboard.
Environmental permit	Gives permission for one or more activities in the physical environment. Permission applies to the applicant of the permission. All government tiers can designate activities that require a permit.

4. THE DIGITAL SYSTEM

Digitalisation is an important pillar of the new Environment and Planning Act. Providing one digital data warehouse for all relevant environmental and spatial information should lead to equally informed parties (government, businesses and citizens alike). It aims to increase transparency and clarity about the information used for decision making. Access to relevant information is provided for all users by one click on the map.

The new digital system is the central access point for all stakeholders that holds all relevant digital information, on a geographical basis, about the physical environment. The digital system supports three main processes in the domain of spatial planning (https://aandeslagmetdeomgevingswet.nl/digitaal-stelsel/hoe-werkt-het/):

- Spatial plans: the process from development and publication of a spatial plan to consultation of the published plans by stakeholders.
- Planning permissions: supports the process from idea to submitting a request for a planning permission. It provides information about location-bound planning rules and regulations.
- Information: providing specific location-bound information about noise, soil, and water for example.

Figure 2 gives a schematic overview of the digital system (Ministerie van Infrastructuur en Milieu, 2014). The digital system was designed keeping three user types in mind: (1) the initiator, (2) stakeholders, and (3) authorities. Depending on the situation, an initiator, stakeholder or authority wants to orientate him or herself about possibilities to use, develop or adjust the physical space. Information is retrieved to be able to judge whether the development or adjustment is possible at all or that a permission is required. When a permission is needed or the activity has to be reported, then the initiator has to submit a request. The request is taken into consideration, the responsible authority takes a decision, and informs the initiator and stakeholders.

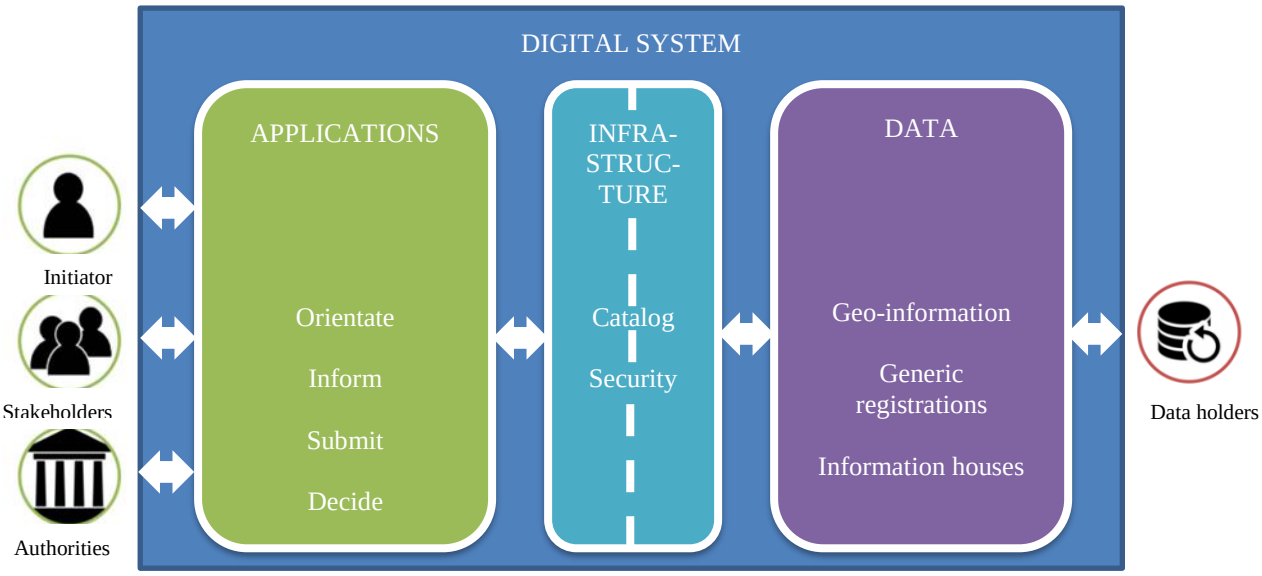

Figure 2 Schematic overview of digital system for the Environment and Planning Act (source: Ministerie van Infrastructuur en Milieu, 2014)

Dissemination of the required data relies on the available set of key registrations and other generic registrations. Some of the key registrations hold geo-information, while others contain administrative data. Ten different 'information houses' unravel the available data by theme. Distinguished themes are noise, water, soil, nature, external safety, air, heritage, space, construction, and waste. The intermediate infrastructure matches the information need with the available information in a structured way.

