

Constitutional and Administrative Law Comments on Public-Private Partnerships in Urban Development: experiences from the Netherlands

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Summary

Public-private partnership agreements can be seen as government making use of private law to achieve planning objectives. Public-private partnerships (PPP's) have extensively been used in urban development projects during the past few decades in the Netherlands (and elsewhere around the globe). A lot of experience has been gained regarding PPP's, in particular on the local level. However, from the legal viewpoint, critical comments can be made regarding the use of public-private partnerships for urban development; in particular regarding PPP joint-ventures. In this paper, I identify three major points of criticism relating to PPP joint-ventures:

- Limited democratic legitimisation: PPP joint-ventures put 'politics at a distance'.
- Conflicts of interests: local government is party to a private law agreement and at the same time the competent authority for public-law decisions, such as adopting a land-use plan for the PPP project.
- Hybridisation: the blurring of the division of tasks and accountability between public and private parties.

This paper elaborates on these points of criticism on public-private partnerships. Many parties are unaware of them and they are seldom discussed in legal and planning literature. The critical comments are a consequence of the fact that through the use of PPP's public actions become intermingled with the logic of the private market.

1. Introduction to the research question

It is very common for governments to employ private law, for instance their right of ownership to land, as an instrument to reach planning goals. To a certain extent, private law regulation of land use can be an alternative to public law regulation. Needham wrote about the topic in his interesting study *Planning, Law and Economics; The rules we make for using land*.¹ In urban planning practice in the Netherlands, private law regulation of land use is not so much an alternative as an addition to the use of public law instruments. In this paper I shall discuss a particular form of use of private law by government: public-private partnership (PPP) agreements and PPP companies.

The use of PPP's for urban development purposes is very understandable. Indeed, PPP's can fill the 'void' between (public sector) spatial planning and (private sector) real estate investments. The fundamental weak link between public (land-use) plan and private sector realisation can be strengthened through the use of PPP's. However, we cannot confine ourselves to the strengths of PPP's. After all, through the use of PPP's public actions become intermingled with the logic of the private market. As a result, certain legal comments can be made regarding the use of PPP. The specific question, to be answered in this paper is:

Which constitutional and administrative law comments can be made regarding the use of public-private partnerships in urban development?

2. The Netherlands: no strict division between public and private domains

Before going into the details of public-private partnership agreements, it is important to describe the 'freedom of action' for Dutch municipalities. Therefore, this section and the following section briefly describe the broad freedom to act for municipalities.

Dutch municipalities are permitted to buy land on which 'private objectives', such as houses or offices are planned. After preparing the land for construction, they can sell it to developers. This allows for financial gains to be made by municipalities. This can be seen as 'market behaviour' of municipalities. Other practices of 'market behaviour' of municipalities can easily be found. Unlike some other countries, such as the United Kingdom, Dutch municipalities in principle are allowed to participate in public-private partnerships by which market risks are carried by government. In the Netherlands, public-private partnerships in the form of a legal entity in which (financial) risks are shared between the public and the private parties, are allowed and very usual. These kinds of partnerships may relate to land development, but sometimes even to the subsequent real estate development. This shows that the Netherlands, unlike for instance the United Kingdom, does not follow the principle of a strict division between the public and private domains. By this is meant that Dutch municipalities in principle are allowed to act as a market party, so within what is considered to be the private domain.

¹ Needham, B., *Planning, Law and Economics; The rules we make for using land*. London/New York (Routledge) 2006.

3. The Netherlands: active and passive land policy

Purchase of land by municipalities in the Netherlands is not limited to land that is designated for public land-use objectives, such as roads, squares or public schools. The purchase may relate to land on which ‘private objectives’ are planned, such as a residential area or an office area. However, the houses and offices will not be *built* by the municipalities. After having bought land from the previous owners, the municipality may prepare the land for construction and after that sell the land to the parties that will develop the land on which private objectives are planned, usually being property developers. Municipalities have made substantial financial profits resulting from the sale of land to developers.² The term that is used for (1) municipal acquisition of undeveloped land, followed by (b) preparing the land for construction, followed by (c) sale (or issue land under ground lease) by the municipality to developers or housing associations, is *active land policy*. Active land policy is a distinctive trait of Dutch spatial planning.

