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L'AGRICULTURE ET LES EXIGENCES DU DÉVELOPPEMENT DURABLE – AGRICULTURE AND THE REQUIREMENTS OF A SUSTAINABLE DEVELOPMENT – DIE LANDWIRTSCHAFT UND DIE ANFORDERUNGEN AN DEREN NACHHALTIGE ENTWICKLUNG

Els H.M. Harbers, Attorney at law
Hekkelman Advocaten en Notarissen Nijmegen

Abstract
In terms of spatial planning and rural areas, the Spatial Planning Act ("Wet ruimtelijke ordening") is the most important piece of legislation. Spatial planning strikes a balance between the different actors in rural areas, including agriculture, nature (and environmental protection) and the ever-expanding urban sprawl. The systems provides the government with far-reaching authority to limit the establishment and proliferation of agricultural businesses and to regulate the nature of agricultural activities.

Environmental legislation has had a tremendous impact on the establishment and expansion of agricultal businesses. The implementation of European regulations has led to an Environmental Protection Act ("Natuurbeschermingswet"), which has significantly limited possibilities in terms of keeping livestock in close proximity to natural reserves and parks.

Reality shows that the agricultural sector is in need of scale increases. This need has led to a decrease in the number of agricultural businesses, and to subsequent problems concerning the re-zoning of newly available agricultural real estate and a decrease of the rural population.

Furthermore, these scale increases have led to an expansive growth in the size of agricultural businesses ("mega stables"), resulting in social resistance. On the provincial level, this resistance has been translated into regulations limiting the establishment of large businesses. On the national level, a policy position is being prepared on the future of livestock farming in the Netherlands.

1. Spatial planning (questions 5, 8 and 27)

Introduction

The Netherlands is a small, densely populated country, requiring meticulous planning to accomodate agriculture, industry, nature and residential areas in such a manner that they restrict one another as little as possible. This is why spatial planning takes place on both an integral and a sectoral level. The entire territory of the Netherlands is subject to a general system of policy positions, general regulations and zoning ordinances, based on a comprehensive balance of interests. In addition, certain aspects, including environmental conservation, monument preservation and constructional requirements are laid down in separate sectoral laws. In terms of spatial planning, these sectoral laws are taken into consideration in the process of balancing conflicting interests.

Spatial planning policy

As per the Spatial Planning Act, every level of government (i.e. municipal, provincial and central governments) adopts policy positions concerning spatial planning, the so-called structural positions.[1] These positions lay down the basic outlines of the proposed developments and the prospective policies for the entire territory, resulting in an initial assessment of the different interests competing for prominence in the area of spatial planning. Because these positions are instruments of policy as opposed to legal norms, stakeholders cannot file for an appeal with an administrative judge against a structural position. Structural positions are guidelines containing the government's intended policy concerning decisions related to spatial planning. Decisions that do have legal effect are made with due consideration for the contents of the structural position. Decisions deviating from the stuctural position are possible, but these decisions will have to contain an elaboration of the grounds for deviation.

Zoning ordinances

Whereas structural positions contain the main outlines of spatial planning policy, this policy is defined and put into practice through concrete decisions. Within the system of spatial planning, the municipal zoning ordinances are of paramount importance. In these ordinances, municipalities lay down which areas of their respective territories may be used for which purposes.They contain specific rules on land use and construction.[2] In drafting these zoning ordinances, municipalities are under an obligation to thoroughly consider all interests. However, within this limitation they do enjoy a substantial margin of appreciation, as the only norm contained in the Spatial Planning Act is the

[1] Article 2.1, 2.2 and 2.3 Spatial Planning Act

[2] Article 3.1 Spatial Planning Act

"good spatial planning" requirement.

A draft zoning ordinance is presented and made available to the public, after which interested parties have six weeks to submit their points of view. A point of view can be submitted by anyone. After the six week deadline, the city council has twelve weeks to adopt the zoning ordinance. In its final decision to formally adopt the zoning ordinance, the City will have to elaborate on the manner in which the submitted points of view were weighed and assessed.

Subsequently, stakeholders– people or organisations whose interests are directly affected by the decision–can file an appeal with an administrative judge within six weeks of publication. The Dutch Organisation for Agriculture and Horticulture ("Land- en Tuinbouw Organisatie Nederland" or "LTO") is a private sector entrepreneurial organisation and as such it is recognized by the administrative courts as a collective stakeholder in terms of decisions affecting agricultural businesses. The highest administrative court, the Department of Administrative Adjudication of the Council of State ("Afdeling Bestuursrechtspraak van de Raad van State") is the court of first instance concerning for appeals of zoning ordinances. As the city council enjoys a comprehensive margin of appreciation when it comes to determining what constitutes good spatial planning, the administrative judge is limited to a marginal review of the policy considerations that support the zoning ordinance. The city council is free to determine its own spatial planning policy, unless it conflicts with existing legislation or the general principles of administrative procedure. A number of these principles have been codified in the the General Act on Administrative Law ("Algemene wet bestuursrecht"), others are based on legal precedent.

Changes in zoning ordinances can lead to devaluation of property or loss of income, for instance because certain opportunities for construction are no longer available. The Spatial Planning Act contains provisions on compensating these losses.[3] The City reimburses these types of losses to the extent that they exceed normal and acceptable public risks. In the event that changes were implemented upon an application submitted by a stakeholder, the City is authorized to broker an agreement in which the losses incurred by these changes are reimbursed by the applicant.

Zoning permit

Zoning ordinances contain general rules on intended land purpose, real estate and use, but in order to effectively use those possibilities, a zoning permit is often required. Activities including construction, demolition, actively using installations and deviating from the zoning ordinance require zoning permits.

