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Summary

Title: Transferable development rights. Instrument of land use policy for the recovery of planning gains and equalisation

I GENERAL

The Dutch government pursues a spatial planning policy and a land use policy. In its spatial planning policy the government determines the desirable types of construction and use. This spatial planning policy is then worked out into zoning ordinances. By pursuing a land use policy, the government aims to ensure that these zoning ordinances are actually implemented.

This legal research concerns the instrument of transferable development rights. In this study, ‘transferable development rights’ are understood to mean an instrument of land use policy, by virtue of which value increases resulting from relaxations of zoning restrictions – also referred to as planning gains – can be recovered. It is assumed that these recovered planning gains will be used to provide (financial) support to loss-making spatial developments. Therefore, the instrument of transferable development rights provides not only for the recovery of planning gains, but also for equalisation.

The interpretation given to the instrument of transferable development rights in this research, deviates from the meaning accorded to transferable development rights in the Land Use Policy Memorandum (*Nota Grondbeleid*) and the policy documents issued pursuant to it. In these policy documents, the application of transferable development rights implies a separation of land ownership from the right to develop that land, whereas the interpretation adopted in this research does not entail any such separation.

II BACKGROUND AND THE QUESTION ADDRESSED

Current Dutch law entails that any value increases arising from zoning changes will accrue to the land owner. If municipal and other governmental authorities own the land, these value increases will accrue to them. If, on the other hand, the land is owned by private parties, then, in principle, these private parties will be the only ones to reap the financial benefits of a relaxation of zoning restrictions. In cases of expropriation, the government must provide compensation for the land value that results from any relaxation of restrictions. Furthermore, if land owners facing the threat of expropriation invoke their right to realise a spatial function envisaged by the government themselves, the government cannot enforce the recovery of planning gains.

Since the value increases resulting from relaxations of zoning restrictions accrue to the land owner, it is advantageous to the government to pursue land use policy from a position of ownership. This is known as an active land use policy. If the value increases arising from relaxations of zoning restrictions accrue to governmental authorities under such a policy, and the authorities then sell their land, they can use the proceeds to fund loss-making spatial developments. As these proceeds include the planning gains, it can be argued that by pursuing an active land use policy the government will be achieving equalisation between these gains and the costs of loss-making developments. Land held by private parties, particularly surrounding urban areas, prevent the government from using an active land use policy to recover planning gains and thereby to pursue equalisation.

In recent years, local authorities have increasingly used a number of instruments which – in cases where zoning restrictions are relaxed at the initiative of a private party – result in an equalisation between the costs of loss-making developments and the gains arising from the relaxations of restrictions. These instruments essentially amount to the recovery of planning gains and equalisation. However, the legal validity of these equalisation instruments is open to question. For instance, it is not clear what restrictions apply to the right to enter into land exploitation agreements, as derived from article 6.24, paragraph 1, subparagraph a, of the Spatial Planning Act (*Wet ruimtelijke ordening*).

Given that the recovery of planning gains and equalisation cannot always be achieved through an active land use policy and that there are restrictions attached to the equalisation instruments, policy documents issued by central and decentralised governmental authorities have given consideration to a general instrument to allow for the recovery of planning gains and equalisation where land is in private hands. Transferable development rights in the sense of this research would be such an instrument. The question addressed is therefore: would it be possible and desirable, with the intention of pursuing the recovery of planning gains and equalisation, to apply the instrument of transferable development rights in the Netherlands?

III STRUCTURE OF THIS RESEARCH

The question addressed was answered in three steps. Firstly, consideration was given to the fact that the instrument of transferable development rights is applied in the United States. In order to investigate whether there are lessons to be learned from experiences in the United States, the background to the application of the US instrument and the decisions taken by US governmental authorities were described. It was explained that the US instrument of transferable development rights essentially entails the recovery of planning gains. These gains are diverted to loss-making spatial developments, particularly to compensate for value decreases resulting from zoning restrictions. Therefore, equalisation also takes place.

Secondly, the form in which the instrument of transferable development rights might be introduced in the Netherlands was examined. The principle that the US instrument entails the recovery of planning gains and equalisation was taken as a starting point in assessing the possibilities for applying transferable development

rights in the Netherlands. It was concluded that the possibilities for applying the instrument have three characteristics in common: the deployment of transferable development rights, the creation and apportionment of these rights, and a market for these rights.

