



Trnovski pristan 2, p.p. 4717, 1127 Ljubljana, SLOVENIA
Phone: +386 1 420 13 00, fax: +386 1 420 13 30
E-mail: info@uirs.si, web: <http://www.uirs.si>



Workshop 19 - Legal Aspects of Housing, Land and Planning

Enforcing Dutch building regulations

Johannes Jan Van der Heijden

J.vd.Heijden@otb.tudelft.nl

Paper presented at the ENHR conference
"Housing in an expanding Europe:
theory, policy, participation and implementation"
Ljubljana, Slovenia
2 - 5 July 2006

Jeroen van der Heijden
Delft University of Technology
OTB Research Institute for Housing, Urban and Mobility Studies
Jaffalaan 9, 2628 BX Delft
J.vd.Heijden@otb.tudelft.nl

ABSTRACT

Some deadly incidents in the beginning of the 21st century put building control high on the Dutch political and public agenda. Government, municipalities and private parties are working together on new more (cost-)effective building regulation enforcement-strategies. These new strategies seem to focus mostly on the *execution*-question: which party (private or public) can perform building control most cost-effective? Much attention is paid to the fact that municipalities seem to be (qualitative and/or quantitative) lacking the capacity to perform a level of building control that meets the legal criteria. Far less attention is paid to the fact that the occurrence of the incidents have shown, that regulations are not being (totally) fulfilled.

In this paper we start by taking a look upon the present state of Dutch building regulations and building control. We then present a theoretical framework on both regulation and enforcement literature. The framework will be build up out of a continuum of enforcement-strategies – from instrumental to normative; and a continuum of execution-strategies – from public to private parties. In the second part of this paper we discuss new (under construction) Dutch building regulation enforcement-strategies and place these within the theoretical framework. In the final part of the paper we discuss the present state of Dutch building regulations and control, both formal and daily practice, and new enforcement strategies from the theoretical framework we've build.

1 INTRODUCTION

The role played by local authorities in defining (local) building regulations and monitoring compliance has a long history. As far back as the Middle Ages, local administrators were setting standards for existing and future buildings via so-called 'civic by-laws'. It was not until 1902, when the Housing Act came into effect, that the Dutch government officially got to grips with public housing. However, public housing policy was legally the responsibility of the government, implementation of this policy was the responsibility of the municipalities. This responsibility of the municipalities consisted of setting up regulations related to buildings, supplying building permits and controlling compliance with building regulations.

During the twentieth century the building regulations were further developed and streamlined at national level. The Building Decree in 1992 introduced a general set of requirements for all buildings. Since the 1980s and 1990s the government's attitude to the building sector has been re-shaped by the concept of redefining regulations ('deregulation'), which was expected to increase freedom (of design) as well as create equal legal status and legal protection for citizens and ease the burden on industry and public administration. These goals were the mainspring behind legislative and regulatory amendments (for an overview of the development of Dutch building regulations between 1901 and 2003 see: Van der Heijden, et. al., 2006a, pp. 1541-1554).

Though the building regulations have continued to develop, the monitoring practices have more or less remained unchanged. Responsibility still lies with central government and the municipalities still decide on how to exercise control. As seen from a formal point of view Dutch building regulations show much features of a *command-and-control* strategy (Baldwin and Cave, 1999, chapter 4), which aims at compliance through means of deterrence (Reiss, 1984) and/or fear of sanctioning (Hawkins, 1984a). However, from a survey upon the daily practice of Dutch building control (Van der Heijden, Visscher en Meijer, 2006a) it can be learned that the Dutch municipalities' enforcement-strategy, also shows features of the *responsive regulation* model as described by Ayres and Braithwaite (1992), which aims at compliance in the first place by persuasion through means of teaching, instruction, persuasion, negotiation and advising. For some time now the municipalities have been coming under fire because of the way in which they execute this task.

This paper addresses the following questions: How, in short, have current Dutch building regulations and building control developed in the Netherlands? How, in short, is Dutch building control performed currently? What are expected future developments for Dutch building control? Into what extent can we place current Dutch building control and expected future developments in a theoretical framework? Into what extent does this theoretical framework help us get insight in possible future development of building control? The paper is based both on a policy analysis – methodology used as described by Dunn (2003) – and a field survey on building control – methodology used as described by Fowler (2003) –. The presented theoretical framework is based upon a literature survey on enforcement strategies. This paper will serve as the basis for a dissertation, which aims to provide suggestions of how to shift tasks and responsibilities in a way that optimally guarantees compliance with building regulations, while minimising administrative burden.

In section 2 we chart the progress of the 1901 Housing Act until the present situation. We look briefly upon the period between 1901 and the early 1980s and go deeper into the development of Dutch building regulations in the period 1982 – 2004. Section 3 presents a theoretical framework based upon a literature study on enforcement strategies. In section 4 we give an overview of a field study on building control executed in 2005-2006. Future developments in Dutch building control are being presented in section 5. In the final section we look upon formal and actual Dutch building control and the discussed expected future developments from a theoretical point of view. We end this paper by drawing some conclusions on possible future changes in Dutch building control and discussing future research upon this subject.

2 PROGRESS OF THE HOUSING ACT

Van der Heijden, et. al., (2006b) make a division of the development of Dutch building regulations into three phases: first, a period of regulation, 1901-1940. The introduction of the Housing Act in 1901 is often regarded as the first step by the government towards official involvement in the building sector. The Housing Act of 1901 placed the responsibility for public housing policy squarely with the government and the responsibility for implementation in the hands of the local municipalities. This legislation immediately gave the municipalities the freedom to draw up their own building and housing regulations, and to introduce their own control and inspection measures. Accordingly, a situation evolved in which building regulations in one municipality could differ radically from building regulations in another. During this period the government passed several amendments which made the municipalities increasingly responsible for drawing up specific building regulations. The municipalities enjoyed considerable autonomy in determining the content of these (local) regulations. This subsequently created a situation in which there was very little standardisation or transparency.