[3] Section 6.1 Spatial Planning Act

As of October 2010, new legislation has come into effect, known as the General Act on environmental law, which has resulted in one single permit, the environmental permit, encompassing all the previously separate permits.[4]

Provincial and national decisions on spatial planning

Structural positions are not limited to municipalities; provincial governments and the central government can also adopt structural positions to give substance to their spatial planning policies. The primacy within the system of spatial planning lies with the municipal zoning ordinances. However, provinces and the central government are also endowed with the authority to make decisions concerning spatial planning based on provincial or national interests. They can, for instance, exert pressure on municipalities by adopting regulations containing rules on the way in which municipalites are required to weigh different interests in their zoning ordinances and environmental permits. These regulations contain provisions with generally binding effect, which means that municipalities and civilians are required to follow these provisions unless they are exempted by the relevant provincial government or the central government. Provisions with generally binding effect cannot be appealed by an administrative court. The legality of these regulations can only be contested indirectly, by filing an appeal with an administrative court against the end product of these regulations, i.e. a zoning ordinance or environmental permit. When (part of) the regulation conflicts with a higher source of law, the judge may decide to declare that regulation null or to refrain from applying it in the pertinent case. A petition to review the legality of a regulation could also conceivably be submitted to a civil court judge, by way of a tort claim.

In addition to adopting general rules in regulations, the provinces and the central government can also protect provincial or national interests by taking decisions in specific cases, although this authority is limited to exceptional circumstances.

Provinces and the central government can proactively direct municipalities to draft zoning ordinances for specific areas.[5] Furthermore, they can submit their points of view during the draft stages of a zoning ordinance. If the City fails to adequately accommodate these points of view in the final ordinance, the submitting authority can also issue a reactive directive, effectively preventing a part of the zoning ordinance from coming into effect. Finally, the provinces and the central government can decide to adopt their own zoning ordinances, which are known as accommodation plans.

[4] Article 2.7 General Act on environmental law
[5] Article 4.2 and 4.4 Spatial Planning Act

2. Agriculture (questions 3, 4, 9-12, 16)

Regulations concerning agricultural businesses
The Constitution contains no provisions concerning the establishment and conduct of agricultural businesses. However, it does contain a number of general fundamental rights that pertain to argricultural businesses. Relevant provisions include the right to freedom of assembly, certain guarantees concerning expropriations and environmental protection.

However, there are certain laws that pertain specifically to agricultural businesses. For instance, the Agriculture Act lays down specific rules concerning the annual agricultural census. Furthermore, several governmental authorities are tasked with regulating specific products or sectors, including the Livestock, Meat and Egg Authority, the Dairy Authority and the Horticultural Authority. Agriculture is often defined in these laws as: crop production, livestock farming– including concentrated livestock farming– , horticulture – including fruit, flowers, bulbs and arboreal cultivation –, forestry and any other type of soil cultivation.

Private sector regulations concerning soil use by agricultural businesses
Most agricultural businesses operate on an ownership model. However, some businesses operate solely on the basis of agricultural tenancy. Mixed model businesses are most common, owning some of their plots (and structures) while leasing others. Until September 1st of 2007, the Lease Act ("Pachtwet") was the main source of legislation concerning lease and tenancy. As of that date however, the relevant legislation can be found in title 7.5 of the Dutch Civil Code ("Burgerlijk Wetboek"). However, the adoption of this new legislation did not entail any comprehensive changes. The lessee still enjoys a substantial level of protection, in terms of the duration and extension of the lease agreement as well as the review of the agreed upon lease payments. Legislation serving to further liberalise the current lease system has been introduced.

As far as claims regarding the CAP subsidy regime in the lessor-lessee relationship are concerned, the Dutch judge on matters concerning leases (the Lease Chamber of the District Court of Arnhem) submitted several prejudicial questions to the European Court of Justice in 2008. The ECJ issued a judgment in 2010[6], in which it concluded that, based on community law, the lessee is not obligated to return the leased land and the accumulated or otherwise related CAP subsidies to the lessor upon termination of the lease, nor is the lessee obligated to reimburse the lessor. The Dutch court subsequently concluded that,

[6] ECJ 21 January 2010, nr C-470/08 Van Dijk/gemeente Kampen

under national law, the lessee is equally not under an obligation to hand over the CAP subsidies to the lessor or reimburse the lessor for these subsidies.[7]

Agriculture in the zoning ordinance

As the various municipal zoning ordinances combine to cover the entire territory of the Netherlands, the question whether or not a specific plot may be used to establish an agricultural business can be answered by consulting the relevant zoning ordinance. Furthermore, zoning ordinances differentiate in which specific types of agricultural business are allowed and which are not, including crop cultivation, livestock farming, concentrated livestock farming, menageries and horse breeding and horticulture. Each zoning determination must be adequately substantiated by spatial planning arguments. The interests of agricultural businesses are weighed against the interests of, e.g. residential developments or environmental protection. This means that, in terms of spatial planning, the ordinance will have to elaborate on, for instance, the reasons behind certain limitations in size or why a certain business is not allowed to expand.

Ordinances contain two types of rules, construction rules and rules of use. Ordinances contain construction blocks, that determine which locations may be used to construct stables, barns or manure storage facilities. These blocks also contain limits in terms of the dimensions of these constructions

Other rules pertain to land use. Rules may be adopted to limit the types of crops that are allowed. For instance, permits may be required for the cultivation of corn. Certain uses and activities may be subject to a permit. Among others, deep plowing, soil levelling and the digging of irrigation ditches may require a permit if the protection of the intended land use warrants such a requirement.

