Minister of Infrastructure and the Environment
M.H. Schultz van Haegen
PO Box 20901
2500 EX The Hague
The Netherlands

Subject	:	Environment and Planning Act: opportunity for quality
Date	:	4 November 2011
Our reference	:	Advice number 2001/07
Appendix	:	1

Dear Minister Schultz van Haegen,

In your policy letter 'Simply better' (*Eenvoudig beter*) of 28 June 2011, you set out the key principles for a fundamental reform of environmental and planning legislation. You requested the Council for the Rural Area, the Council for Transport, Public Works and Water Management and the Council for Housing, Spatial Planning and the Environment (VROM Council) – together comprising the Councils for the Environment and Infrastructure (RLI) – to advise on the intended changes. The purpose of this letter is to answer that request.

This advice is divided into four parts. Part 1 discusses the councils' vision on legislative reform in the area of planning and the environment and proposes some basic principles for an Environment and Planning Act. Part 2 contains general recommendations for the law, its design and the decision-making process on physical developments. Part 3 presents five suggestions that the councils feel should be adequately addressed in the new Environment and Planning Act. These five suggestions are: (1) an 'accordion model' that links the decision-making stages to the appeals process, (2) a proposal for an 'Elverding-light' procedure for medium-sized projects, (3) suggestions for improving small projects, (4) a way to strike a balance between general rules and permits and, finally, (5) a suggestion for treating established rights differently. Part 4 presents a procedural recommendation for the legislative process.

Part I Vision and principles

The councils view an Environment and Planning Act (*Omgevingswet*) as a promising instrument to improve, develop and manage the quality of the built and natural environment. Your aim is to integrate the many laws, general administrative orders and regulations regarding the zoning, design and management of the physical domain. A single Environment and Planning Act should lead to more cohesive legislation and allow the relevant parties to work efficiently and effectively to

create a sustainable living and working environment. The councils support this goal wholeheartedly. A law that simplifies regulations can reduce some of the complexity surrounding spatial development. Your intention to draw up a completely new Environment and Planning Act can present a major opportunity to create a sustainable living and working environment, which, in our dynamic and complex society, is currently under pressure. The councils urge you to seize this opportunity.

The councils also support your initiative of working within the interdepartmental programme 'Simply Better' on three related areas – legislation, administrative processes, and knowledge and expertise. The effectiveness of a new Act will greatly depend on how citizens, firms, government employees and policymakers can work with it in practice.

The councils base their assessment of the intended reform of environmental and planning law on five guiding principles. These are used to formulate the recommendations in this advice, which are discussed below.

Recommendation 1

The new Environment and Planning Act should contribute to improving the built and natural environment and provide for judicious balancing and appraisal of the different interests involved in the complex array of stakeholder perspectives. The councils advise using the following guiding principles:

- Improve the quality of the built and natural environment;
- Simplify and speed up;
- Disentangle law from politics;
- Develop *and* protect;
- Stimulate facilitative planning [*uitnodigingsplanologie*].

Improve the quality of the built and natural environment

The councils attach great importance to the quality of our living and working environment. This quality is under threat in many areas. Decisions made on the basis of short-term interests are overshadowing qualities that are crucial for the long term. In the councils' view, the law should be directed towards improving environmental quality by considering spatial development as a way to enhance quality.[1]

Simplify and speed up

The councils see many opportunities to simplify regulations and speed up decision-making on environmental quality and spatial development. Better legislation will help to achieve this. Streamlining the relatively fragmented regulations and procedures, instead of applying them separately or consecutively, can make the rules more transparent and speed up project realisation.

Disentangle law and politics

In the current situation judges regularly have to make substantive decisions on matters that should actually be made by elected representatives. Both politicians and judges have indicated that they are unhappy with this situation. The councils feel that the new Environment and Planning Act should be designed to provide a clearer separation of the political and juridical realms, but without unreasonably restricting the legal protection of citizens.

Develop *and* protect

In decision-making on the environment and spatial development, there is a tension between the wish to expedite valuable developments on the one hand, and the collective desire to protect vulnerable environmental qualities on the other. There is no objective scale on which to balance these interests. The councils feel that a new Environment and Planning Act should not only increase

[1] See also VROM-Council (2011). *Verkenning ruimtelijke kwaliteit* [Spatial quality survey]. The Hague.

possibilities for development, but should also protect *and* improve important qualities (e.g. spatial quality, human health and biodiversity). The councils warn against giving preferential treatment to either goal: the law must safeguard both. Irreversible spatial developments that are regretted afterwards must be prevented.

Stimulate facilitative planning

The new law will come into force within a pre-existing administrative and social context. In view of this, the councils draw attention to some developments in spatial planning the new law should address. The advent of development planning over the past two decades has enriched the tradition of regulative planning. Decreasing public-sector investment and growing self-assurance of the market and society are driving a further shift towards 'facilitative planning' (in Dutch: *uitnodigings-planologie*). Increasingly, the government will limit its role to creating the preconditions for others to take action. The Environment and Planning Act should facilitate this. This principle is in line with the councils' earlier call in their advice on the future of spatial policy (8 June 2011) for a more receptive attitude to initiatives originating from the private sector and civil society.

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. The consortium that wants to build the A58 motorway (see Box 1) is a good example of this. Taking a programmatic approach[2] and working with concessions for area-based development are two ways that private parties and civil society can be challenged to come up with creative and innovative solutions which enjoy community support. The councils are wholeheartedly in favour of incorporating the mechanisms of facilitative planning into the Environment and Planning Act.