With respect to transferable development rights in the Netherlands, consideration was given to how the deployment, creation and distribution of these rights, and the market, could be enshrined in legislation. This was done on the basis of the assumption that the instrument of transferable development rights should tie in with existing laws insofar as is possible and the assumption that a properly functioning market for these rights needs to develop. This examination was not limited to the law that would apply to the instrument as such. Other land use policy instruments were also taken into account, in particular the instruments regulated in the Expropriation Act (*Ontheffingswet*), the Municipalities Preferential Rights Act (*Wet voorkeursrecht gemeenten*) and the land exploitation rules laid down in part 6.4 of the Spatial Planning Act (*Wet ruimtelijke ordening*). The rationale for designing the instrument of transferable development rights based on current law is that it will ensure that the instrument can in fact be applied in the Netherlands.

Finally, it was acknowledged that the Netherlands can be characterised as a democratic state under the rule of law. Therefore, an analysis was made of whether the instrument of transferable development rights satisfies the requirements applicable to laws in a democratic state under the rule of law. Furthermore, an evaluation was made of how, from the perspective of the principles of a democratic state under the rule of law, the instrument of transferable development rights relates to current government intervention in the land market. To this end, the instrument of transferable development rights was compared with current land use policy. Based on this assessment in view of the requirements and principles of the democratic state under the rule of law, consideration was given to whether, from a legal perspective, it would be desirable to apply transferable development rights in the Netherlands.

IV TRANSFERABLE DEVELOPMENT RIGHTS IN THE UNITED STATES

The application of the US instrument of transferable development rights often forms part of a policy intended to protect and preserve spatial assets, such as nature, the landscape or listed buildings. To achieve these goals, restrictions on construction and on the use of land are introduced. When the instrument of transferable development rights is applied, these restrictions – or at least the compensation provided to the affected land owners – are funded by the developers of other, profitable sites.

Provided that they deploy transferable development rights, the developers of the profitable sites can lay claim to a relaxation of restrictions on construction and use. In order to acquire such rights, these developers must pay a sum of money or incur a financial loss. This payment or the incurring of a loss amounts *de facto* to a recovery of planning gains, as the payment or loss will detract from the value

increase that arises from the relaxation of the restrictions on construction and use. Since these recovered gains will then be diverted to the protection and preservation as described above, there is an equalisation between, on the one hand, the value increases resulting from the relaxation of restrictions on construction and use and, on the other hand, loss-making spatial developments.

The compensation for land owners on whom restrictions are imposed regarding the possibilities for construction and use of land, takes the form of the granting of transferable development rights. Transferable development rights have a financial value because developers can deploy them in order to claim a relaxation of restrictions on construction and use at other sites. Developers are therefore considered to be willing to purchase transferable development rights from land owners who have received these rights as compensation. By selling transferable development rights, the land owners affected by restrictions receive financial compensation.

The compensation for restrictions on construction and use of land must be seen in light of the fact that the Fifth Amendment to the US Constitution protects land ownership. According to that amendment, the government may take private property only 'for public use'. Where private property is taken for public use, the party from whom it is taken is entitled to 'just compensation'. In examining the background to the application of the instrument of transferable development rights in the United States, consideration was also given to the spatial planning system, spatial planning powers, the power to apply the instrument of transferable development rights, and easements under US law.

As the application of the instrument of transferable development rights is practically always a local or regional matter, the instrument does not exist in a single, identical form. The general decision making that takes place – referred to as the 'basic programme' – was explained. Usually, the land to be protected or preserved is designated as a 'sending site'. Restrictions on construction and use are implemented at such sites. Due to tension with the Fifth Amendment to the US Constitution, these restrictions generally take the form of voluntary restrictions on construction and use. Once the restrictions are implemented, the affected land owners are granted transferable development rights.

'Receiving sites' are also designated. These are sites where restrictions on construction and use can be relaxed, provided that the developers in question deploy transferable development rights for this purpose. In order to do so, it may be necessary for the land owners of sending sites, to whom rights have been granted, to transfer these rights to the developers of receiving sites. The supply of transferable development rights from the land owners of the sending sites and the demand from developers of the receiving sites enable a market for transferable development rights to develop.