Zoning ordinances are drafted on the fundamental principle that existing legal forms of land use –and the buildings associated with those forms of use– are treated favorably. Furthermore, it is important that existing and viable agricultural businesses are offered adequate opportunity to remain viable and profitable. However, municipalities may choose to use a zoning ordinance to change the intended use of a certain plot from agricultural to either recreational, residential or natural reserve, effectively re-zoning an agricultural business. Provided that the nature of the agricultural business does not change, it may stay in its current location under the purview of transitional law. However, it may not expand its activities. Once a plot has been re-zoned to non-agricultural use, the City may –under certain circumstances– decide to expropriate the land. This means that re-zoning agricultural plots leads to an uncertain future for the pertinent business, even if the re-zoning only applies to a portion of the

[7] Lease Chamber of the District Court of Arnhem, 22 june 2010, Agr.r. 2010, 5584 m nt Bruil

business's land. This is why the City may only re-zone a certain area after it has investigated how the intended new zoning relates to the existing legal use by each individual stakeholder and whether a profitable business can still be run after the re-zoning.

Livestock farms are subject to specific norms concerning ammonia and odor pollution. Although these regulations primarily focus on the circumstances under which an environmental permit is required, environmental rules also have an impact on opportunities in zoning ordinances to allow livestock farms to expand their activities.

In 1997, the Netherlands were struck by an outbreak of classical swine fever, exposing the veterinary risks associated with keeping a large number of livestock on a relatively small plot of land. Subsequently, pig farms saw their manure production rights slashed by 25% by way of the Pig farms restructuring act of 1998 ("Wet herstructurering varkenshouderij"), in order to reduce veterinary vulnerability. The high concentration of livestock also caused problems related to manure pollution, acidity levels and odor pollution. That is why the Pig farms restucturing act was supplemented by the Concentrated areas reconstruction act of 2002, which applies to all livestock farms. This act combines environmental concerns with spatial planning interests in order to effectively tackle the aforementioned environmental problems in an integrated manner. Under this act, a number of areas were designated as deconcentration areas, forcing concentrated livestock farms to leave the designated area. Other areas were designated as areas of agricultural development, which meant that agricultural businesses were offered some opportunities to expand their activities. The third and final category consists of integration areas, where the different functions of rural land will have to be weighed against one another.[8]

In preparing zoning ordinances or other types of decisions that have consequences in terms of spatial planning, the potential impact on the environment must be taken into consideration. Every business located in the Netherlands is obligated to comply with general norms of distance concerning, among others, odor, sound and external safety. In addition to these general norms, agricultural businesses have to comply with a number of specific norms as well. Deviations from these norms are allowed, but only if they are adequately motivated. The fundamental principle is that the quality of the residential climate is not compromised.

Another element that has to be considered is zoning in terms of odor and ammonia. Under the Odor pollution and livestock act ("Wet geurhinder en

veehouderij") and the Ammonia and livestock act ("Wet ammoniak en veehouderij") a perimeter is set up around livestock farms, that may not contain any ammonia-sensitive objects, e.g. Natura 2000 areas. These perimeters primarily inform decisions on whether to issue environmental permits, but, through their impact on zoning ordinances, they also affect spatial planning. This effect is known as their reverse impact. The next chapter will focus more specifically on the protection of Natura 2000 areas and ammonia deposits.

Odor pollution is assessed by gauging whether it compromises the residential quality of odor-sensitive objects (e.g. residential neighborhoods). That is why zoning determinations will generally account for a certain distance between livestock farms and pollution-sensitive zones (e.g. "residential purposes"). Not only the direct vicinity of individual businesses is taken into account, the effects of the cumulative odor pollution created by nearby livestock farms on the residential quality is considered as well. On the other hand, an odor-sensitive object may be planned inside a livestock farm's perimeter if the planner can substantiate his claim that the residential quality of that object is not compromised. In other words, the presence of a livestock farm can prevent an area from being designated as residential in a zoning ordinance. Exceptions are possible if expansion of business activities has already been made impossible by the presence of another odor-sensitive object. On a related note, city councils are authorized under the Odor pollution and livestock act to adopt area-specific odor norms that deviate (within a certain range) from the national norms. These local norms can contain either higher or lower parameters as well as stricter or less strict distance requirements, which may serve to either simplify or complicate the establishment of a livestock farm near a residential area. Former agricultural residences can also prevent the exploitation of an agricultural business when they are designated as a civil residence, i.e. an odor-sensitive object. A civil residence designation is required for non-farmers who wish to legally build a residence, which has resulted in a stalemate. Currently, legislation is being prepared to remedy this situation.

Furthermore, the use of pesticides is subject to certain distance requirements. As is evident from case law, agricultural areas and residential areas will have to be separated by a so-called spray zone to prevent pesticides from polluting the environment.

3. **Environmental protection (questions 17, 21 and 23-25)**

Introduction

There are roughly two types of environmentally protected areas in the Netherlands: Natura 2000 areas and the Main Ecological Structure or MES ("Ecologische Hoofdstructuur" or "EHS"). The primary goal consists of expanding and interconnecting the existing natural preserves. The MES plan was introduced in 1990, marking the beginning of still ongoing efforts to create a 728,000 ha (1,8 million acre) network of existing and future natural preserves. By 2018, all natural preserves in the Netherlands should be interconnected through the main ecological structure. By then, the MES will constitute an interconnected network that is integrated into the Pan-European Ecological Network (PEEN). Approximately 50% of the MES consists of Natura 2000 areas, which is the community moniker adopted for areas that fall within the ambit of the Birds and Habitats Directives. The Netherlands is home to 162 Natura 2000 areas and 4 marine habitats, of which 56 areas have received a definitive designation.