Box 1: A58 consortium

The business community in Brabant and Zeeland presented a plan to the minister of infrastructure and the environment to take over the management, maintenance, widening and operation of the A58 motorway between the cities of Vlissingen and Eindhoven. One of the ideas is to let Philips use this stretch of road to test a road lighting concept to reduce traffic congestion in the winter. Philips is cooperating with TNO on this project. The business community argues that the plan is necessary because the government cannot afford to upgrade this 'vital artery for the economy of Brabant' (MIRT project book). They believe they can gain ten years by resolving various bottlenecks on the motorway. According to the plan, management of the road will be taken over by a consortium, with the private sector holding a majority interest of 51%; the remaining shares will be held by the government. The participants want to receive payment on a performance-basis, with bonuses for reduced traffic congestion, and from the operation of advertising hoardings, service areas and filling stations.

Part II General recommendations

This section presents the councils' general recommendations for the new Environment and Planning Act. These concern the design of the law and the decision-making arrangements. Special attention is given to the relationship between politics and law.

Recommendation 2

The councils advise the national government to opt for:

- A 'future-proof' law;
- A phased law that integrates all legislation in the area of the physical environment;
- A law that is consistent with the European conceptual framework;
- A law that takes Europe as the basis for regional interpretation;
- A law that builds on the system of the Spatial Planning Act;
- A law that gives elected representatives the prime responsibility for substantive standards.

[2] A programmatic approach attempts to speed up the implementation of a number of projects to attain a particular objective, or cluster of related objectives. Although the individual projects are important in their own right, they all ultimately serve the main objective. If a project is found not to contribute sufficiently to the objective, priority can be given to other projects.

A future-proof law
The councils hope that the Environment and Planning Act will usher in a long period of legislative stability. Laws generally have a lifespan of several decades. For this reason, it is important to reflect on the system, or philosophy, on which this law will be based. This system should be able to stand the test of time and adapt to new developments.

An phased law that integrates all the relevant legislation in the field of the physical environment
The councils advocate a Planning and Environment Act that (in time) can incorporate all regulations relevant to the physical environment to ensure comprehensive and coherent coverage. It makes sense to opt for a phased law, one which can be adopted in stages. A similar approach was taken for the Environmental Management Act and the General Administrative Law Act.

The integration of regulatory regimes for the physical environment should take precedence when drawing up the law. The current organisation of ministries and departments should not be a relevant factor; ministers from other departments can act as co-signatories of the Environment and Planning Act. For this reason, the councils argue that the spatial aspects of nature policy should be incorporated into the Environment and Planning Act straight away, instead of first being included in the new Nature Act. If the purpose of integrating all spatially relevant regulations is to provide legislative clarity to citizens and the business community, exceptions should be avoided as much as possible.

A law that is consistent with the European conceptual framework
In your policy letter, you say you want "more consistency with EU legislation" which, you argue, would make it easier to "work towards European objectives, avoid unwanted goldplating and help make the system more transparent".[3] The councils feel that using the relevant European conceptual framework can help bring this about. This approach will also make the new Environment and Planning Act more suitable for implementing European directives. Relevant terms used in European environmental policy include: installation, plan, project, permit and significant.[4]

A law that takes Europe as the basis for regional interpretation
By using the concepts and the meanings attached to them that are generally accepted in the EU, the new Environment and Planning Act will make national and regional goldplating more visible. The political debate may give the impression that goldplating is inherently undesirable. The councils firmly contest this view: in the global competition between regions, for instance, a high-quality environment can be a decisive location factor for businesses. A region that profiles itself as an exceptionally healthy area to live might want to set higher standards for air quality than the European minimum. This is one reason why the councils are not in favour of restricting the freedom of local or regional governments to set their own standards. This is also in line with your wish for a decentralised system. The councils also point to the positive effects of European regulations. Not only is a level playing field increasingly becoming a reality in Europe, which is good for the Dutch economy, but it also improves the quality of the European environment. As part of the European Union, the Netherlands benefits from this, an example being the European efforts to improve the water quality in the Rhine.

[3] Tweede Kamer [Dutch House of Representatives] (2011). *Beleidsbrief Eenvoudig Beter. Brief van de minister van Infrastructuur en Milieu aan de Tweede Kamer van 28 juni 2011* [Simply Better: a letter from the Minister of Infrastructure and the Environment to the Dutch House of Representatives]. Vergaderjaar 2010-2011, 31 953, nr. 40, p. 3.

[4] The Councils wish to call particular attention to spatial planning terms as the European Union does not (yet) conduct spatial policy.

A law that builds on the system of the Spatial Planning Act

Partly with a view to the need for consistency in government, the councils advise aligning the Environment and Planning Act to the system of the new Spatial Planning Act (Wro).[5] Considerable thought went into the preparation of that law and the parties involved have since gained experience with its application. This has been advocated in the professional debate as well. The introduction of the Spatial Planning Act has made some other legislation, for example the Transport Infrastructure (Planning Procedures) Act (*Tracéwet*) redundant (RLI, 2010).[6]

A law that gives elected representative the prime responsibility for substantive standards

The councils recommend exercising restraint when drawing up substantive standards. Setting standards should take place first and foremost in the political or policy domain. One can question whether the Environment and Planning Act should specify any substantive principles at all, such as the polluter pays principle. When substantive standards are included in law as an overall principle, they start to function as general legal standards. This becomes problematic as judges will often have to apply these principles in their judgements, which overburdens the legal system and leads to less predictable of legal decisions.

Including general principles in the new Environment and Planning Act (e.g. a sustainable built and natural environment) would add a fundamental legal standard to the system, presenting judges with an open and vague criterion that is difficult to apply. This drawback should be balanced against the added value that such a comprehensive standard would have. The problems of ambiguity and applicability can be partly reduced by translating a general principle into procedural requirements (in general administrative orders or ordinances), such as a 'ladder' for sustainable urban development, mobility or waste.[7]

Consideration could be given to combining the various general principles in current (sectoral) laws, such as the importance of good spatial planning and good environmental and water quality, into a single principle. One possibility is 'to promote a sustainable built and natural environment', and another the adage 'do no harm, and improve when possible' (known in the Netherlands [in English] as the 'stand-still step forward' principle).[8]

In short, the councils argue for exercising restraint regarding the inclusion of substantive standards in the law. At the very most, the Environment and Planning Act should contain a framework for setting standards. Particular standards can be established in general administrative orders, ordinances or policy rules (decrees as opposed to Acts). These are easier to amend if required by new insights or political priorities.