1. Draw up the environmental and planning vision
2. Draw up programme
3. Draw up environmental plan
4. Provide information
5. Answer questions
6. Explore initiative
7. Notification initiator
8. Notification nuisance
9. Permits and exemptions
10. Monitoring
11. Detect
12. Impose sanction
13. Enforcing sanction
14. Levy
15. Settle objections
16. Risk assessment

Figure 3 Municipal processes (source: VNG, 2016)

The association of Dutch municipalities has investigated what the new legislation will imply for their processes and information management (Vereniging Nederlandse Gemeenten, 2016). They found that the Environment and Planning Act inflicts a major impact, content-wise or content- and process-wise, on 12 out of 16 distinguished processes (Figure 3). Add to that the fact that municipalities often work together with multiple parties (other governments, governmental organisations, public-private partnerships, or consultancies), and it is obvious that the complexity of various use cases for the digital system will increase.

5. LAND POLICY INSTRUMENTS

Modifications in land use inevitably interrelate with land tenure. However, this specific aspect was hardly mentioned in the debate about the reforms. In the early stages of the planning reform, the Advisory Division of the Council of State placed some critical remarks regarding the lack of notion about the need for land policy instruments to implement location-bound spatial developments (Council of State, 2012). Currently, all available land policy instruments, such as pre-emption rights, self-realization principle, land consolidation, or compulsory purchase, are foreseen to be bundled in one supplementary Act about land tenure (see Figure 1). Additionally, a new instrument for land readjustment in urbanized areas, will be introduced.
Major amendments to the land policy instruments itself and their applications are not foreseen, except for the expropriation law. To speed up the expropriation procedure, it was proposed that executive actors, e.g. commercial parties, could also take the decision to designate parcels for expropriation. This led to criticism. Sluysmans (2016) argues that such a substantial change, which implies also a shift from civil court to administrative court, will negatively affect the legal protection of citizens land rights.
After reviewing the bill of the supplementary Act for land tenure, the Council for the Environment and Infrastructure (2017) did advise to take the opportunity to modernise the land policy instruments in line with the ideas of the Environment and Planning Act. They recommended for example to speed up expropriation procedures, give executive parties – next to governments – also access to certain land policy instruments, to interconnect self-realisation to a realisation obligation, and to extend and simplify possibilities for the distribution of costs.

The supplementary Act about land tenure will be added and enacted after the Environment and Planning Act has come into force (foreseen in 2021). To what extent the bill of the supplementary Act will be amended based on the reactions from stakeholders about the draft publication is not yet clear.

6. DISCUSSION AND CONCLUSIONS

The aims for the new legislative framework in the environmental and planning domain are ambitious. Contemporary developments demand a lean legislative framework that provides discretionary power for governments to decide about complex developments. This idea moves away from the traditional planning-by-permission, where land use plans prescribe current land use and development requires the plans to be amended at the discretion of the local authority, towards a planning-by-invitation (Korthals Altes, 2016). The latter involves a more facilitating role for governments, whereby governments ‘invite’ stakeholders to take up spatial developments. In a win-win situation, this approach will probably have benefits for involved stakeholders. But does it also work in more problematic situations or for spatial developments that accommodate ‘unfavourable’ land uses such as nature protection. The tragedy of the commons (Hardin, 1968) learns that it is difficult to protect common values

such as environmental quality or biodiversity. The transition towards a sustainable spatial development (economic, environmental and social), in the interest of 'the commons', needs a leading role of the government.

Calling for flexibility is at odds with providing legal certainty for land right holders. Planning-by-invitation may lead to diverse planning processes, diverse forms of participation, and diverse outcomes. Further decentralisation of responsibilities and discretionary powers to lower tiers of the government, may on the one hand facilitate a more flexible approach tailored to the complexity of the situation but may on the other hand also lead to different outcomes among municipalities. Different outcomes in similar situations may negatively inflict the perceived reliability of the government. Practice will learn how governments, businesses and citizens will deal with insecurities that come along with the demand for flexibility.

The novel way in which the legislative reform is taken into consideration in conjunction with a revision of the digital information system gains a warm approval. However, it is like the prisoners dilemma. Designing an information system for such a complex matter, while the formal institutions (the legislative framework, the distribution of responsibilities, procedures and processes) have neither been established nor settled yet, is impracticable. Enacting legislation without having a proper information system is undesirable as well. The mutual dependencies between legislation on the one hand and the digital information system on the other hand, requires a highly interactive and iterative development process. Until planning practice has led to a common understanding of the reformed legislative framework, it will be difficult to describe the user needs for the digital information system.

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BIOGRAPHICAL NOTES

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