Consideration was also given to a number of decisions that extend the basic programme, such as the establishment of a bank. Another important variant of the basic programme involves implementing compulsory rather than voluntary restrictions on construction and use of land at the sending sites.

V TRANSFERABLE DEVELOPMENT RIGHTS IN THE NETHERLANDS

For the purposes of the application of transferable development rights in the Netherlands, the instrument was designed taking into account the two assumptions set out in section 3 above.

Deployment of transferable development rights

The first characteristic of the instrument of transferable development rights is that these rights must be deployed in order to lay claim to a relaxation of zoning restrictions. The deployment of these rights implies a full or partial recovery of the gains arising from the relaxation of the restrictions, as transferable development rights can be obtained only in return for payment of a sum of money or by incurring a loss. The recovery of planning gains is reconcilable with the fundamental right to a peaceful enjoyment of one's possessions, as protected by Article 1 of the First Protocol to the European Convention on Human Rights and by Article 14 of the Constitution.

The relaxation of restrictions on construction and use of land is regulated by zoning ordinances. In order to ensure that planning gains are recovered, a relaxation of restrictions may only be used if sufficient transferable development rights are deployed. The law should provide that the relaxation of zoning restrictions may be made subject to the condition that sufficient rights are deployed. The law should also specify the kinds of relaxations of restrictions that can be obtained in return for the deployment of such rights. In this research it is assumed that transferable development rights will be deployed only in the case of 'far-reaching' relaxations of restrictions. Furthermore, in relation to the requirements for deploying transferable development rights, the question of whether the government is pursuing land use policy from the position of public land ownership or on the basis of private land ownership should be irrelevant.

The number of rights to be deployed should be determined based on the specific value increase that arises from a relaxation of zoning restrictions. This value increase must be divided by the value increase linked to one transferable development right upon creation; see below. It was also argued that the rights should be deployed upon the submission of an application for a building permit. Once the government has approved the deployment of these rights, the transferable development rights in question must lapse.

The possibilities for deploying transferable development rights largely determine the demand-side of the market for these rights.

Creation and apportionment of transferable development rights

The second characteristic is that transferable development rights are created and apportioned. By creating them the government determines the maximum number of transferable development rights that can be granted and brought into circulation. Upon creation these rights have to be defined – i.e. the value increase resulting from a relaxation of zoning restrictions that matches a single right must be determined. The value increase linked to one right need not be the same as the market

value of the right. Furthermore, a preference was expressed for national transferable development rights. Upon creation, it will also be necessary to regulate how the transfer of transferable development rights will be administered.

Three methods for apportioning transferable development rights were worked out in detail. Firstly, like the US instrument, the rights could be granted to land owners on whom restrictions are imposed regarding construction and land use. This method was referred to as ‘compensation-based apportionment’. Under this method of apportionment, the granting of rights would be an alternative to the provisions of part 6.1 of the Spatial Planning Act (*Wet ruimtelijke ordening*) regarding compensation for losses resulting from government planning decisions. Secondly, transferable development rights could be granted to support land owners and developers of desirable, but loss-making, developments. This variant was referred to as ‘development-based apportionment’. Thirdly, the government could apportion transferable development rights by selling them. It was argued that in such case the sale price should preferably be determined by supply and demand, which would apply if the transferable development rights were sold by means of an auction. Since the proceeds of the sale should then accrue to a fund for loss-making spatial developments, set up for the purposes of equalisation, this third method was referred to as ‘fund-based apportionment’.

The supply-side of the market for transferable development rights is influenced by the creation and apportionment of these rights.

Market for transferable development rights

The third characteristic is that a market for transferable development rights may develop. The instrument was designed bearing in mind that such a market needs to function well, which means that there needs to be sufficient supply and demand. Transferable development rights were designed as homogenous rights, contributing to the establishment of a properly functioning market. It was also argued that full information needs to be available, there should be no obstacles to entering or exiting from the market, and no transaction costs should be incurred.