The second phase 1940-1980 was characterised by attempts for standardisation. Delays occurred in projects that were specifically set up with the aim of easing the urgent housing shortage in the post-war years. The government decided to tackle the housing shortage by amending the building legislation in such a way that it would become more uniform and nationally applicable. Commercial and other parties in the building sector and ordinary citizens needed better legal protection. It was to this end that the Housing Act was drastically amended in 1961. The model building by-law, introduced in 1965, was primarily responsible for far-reaching standardisation of municipal building regulations. Nevertheless, the 1961 amendment still allowed the municipalities considerable freedom. The model building by-law gave them scope to grant exemption from regulations and to impose additional requirements. In the government's vision, equal legal status for companies and citizens was still insufficiently guaranteed.

The third phase, 1980-2003, was characterised by redefining regulations ('deregulation'). In 1982 certain goals were defined by the Government (Lubbers I Coalition Agreement) which would supposedly simplify and reduce regulations. The Coalition Agreement stated that superfluous rules and regulations should be scrapped – particularly with regard to the technical aspects of housing – and that the building regulations themselves had to become more uniform. The goals that were set in this Coalition Agreement laid the foundation for the MDW operation (market forces, deregulation and law), which involved the modernisation of legislation and regulations from 1994 till 2003. The aims of

this operation were to lower the costs for businesses and members of the public, to create more scope for market forces, and to improve the quality of legislation.

In mid-1983 an action plan (Actieprogramma Dereguleren) was submitted to the House of Representatives, which more or less marked the start of redefining the building regulations ('deregulation'). It was hoped that this redefining would ultimately increase freedom, improve legal security and stimulate equality of status for members of the public, and ease the burden on businesses and government (TK, 1983). The action plan also described how the government's proposals for improvement could be incorporated in a Building Decree (Overveld, 2003 p. 11). This Building Decree would set out all the technical requirements for existing and new constructions and thus lead to unity and transparency in building regulations (Visscher, 2000 p. 32).

The Building Decree of 1992 set out the minimum standards that a plan had to meet in order to get a building permit. It also set out minimum standards for existing buildings. These standards took the form – as far as possible – of performance requirements. And it contained functional descriptions, which indicated the purpose of the Decree, whereas the threshold value indicated the required performance level. Essentially, there was no difference between the level in the 1992 Building Decree and the level in the previously mentioned model building by-law. The introduction of the Building Decree in 1992 was accompanied by an amendment to the Housing Act. The main changes compared with the Housing Act of 1962 were as follows (Bercken, 1997 and Visscher, 2000):

- Building projects were split into three categories: a permit-free category, a report-obligation category and a permit-obligation category;
- A deadline was set within which the Mayor and Aldermen had to reach a decision on a report or an application for a building permit (5 and 13 weeks respectively). If no decision was reached within this deadline, the permit would be nominally granted;
- A provision was incorporated which attached public law significance to private law certificates.

The Building Decree of 1992 only partially reflected the policy goals in the plan to deregulate the building sector. It failed to address the goal that the Building Decree be brought into line with other building regulations which were not within the remit of the officials at the Department of Housing. The intention was to create clarity and uniformity in the building regulations. An evaluation of the Building Decree (VROM, 1996) revealed that the building sector favoured the systematic approach and endorsed the principle of performance levels. However, it also emerged that the envisaged simplicity was being obstructed by a complex reference structure pertaining to norms and ministerial arrangements, and by the legalese in which the regulations were couched.

A need for further deregulation coupled with reports about the incomprehensibility of the building regulations and incompatibility with other legislation prompted a revision of the Housing Act. The new version came into effect along with the (converted) Building Decree 2003 on 1 January 2003 (Overveld, 2003). It was hoped that the Housing Act and the underlying Order in Council would trigger the development of more customer-friendly and comprehensible building regulations (Damen, 2003).

The Building Decree 2003 differed mainly in form and partly in content from the Building Decree 1992. One significant innovation was the introduction of 'table legislation', i.e. sets of tables that determine the sub-sections which apply to parts of a building with one and the same intended use (Overveld, 2003, p. 17 et seq.). The concept of 'use function' does not appear in the Building Decree 1992. 'Use function' is understood as: the parts of one or more buildings on a piece of land which are used for the same purpose and together form a use unit. There was no question of actual deregulation via the amendments: the Building Decree 2003 comprises more sections (regulations) than the Building Decree 1992.

An important change in the 2003 amendment of the Housing Act was the abrogation of the category report-obligatory building works and the introduction of a light-permit-procedure category and a normal-permit-procedure category. The light-permit-procedure category consists of small building projects, small adjustments to existing buildings and small changes to existing buildings like adding a greenhouse to an existing house, or raising a small garage. The light-permit-procedure category overlaps partly with the permit free category. The difference in categories can be found in the location of the small building projects: if these are being raised at the front site of the existing building, a light-permit is obliged, if these are being raised at other sides of the building it permit free, which has to do with compliance to zoning and aesthetic by-laws. For example: for raising a shed dormer at the front-side of an existing house a light-permit is compulsory, but raising exactly the same shed dormer at the back side of that same house can be done permit free.

Problems in monitoring compliance with building regulations

Despite the changes to the building regulations and their objectives, the municipalities were still responsible for monitoring compliance. Various incidents at the turn of the century (a pub fire in Volendam, an explosion of a fireworks factory in Enschede, the collapse of a carpark deck in Tiel and the collapse of a balcony in Maastricht) sent building control straight to the top of the political and public agenda (with articles in i.a. Cobouw, 2000 and Cobouw, 2003). Investigations into these incidents revealed that various municipalities were consistently neglecting to conduct adequate checks, that there were shortcomings in the issue of building permits, and that the responsibilities within the municipalities were not clearly enough defined. The reports concluded that the government ought to play a stronger role in policing the regulations and that clearer distinction was needed in the allocation of responsibility. It should be noted that these defects were ascertained mainly in the municipalities (for an overview of these reports see: Van der Heijden, et. al., 2006b, pp.).