Acquiring natural preserves

In order to achieve a network of protected areas in the MES, the central government has provided the provinces with a designated budget, known as the 'Investment budget for rural areas'. The guiding principle is one of amicable acquisition of agricultural land at the going agricultural rate or in exchange for compensation of relocation costs. Governmental authorities are required to adhere to the rules on state aid, laid down in article 107 of the EU Treaty (formerly article 87 of the EC Treaty) and the Commission communication on state aid elements in sales of land and buildings by public authorities. Provincial governments must be very careful to prevent undue advantages for businesses as a result of land transactions at non-market rates. This is why the land must be acquired after an independent appraisal, at no more than 5% over the market price determined by the appraiser. The costs of relocation in favor of the MES may be reimbursed fully. However, when the business owner profits from the relocation because it enables him to use more modern equipment or realize higher production capacity, he will have to carry at least 60% of the financial burdens that lead to these advantages.

Only if amicable acquisition proves impossible will the government resort to expropriating the land for environmental purposes. Under the Expropriation Act ("Onteigeningswet"), municipalities, provinces and the central government are authorized to do so. However, expropriations do require a re-zoning of the area from agricultural to natural. Furthermore, full compensation must be offered. When the transformation from agricultural area to natural habitat requires no construction programs, the costs of acquiring a natural preserve will not be offset by revenue. That is why municipalities are reluctant to expropriate land

for environmental purposes. Expropriations by provinces or the central government require that the area has been zoned as a natural habitat and municipalities are reluctant to cooperate to that end, which is why expropriations by the forestry service are rare. However, as of 2008, the provinces and the central government do have the possibility to re-zone an area using an accommodation plan, thus creating the circumstances required for expropriation. Nevertheless, this is a course of action that is rarely seen.

Amicable acquisitions and expropriations are currently both on hold as the administration has decided to freeze the investment budget for rural areas. Until October of 2010, provinces tried to broker amicable land transactions whereas the actual purchases were made by a government agency. All of this has come to a complete standstill, which also affects any ongoing negotiations on the acquisition of land. The central government came to its decision in light of spending cuts in its natural preservation and acquisition budget. At present, it is unclear whether sufficient funds will be available to manage the existing natural preserves, let alone acquire more agricultural plots over the coming years.

Within the Natura 2000 areas, agriculture is virtually non-existent but it is present in the larger MES. Agricultural businesses do exist in the MES, but due to the strict spatial development norms, their opportunities for expansion are very limited. That is why provincial governments offer subsidies to relocate those businesses elsewhere by way of farm relocation schemes. These provincial relocation schemes have all been presented to the Commission in light of the state aid implications they entail and all of them have been approved.

Agricultural environmental management

Agricultural business owners can be incentivized to structure their businesses in such a manner that nature and agriculture can coexist, i.e. agricultural environmental management. Agricultural business owners who manage agricultural lands, owners, lessors or other users of characteristic woodlands and habitats can be compensated for their nature-friendly land management. These compensations are part of the Nature and Landscape preservation Subsidy scheme. The level of compensation depends on the actual management and aims at effective agricultural natural and landscape management, taking the various types of habitats into account. Provincial governments determine which managers in which areas are eligible for (agricultural) nature and landscape subsidies from the Nature and Landscape preservation Subsidy scheme. That is why the provincial government drafts a nature management plan in which nature and landscape types are mapped for each individual plot. Land owners can only apply for subsidies that match the management type that is laid down in the nature management plan.

In order to prevent subsidies and management reimbursements from resulting in state aid, the level of reimbursements are meticulously laid down for each type of agricultural environmental management. Furthermore, reimbursements are only distributed for services that go beyond legal obligations and that cannot be rendered without incurring costs. In addition, the services must be verifiable and reviewable and may not distort competition.
The current ambition is to have 118,000 ha of the 728,500 ha of MES managed through agricultural environmental management by 2018. However, reality has not yet caught up with this ambition. As of 31 December 2009, actual agricultural management arrangements have been made for 53,759 ha of MES.
Currently, the MES is under exhaustive review. It turns out that the realization of a network of natural preserves costs considerably more than anticipated and apparently, environmental protection is much more of an obstacle in terms of spatial development than the current administration would care to allow.
That is why the nature preservation laws are currently under review, which also entails a re-evaluation of the ambitions concerning the MES and Natura 2000. Through this re-evaluation process, the administration hopes to achieve a better combination of natural preservation and agricultural land use. Together with the other countries participating in Natura 2000 and the European Commission, the administration hopes to solve several key problems. For instance, research is being carried out into the possibilities of merging or abandoning smaller natural peserves, obviously within the parameters of the European directives.

Differentiated preservation

As indicated earlier, a part of the MES consists of Natura 2000 areas. Consequently, two different regimes apply in terms of natural preservation. The entire area is subject to the 'MES Rules'. The Natura 2000 areas are also subject to the more strict requirements of the Natural preservation act of 1998 ("Natuurbeschermingswet ") and the Flora and Fauna act ("Flora- en Faunawet"), which will be covered in more detail below. The MES Rules state that the MES is to be protected through spatial planning regulations. National and provincial norms dictate the manner in which municipal zoning ordinances should deal with spatial developments within the MES. The essential characteristics and values for each specific area are codified. Each new development will have to be preceded by an ecological survey into the potential threat to these essential characteristics and values.Final and integral decisions concerning spatial development are made on a 'no, unless' –basis, using requirements that largely coincide with the requirements of the Natural preservation act of 1998. The major difference between the two is the fact that these developments do not require a natural preservation permit, as they are assessed in light of the integral standard of 'good spatial planning'. Substantia; interests and the absence of viable alternatives can play a part in this assessment, although they will require the implementation of compensatory measures.