This policy can also be pursued in case of developed land. Then active land policy contains: (1) acquisition of developed land and structures on it, subsequently (2) demolition of (some or all) structures, decontamination of land, relocation of companies, reallocation of land and (3) sale of land and structures (or issue land under ground lease) to developers or housing associations. It must be noted that active land policy is not mandatory; municipalities may opt for a *passive land policy*. In case of passive land policy municipalities do not actively buy land, but restrict themselves to lay down a public law framework for developers, of which the land-use plan (*Dutch: bestemmingsplan*) is most important. This policy has no financial risks for the municipality, but makes it impossible to make profits from sale of land.

In general, one could say that Dutch municipalities, compared to municipalities in certain other countries, have many strong powers, both public law powers and private law powers. Besides, they dispose of – again compared to municipalities in certain other countries – relatively large budgets.

Yet other examples of government making use of private law for achieving planning objectives are public-private partnership agreements. In general, public-private partnership can be described as ‘an institutional form of cooperation of public and private actors who, on the basis of their own indigenous objectives, work together towards a joint target, in which both parties accept investment risks on the basis of a predefined distribution of revenues and costs’.³

4. Public-private partnerships for urban development

In the Netherlands, there is no such thing as a separate code of law for public-private partnerships, nor a distinct legal concept dubbed public-private partnership. Public-private

² The profits for municipalities resulting from the sale of land more or less function as a substitution for the very limited powers of municipalities to levy (municipal) taxes. Revenues from land sale as a source of income is vulnerable to economic changes; if the economic situation worsens – as has happened in the past few years – usually land sales drop and thereby municipal revenues from land sale.

³ Nijkamp, P., M. van der Burch and G. Vindigni, A comparative institutional evaluation of public-private partnerships in Dutch urban land-use and revitalisation projects, *Urban Studies*, 39 (10), p. 1865-1880.

partnership in itself is not a legal, but a social-academic qualification. All being said, however, existing legal concepts can be applied to public-private partnerships.⁴

From the legal viewpoint, public-private partnership *agreements* are of interest. Most relevant agreements are: declarations of intent and partnership agreements. These are agreements between a governmental party (usually a municipality) and mostly developers and/or investors as private parties. Such agreements are used if parties wish to cooperate in connection with an urban area development project. This may be the case, for example, if the ownership of land in the development location is divided between the parties.

In a *declaration of intent* parties agree in principle to initiate a certain trajectory of urban area development together. In a declaration of intent they lay down their intention to cooperate. For this purpose, they agree to investigate whether and how partnership can be realised for the area. Mostly, the investigation is to result in the preparation of a ‘feasibility study’, to be agreed upon by parties involved. The feasibility study mainly has a financial nature; basically it gives an answer from a financial viewpoint to the question if a certain program with a certain quality level can be realised.

Following the declaration of intent, parties enter into a *partnership agreement* — that is, if they decide to continue their cooperation.⁵ A partnership agreement aims to have a building location realised by a municipality and developer together, while they agree how, when and for whose account and risk the development project will be realised.⁶ In practice, partnership agreements also occur under different names, such as ‘development agreement’ (Dutch: ontwikkelovereenkomst).

As to the *contents* of a partnership agreement, several elements can be distinguished. The following elements are the main ones in partnership agreements.

(a) Arrangements of a financial nature

The financial arrangements surely will relate to the amount of financial compensation the property developer(s) pays for the services the municipality will provide to the developer’s advantage. These services may include roads, sewerage and green areas.

(b) The program

Part of the partnership agreement is the program (offices, dwellings, leisure, retail) that will be realised as well as the intended quality level. Parties may lay down that a master plan for the area, where the parties previously agreed upon, is point of departure for the project. As far as the dwellings are concerned, usually a percentage of affordable housing (rent and/or sale) is

⁴ H. Stout and H. Weening, *De (on-)betrouwbare overheid: een juridische kijk op private verwachtingen*. (‘The [un]reliable government: a legal perspective of private expectations’.) In: H. van Ham and J. Koppenjan (editors), *Publiek-private samenwerking bij transportinfrastructuur. Wenkend of wijkend perspectief?* (Public-private partnership in transport infrastructure. Beckoning or yielding perspective?) Utrecht (Lemma) 2002, p. 154.

⁵ It is possible that apart from a declaration of intent and a partnership agreement other agreements have been concluded between the municipality and the developer. For reasons of clarity we will refrain from discussing these other agreements. As a rule in all of the successive agreements between municipality and developer, the same aspects recur. The differences between the successive agreements lie in the increasing degree of detail on each of the aspects.