A report on the national ministerial inspections at municipalities (VROM, 2005) provides an overview of a (government) inquiry into the quality of municipal building control. The report uncovered that information which is needed for checking various aspects of the Building Decree was missing from 45% of new-building files for 2003 and 27% for 2004. In addition, the Building Decree was (partially) breached by approximately 8% of the files for 2003 and 17% of the files for 2004. Finally, the report stated that in 2003 and 2004 no (visible) checks were performed for the various regulations and requirements in the Building Decree in 69% and 47% respectively of permit applications. Large discrepancies were also found in the calibre of the checks performed by the different municipalities. In 2003, the municipalities had already made known that they were unable to fully monitor compliance with the building regulations: "100% supervision is beyond our capability" (VBWTN, 2003).

Conclusion

Though Dutch building regulations have continued to develop, the monitoring practices have more or less remained unchanged. Responsibility still lies with central government and the municipalities still decide on how to exercise control. Exercising this responsibility the municipalities show only a limited degree of uniformity and standardisation. Serious problems also exist in supervising adherence to regulations. The municipalities lack the capacity to perform inspections that meet the legal criteria. In addition, they are scarcely responsible (if at all) for testing the content of building plans against the Building Decree. Tentative developments which were started up during the deregulation period may eventually lead to the (partial) transfer of municipal control tasks to the private sector (Van der Heijden, et, al, 2006b).

3 (SOME) THEORIES ON REGULATION AND ENFORCEMENT

A vast amount of literature on regulation and enforcement has been produced by many authors from different scientific backgrounds. It is not our aim to view upon all the opinions of these authors, or to view upon all movements that have been described throughout the years within this paragraph. What we will try to do is to look briefly upon regulation as a concept and mention, in short, some models or strategies that might give us more understanding of the Dutch building control system.

Traditionally two enforcement strategies are being mentioned: *compliance* and *command and control* (Kagan, 1994; Hawkins, 1984a, Hawkins en Thomas, 1984b; Aalders en Niemeijer, 1999; Ringeling, 2003). The compliance-strategy aims at spontaneous obeying of regulations (Hawkins, 1984a; Kagan, 1994; Van Stokkom, 2004). The command and control-strategy aims at deterring non-obedience prior to law braking (Reis, 1984) or aims at sanctioning non-obedience after the law has been broken (Hawkins, 1984a). The choice for deterring or sanctioning depends on the legal system of a country. The United States of America and Germany, for example, show the use of a deterrence strategy, whereas most European countries show a preference for a strategy based upon sanctioning (Ogus, 2002).

The compliance-strategy aspires maximum effectiveness of public (governmental) means and activities by encouraging those features that bring about spontaneous obedience and weaken those features that bring about non-obedience (Parker, 2000, p. 535). Spontaneous obedience is thought to proceed from feelings of moral condemnation with braking the law (Tyler, 1990). Hutter (1997) makes a division between *persuasive* and *insistent* compliance-strategies. Critics of compliance strategies

note that people only obey the law, as long as this is their self-interest and therefore would act as calculative actors (e.g. Parker, 2000, p. 534). Cason and Gangadharan (2005) find a direct positive relation between non-obedience and the costs obedience brings about.

The command and control-strategy aspires at making the law work, not at changing behaviour that influences spontaneous obedience (Van Stokkom, 2004). The consequences of non-obedience have to be feared (e.g. Ogus, 2002). A central hypothesis within this strategy forms the idea that the higher the change to get caught breaking the law and/or the higher the sanctions on breaking the law, the less willing people are to break the law (Coolsma and Wiering, 1999). Critics of this strategy state that it is ineffective and expensive, it brings about problems with enforcement and it aims to much at end of pipe solutions (e.g. Fairman and Yapp, 2005, p. 493). The system is also said to be prone to capture (Baldwin and Cave, 1999, p. 36-37).

Both strategies have their own enforcement style: a *persuasive* or *normative-style* to the compliance-strategy and a *sanctioning* or *instrumental-style* to the command and control strategy (Wiering, 1999; Van Stokkom, 2004). Different authors have the opinion that both styles can be used simultaneously (e.g. Hawkins, 1984a; Hawkins en Thomas, 1984b; Reiss, 1984; Tyler, 1990; Shapiro en Rabinowitz, 2000; Parker, 2000).

At the turn of the twentieth century more and more criticism is placed upon the command and control system. Also a different approach towards executing enforcement can be found: more and more attention was given to using market strategies or private parties in the enforcement strategies. This all has led to the development and implementation of alternative enforcement strategies (for an overview see: Baldwin and Cave, 1999), two of them being: *self-regulation* and *enforced self-regulation*.

Self-regulation can be seen as taking place when a group of firms or individuals exerts control over its own membership and their behaviour (Baldwin and Cave, 1999, pp. 124-133). Self-regulation is said to have both advantages and disadvantages. Advantages are: relevant expertise of own body and efficiency; disadvantages are: mandates, (lack of) accountability and the (public) belief in fairness of procedures.

The expression enforced self-regulation has been introduced by Braithwaite (1982) and is being further developed by Ayres and Braithwaite (1992, chapter 4). Enforced self-regulation aims at a combination of governmental (public) enforcement and (private) self-regulation. It is the combination of public enforcement of privately written rules and publicly mandated and publicly monitored private enforcement of those rules that forms the key-notes of the model (Ayres and Braithwaite, 1992, p. 116). Enforcement within this model is seen as controlling the controlling (Fairman and Yapp, 2005, p. 493). Critics of this model (e.g. Ogus, 1995; Baldwin en Cave, 1999; Fairman en Yapp, 2005) point at the (un)willingness of employees to act as controller or signaller; the economic circumstances that might or might not stimulate companies to implement self-regulation; the knowledge and willingness within an organisation to implement self-regulation; the risk of capture; and the public belief in the fairness of the procedures. The model also seems to bring about large public costs concerned with consultancy between government and companies, therefore the model seems not fit for regulating smaller companies.