Natural preservation based on European directives

Natural preservation is also founded on the Birds and Habitats Directives. Article 3 of the Habitat directive was implemented by way of article 10a of the Natural preservation act of 1998. Under this article, areas falling under the Birds and Habitats Directives are designated as Natura 2000 areas. The Birds and Habitats Directives contain criteria that guide member states in their decisions as to which areas qualify for designation. In the Netherlands, areas are designated by the Minister of Economic Affairs, Agriculture and Innovation. Areas may not be designated based on economic, social or cultural requirements. Only ecological requirements may be considered in the designation process, as was confirmed by a Dutch court (the Department of Administrative Adjudication of the Council of State) in its verdict dated September 29th, 2010.[9]

In the Netherlands, designation is only required for areas with a minimum surface area of 100 ha. Furthermore, only areas that (i) were either formally recognized under the Natural preservation act of 1998, (ii) have been reported with the European Commission or (iii) have been put on a list of areas that are important to the Community require official designation. In other words: only areas that fall within the definition of 'Natura 2000 area' as found in article 1(n) of the Natural preservation act of 1998 require offical designation. According to the Dutch courts, the limited scope of this requirement stems from article 4, paragraph 5 of the Habitats Directive and the ECJ's Wells verdict.[10]

Decisions on designations must be thoroughly substantiated. Recent case law has clarified the key elements on which a judge will review any designation. The courts have concluded that, in the establishment of area-wide conservation goals, the minister may consider criteria that are not ecological in nature. In that light, the minister is allowed to use a 'feasible and affordable'-criterion, which means that economic interests may be considered as well when it comes to determining the conservation goals for a specific Natura 2000 area. For an individual conservation goal, the minister is therefore allowed to search for an area in which the goal in question will be most easily achieved. This also means that, in the event that a certain species or type of habitat is under a nation-wide state of conservational threat, the restoration plans may be drafted to focus on those areas in which restoration can be most readily achieved. In the final analysis however, the pertinent conservation goal will have to be achieved on a national level.

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[9] Department of Administrative Adjudication of the Council of State, 29 September 2010, case number 200908062/1/R2, www.raadvanstate.nl

[10] ECJ, 7 January 2004, nr. C-201/02 (Wells)

Case law has also shown that striving for a positive state of conservation does not necessarily require a policy striving to conserve the populations and species as they were present at the time when the Netherlands were required to have implemented the Birds Directive (which was 1981). Nor do the courts require that designation decisions contain realization deadlines for the conservation goals. According to the courts, these types of deadlines can be incorporated in management plans.

Dutch case law also shows that damage caused by the designation decision does not constitute sufficient grounds to refrain from adopting the decision and that the designation does not have to contain an indication of its impact on activities in and around the designated area, as the consequences of such a designation cannot be assessed beforehand.

Once a Natura 2000 designation is final, article 19a of the Natural preservation act dictates that a management plan –which will be valid for six years– must be drafted within the following three years. A management plan must contain a description of the conservation measures necessary to maintain or restore natural habitats and species of wild animals and plants. The final result of the management plan (which must be attained before an unspecified deadline) must consist of the realization of the conservation goals. The management plans enumerate which activities are allowed in and around the natural preserve, effectively implementing article 6, paragraph 1 of the Habitats Directive. The scope of a management plan may be hard to determine however, as article 19a, paragraph 1 of the Natural preservation act of 1998 states that the management plan "may" also regulate development outside of the preserve.

Permits are required for projects or actions that either threaten the quality of habitats in a Natura 2000 area or significantly disturb the species that were the initial reason for the area's designation, unless they have been incorporated in a management plan (article 19d, paragraph 2 of the Natural preservation act).

Under article 19c, paragraph 1 of the Natural preservation act, appropriate measures must be taken to prevent existing uses from compromising the quality of habitats and to prevent the emergence of disturbing elements that may have a siginificant impact on the pertinent conservation goal.However, these appropriate measures may not target existing uses that have been incorporated in a management plan (article 19c, paragraph 6 of the Natural preservation act). The obligation to adopt appropriate measures meets the 'appropriate measures' requirement of article 6, paragraph 2 of the Habitats Directive. On the 31st of March 2010, article 19ke of the Natural preservation act was adopted, adding a new obligation to adopt appropriate measures. This obligation is aimed specifically at nitrogen deposits. These measures may in fact be targeted at nitrogen deposits that have been incorporated in a management plan.

Under article 19d, paragraph 3 of the Natural preservation act, permits are not required for existing uses. Article 1, under m of the Natural preservation act defines existing use as any activity that was carried out on October 1st of 2005 (or on the moment the area was designated in accordance with the Habitats or Birds Directive, if that moment occured after October 1st of 2005) and has not, or at least not significantly, been changed since then.

