1. Growing private sector involvement in urban development

Private sector involvement in urban development practice has grown in the past decades in the Netherlands. In his recent PhD-thesis *Private Sector-led Urban Development Projects*, Heurkens brings forward several explanations pointing towards more private sector involvement in the built environment.²

*First*, Heurkens notices an evolutionary process of increased neoliberalisation and the adoption of Anglo-Saxon principles in Dutch society. This results in a shift towards a more market-oriented development practice too. Although the Netherlands are having ‘Rhineland’ roots with a focus on welfare provision, several neoliberal principles (privatisation, decentralisation, deregulation) have been adopted by government and incorporated in the management of organisations.

*Second*, as Heurkens explains, the result of the ‘Anglo-Saxon wind’ is the emergence of a market-oriented type of planning practice based on the concept of *development planning*. In development planning, the government does not only make spatial plans, but goes further than that.² Purpose of development planning is accomplishing a link between spatial planning (preponderantly the domain of government) and spatial investments (preponderantly the domain of private parties). Development planning does not make a distinction between planning and implementation, but – on the contrary – combines planning and (agreements on) spatial investments. This means that there is no succession (in other words: no fixed sequence) of public planning and private investments. On the contrary, private parties are strongly involved in planning. Planning therefore shifts from being an internal governmental

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activity to the creation of a social coalition. Feasibility is consequently enhanced. Private parties with investment power (= money) receive access to government planning. In exchange, the government receives commitments for the implementation of plans created in coalition with those private parties. From a legal perspective, development planning goes hand in hand with an increased use of private law by government. More specifically: public-private partnership usually requires a public party to act on the basis of private law with respect to public powers.4

Third, Heurkens argues that the European Commission expresses concerns about the hybrid role of public actors in Dutch institutionalised public-private partnerships. Public actors in such public-private partnerships serve both commercial purposes (making money) and the public interest at the same time. EU legislation, however, favours formal public-private role divisions in realising urban projects based on Anglo-Saxon legal principles notably being: competition, transparency, equality, and public legitimacy. The European Commission’s position would, in Heurkens’ view, lead to a smaller role of public actors. Hence the role of the private sector in urban development projects would increase.

Fourth, Heurkens explains that the financial and economic crisis is a stimulus for private sector involvement in urban development. Indeed, financial retrenchments in the public sector and debates about the financial risks of Dutch municipalities’ active land development policies point towards a lean and mean government that moves away from risk-bearing investments in urban projects and leaves this to the market.5

Each of the reasons stated above, implied growing private sector involvement in urban development in the Netherlands in the past decades.

2. Legislation concerning the initiative and the drafting of land-use plans

Question 1 reads:
Is there legislation concerning the initiative and/or the drafting of zoning plans and other equivalent documents by private entities? What is the procedure in that legislation and does it guarantee municipal control of planning powers? How is public participation organized in this procedure?

The answer is:
No, there is no legislation concerning initiative or drafting of land-use plans by private entities.6 Of course, there is legislation regarding the initiative and drafting of land-use plans. However, this legislation does not refer to any role for private entities.

5 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 the literal English translation of the Dutch term ‘actief grondbeleid’. English speaking countries usually use the term ‘land banking’ to describe this phenomenon. Dutch municipalities in the past decades have made huge profits from land sale to property developers. However, since the financial and economic crisis started it turned out that undeveloped land that is owned by municipalities, but cannot be sold to property developers, has become a major financial burden for municipalities.
6 The term ‘zoning plan’ is not often used in the Netherlands as a translation of the Dutch ‘bestemmingsplan’ – which is the legally binding urban development plan. Instead, ‘land-use plan’ is mostly used. Therefore, in this paper, I will use the term ‘land-use plan’.
The procedure of a land-use plan has the following elements:

(1) **Preparation** of a draft of a land-use plan. The legislation does not specify who is responsible for the preparation of a draft land-use plan. In practice, a draft is prepared under the administrative responsibility of the municipal executive (Burgomaster and Aldermen). Once the draft land-use plan is ready, it will be offered to the municipal council.

(2) **Democratic legitimisation** in the form of adoption of the land-use plan by the Municipal council (which indeed are the directly chosen representatives of the people on the municipal scale). This is laid down in article 3.1 SPA, paragraph 1. Herewith it is democratically determined that the plan is for the public good.