Criticism on both the model of command and control as the model of self-regulation have led to Ayres and Braithwaites (1992) model of *responsive regulation* within which the concept of enforced self-regulation plays an important role. They introduce two conceptual enforcement-pyramids: one based upon a hierarchy of sanctions, the other based upon a hierarchy of enforcement strategies. From base to top the hierarchy of sanctions shows persuasion, warning letter, civil penalty, criminal penalty, license suspension and licence revocation. The hierarchy of strategies shows self-regulation, enforced self-regulation, command and control regulation with discretionary punishment and command and control regulation with nondiscretionary punishment. The model is based upon early empirical research by Braithwaite (1985) on the execution of enforcing health and safety regulation (e.g. in the coal-mining industry). Empirical research mentioned by Ayres and Braithwaite (1992) on health and safety regulation and on economic regulation (Braithwaite, 2002) shows the strength of the model for different fields of regulation.

According to the authors of the model, the strength of the hierarchy of sanctions lies in the possibility to choose, within a certain social and political accepted range, for different types of sanctions and therefore make it possible to choose a tactical sanction. By making it possible to choose between sanctions, it gets unclear for the subject which sanction the controller will choose, therefore the controller has an information advantage over the subject (Ayres and Braithwaite, 1992, pp. 35-38).

The strength of the hierarchy of strategies lies in the possibility to choose between different strategies, to enforce obedience with, from the point of view of the subject, more and more harsh means (Ayres and Braithwaite, 1992, pp. 38-40).

From a research by May (2004) on compliance with building regulations of building contractors in the United States home building industry it is concluded, that negative compliance motivations are influenced by inspection practices, whereas affirmative motivations are mostly influenced by attitudes and beliefs of regulatees and by their knowledge of the rules. For example: a facilitative style fostered affirmative motivations while detracting from negative motivations, and a formalistic style detracted from affirmative motivations – no effect was found for the influence of a formalistic style on negative motivations. Important conclusions drawn from this research is the insight (and empirical proof) that different motivations can be addressed to get compliance, that the role of the inspector does influence compliance motivations and that compliance motivations also are being influenced by the possible loss of reputation among peers. These first two conclusions seem to underpin the strength of the responsive regulation model.

Gunningham, Gabrovsky and Sinclair (1998) use the model of responsive regulation as starting point of their own model of *smart regulation*. This model is based upon both theoretical research and extensive empirical research of the chemical and agricultural sector in the U.S.A, Great Britain and Australia. Gunningham, et. al. (1998, p. 387 et seq), name five principals to get to smart regulation: (1) prefer policy mixes incorporating a broader range of instruments and institutions; (2) prefer less interventionist measures; (3) involving a third party in the enforcement-process; (4) empower participants which are in the best position to act as surrogate regulators; (5) maximising opportunities for win-win outcomes. The first two principals prove the strength of the responsive regulation model. Especially the third and fourth principals, the involvement of third parties and surrogate regulators, next to public and/or private controllers, within the controlling process seems to be the major difference towards the responsive regulation model. Though from extensive empirical research (Gunningham, et. al., 1998, pp. 137-372) it is learned, that involving these participants and parties is more efficient when big companies are involved and when non-compliance is easy to notice to these participants and parties. From empirical research in the agricultural sector (see Van Stokkom, 2004, p. 37) it is learned that fair and regular controls offer more perspective, than varying in enforcement styles. It is also learned, that sanctioning has a turning-point, after which contra productive effects are gained: more sanctioning will encounter resistance. This said, a too informal relationship between controller and subject could bring about negative results, when the possibility to sanction is not being used.

At the turn of the twentieth century we also notice a more and more important role that thinking in terms of risk-reduction gets in discussions on regulation (Hutter, 2005). A shift towards so called *risk-based regulation* can be perceived - for a perception of the emerge of this enforcement strategy based upon risk-reduction or risk-perception we refer to Baldwin and Cave (1999), Baldwin, Hutter and Rothstein (2000) and Hutter (2005). Risk is often defined as “the probability that a particular adverse event will occur during a stated period of time, or result from a particular challenge” (Baldwin and Cave, 1999, p. 138). Risk-based regulation aims at setting standards, collecting information and influencing and changing behaviour (Hood, et. al., 2004). Risk-based regulation differs from traditional regulation, because it is not based upon the input of an activity – prescribing what to do, or which standards to meet – but based upon its output – the risk it causes. Another difference between traditional regulation is its non-deterministic character: traditional regulation aims reducing non-obedience to zero, whereas risk-based regulation accepts that some risks are inevitable, but tries to reduce these risks to a minimum (Seiler, 2002, p. 33). The UK Health and Safety Executive (HSE, 1992) by the Health and Safety commission, a government agency responsible for health and safety regulation in Great Britain, is seen as frontrunner of risk-based regulation (Baldwin, et. al., 2000; Flüeler and Seiler, 2003, Hutter, 2005). Within the HSE (1992) three levels of risks are being used: (1) Unacceptable region: risks cannot be justified, save in extraordinary circumstances; (2) the ‘As Low As is Reasonably Practicable’ (ALARP) or Tolerability region: risk-reduction is undertaken only if a benefit is desired; and (3) a Broadly acceptable region: only those actions are being undertaken to keep the risk at an acceptable level.

Conclusion

Theoretical notions on enforcement show a continuum of strategies – from instrumental to normative. Also on the execution of enforcement of public regulation a continuum can be seen: from public control to self-control. In figure 1 we visualise these two continua in a model.