Demand would largely be determined by the possibilities for deploying transferable rights in order to lay claim to a relaxation of zoning restrictions. The creation of national transferable development rights would also contribute to there being sufficient demand for these rights.

The supply of transferable development rights should be aligned with the demand for these rights. The supply is determined by, among other factors, the apportionment of the rights by the government. Under a system of compensation-based and development-based apportionment, a bank for transferable development rights could be established in order to guarantee sufficient supply. Under a system of fund-based apportionment, the government could to a large extent control the supply of transferable development rights.

Government action that influences supply or demand in the market for transferable development rights is described as government intervention. Government intervention should preferably take place on market terms, in other words in a way that the market parties can be aware of in advance. Even when intervention takes this form, it will be difficult for the market parties to align their actions with gover-

nment actions that alter the supply of transferable development rights. However, government action of this nature is unavoidable when transferable development rights apply. With respect to government intervention on the supply side, it was shown that new transferable development rights would have to be created after a certain period of time.

The Expropriation Act, the Municipalities Preferential Rights Act and part 6.4 of the Spatial Planning Act

Besides the three characteristics referred to above, it was also examined whether it is possible to align the instrument of transferable development rights with the legislation regarding other instruments of land use policy, in particular the Expropriation Act (*Onteigeningswet*), the Municipalities Preferential Rights Act (*Wet voorkeursrecht gemeenten*) and part 6.4 of the Spatial Planning Act (*Wet ruimtelijke ordening*). This legislation assumes that the government is not entitled to enforce the recovery of planning gains. The introduction of transferable development rights would change this, without requiring any far-reaching amendments to the Expropriation Act, the Municipalities Preferential Rights Act or part 6.4 of the Spatial Planning Act.

VI TRANSFERABLE DEVELOPMENT RIGHTS IN A DEMOCRATIC STATE UNDER THE RULE OF LAW

In order to examine whether it would be desirable to apply the instrument of transferable development rights in the Netherlands, the instrument was examined from the perspective of a democratic state under the rule of law. Based on Scheltema's vision, it was assumed that in a democratic state under the rule of law, the principles of 'legal certainty', 'equality', 'democracy' and the 'principle of the government as a facilitator' need to be safeguarded to the greatest extent possible.

Firstly, requirements that the instrument of transferable development rights must satisfy in a democratic state under the rule of law were derived from the aforementioned principles. The instrument largely satisfies these requirements. However, in view of these requirements, fund-based apportionment would be preferable to compensation-based or development-based apportionment.

Secondly, consideration was given to how, from the perspective of a democratic state under the rule of law, the instrument of transferable development rights relates to current government intervention in the land market. It was concluded that the instrument of transferable development rights would better safeguard the principle of equality and the principle of the government as a facilitator than the current law. Equality would be served as the gains arising from zoning changes would be more evenly spread across society. For this reason, it can be said that the instrument would also serve the idea of distributive justice. The principle of the government as a facilitator would be safeguarded since the instrument of transferable development rights ties in with national spatial planning and land use policy goals.

Furthermore, a comparison was drawn between the application of transferable development rights on the one hand, and the pursuit of an active land use

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policy to achieve the recovery of planning gains and equalisation, and the use of existing equalisation instruments on the other hand; see section 2 for more details. Based on this comparison it was concluded that the instrument of transferable development rights would better safeguard the principles of legal certainty, equality, democracy and the principle of the government as a facilitator. The principles of legal certainty and equality would be promoted, since national legislation would stipulate when and to what extent planning gains can be recovered. In addition, the spatial planning decisions of representative bodies would face less potential interference from the powers of a non-representative body. For this reason, the instrument of transferable development rights would serve the principle of democracy. With respect to the existing equalisation instruments, the principle of the government as a facilitator would be better safeguarded, since the current range of instruments is less effective in terms of the recovery of planning gains and equalisation.

VII ANSWER TO THE QUESTION ADDRESSED

In conclusion, given the way in which the instrument of transferable development rights was designed – and in particular given the assumption that the instrument must be aligned with current law insofar as is possible – it is possible to apply the instrument of transferable development rights in the Netherlands. Furthermore, it was argued that the introduction of this instrument is desirable, as the instrument must be viewed positively from the perspective of a democratic state under the rule of law.