Under article 19d of the Natural preservation act, permits are required for new projects and other activities with potentially significant consequences. Before the provincial authorities can decide on a project's permit application, the applicant must assess the impact on the Natura 2000 area, in accordance with article 19f of the Natural preservation act. A permit cannot be issued before the integrity of the environmental characteristics of the area is guaranteed; article 19g, paragraph 1 of the Natural preservation act. These provisions implement article 6, paragraph 3 of the Habitats Directive. The fourth paragraph of article 6 of the Habitats Directive corresponds to article 19g, paragraph 2 and article 19h of the Natural preservation act. If the assessment indicates that the project threatens to compromise the area's environmental characteristics, a permit can only be issued under the conditions laid down in article 6 of the Habitats Directive.

Recent developments concerning nitrogen deposits

Agricultural businesses in the vicinity of Natura 2000 areas who wish to change or expand their business activities and/or buildings face a permit requirenment under the Natural preservation act of 1998. Nitrogen deposits influence Natura 2000 areas and consequently affect the possibilities for companies to obtain permits under the Natural preservation act. The following will discuss recent developments concerning existing uses, as they provide agricultural businesses with an important ground for exemption from the permit requirement.

Many of the Natura 2000 areas contain prohibitive levels of nitrogen depositis, which makes it difficult for nearby agricultural business to obtain a permit under the Natural preservation act. On March 31st of 2010, the Natural preservation act was amended. Increasingly lower levels of nitrogen deposits are important in terms of the execution of the Habitats Directive, the restoration of natural preserves within a reasonable timeframe and the prevention of environmental deterioriation. Lower deposits also ensure more leeway for nitrogen producing activities. That is why article 19ke of the Natural preservation act gives national and provincial governments the authority to order measures on individual installations and issue general directives on nitrogen deposits. These measures can have far-reaching consequences, as they may even consist of orders to completely cease all nitrogen producing activities. This newly attributed authority covers all activities that cause nitrogen deposits,

including those activities for which permits have been issued and activities that are not subject to any permit requirement whatsoever.

The law offsets these stricter norms concerning nitrogen by offering agricultural businesses certain advantages. The 2010 amendment to the Natural preservation act introduced a provision regarding existing rights in the form of the new article 19kd. This provision states that decisions on applications for natural preservation permits will include an assessment of the potential consequences in terms of nitrogen deposits if the pertinent activity was carried out on December 7th of 2004 (or later, if the area was designated as a Natura 2000 area after December 7th of 2004) and has not, or at least not significantly, been changed since then. These cases require guarantees that, in light of the measures taken with regard to that particular activity, ammonia deposits do not and will not increase on balance. Article 19kd of the Natural preservation act is therefore not an exception to the permit requirement for existing rights, like for instance article 19d, paragraph three of the Natural preservation act, but it means that decisions on whether to issue a permit can be made without considering the consequences of ammonia deposits.

Another important development is the possibility of 'balancing', an extenuating measure resulting from article 19kd of the Natural preservation act. As explained above, article 19kd of the Natural preservation act states that ammonia deposits may not increase "on balance". This implies that balancing and other extenuating measures may be considered in the decision whether to issue a permit. Extenuating measures can be considered in the appropriate assessment of article 19f, paragraph 1 of the Natural preservation act. Recently, the courts saw their first case in which a judge accepted balancing as an extenuating measure in terms of a permit issued under article 19d of the Natural preservation act. The issuance of a permit for expansion of a dairy farm was rules permissable because it coincided with the termination of a second business that contributed to the nitrogen deposits in the area. On aggregate, the area's nitrogen deposits decreased. One should note that there was a direct relationship between the expanding company and the disbanding company, as they had signed an agreement on the transfer of deposit rights, all of which pertained to the same natural preserve. Furthermore, the disbanding business guaranteed it would not restart its activities and there were no increases in nitrogen deposits throughout the area. The court ruled that these circumstances merited the provincial government's standpoint that one could safely guarantee that the environmental characteristics of the area would not be compromised as a result of the expansion permit.

Recent developments on existing use

Under article 19d, third paragraph of the Natural preservation act, agricultural businesses are exempt from the permit requirement for existing uses. However,

the Birds and Habitats Directives do not use the term ‘existing use’. In light of considerations of legal certainty, the directives only require adequate evaluations and permits for projects that started after the directive’s implementation deadline (which was June 10th of 1994).

Assessments of whether an activity proposed by an agricultural business falls under the existing use exemption will rely on a determination of whether the proposed activity is part of an existing project or constitutes an entirely new project. In 2004, the ECJ clarified certain aspects of what constitutes existing use in the Cockle fisheries case.[11] The Habitat directive does not contain a definition of the term ‘project’, which is why article 1, paragraph two of the 85/337/EC Directive is important. It states that a project constitutes the execution of construction works or of other installations or schemes and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. The fact that a certain activity has been conducted periodically in a specific area for a number of years and that it is subject to annual review as to whether it can be continued and if so, in what area, does not prevent it from being deemed a new project with each new application. The fact that annual re-evaluation is considered necessary from an ecological point of view actually affirms the assumption that each renewed activity ought to be considered as a separate project.

A Dutch court recently clarified the difference between a project and an agricultural business’s other activities. The exisiting exploitation of a livestock farm can not be considered as a project, but as an activity for which, on principle, a permit is required udner article 19d of the Natural preservation act of 1998. Expansion of these exploitation activities, for instance in terms of cattle, is considered to be a new project. Therefore, this expansion requires a separate permit and adequate assessment, in accordance with the stricter criteria laid down in articles 19f through 19h of the Natural preservation act. In all likelihood, the execution of the project will lead to a significant change in the exploitation of the livestock farms, which means that the term ‘existing use’ will no longer apply and that this other ongoing activity will no longer be exempt from the permit requirement.

In a recent ruling, a court also found that, if ‘permission’ had already been granted for the activities before the area was designated as a protected area or added to the list of areas that are important to the Community, and the activities have not, or at least not significantly, changed since then, no natural preservation permit is required.