From notions on the responsive regulation and smart regulation models we expect these models to fit to some extent on (Dutch, but also international) building control. Both models seem to have good expectations to and experiences with the enforcement of health and safety regulations. Health and safety regulation traditionally form the basis of (Dutch) building regulations. Though the models also raise questions towards building control: To what extent is it possible to make use of different enforcement strategies in controlling compliance with building regulations? To what extent is it possible to shift between different intervening measures, without losing sight of the principles of good governance? To what extent will it be useful to and to what extent can third parties and surrogate controllers be involved in enforcing building regulations?

We experience the model of risk-based regulation more as a tool, than as a new enforcement strategy. Though prioritization of risk seems to have strengths for solving problems addressed in the municipal monitoring of compliance with building regulations.

4 DAILY PRACTICE OF DUTCH BUILDING CONTROL

During the period October 2005-March 2006 OTB Research Institute for Housing, Urban and Mobility Studies performed a field research on building control by municipal departments during 2001-2004 (Van der Heijden, et. al., 2006a). The aim of this field research was to examine to possibilities for a special form of controlling small construction works within the framework of voluntary process certification (see section 5). Prior to the research it was believed, that these small construction works made up for over 60% of the building permit applications. The research aimed at construction works with building costs that do not exceed €75,000. Another aim of the field research was to gain insight in the daily practice of building control at the municipal level, on both a qualitative and a quantitative level.

From a random sample survey 64 municipalities were selected to fill five survey-groups defined by the number of residents. Out of this 64 municipalities 27 municipalities were willing to participate in the research. The research consisted out of a questionnaire to be filled in by the municipal building control department and an semi-open-interview with one or more members of this department, preferably staff-members. Performing this survey research methodology as described by Fowler (2003) was used. The period 2001-2004 has been chosen to compare the period before the 2003 amendment with the period after it.

From the field research insight in the time spent on the actual building control process could be gained. About 40% of the time spent concerns checking of building plans to the Building Decree (checking construction-safety aspects included); about 30% of the time spent concerns site inspections; about 15% of the time spent concerns checking the applications to zoning and aesthetics by-laws; and about 15% percent of the time spent concerns other activities (2% external advise included). Three municipalities, out of the twenty-seven participating, showed almost no checking applications upon the Building Decree; six municipalities showed none or almost no site controls. No clear differences were to be made between the different survey-groups, but also no clear 'national' way of dealing with applications can be described: both time spent on building control as permit fees vary in a wide range; for example: from 2 hours to 60 hours for controlling the extension of a house, with a building cost of €75,000. For this particular work the permit fees varied from €345 to €2,048.

From the data of these interviews insight was gained in the way municipal building control departments perform their building control tasks; how their processes are set up; for what type of building activities most building permit requests are being made; into what extent applicants and building plans are being treated likewise; and into what extent the municipal building control department value to provide preliminary consultation to (possible) applicants.

The building control departments of the different municipalities are dealing with building control in different ways, no 'national' standard could be described, however some assumptions on Dutch building control could be made. First of all, almost all departments say the safety and health requirements form the main focus in building control. From the interviews and the questionnaire it

was learned, that applications for frequent-building activities (defined as activities with building costs of maximum € 50.000, mostly adjustments to or improvements of houses – 80% of all applications concern frequent-building activities) are being checked upon in basic terms. Second, the departments seem to work with an (informal) prioritisation in relation to the expected risks of a building plan, more or less based upon its building costs. Third, throughout the range of interviews it got clear, that building control employees seem to treat different applicants in a different manner: a clear distinction exists in the way civilians (laymen) and professionals in the building sector are being treated. Civilians seem to get more help, more instruction and more advice prior to and during the building control process than the professionals. Professionals are expected to know their way around and manage their own difficulties. “That’s what they [the professionals] get paid for” seems to be the general justification of this difference in attitude towards the different applicants. Also difference in treatment seems to be made between professionals (architects, advisors and building contractors) known to the employees of building control departments. Work (both designs and building constructions) of professionals with a good reputation at the department seems to be checked upon far less deeply, than work of professionals with a bad reputation at the department. Again an estimation of risks seem to be made, in order to define the level of enforcement an application or a building under construction needs to get the compliance as wanted. This risk-estimation is being based upon the reputation of a professional, which is built up during a period this professional interacts with the building control department. Likewise the risk-estimation based upon building costs, this risk-estimation based upon reputation is no formal policy within the building control departments. And a fourth and final assumption that can be made, based upon the interviews, is the way municipal building control departments value the possibility for a (possible) applicant to consult the department on his planned building activity, prior to the official building-permit application. On the one hand this consultation gives the departments the possibility to steer the conceptual plans, on the other it saves the applicant problems with non-compliance (the applicant is made clear into what extent the plan will, or will not comply with regulations and, if necessary, where it should be altered to make it comply), which gives the applicant certainty. An other argument that was given to the positive aspect of prior-consultancy, was its shortening effect on the processing-time, though no department interviewed records the processing-time of this prior-consultancy.

From the field research the question if a special form of controlling small building activities within the framework of voluntary process certification (see section 5) is necessary, could be partly answered. Because in many small building activities non-professional parties are involved, it seems doubtful that applicants would use a certificated (private) controller for these kinds of activities. Though an improvement of quality could be raised, because municipalities seem to control small building activities on a low level. Reduction on permit fees when a certificated controller is being used might be an incentive to stimulate the use of this type of building control. In future research architects and engineers will be involved in a study that explores the way these professionals look upon the changes of this special form of controlling small building activities within the framework of voluntary process certification.

5 FUTURE DEVELOPMENTS IN DUTCH BUILDING CONTROL

In the last 15 years the Dutch government and the municipalities have launched a number of initiatives which are designed to improve the effectiveness and efficiency of building control. The amendment to the Housing Act in 1991 had already scrapped the obligation to establish a local authority building control, stating instead that ‘measures should be taken’ to that end. This gave municipal councils an opportunity to opt for a privatised form of supervision or to transfer the task (e.g. in a regional context). Private organisations could also be involved in the monitoring process (Visscher, 2000, p. 113).