The process: use the philosophy of the Elverding Committee

The philosophy of the Elverding Committee was developed to promote more rapid decision-making on infrastructure projects. It presents a model of 'funnelled decision-making' in which decisions become increasingly concrete as the process progresses. The stages include a survey of alternatives, commissioning appropriate impact studies (from general to specific), and arranging

[5] The new Spatial Planning Act introduces a separation between regulation and strategy/visioning, and a flexible division of responsibilities which allows every tier of government to take the initiative for a particular project under certain circumstances.

[6] The Council for the Rural Area, the Council for Transport, Public Works and Water Management and the VROM-Council (2010). *Maak ruimte voor vernieuwing* [Make Room for Renewal]. The Hague: RLI.

[7] The 'ladder' refers to a series of considerations that should be taken into account in decision-making. The ladder for sustainable urban development, for example, stipulates that infill development should be considered before developing greenfield sites. This is similar to the 'sequential approach' guideline in the United Kingdom.

[8] This principle was advocated during a conference on the Environment and Planning Act for provincial government officers organised by the Association of the Provinces of the Netherlands (IPO) on 11 October 2011. It means that new developments should, on balance, not harm the qualities of an area and preferably contribute to improving the quality of the built and natural environment. See the report (in Dutch): Royal Haskoning (2011). *Verslag IPO-Werkconferentie Vernieuwing omgevingsrecht*, Utrecht, 11 October 2011. Nijmegen.

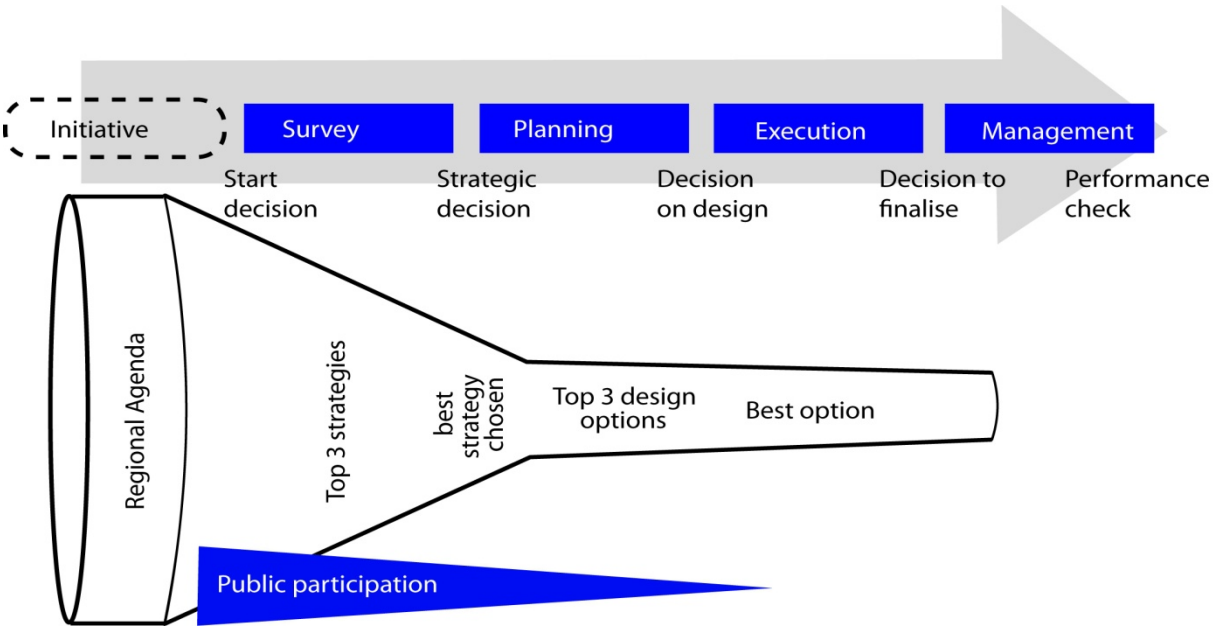
public participation before taking a strategic decision (see Box 2). The main idea is that investing heavily in the beginning of the process will pay for itself in the form of increased public support and fewer objections and appeals in future decisions.[9]

Recommendation 3

The councils look favourably on the intention of the minister to broaden the scope of the Elverding approach to include the physical domain:

- in area-based development and site development;
- with minimal rules for how participation in the early phase is organised;
- offering latitude for decision-making when funnelling towards a strategic decision and in a programmatic approach;
- closing the cycle: with more weight given to monitoring, supervision and enforcement.

Box 2: The Elverding approach[10]



The councils are positive about the proposal to broaden the scope of the Elverding philosophy in the new law so that it will be generally applicable to large spatial projects and complex area-based development processes.[11]

Public participation in the initial phase

The councils have already pointed out the shift from government to multi-level governance and multi-sector governance.[12] As Dutch society has become increasingly complex, decision-making

[9] It remains to be seen if this will actually occur. The method has not yet been widely put to the test.

[10] Ministerie van Verkeer & Waterstaat, Rijkswaterstaat Projectdirectie Sneller & Beter (2010). *Koepelnotitie Zinvol Effecten Bepalen: Handreiking ter vereenvoudiging van methoden voor de bepaling van effecten bij infrastructuurprojecten* (update) [Update of linkage document: Determining significant effects, guidelines for simplifying methods to measure impacts of infrastructure projects]. The Hague.