[11] ECJ, 7 September 2004, case C-127/02, AB 2004, 365 (Cockle Fisheries)

The courts have concluded that this exemption from the permit requirement does not conflict with article 6, third and fourth paragraph of the Habitats Directive. Article 19d, paragraph three of the Natural preservation act states that the permit exemptions may not cover existing uses that -independently or in combination with other projects- significantly affect Natura 2000 areas. This article complies with the general protection obligation of article 6, paragraph 2 of the Habitats Directive, as it does not require a permit system. This verdict by the Department of Administrative Adjudication of the Council of State, dated March 31st of 2010, is a continuation of the rationale found in the Ems/Papenburg case.[12] In the Ems/Papenburg case the ECJ concluded that the continuation of an existing activity does not require permission in the sense of article 5, third paragraph of the Habitats Directive, as long as this existing activity can be considered to be part of the earlier activity and a valid "permanent" permit has been issued under national law for that earlier activity. The Dutch courts have concluded that the Ems/Papenburg case entails that the continuation of existing use does not require a natural preservation permit if a Dutch environmental permit has already been issued under the Pollution act (old) or the Environmental Protection act or following a notification based on the Environmental Protection act. According to the courts, these permits fall within the definition of "permission".

European law uses two yardsticks to assess at which moment in time the protected existing use started: (i) use that began prior to the June 10th, 1994 implementation deadline and (ii) use that began before the pertinent area was designated as a protected natural preserve or before it was added to the list of areas that are important to the Community. The Dutch legislature chose to legally codify the exemption from the permit requirement for existing uses as of February 1st of 2009. These existing uses must have started prior to October 1st of 2005 and they may not, or at least not significantly, have changed since then. This deadline deviates from the directives' implementation deadlines, which has created a level of uncertainty as to whether the activities that began between June 10th of 1994 and October 1st of 2005 can be considered as existing uses under European law. However, this potential problem was solved by an additional criterion introduced by Dutch case law. The requirement that the current situation may not differ from the October 1st, 2005 situation (where agricultural businesses are concerned, this requirement refers to livestock and stables), is supplemented by an additional requirement, stating that exisiting use only refers to situations in which ammonia emissions do not differ from the emissions present in the permitted situation (the "permission") when the area was added to the list of areas that are important to the Community or at the time when the designation as a special protection area, as defined in the Birds directive, entered into force (as opposed to the October 1st, 2005 criterion). The

[12] ECJ, 14 January 2010, case C-226/08, AB 2010, 68 (Ems/Papenburg)

courts will consider the most recently granted “permission” prior to the pertinent natural preserve’s initial designation as a protected area. If an area has subsequently been added to the list of areas that are important to the Community as well, any permits that may have been issued in the meantime may, in accordance with European law, not be used as a reference. Agricultural businesses profit heavily from the permit exemption. Existing use not laid down in a management plan is still exempt from the permit requirement.

A recent legislative proposal also suggests further expansion of the existing use exception. The Dutch House of Representatives already agrees on defining existing use as use that was known, or could have reasonably been known by the authorities, on March 31st of 2010. If the Senate reaches agreement as well, a large number of current activities will be exempt from the permit requirement. Furthermore, this new legislation would mean that the ‘no significant change’ criterion would be abandoned.

Foresty

The protection of the nation’s forests is subject to the Forestry act. It does not contain provisions on the prevention of forest fires, which are quite rare in the Netherlands. Local (environmental) ordinances prohibit the use of open fires and the burning of waste materials. Open fires are never allowed on or close to natural preserves. Furthermore, article 3 of the Forestry act provides for a general obligation to re-plant any woodlands that may have been destroyed. Within three years, the woodlands must be replanted in an ecologically responsible manner. If the replanting of these woodlands is unsuccessful, new replanting efforts must be undertaken within another three years. On principle, the replanting is to take place on the same soil on which the destroyed woodlands stood.

4. Rural development (questions 6 and 13-15)

Despite the fact that the Netherlands are quite densely populated, over 60% of its surface area is used for agricultural purposes. A number of stimulus programs have been instituted in order to develop the countryside. With the enactment of the Rural area planning act, a large number of stimulus programs have been replaced by a single national Investment budget for Rural Areas (IRA). The IRA is supplemented by a number of national and local European stimulus programs for rural areas. Despite the existence of an act targeted specifically at the spatial planning of rural areas, a singular political or legal definition of what constitutes a rural area remains absent. A study commissioned by the Ministry of Housing, Spatial Planning and the Environment defines a rural area as a non-urban area, containing small cities and villages (up to a maximum of 10,000 inhabitants) in a rural environment.

Rural developments

A number of different developments are currently shaping the countryside. For instance, the number of agricultural business is falling while scales are increasing. However, the Dutch agricultural sector and its affiliated market sectors still represent 10% of the Dutch economy and employment figures. Another development within the agricultural sector is the rise of 'diversified agriculture', which consists of agricultural business owners who choose to exploit other commercial activities alongside their agricultural activities. These commercial activities include the sale of regional products, recreational activities and tourism, educational activities and small-scale care for senior citizens, the developmentally challenged, addicts and former convicts on what are known as 'care farms'.

Finally, a large number of rural municipalities are faced with declining population numbers. The rural population is shrinking and ageing. This influences the capacity to maintain current standards of service in rural areas, which makes them less attractive for residential purposes, which is why many municipal governments try to slow down the decline in population. It is expected that, over the next thirty years, approximately 40% of Dutch municipalites will face some level of population decline, some of which will even decline by as much as 5%. That is why the central, provincial and municipal governments have drafted an Intergovernmental Action Plan on Population Decline, known as "Shrinking with Quality", in order to deal with the consequences of declining populations.