The MDW Work Group also saw the recruitment of private organisations as a means of increasing the effectiveness and efficiency of the permit process. It discerned concrete opportunities for legalising voluntary process certification. This would considerably speed up the procedure and, at the same time, ease the burden on the municipality and the applicant: “the deployment of a certified organisation for the design would dispense with the need for preventive technical screening” (TK, 1997). In 2000 the government presented a policy agenda for standardisation, certification and accreditation (TK, 2000a), which stated that, in self-regulation, the focus would be on evaluation and

the possible extension of standardisation and certification as an alternative or supplement to regulation. It was announced in the policy document, Building Regulations Agenda, 2002-2006 (TK, 2002b), that the prospects of clarifying public and private responsibility in the building sector on a certification basis would be explored. In 2003-2005 the Ministry of Housing, Spatial Planning and the Environment (VROM) set up trials in which building plans were controlled by private parties that were certified for this purpose. It was concluded that a uniform testing method would be needed in order to realise a certified Building Decree test which was at the very least an equivalent alternative to the municipal Building Decree test. As there is no information about the quality of the municipal test or the amount of time involved, it is impossible to draw conclusions on whether certified organisations could do the job more quickly and effectively than the municipalities.

The problems that emerged during the trials, caused by the lack of a uniform testing method for the different (public and private) participants, also emerged in the Building Decree tests in the municipalities. To devise a consistent screening method the Netherlands association of building inspectorates (Vereniging Bouw en Woningtoezicht Nederland/ VBWTN) has set up two projects: the Project for Collective Quality Standards for Building Permits (Collectieve Kwaliteitsnormering Bouwvergunningen / CKB) and the Project for Supervision Protocol (Toezicht Protocol / PTP).

The aim of the CKB project is to reach consensus on a collective minimum level of screening and to convert this into a tool that can generate checklists for every routine type of building permit application (PCKB, 2003 - 2005). The instigators of the project expect that clear prioritisation and systematic disclosure of the regulations will lead to a realistic work package for the administrator and the screener. This should, in turn, bring about a significant improvement in the quality of the building permits, particularly in terms of safety. To realise this objective a Checklist Generator has been designed as an Internet application. This can be used to create checklists, indicating the aspects that need to be specifically screened on the basis of type of construction, discipline (general, building physics, safety) and the division of the Building Decree.

The PTP project was started by the VBWTN in 2004 with the aim of "developing a broadly supported system which will make the quality of external building inspections more transparent, streamlined and manageable" (VBWTN, 2004). The Inspection Protocol will ensure that the method for monitoring compliance with regulations during a building project (external inspection) is objectively defined. The aim is to develop a prescriptive method which can be used for site inspection and for reporting. This method is supported by a set of checklists for different types of building projects (VBWTN, 2004). The PTP should lead to a transparent, unambiguous working method, objective testing criteria, and a traceable end result.

6 CONCLUSION

Taking a look upon formal Dutch building regulations and building control we detect many characters of a *command and control* system: building regulations are compulsory imposed by the Dutch state government, all subjects should be treated likewise, enforcement of building regulations is largely being executed by governmental agencies and non-obedience will be sanctioned. Enforcement of building regulations seems to aim at an *instrumental style* instead of a normative style. The references to Dutch-norms (NEN-norm) within the Building Decree seem to be an exception, because these norms are being laid down by a private organization. This can be seen as a form of (enforced) self-regulation within formal Dutch building control.

When we take a look upon the actual execution of building control by Dutch municipal building control departments we detect a less instrumental style and a more *normative style* of enforcement. In the way these employees execute their tasks, they choose a persuasive and instructive attitude (shown, for example, by the way they execute and value the possibility of consultancy prior to the official building-permit application). Prioritisation in building activities, applicants and professionals is made: building activities with large building costs are prioritised higher, than building plans with small building costs; civilians (laymen) do get more help, more advice and more instruction prior to and during the building control process than professionals; and within this group of professionals distinction is being made based upon reputation of the professional that designs or executes the building plan, that is under control. These forms of prioritisation show similarities of the described *risk-based* model, whereas the style of execution building control shows many similarities with the *responsive regulation* model. We expect the same problems towards implementing the *smart*

regulation model within building control as seen within the agricultural industry: 80% of all permit applications consist of frequent-building activities (defined as activities with building costs of maximum € 50.000, mostly adjustments to or improvements of houses) in which professional actor involvement is low. Visibility of non-compliance to building regulations for third parties or surrogate controllers seems to be low, especially within the frequent building activities.

This said we conclude, that although formal Dutch building control shows many characteristics of a command and control system, in daily practice a move towards a more responsive regulation model can be seen. In figure 1 we present a visualisation of the two continua described in section 3: a continuum of enforcement strategies (vertical axis) and a continuum of enforcement of (public) regulation. In the model we placed formal Dutch building control (as a concept) and the daily practice of Dutch building control (as a concept).