[11] See also Council for Transport, Public Works and Water Management (2009). *Beter is sneller* [Better is faster]. The Hague.

[12] VROM-Council (2008). *Wisselende coalities* [Changing coalitions]. The Hague; VROM-Council (2006). *Ruimte geven, ruimte nemen* [Give space, take space]. The Hague.

has become less exclusively the domain of the traditional governmental hierarchy (national government, province and municipality). With the growth in European legislation, the national government has increasingly become a 'new middle-level administration'. At the same time, decisions and investments by the private sector and civil society affect the spatial development of the country. Parties increasingly work together in public-public networks and mixed public-private networks. These changing, more flexible and diffuse social relationships have made the early phases in the Elverding approach critical, as this is where public participation can occur. In this part of the process, a customised procedure can help to ensure broad public involvement.[13]

To a certain extent, decision-making in this preliminary phase can take place according to the tenets of the General Administrative Law Act, as the extensive preparatory phase as described by Elverding has not yet been written into law. The Environment and Planning Act could, however, add a legal 'Elverding preliminary procedure' to the standard procedure. The councils urge moderation on two points in this regard. First, the councils feel that the law should only set minimal procedural requirements for a broad-ranging preliminary phase. Obviously, the law should ensure that public participation takes place, but it should not dictate how it takes place. Due to the need for transparency and legal certainty for those involved, the project proponent should indicate at the onset how the preparatory phase of the process should be organised – including public participation. Setting a minimal number of procedural conditions allows scope for creativity and innovation, as intended by the Elverding Committee.[14] The second point is that, in the councils' view, the Elverding approach is not always appropriate. To explain this, a distinction can be made between large projects, medium-sized projects and small projects. When different alternatives do not need to be considered (which is the case for many small projects), it does not make much sense to commission a wide-ranging survey of options. For large urban development projects, on the other hand, it is a good idea to make such a survey mandatory in the decision-making process (using minimal procedural requirements). For medium-sized development projects, it be sensible to employ a 'light' version of the Elverding approach. Part 3 of this advice contains specific proposals for each of these three categories.

Information can be provided to help adapt Elverding's preliminary phase to local conditions. The councils feel that providing guidelines regarding a 'good' approach and dissemination of best practices (along the lines of the 'demonstration projects' [*voorbeeldprojecten*] in spatial planning) can inspire policymakers, government officers and stakeholders to set up an appropriate tailor-made process for this phase.

Broaden the scope for decision-making

In the preliminary phase of the Elverding approach, most options are still open, as no choices have been made. As you indicated, the scope for decision-making in subsequent phases can be extended by introducing a so-called programmatic approach.[15] The councils agree that this approach holds promise.[16] It creates a situation in which policy is able to work towards making the built and

---

[13] This phase can still be time-consuming in the future. The Netherlands Environmental Assessment Agency (PBL) found that area-based urban development entails balancing competing interests regarding design, programming, financing and public participation, within the legal limits. This "is a complex and time-consuming puzzle" (Sorel, N., E. Buitelaar, L. van den Broek, M. Galle & F. Verwest (2011). *Omgevingsrecht en de procesduur van gebiedsontwikkeling*. [Environmental law and the length of procedures for area-based development], The Hague, p. 4).

[14] Moreover, this reduces a risk caused by formally prescribing the nature of the preliminary procedure, namely that the parties involved will themselves initiate a new informal stage prior to this. There will always be a need for pre-consultation, informal contact and 'sizing each other up' before getting down to business. A legal requirement for a wide-ranging preliminary procedure is not a guarantee for success – this requires the right attitude from policymakers, politicians and government officers.

[15] A programmatic approach provides room to make trade-offs between generic policy measures to improve environmental quality and plans for polluting developments (Sorel et al., 2011). This may concern a sector programme (such as air quality) or a cross-sector programme in which different environmental aspects can be traded off against each other.

[16] The IPO employed the motto 'from derogation to trade-off' to describe how policymakers should be able to consider the intent behind a standard. See IPO (2011). *Reactie op beleidsbrief Eenvoudig Beter* [Reaction to policy letter 'Simply better'], draft version consulted.

natural environment more sustainable. Moreover, it shifts attention from what is not allowed to what can be achieved by measures and improvements within the parameters of existing quality standards.

The councils feel that it is useful to increase the scope for decision-making in the Environment and Planning Act, but also to increase transparency regarding the factors considered in decision-making. This can be achieved by providing more possibilities to grant exceptions and dispensations, if allowed by European law[17] and considered acceptable. One example is to grant a temporary exemption, such as the 'development areas' in the Crisis and Recovery Act which give ten extra years to comply with the standards. In addition, the Netherlands Environmental Assessment Agency (PBL) has suggested the option of reducing the number of legal exemption procedures, especially when – such as with noise standards – the exception has become the rule. In these cases, it can be better to just set these higher values as the maximum permitted value.[18]

Trade-off and exchange
Another way to increase the scope for decision-making is to work more with trade-off and exchange arrangements. In principle, the councils look favourably on these methods, but also point out that there are limits to their application. These limits ought to be determined in the political debate.[19] The idea is to guarantee a certain basic level of quality and provide room for negotiation above this level. Some things are more amenable to being traded off than others: elements that can be influenced by the design of a particular plan seem more suitable for this than those which cannot.[20]

One idea raised during the discussion on broadening the scope for decision-making is to apply a principle of 'positive proportionality' when making a trade-off. The councils are not opposed to this in principle, but point out that this carries a risk that important standards, such as those for the protection of the environment, will be ignored by the competent authority when making a particular local decision. This risk can be obviated by raising the bar for substantiating how the decision was made. If the decision is appealed, this argumentation can be submitted to a judge in a court of law. Finally, flexibility in dealing with existing rights can also enhance the scope for decision-making. This is examined further in Part 3.