⁶ Definition derived from P.S.A. Overwater, *Naar een sturend (gemeentelijk) grondbeleid. Wie de grond heeft, die bouwt*. (‘Towards steering [municipal] land policy. He who owns the land, builds’.) Alphen aan den Rijn (Kluwer) 2002, p. 103.

specified. At this stage, possibilities for flexibility are often built in as market conditions may change. The agreement thus allows for shifts in the program, depending on the market. Examples in this context are more (or more expensive) dwellings as opposed to a segment of the intended office development.

(c) Phasing and planning

This regards spreading out in time of the activities that are necessary for the development. Urban development is a comprehensive and complex activity. Not every aspect of it can be done simultaneously. That is impossible from the technical viewpoint and from the commercial viewpoint as well. To give an example of the latter: bringing to sale at one time too many houses of the same type and price range may spoil the market.

(e) The partnership model

As far as the structure of the partnership between municipality and project developer(s) is concerned, various alternatives exist. In their partnership agreement, parties will choose for one of the alternative models. A model that is often used is the *joint-venture model*.

(f) Financial means and public law powers

A partnership agreement also indicates which financial means and which public law powers a municipality will deploy to advance the development of the area. This is important, because, when the partnership agreement is concluded, a land-use plan enabling the (re)development project under public law is usually not yet in place.

5. The joint-venture model of public-private partnership

As to the *models* of the partnership, there are various alternatives. One particular model entails public and private parties jointly incorporating a legal entity (a company) that will constitute the legal vehicle for (re)developing the area. This is the *joint-venture model*. I shall use this model for my constitutional and administrative law comments. The joint-venture model is widely used in the Netherlands.

The joint-venture model is particularly suitable if public and private parties are willing to share the risks and opportunities involved in the (land) development and in case of the long-term development of the area. (Financial) risks that are too high for one public or private party can be spread in a legal entity, as a result of which a large-scale development can be realised. Other considerations for choosing this model are of a tax and civil law nature, for the joint-venture model offers possibilities to realise tax advantages and to limit liabilities for the parties involved.⁷ A joint-venture can be seen as a link between the public and the private domains. In a joint-venture, the joint public (municipality) and private (property developer) ambitions for the area are embedded.

6. PPP joint-venture in the form of a land development company

Usually, in the Netherlands a joint-venture PPP entails the incorporation of and participation in a legal entity. This means, *in casu*, that the government body, usually a municipality, incorporates a company together with other parties, in which it holds shares. This is a public-private partnership in the form of a legal entity. The legal entity is labelled a 'land

⁷ Overwater 2002, p. 130.

development company' (Dutch: grondexploitatie maatschappij; GEM). Land development companies represent the *joint venture model* of public-private partnership.

The land development companies function in accordance with the following principle. In urban area development projects, we often see situations in which landownership is divided between a municipality and one or more developers. A company is incorporated by the municipality and the developers. Subsequently, the parties transfer their lands to the company. By means of purchasing the lands, the company then acquires the remaining lands required for the urban area development project. This refers to lands the parties do not own at the moment they incorporate the company. The partnership agreement (drafted prior to the incorporation of the company) contains a provision for the event this may not succeed on a voluntary basis: by exercising its pre-emption right or by expropriation, the municipality will acquire those lands and subsequently transfer them to the company. In its turn, the company develops the land of the area, in particular preparing the lands for construction. Apart from preparing the land for construction, the land development companies also produce urban design conditions.⁸ To conclude, the lands that are ready for construction are allocated to the developers (and possibly to third parties), who subsequently proceed with developing buildings. Moreover, the developers and third parties will be bound to the urban design conditions.

Very occasionally, we see a company undertaking tasks not only of land development, but also of real estate development (structure development). In those situations, the municipality goes beyond its traditional task of land development by participating in the development of real estate, while bearing the risks.⁹ In those situations, the boundary between that which is traditionally included in the public party's domain and that which is included in the private party's domain, has become blurred. The advantage of this construction is often said to be that a profit and risk settlement can take place between the result of the land development and that of the structures.¹⁰ For in those situations the financial risks and opportunities of the municipality (and its partners) are not limited to the land development, which is the case in land development companies, but also extend to the development of the real estate.