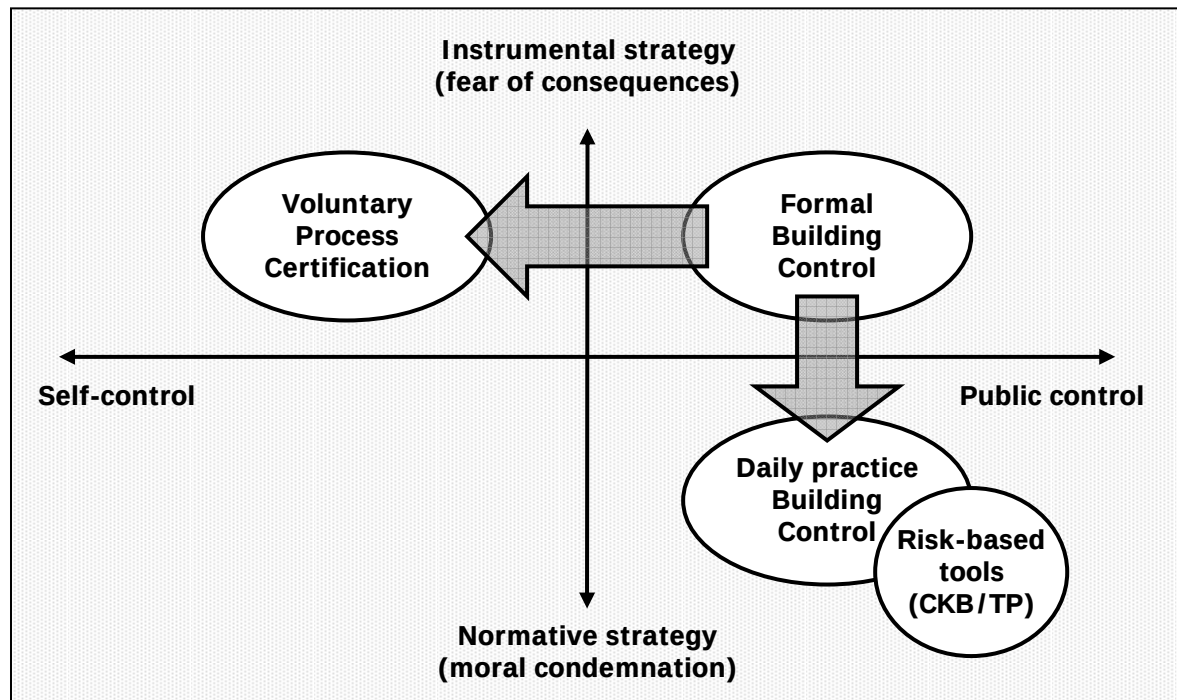


Figure 1 - A continuum of enforcement strategies (vertical axis) and a continuum of enforcement execution make up a model of public regulation enforcement

Also in future developments in Dutch building regulations and Dutch building control also a move from the traditional command and control system can be seen: the introduction of certified private building control shows many characteristics of (enforced) self-regulation, the development of the Project for Collective Quality Standards for Building Permits (CKB) and the Project for Supervision Protocol (TP) show many characteristics of risk-based regulation – see figure 1. Though, as said in section 3, we look upon this type of risk-based regulations as tools, not as new systems. The tools might strengthen the daily practice of building control and make the process more effective and efficient, it is not expected to change it extremely. The introduction of certified building control might, though from experiences trials by the ministry of VROM testing this form of building control we conclude that many questions can be raised upon this subject. Some of which are: To what extent is it possible to realise a certified Building Decree test which is a better alternative to the municipal Building Decree test? To what extent can the Collective Quality Standards for Building Permits function as such an alternative? To what extent is it possible to realise a form of certified site inspections? To what extent does a system of certified building control make the process more effective and efficient as long as municipal departments have authority to do rechecks upon the work of the certified controllers? To what extent is it desirable to make use of a two-way system: the choice between traditional public building control and (private) certified control?

We will oppose these questions in future research. Within the Dutch system we will monitor and join research upon both certified building control and risk-based tools. From this research we expect to

find answers to the question, which have to do with improving the effectiveness and efficiency of building control systems. From international research on building control systems and research on other policy-fields we expect to find data from experiences with alternative enforcement models and tools, that might help us answering other questions raised. From this research we might even find data that could fill up the yet empty quadrant in figure 1.

REFERENCES

Aalders, M. en B. Niemeijer, 1999, Zelfregulering en reflexief recht, in: **Handhaving in stukken. Beschouwingen over theorie en praktijk van de handhaving van recht**, Amsterdam (Siswo) pp. 75-114

Ayres, I. en J. Braithwaite, 1992, **Responsive Regulation: Transcending the Deregulation Debate**, New York (Oxford University Press)

Baldwin, R. en M. Cave, 1999, **Understanding Regulation. Theory, Strategy and Practice**, New York (Oxford University Press)

Baldwin, R., B. Hutter en H. Rothstein, 2000, **Risk Regulation, Management and Compliance. A report to the BRI Inquiry**, Londen (London School of Economics and Political Science)

Bercken, F.H. van den, 1997, **Reeks Bundels Bouwvoorschriften, I. Woningwet en Bouwbesluit**, Den Haag (Sdu Uitgevers)

Braithwaite, J., 1982, Enforced Self-Regulation: A New Strategy for Corporate Crime Control, **Michigan Law Review**, nr. 80, pp. 1466–507

Braithwaite, J., 1985, **To Punish or Persuade: Enforcement of Coal Mine Safety**, Albany (State University of New York Press)

Braithwaite, J., 2002, **Restorative Justice and Responsive Regulation**, Oxford/New York (Oxford University Press)

Cason, T.N. en L. Gangadharan, 2005, **An Experimental Study of Compliance and Leverage in Auditing and Regulatory Enforcement**, West Lafayette/Melbourne (Purdue University/University of Melbourne)

Cobouw, 25 februari 2000

Cobouw, 2 juni 2003

Coolsma, C. en M. Wiering (red.), 2001, **Handhaving in stukken. Beschouwingen over theorie en praktijk van de handhaving van recht**, Amsterdam (Siswo)

Damen, 2003, **Monitoring ervaringen bouwregelgeving. Een onderzoek naar de eerste ervaringen in de praktijk met de per 1-1-2003 gewijzigde bouwregelgeving**, Delft (Damen Bouwcentrum)

Dunn, W.N., 2003, **Public policy analysis: an introduction**, New Jersey (Prentice Hall) 3rd edition