Predictability in the rest of the Elverding approach
One of your stated objectives for the new Environment and Planning Act is "a higher predictability for all parties working with the law".[21] The councils also feel this is important. However, this desire seems to conflict with another of your objectives, namely broadening the scope for political decision-making. How do these goals relate to each other? The councils believe that the phased and funnelled approach proposed by the Elverding committee for large projects offers a solution. During the preparatory phase, there is a great deal of latitude for decision-making, and therefore a high level of uncertainty for the project initiator. Once the strategic decision is taken, the scope for decision-making is narrowed down and more certainty obtained regarding both content (general

[17] Opportunities to increase the scope for decision-making must be considered in the light of European regulations; this is virtually non-existent for Natura 2000.

[18] Sorel, N., E. Buitelaar, L. van den Broek, M. Galle & F. Verwest (2011). *Omgevingsrecht en de procesduur van gebiedsontwikkeling*. [Environmental law and the length of procedures for area-based development], The Hague.

[19] See VROM-Council (2009). *Dynamiek in gebiedsgericht milieubeleid* [Dynamics in area-based environmental policy]. The Hague. See also Interprovinciaal Overleg [Association of the Provinces of the Netherlands] (2011). *IPO-reactie verankering Crisis- en herstelwet. Brief aan minister Schultz van Haegen* [IPO reaction to embedding Crisis and Recovery Act, letter to Minister Schulz van Haegen]. 6 June 2011, p. 15.

[20] Sorel, N., E. Buitelaar, L. van den Broek, M. Galle & F. Verwest (2011). *Omgevingsrecht en de procesduur van gebiedsontwikkeling*. [Environmental law and the length of procedures for area-based development], The Hague.

[21] Tweede Kamer [Dutch House of Representatives] (2011). *Beleidsbrief Eenvoudig Beter. Brief van de minister van Infrastructuur en Milieu aan de Tweede Kamer van 28 juni 2011* [Simply Better: a letter from the Minister of Infrastructure and the Environment to the Dutch House of Representatives]. Vergaderjaar 2010-2011, 31 953, nr. 40, p. 4.

direction) as well as how the remainder of the process will progress. At this point, there should be clarity about the next steps to be taken and which decisions are still needed.

Increased importance of monitoring, supervision and enforcement
Monitoring, supervision and enforcement are more important for laws that work with general rules than those based on permissions. Permissions are made on the basis of an assessment or judgement. Because this is not the case for general rules, one can only investigate afterwards whether or not a project meets the requirements (if so desired, non-conformance can be corrected by initiating an enforcement procedure). Wider application of the programmatic approach in the physical domain will make it increasingly important to close the cycle by means of monitoring, supervision and enforcement. The councils suggest considering the introduction of a 'final appraisal' to establish whether the intended goals have actually been met. This is proposed with some hesitation, because in Dutch policy, ex-post evaluations and performance checks rarely lead to sanctions. Stricter performance checks afterwards combined with the ability to impose sanctions can justify a more general ex-ante check. Significant environmental gains can be obtained when working with trade-off and/or 'deferred checks' arrangements. To ensure a balanced approach, however, this should be accompanied by more rigorous monitoring to ensure that consistency in the application of regulations and standards over the long-term and over a wider area is not compromised.

Part III Suggestions

The councils wish to exchange ideas about the new Environment and Planning Act and in the spirit of this exchange, present a few suggestions that could be incorporated into the new law. The councils believe that these proposals can contribute to better and simpler environmental and planning legislation. The councils recommend a diversified regime, as set out below.

Recommendation 4

The councils argue that the new Environment and Planning Act should be suitable for large, medium-sized and smaller projects. The new law should speed up and streamline procedures and ease the research burden.

- Large projects: accordion model (a single authority can take several decisions at the same time, with simultaneous opportunities for appeal);
- Medium-sized projects: Elverding-light;
- Small projects: routine and speed.

Large (area-based development) projects: accordion model
One of the aims of the new Environment and Planning Act is to speed up the implementation of large urban development projects and simplify the related procedures. According to the councils, this aim is justified. Urban development is complex: many functions and land-uses are involved, different alternatives need to be considered and various permissions are needed for various sub-areas or sub-projects. Simplifying and speeding up this process is a worthy goal. To this end, the councils propose following an 'accordion model' for large projects. Following this method, the responsible authority can, like an accordion, pull apart or squeeze together the different decision-making and appeals procedures as it sees fit. The accordion model consists of three specific steps in decision-making:

- Step 1: taking a strategic decision (based on the Elverding approach);
- Step 2: adopting a spatial plan;
- Step 3: granting permission for one or more sub-areas or projects.

The councils feel that these steps can be followed either consecutively or simultaneously: the competent authority should decide which route to take. It could opt to take a strategic decision and adopt a spatial plan at the same time, but decide on planning permission later. However, it is

equally conceivable to take a strategic decision first and at a later stage adopt the plan and at the same time grant permission for a sub-project. It is also possible – especially in cases of urgent smaller developments – that all three steps are combined.

The accordion model gives decision-makers different options for legal protection as well. If an authority responsible for taking a strategic decision wishes to have this decision reviewed by a judge, it can open it up to an appeal (at the Administrative Law Division of the Council of State). The authority can also opt to suspend appeals until the plan has been formally adopted or the first permission issued.