7. Three points of criticism

PPP joint-ventures in the form of a land development company have strong points in favour of them. As stated in the first section of this paper, land development companies can fill the 'void' between (public sector) spatial planning and (private sector) real estate investments. The fundamental weak link between public (land-use) plan and private sector realisation can be strengthened through the use of PPP's.

However, PPP joint-ventures are not without criticism. Through the use of joint ventures, public actions become intermingled with the logic of the private market. As a result, certain

⁸ The conditions from a land development company are the result of consultation and consensus between the public and private parties in a land development company.

⁹ An example in this context is the urban area development in the Paleiskwartier in 's-Hertogenbosch. See for further information I. Bruil, F. Hobma, G.J. Peek and G. Wigmans, *Integrale gebiedsontwikkeling. Het stationsgebied 's-Hertogenbosch*. ('Integral area development. The railway station area of 's-Hertogenbosch'.) Amsterdam (SUN) 2004.

¹⁰ G. Wigmans, *PPS en de totstandkoming van de Ontwikkelingsmaatschappij Paleiskwartier* ('PPP and the creation of the development company Paleiskwartier'). In Bruil et al 2004, p. 337.

legal comments can be made. I make three comments from the viewpoint of constitutional and administrative law. The comments are based on my own research and on literature review:

- The first comment has to do with limited democratic legitimisation. PPP joint-ventures put ‘politics at a distance’.
- The second comment relates to municipality’s (potential) problem of conflicts of interests. It is party to a private law agreement and at the same time the competent authority for public-law decisions, such as adopting a land-use plan for the PPP project.
- The third comment has to do with hybridisation: the blurring of the division of tasks and accountability between public and private parties.

These points are seldom discussed in legal and planning literature and many people are unaware of them.

(1) Little democratic legitimacy

PPP joint-ventures have little democratic legitimacy. Legal researchers Van der Heijden *et al* write that incorporating an independent legal entity puts ‘politics at a distance’¹¹. This is supported by other studies into PPS joint-ventures.¹² By working with PPP companies (for example: private limited companies or limited partnerships/private limited companies), the project is more or less privatised and the municipal council is placed at a distance. Local politicians, for example, cannot easily influence the policy of such companies. In addition, public access to or insight into commercial figures cannot be taken for granted by councillors, in view of the market-sensitive contents of such documents. In general, lawyer Koster identifies that ‘a municipality’s partnership with a private party in the form of a limited partnership/private limited company (can) to a large extent evade the usual democratic control’.¹³

(2) (Potential) conflicts of interests

PPP joint-ventures carry with them a potential of conflict of interests for municipalities. In essence, an involved municipality is party to an agreement and at the same time the competent authority for public-law decisions such as adopting (a revision of) the land-use plan. In the vast majority of cases a revision of the land-use plan is needed for the project, because the project is in conflict with the existing land-use. This ‘double hat’ situation may lead to problems. The most important problem is perhaps the position of *third parties* concerned. I will illustrate this by referring to procedural stages of the planning process: *(2a)* public participation and *(2b)* views.

¹¹ G.M.A. van der Heijden, N.F. van Manen and C.L.B. Kocken, *Publiek Private Samenwerking. Risico’s en regulering* (‘Public private partnership. Risks and regulation’) Den Haag (Ministerie van Volkshuiving, Ruimtelijke Ordening en Milieubeheer) 2000, p. 42.

¹² For example, G. Wigmans, I. Bruil and F. Hobma, *Thematische evaluatie* (‘Thematic evaluation’). In: Bruil *et al*, 2004.

¹³ W.J.H. Koster, *De BV/CV en het wetsvoorstel personenvennootschappen; Leidt het wetsvoorstel tot het einde van de publiek-private samenwerking (PPS) in de vorm van een BV/CV?* (‘The BV/CV and the legislative proposal on limited-liability partnerships; will the legislative proposal lead to the end of public private partnership (PPP) in the form of a BV/CV?’) *Bouwwrecht*, no. 8, augustus 2005.

(2a) Public participation

A point of criticism is that government can no longer be impartial once it has entered into an agreement and a land development company has been established. It is no longer free in its choices, for example, relating to *variants and alternatives to be investigated* proposed by third parties.¹⁴ More specifically, this relates to the position of third parties concerned. In this context, Pluimakers points out that *public participation responses* to the pre-draft land-use plan can no longer be assessed with an open mind.¹⁵ After all, an agreement has been concluded between municipality and developer holding one specific solution for the urban development. This solution is the outcome of (sometimes hard) negotiations and laid down in a contract. It is foreseeable that the municipality will not easily accept variants and alternatives as proposed through public participation, because it may be in conflict with the prior contract that has been concluded.