Fairman, R. en C. Yapp, 2005, Enforced Self-Regulation, Prescription, and Concepts of Compliance within Small Businesses: The Impact of Enforcement, in: **Law & Policy**, vol. 27, nr. 4

Flüeler, T. en H. Seiler, 2003, Risk-based regulation of technical risks: lessons learnt from case studies in Switzerland, **Journal of Risk Research**, vol. 6, nr. 3, pp. 213-233

Fowler, F.J., 2003, **Survey Research Methods**, London (Sage Publications) 3rd edition

Gunningham, N., P. Gabrovsky en D. Sinclair, 1998, **Smart Regulation. Designing Environmental Policy**, Oxford (Clarendon Press)

Hawkins, K., 1984a, **Environment and Enforcement: Regulation and Social Definition of Pollution**, Oxford (Clarendon Press)

Hawkins, K. en J.M. Thomas (red.), 1984b, **Enforcing Regulation**, Boston/Den Haag (Kluwer-Nijhoff)

Heijden, J.J., H.J. Visscher en F.M. Meijer, 2006a, **Bouwtoezicht bij veelvoorkomende bouwactiviteiten**, non-published report

Heijden, J.J., H.J. Visscher en F.M. Meijer, 2006b, **Shifting responsibilities in Building Control in the Netherlands: a historical perspective**, Second International Congress on Construction History Proceedings, Cambridge (Construction History Society)

Hood, C., H. Rothstein en R. Baldwin, 2004, **The government of risk**, Oxford (Oxford University Press)

HSE, United Kingdom Health and Safety Executive, 1992 (revised), **The Tolerability of Risk from Nuclear Power Stations**, London (HMSO)

Hutter, B.M., 1997, **Compliance: Regulation and Environment**, Oxford (Clarendon Press)

Hutter, B.M., 2005, **The Attractions of Risk-based Regulation: accounting for the emergence of risk ideas in regulation**, Discussion paper no. 33, London (ESRC Centre for Analysis and Risk Regulation)

Kagan, R.A., 1994, Regulatory Enforcement, in: **Handbook of Regulation and Administrative Law**, New York

May, P.J., 2004, Compliance Motivations: Affirmative and Negative Bases, **Law & Society Review**, vol. 38, nr. 1, pp. 41-68

Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, 1996, **Evaluatie herziene Woningwet en Bouwbesluit**, Den Haag: Sdu Uitgevers BV

Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, 2005, **Dossier Bouwregelgeving**, <http://www.vrom.nl/pagina.html?id=18350>, last checked on May 3th 2005

Ogus, A., 1995, Rethinking Self-Regulation, **Oxford Journal of Legal Studies**, no. 15, pp. 97-108

Ogus, A., 2002, **Comparing regulatory systems: institutions, processes and legal forms in industrialized countries**, Working Paper Series No. 35, Manchester (Centre on Regulation and Competition)

Overveld, M. van, 2003, **Bouwbesluit 2003: theorie en praktijk. Beoordelen en verder ontwikkelen van bouwvoorschriften**, Den Haag (Sdu Uitgevers BV)

Parker, C., 2000, Reinventing Regulation Within the Corporation. Compliance-Oriented Regulatory Innovation, **Administration & Society**, vol. 32, nr. 5, pp. 529-565

Project Collectieve Kwaliteitsnormeringen Bouwvergunningen, 2003 - 2005, **Nieuwsbrief CKB nr. 1 t/m 6**, Den Haag

Reiss, A., 1984, Selecting Strategies of Social Control Over Organizational Life, in: Hawkins, K. en J.M. Thomas (red.), 1984, **Enforcing Regulation**, Boston/Den Haag (Kluwer-Nijhoff), pp. 23-35

Ringeling, A., 2003, Instrumenten in vieren: een ontwikkelingsgang, in: **Vragen over beleid**, Utrecht (Lemma) p.143-161

Seiler, H., 2002, Harmonised Risk Based Regulation – a legal viewpoint, **Safety Science**, nr. 40, pp. 31-49

Shapiro, S.A. en R. Rabinowitz, 2000, Voluntary Regulatory Compliance in Theory and Practice. 52 **Administrative Law Review**, 97

Stokkom, B. van, 2004, **Handhaven: eerst kiezen, dan doen. Sociaal wetenschappelijke mogelijkheden en beperkingen**, Den Haag (Expertisecentrum Rechtshandhaving)

Tweede Kamer der Staten Generaal, 1983, **Actieprogramma deregulering (woning)bouwregelgeving**, vergaderjaar 1983-1984, 17913, nr. 7, Den Haag (Sdu Uitgevers)

Tweede Kamer der Staten Generaal, 1997, **Marktwerking, deregulering en wetgevingskwaliteit, brief van de staatssecretaris van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer**, vergaderjaar 1996-1997, 24036, nr. 59, Den Haag

Tweede Kamer der Staten Generaal, 2002, **Bouwregelgeving 2002-2006, brief van de staatssecretaris van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer**, vergaderjaar 2002-2003, 28358, nr 1, Den Haag (Sdu Uitgevers)

Tyler, T., 1990, **Why People Obey the Law**, New Haven (Yale University Press)

Vereniging Bouw en Woningtoezicht Nederland (VBWTN), 2003, **Nieuwsbrief CKB. Project Collectieve Kwaliteitsnormering Bouwvergunningen, no. 3**, Den Haag: VBWTN

Vereniging Bouw en Woningtoezicht Nederland, 2004, **Ontwikkeling Toezichtsprotocol**, Projectvoorstel, Den Haag

Visscher, H.J., 2000, **Bouwtoezicht en kwaliteitszorg, een verkenning van alternatieven voor de technische controles door het gemeentelijk bouwtoezicht**, Bouwmanagement en technisch beheer 20, Delft (Delft University Press)

Wiering, M., 1999, **Controleurs in context. Handhaving van mestwetgeving in Nederland en Vlaanderen**, Lelystad (Vermande)