Box 3: *Planungsverfahren*[22] (an all-in-one decision)

The accordion model contains elements of the German *Planungsverfahren*, which is a decision-making model in which a single decision (*Planfaststellungsbeschluss*) is taken on infrastructure or a major construction project (such as a waste incineration plant). It is a very structured process in which one government body is the initiator, obtains authority to take the decision and is politically and legally accountable for the final result. It invites all interested parties and other government bodies to provide input. This broad-based process lasts three months. Certain parties can be given a veto right (for example those responsible for water management). The initiating government body then considers the various interests and ideas and takes its decision. This decision fulfils all requirements of public law – even if afterwards it is found that a particular requirement was overlooked. This model has only one legal protection procedure, so everything must be dealt with in a single appeal. Incremental development is also possible, for example, by starting with the first 10km of a road. It takes about ten years to get from initial idea to the decision, but just six months to get from the beginning of the procedure to the decision. Although the Dutch Transport Infrastructure (Planning Procedures) Act and the Crisis and Recovery Act contain elements of this approach, the latter does not take account of the provisions of the Nature Conservancy Act. Similarly, decisions taken on the grounds of the Transport Infrastructure (Planning Procedures) Act do not include all the required decisions.[23]

By designating a single government body as initiator and responsible party, the councils see an opportunity to structure responsibility in situations of multi-sector and multi-level governance. This conforms with the 'flexible allocation of powers' principle in the Spatial Planning Act: the same instruments are available to all tiers of government. In practice, the partners agree among themselves who should assume the lead role in guiding the project through the formal planning procedures.

Medium-sized projects (site development): Elverding-light

A new comprehensive Environment and Planning Act should be resilient. It should be useful for not only large projects (area-based development), but also for the majority of much smaller projects and permissions dealt with at the municipal level on a daily basis. This concerns both medium-sized projects (site development) and small projects (plot development). The medium-sized projects will be treated first.

Progress on medium-sized projects can also be sluggish, usually due to a lack of support. The councils wish to draw attention to these projects, which are smaller than area-based urban development projects but larger than individual building plans. These projects can be sped up by applying a slimmed-down version of the Elverding approach (survey, participation, preferred alternatives), which stresses the preliminary procedure. It is beyond the scope of this advice to go into the possible details of this 'Elverding light' approach, but the councils suggest that the initiator should be the one to decide whether it is useful to instigate a preliminary procedure with public participation. If the initiator is a government authority, the preliminary procedure concludes with the designation of a *preferred alternative*. If the initiator is a third party, such as a property developer seeking to build housing or a company seeking to build new premises, this procedure

[22] Backes, C. et al. (2009). *Snelle besluitvorming over complexe projecten vergelijkend bekeken, Quickscan* [Quick decision-making on complex projects in comparative perspective: a quick scan]. Publication No. J-5427. The Hague: Ministry of Justice.

[23] When one looks at neighbouring countries, it appears that Germany and Flanders have organised their environmental legislation differently (see Larmuseau 'Vlaanderen en Nederland op hun snelst' [Flanders and the Netherlands at top speed], available at www.rli.nl).

concludes with a *request to take a spatial decision*. Part of this approach could be a requirement for the initiator, before starting the planning procedure, to make its plans public and consult with those who have made representations. This can increase support for the initiative, lead to improvements and stave off possible legal action.

Box 4: Bouwfonds on financing projects

In the current situation, it is hard to get financing for development projects if no suitable land-use plan is available. The lengthy and expensive planning procedures and the costs of mandatory studies weaken the overall feasibility of the plan and business case. A recent survey by Bouwfonds Ontwikkeling B.V. found that projects containing fewer than 25 housing units are no longer profitable due to the procedures and related costs (e.g. high interest payments).

In practice, lengthy procedures and planning costs for spatial development projects carry a price tag that can undermine the business case (see Box 4). Procedures can be shortened if legal protection procedures are sped up and if it is known earlier whether a plan can go ahead or not. Also for small projects it is worth considering forgoing adjudication in two courts in favour of a single appeals process in a single court (i.e. the Administrative Law Division of the Council of State).

Small projects (plot development): the importance of routine and speed

In order to improve the quality of the built and natural environment, planning processes need to become smarter and faster, not just for large and medium-sized projects, but small projects as well. However, applying the Elverding approach to small projects would be excessive. Moreover, small communities in particular will benefit from making these activities as routine as possible.

The licensing process for smaller projects can be expedited by shortening and streamlining procedures and the requirements for supporting material, which should also reduce the 'research burden'. This can be achieved at the all-in-one permit desk (*Wabo-loket*) by granting the initiator a right to pre-consultation and/or a right to advice on an outline application. It is also worth considering allowing the initiator to have the application evaluated, in full or in part, by a certified professional. Local authorities could then grant permission as soon as an application is submitted (see Box 5). This is an existing practice that can be codified in the law.

Box 5: Certification by third parties: the case of the Boekel permit desk

The municipality of Boekel uses a permitting system that allows planning permission to be issued 'at the desk' once an application has been submitted. The municipality no longer checks applications for compliance with the land-use plan, the building code and the municipal building ordinances. Applications for an all-in-one permit must still meet the normal requirements, but the responsibility for evaluating the application is delegated to the applicant's registered architect (registered architects satisfy the requirements of the municipality). The architect must declare in writing that the application has been checked for compliance with the legal building standards and that the application meets these requirements. The applicant remains responsible for the entire construction process and declares this in writing before the all-in-one permission is issued at the permit desk. Theoretically, building can start immediately afterwards. Of course the six-week period to lodge objections remains in effect, so all construction that occurs within this period is at the applicant's own risk. The desk permit is applicable for small buildings, renovation and individual home construction.[24]

Legal protection procedures can also delay small projects. A single body for adjudication – for example a court of law without the possibility of appeal – should be seriously considered for these cases as well. This will give clarity sooner about whether the plans can definitively go ahead or not.

[24] Municipality of Boekel (no date). *Baliebouwvergunning: sneller een bouwvergunning? Kies dan een goede architect* [Desk permits: for a faster building permit hire an approved architect]. Brochure downloaded from: http://www.boekel.nl, accessed on 21 October 2011.