(2b) Views

The same applies to *views* (Dutch: *zienswijzen*) against the draft land-use plan submitted to the municipal council by third parties concerned. *Formally* the municipality is free to honour views against the draft land-use plan. *Materially*, the situation may be altogether different. It is not inconceivable that the municipality, in view of the earlier agreement on the land-use plan with the private parties, tends to reject such views. Bregman wrote about such situations: 'In this way, the government can actually no longer objectively weigh interests if there are objections by third parties; it has already weighed the interests during the negotiation process with the private partner(s).'¹⁶

The above comments does not suggest that a municipal body is not supposed to have its own clear opinion on an urban area development project. The issue is whether it is (formally) still sufficiently free, or feels sufficiently free (materially), to deviate from the opinion, in view of the agreement made with the third party/parties at an earlier stage.

(3) Hybridisation

The practice of urban development through PPP joint-ventures leads to hybridisation: the blurring of the division of tasks and accountability between public and private parties. In the classic (non-PPP joint-venture) situation, a clear division exists: the municipality takes care of the public law planning framework and private parties (developers) take care of the realisation of the plans. This distinction cannot be made so easily anymore in case of PPP joint-ventures. Indeed, public law decisions, such as the contents of a land-use plan, are prepared in close harmony with developers. The same goes for design codes.

The land development company itself is an example of hybridisation. Municipalities hold a percentage (usually up to 50%) of the shares of the company. The other shares are in the hands of private parties (developers, investors). The municipality acts as a risk taking

¹⁴ W.H.M.A. Pluimakers, *De wetgever en besluitvormingsprocedures over grote projecten* ('The legislator and decision-making procedures regarding large-scale projects'.) In: A. Driesprong, M.V. van Ginkel, H.G. Heegstra and W.H.M.A. Pluimakers, *Lex aquarum, Liber amicorum: opstellen over waterstaat, waterstaatswetgeving en wetgeving, opgedragen aan mr. J.H.A. Teulings* ('Lex aquarum, Liber amicorum: papers on public works, public works legislation and legislation, dedicated to J.H.A. Teulings') Den Haag (Ministerie van Verkeer en Waterstaat) 2000.

¹⁵ Pluimakers 2000.

¹⁶ A.G. Bregman and R.W.J.J. de Win, *Publiek-private samenwerking bij de ruimtelijke inrichting en haar exploitatie* ('Public private partnership in spatial planning and its development'.) *Bouwrecht Monografieën* no. 26. Deventer (Kluwer), 2005, p. 97.

participant in a private law entity. As explained above in section 3: the risk taking activities do not only stretch out to land that is to be developed for public purposes, but also to land that is to be developed for private purposes, such as offices or residential. This, of course, bears in itself the risk of financial losses for the municipality. The risk of financial losses from entrepreneurial activities may suit private parties, but it is questionable if it suits (municipal) government.

8. Conclusion

The use of PPP's for urban development purposes is very understandable. Indeed, PPP's can fill the 'void' between (public sector) spatial planning and (private sector) real estate investments. The fundamental weak link between public (land-use) plan and private sector realisation can be strengthened through the use of PPP's. PPP joint-ventures strongly reduce the 'freedom of obligations' of spatial plans. PPP joint-ventures for land development indeed have the power to link public planning to private investments.

However, we cannot confine ourselves to the strengths of PPP joint-venture land development companies. From the legal viewpoint I mentioned three comments: (1) little democratic legitimacy, (2) potential conflicts of interests, resulting in a weak position of third parties and (3) blurring of the division of tasks and accountability between public and private parties.

Some have made attempts to solve the problems I mentioned.¹⁷ However, practice proves that there is no easy solution to the problems. The comments I made are a consequence of the fact that through the use of PPP's public actions become intermingled with the logic of the private market. This results in market parties asking certainty from municipalities in exchange for their willingness to invest. These certainties are laid down in private law contracts, *prior to* important parts of the public law decision-making procedures. This limits the latitude of the public actors and *de facto* weakens the position of third parties. The willingness to invest does not come for nothing. 'There is no such thing as a free lunch'. Public (planning) actors must be aware of this.

¹⁷ This paper does not leave room to discuss these proposals to solve the problems.