An important fundamental aspect of the policies concerning rural areas consists of striking the right balance between natural preservation and commercial, recreation and residential construction. Due to the declining numbers of agricultural businesses, many agricultural buildings are left vacant. In order to make the most effective use of the newly available real estate, the provincial

governments have drawn up assessment frameworks for spatial developments that intend to use these 'Vacant Agricultural Buildings' (VAB). This policy opens up the possibility of re-zoning vacant agricultural commercial real estate.

Furthermore, 'Space for Space' or 'Red for Red' schemes have been set up. Applicants can request regional assistance for new construction projects in rural areas as compensation for their demolition of agricultural real estate in the area or on the construction site. Another inititiave that intends to improve spatial quality in the countryside is the provincial policy to preserve existing estates and promote the construction of new estates. For instance, developers may construct a limited number of new residential units provided that they see to it that new natural preserves are created as well.

Stimulus programs

The POP2 European subsidy program invests in rural development. POP2 consists of four major goals: (i) strengthening the competitiveness of the agricultural and forestry sectors, (ii) increasing environmental and landscape quality, (iii) improving residential standards in the countryside and rural economies and (iv) executing the Leader approach ('liaison entre actions de développement de l'economie rurale': cooperation in rural development). Leader focuses on socio-economic stimulus in rural areas by financing local initiatives through private parties, local associations or businesses. POP2's entire budget is spent on rural development by way of the national LNV-subsidies regulation.

Provincial governments are responsible for distributing the Investment budget for Rural Areas (IRA). As of 2007, all national, provincial and local subsidies have been merged into one single budget, the IRA. This national investment budget is divided among the 12 provinces, with whom the central government has reached individual agreements on the specific goals to be achieved using the IRA. However, funding of the IRA by the central government has come under some pressure. Acquisitions of new natural preserves in order to complete the MES have come to a grinding halt due to cuts in IRA spending. New negotiations are currently underway and so it remains to be seen which rural development goals will survive for the coming years and which funds will be available to achieve those goals.

5. Final remarks

The "mega stables" debate

In the Netherlands, the debate on the establishment of "mega stables"continues. Mega stables are agricultural businesses approximately three or four times larger than the average agricultural business. The livestock numbers for these businesses range from a minimum of 7500 meat-type pigs or 1200 breeding pigs, 120,000 hens in lay or 220,000 broilers, 250 dairy cows or 2500 beef cattle.

Environmental groups and inhabitants of surrounding areas often protest proposed mega stables. These protesters primarily focus on the ethical implications of the establishment of mega stables, as well as on environmental and public health issues. The political debate on the other hand, is more concerned with implications of spatial development, in which the ethical concerns are less pressing, unless they have an impact on matters concerning spatial development.

Local resistance in the province of Noord-Brabant has led to a recent civilian initiative, supported by 33,234 people. This initiative has prompted the Provincial Council of Noord-Brabant to adopt a moratorium on the construction of new mega stables while a new spatial development regulation is being prepared. A year later, the Animal Rights Party (a political party represented by two members in the House of Representatives and one member in the Senate) proposed a similar moratorium on the national level as a precursor to a national spatial development policy. This proposal was accepted by a majority of the House, but it is yet to yield any executive action.

On March 8th of 2010, the new Spatial Development Regulation entered into force in the province of Noord-Brabant, severely limiting the possibilities of erecting mega stables. New concentrated livestock farms are not allowed thoughout the province, as are multi-story stables. In deconcentration areas, livestock farms are prohibited from expanding and in integrationa areas, expansion of existing livestock farms may not exceed 1.5 ha (formerly 2.5 ha). Expansions exceeding 1.5 ha to a maximum of 2.5 ha are allowed in certain agricultural development areas, but only with a provincial exemption (expansions of 3ha or more used to be allowed). Agricultural businesses that had initiated concrete plans prior to the 19 March 2010 moratorium and had received positive feedback from governmental authorities are exempted from these stricter regulations. However, in order to be eligible for this exception, businesses had to apply for an exemption before January 1st (for relocations) or April 1st (for expansions) of 2010.

At the national level, preparations are made for a policy position concerning scale increases and durability issues in terms of livestock farming. In all

likelihood, this policy position will be ready for presentation to the House of Representatives in October 2011.In preparation of the policy position, the undersecretary has initiated a public dialogue about mega stables in order to obtain an overview of the current positions on the future of livestock farming and scale increases. This public dialogue includes, among others, an online debate,[13] civilian panels and a working conference for representatives of social organizations, corporations, scientists, provinces and municipal authorities.

The relationship between concentrated livestock farming and public health
A report was issued recently, dealing with the relationship between concentrated livestock farming and public health issues in neighboring residential areas. The research supporting the report was commissioned by the central government and it shows that, although levels of particulates and micro-organisms in the air surrounding livestock farms are elevated, the effect on public health in nearby residential areas is indeterminate. As yet, it is impossible to determine the acceptable margins in terms of distance to businesses and concentrations of micro-organisms in relation to public health implications.

The Animal rights act was passed recently, which collects and invigorates existing legislation on animal welfare and health. Under this new act, general executive orders can be issued to regulate the location of businesses that keep animals in relation to residential areas. This should make it possible to explicitly consider veterinary risks in the adoption of future spatial planning decisions.

[13] www.dialoogmegastallen.nl