Notification as a middle way between general rules and permission

In planning and environmental law, permitting systems are increasingly being replaced by general rules. This offers a number of advantages. Developments generally considered to be acceptable can be implemented more easily using general rules than when a large number of permissions need to be obtained. There are fewer decision-making moments (since in many cases no permissions are required at all) and therefore fewer decision-making procedures and legal-protection procedures. If the general rules are *accessible* and *applicable*, citizens can see for themselves whether they can carry out a particular project and if so, how. The councils view accessibility and applicability as preconditions for the proper functioning of general rules.

Recommendation 5

The councils agree in principle with the idea of setting general rules, on the condition that:

- they are accessible and applicable;
- mandatory notification can be used as a middle way.

Accessibility means that the rules can be found easily. This can be improved if the legally binding general provisions in force at each tier of government are brought together in a structured manner. Citizens then just have to look through the general rules, which are relatively easy to find.[25] The second precondition, applicability, largely determines the success of the general rules. Citizens need to be able to translate their particular situation into the more universal language of the general rules and vice versa. The best general rules can be interpreted by a non-expert with little effort. It is important, therefore, that the level of abstraction of the general rules correspond as much as possible to the level at which the rules are applied. In many cases, legal or technical expertise will still be necessary. Smaller firms in particular will need clarification about whether or not they are operating within the rules. General rules can be made easily accessible by keeping abstraction and complexity to a minimum, which will also make them more enforceable.

In order to make the best of both worlds between general rules and permissions, the councils recommend an intermediate option for certain cases: mandatory notification (there is some experience with this in environmental law). An official response to a notification provides some degree of certainty to the initiator and neighbouring residents. By requiring notification for certain activities, such as building extra storeys on homes or extensions to office buildings, decision-makers are given the opportunity to investigate whether the activity complies with the general rules or whether additional specific regulation is needed. The response to the notification also provides clarity about how the general rules were applied. Objectors to the development can contest the response and demand a court decision on the validity of the response. Although mandatory notification is no panacea,[26] the councils consider it a useful intermediate between general rules and permissions. It also offers more certainty to citizens.

A more flexible approach to established rights

The councils feel that a different treatment of existing rights can open up opportunities for innovation and creativity. The instrument of urban land readjustment can serve as an example (see Box 6). In current planning practice, established rights (environmental permissions, awarded damages) and the grounds for reimbursement for compulsory purchases can have a considerable impact on decision-making, which can make it hard to improve the quality of the built environment. This can happen when the acquired rights of a particular company place limitations

[25] A government authority can improve accessibility by issuing a statement that consists of a collection of generally applicable provisions, which do not necessarily all apply to the particular case at hand.

[26] Empirical research on mandatory notification has found that compliance is often lacking due to incomplete or missing notifications or because submitted notifications do not always receive an adequate response (Duijkersloot, A., de Gier, A., Groothuijse, F., van Rijswick, H., Uylenburg, R. (forthcoming). Algemeen geregeld, goed geregeld? [General rules, well-regulated?] *Milieu en Recht*, 167 (9).

on the development of the surrounding area, particularly when acquired 'environmental space' (i.e. pollution rights) has not been used but can still be claimed, and which nevertheless has to be bought off. Sometimes urban developments are no longer feasible due to the high costs of damage claims and compulsory purchase.

Recommendation 6
The councils recommend adopting more flexible provisions for dealing with established rights in environmental and planning law. This can apply to environmental permits, damage claims and the grounds for reimbursement for compulsory purchase.

According to the councils, these problems stem from three factors, which can all be attributed to the current protection of established rights. First, environmental permits that grant holders a right to pollute have no expiration date and are virtually inalienable. This creates a static situation which is at odds with the desire to facilitate development and private enterprise and improve environmental quality. From this point of view, it may be a good idea to give policymakers more power to allocate 'environmental space' for desired developments by relaxing the principles underlying environmental permits or by imposing a time limit on rights. All this will make established rights less inviolable.[27] The Crisis and Recovery Act has taken a first step in this direction for measures that can be imposed in an area-based development plan.

The second factor concerns the current procedures for damage claims in the Netherlands. In practice, these payments can harm the feasibility of a development. Damage claims can arise as soon as a land-use plan enters into force, even though the envisioned developments have not yet occurred, and may never be fully realised.[28] The damages to be paid are therefore, in part, theoretical. There is a need for a good set of rules to rescind building rights and permitted emissions or other aspects of 'environmental space'.[29] For this reason, the councils recommend including provisions in the Environment and Planning Act to limit damage claims based on theoretical 'anticipated value'.[30]

Another aspect of damage claims that needs to be addressed is the time of payment. At present, development can be frustrated because damages have to be paid at an early stage, even though the parties involved in the development still have no assurance that the plan will be realised. Consideration could therefore be given to delaying payment until construction actually begins (the same thing now applies under the Land Servicing Act).

The third factor pertains to reimbursements for compulsory purchase. At present, remuneration is linked to expected value, which puts a strain on project financing. Previously the VROM-Council argued that, in these cases, payment should be linked to the value of the current land use and property, plus a reasonable compensation to ensure the continuation of business operations.[31]

---

[27] See VROM-Council (2009). *Dynamiek in gebiedsgericht milieubeleid* [Dynamics in area-based environmental policy]. The Hague; Backes, C. (2010). *Naar een integrale omgevingswet?* [Towards a comprehensive Environment and Planning Act?] In: Ministerie van Infrastructuur en Milieu (ed.) *Bezinning op het omgevingsrecht: essays over de toekomst van het omgevingsrecht* [Meditations on environmental law: essays on the future of environmental law] (p. 2-17). The Hague.

[28] Awards for damages are based on the development provided in a plan. See Sorel, N., E. Buitelaar, L. van den Broek, M. Galle & F. Verwest (2011). *Omgevingsrecht en de procesduur van gebiedsontwikkeling*. [Environmental law and the length of procedures for area-based development], The Hague, p. 17.

[29] For one thing, this obstructs the elaboration of general land-use plans after the management phase has begun. In practice, this makes general land-use plans much less practicable than they were intended to be.

[30] One way would be to link the damages to the actual use of the property. One could also consider a system of 'writing off' unused environmental space, similar to the way building permits expire after a certain date. Other options include a larger 'own risk' contribution proportional to the share in the total value of the property or the 'change in the social environment that can be reasonably expected'.

[31] VROM-Council (2009). *Grond voor kwaliteit*. [Grounds for quality]. The Hague. Compulsory purchase is not applicable to owners who wish to exercise their right to develop (according to the zoning plan provisions), and in this way obtain the expected value themselves.

Box 6: Urban land readjustment

Urban land readjustment is an instrument that can be employed when redeveloping an urban area. It provides an alternative way to deal with existing entitlements. In a situation of multiple-ownership, the urban land readjustment process allows the power of disposition over property to be transferred until the realisation of the project. The plan can then be carried out immediately with the collective owners, or a contracted third party, acting as principle. Once the project has been completed, the new or renovated property is returned to the original owners, along with the associated property rights. The amount or value of property allocated to each owner is directly proportional to his or her share in the area; participants can also be compensated for loss of ownership rights. All owners profit proportionally from the property value increase, but also contribute proportionally to the costs of the redevelopment.[32] This instrument is used extensively in Germany (*Baulandumlegung*). It also has similarities to the policy of agricultural land consolidation in the Netherlands.

Part IV Conclusion

Prudent Elverding procedure

Your plan is to vigorously bring about a fundamental reform of environmental legislation. Experience has shown that a prudent legislative process often takes years (see the history of the new Spatial Planning Act, the General Administrative Law Act and the Civil Code). The road to a new Environment and Planning Act will also be long. This has the advantage that the users of the law will have the opportunity to make the necessary preparations. While the councils respect your determination to make quick and fundamental reforms, they point out the need to consider the legislative process and how the law will come into force. The councils emphasise the importance of diligence and prudence in the legislative process, and for this reason argue that the Elverding approach should also be applied to this process. This will entail an interactive preliminary procedure about the key principles of the new law (broad survey of alternatives and opinions about them, with many opportunities for public participation), a strategic decision on a basic outline, followed by the drafting of the legislative provisions in detail. Constructing the law in a series of stages will also enable the process to allow for the required prudence while progressing at the desired rate.

The councils are strongly in favour of a prudent legislative process and feel that, before the new regulations are introduced, thought should be given to those who will have to work with them. Minister, please follow the Elverding approach when drawing up the Environment and Planning Act.

The councils appreciate your invitation to advise you at this early stage of the process, and would be delighted to meet you and your team to discuss the councils' vision on the Environment and Planning Act and the content of this advice.

Yours sincerely,

On behalf of the Councils for the Environment and Infrastructure,

H.M. Meijdam,
Chair of the VROM-Council

R. Hillebrand,
General secretary

[32] Van der Krabben, E. (2011). *Gebiedsontwikkeling in zorgelijke tijden* [Urban development in troubled times]. Nijmegen: Radboud University Nijmegen (p. 17-18).

Appendix 1 List of contributors

Members of the Council for the Rural Area
A.J.A.M. Vermeer, chair
G. Meester
P.J.H.D. Verkoelen

Members of the Council for Transport, Public Works and Water Management
G.J. Jansen, chair
M.E. van Lier Lels
M.P.M. Ruigh - van der Ploeg

Members of the VROM Council
H.M. Meijdam, chair council committee
N.S.J. Koeman, member council committee
A.J.M. Roobeek

External members of council committee
J.H. de Baas
G. de Roo
B. Schueler

General secretary
R. Hillebrand

Staff members involved in this advice
L. van Duinen (project leader)
T. Zwanikken (Royal Haskoning SMC)
D. Hamhuis
L. Bouwen

Essay 'Vlaanderen en Nederland op hun snelst' [Flanders and the Netherlands at top speed]

I. Larmuseau – Flemish Environmental Law Association

Consulted experts

N. Berg – Ministry of Economic Affairs, Agriculture and Innovation
E. Buitelaar – Netherlands Environmental Assessment Agency
I. Faber – Association of the Provinces of the Netherlands
R. Haije – Ministry of Economic Affairs, Agriculture and Innovation
A. Nijenhuis – Ministry of Infrastructure and the Environment
I. Ruiter – Ministry of Infrastructure and the Environment
E. Stigter – Ministry of Infrastructure and the Environment
N. Sorel – Netherlands Environmental Assessment Agency
W. de Vos – Ministry of Infrastructure and the Environment

Expert meeting participants
I. Adema – Municipality of Veghel
C. Backes – Maastricht University
D. Bel – Witteveen + Bos
P. van den Biesen – Van den Biesen Boesveld Soliciters
N. van den Biggelaar – De Brauw Blackstone Westbroek
T. Drupsteen – Council of State
B.J. van Ettekoven – University of Amsterdam
D. de Jong – Bouwfonds Ontwikkeling B.V.
F. Schoorl – BNA
C. Verdaas – Province of Gelderland

Other

Editing advice
C. Gudde – Paradigma producties

Translation
D. Evers

Advice number 2011/07

The essay *Vlaanderen en Nederland op hun snelst* [in Dutch] is available at
http://www.rli.nl/sites/default/files/larmuseau-essayomgevingsrecht.pdf

Contact: Lianne van Duinen, tel. +31 (0)70-4562070, lianne.vanduinen@rli.nl

Archive number: RLI-2011-156