(3) Legally established possibilities for affected citizens or organizations to influence the contents of the plan:

- involvement of citizens and societal organisations in the preparation of a land-use plan (art. 3.1.6 Spatial Planning Decree);
- submitting views (Dutch: zienswijzen) against the draft land-use plan. This is laid down in article 3.8, paragraph 1, sub d, SPA: ‘any person may express their views on the draft to the Municipal Council’;
- interested parties have the right to lodge appeal against the adoption of the land-use plan by the Municipal Council. This right is granted in the General Administrative Law Act (Dutch: Algemene wet bestuursrecht).

(4) Final judicial settlement by the independent administrative judge. This refers to the right to lodge appeal. An important feature is that the final word about the oppositions against a land-use plan is not with an administrative body or with politicians, but with the independent administrative judge: the Administrative Jurisdiction Division of the Council of State (Dutch: Afdeling bestuursrechtspraak van de Raad van State).

As said, the legislation does not refer to any role for private entities. However, in practice they may have an import role. This role is connected to element (1) mentioned above: the preparation of a land-use plan. I will elaborate on this in the next section.

### 3. The role of private entities in the preparation of a land-use plan

As explained above, the draft of a land-use plan is prepared under the administrative responsibility of the municipal executive. We can distinguish between four ways of preparation of land-use plans. Two of them involve great substantial influence of private entities. Each of these four ways is used in practice.

(a) The draft of the land-use plan is made by public servants. This means that the draft land-use plan is an ‘in-house’ affair. Public servants like planners, urban designers and planning lawyers together draw up the draft land-use plan. In this case the municipal executive is the commissioner (or: principal) of the draft land-use plan.
This alternative (a) was widely used in the past. Nowadays only a minority of municipalities has a staff that draws up drafts of land-use plans.

(b) The draft of the land-use plan is made by a private urban planning & design consultancy firm. This means that the making of draft land-use plan is ‘outsourced’ to a consultant. However, in this case, the municipal executive still is the commissioner of the draft land-use plan. That is, the consultant will be paid by the municipal executive.
This alternative (b) is widely used nowadays.

(c) The draft of the land-use plan is made by a property developer. This means that a property developer hires a consultancy firm to make the draft land-use plan. Thus, the municipal executive is not the commissioner of the consultant. The property developer will offer the draft land-use plan to the municipal executive.

(d) The draft of the land-use plan is made by a public-private entity. This means that an entity in which the municipality and one or more property developers work together, produces the draft land-use plan. In practice, the ppp-entity will hire a consultancy firm for this. Once the draft land-use plan is ready, the ppp-entity will offer the plan to the municipal executive.
There are no data available regarding how many times alternative (d) occurs in practice. However, it happens on a very regular basis that a ppp-entity produces the draft land-use plan. This has to do with the high frequency of public-private partnerships for urban development in the Netherlands.

Public-private partnerships for urban development

Once specific – and often used – model for public-private partnership implies 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 and entails an intensive partnership. 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. 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. Apart from that, joint-ventures come in many variants. One of the tasks of a joint-venture may very well be to draw up of draft land-use plans.
Joint-ventures for urban development are mainly used for big scale developments. Some of these developments include thousands of dwellings.

Each of these four ways of preparation of a land-use plan ends with offering the draft land-use plan to the municipal executive. If the municipal executive agrees with the draft, it will offer the plan to the municipal council.

So, there is no role for private entities in legislation regarding the initiative or drafting of land-use plans. However, in practice there are ways for private entities (alternative c) or public-private entities (alternative d) to take the initiative to prepare or draft a land-use plan. Nevertheless, it is the municipal executive that will offer the draft to the municipal council.

4. Legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations

Question 2 reads:
Is there legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations? Are private entities only allowed to perform assessment tasks or can they issue development permits and take follow-up enforcement measures?

The answer is:
No, there is no legislation concerning the involvement of private entities in the control and enforcement of public zoning and building regulations. Private entities cannot issue development permits. Nor can they take enforcement measures.

Control and enforcement of public zoning and building regulations is a task of the ‘competent authority’ (Housing Act, art. 92 and Environmental Licensing Act, art. 5.2). This means that municipal civil servants perform control and enforcement. In practice it is the responsibility of a municipal department, generally known as Local Building Control (Dutch: Bouw- en Woningtoezicht). However, national government is considering privatisation of control and enforcement tasks. Very recently, the minister of Interior Affairs commissioned a research after the privatisation of building control and enforcement.7

Issuing development permits is a task of the competent authority too. Usually Burgomaster and Alderman (the municipal executive) are the competent authority (Environmental Licensing Act, art. 2.4).

However, private entities may have a role in testing permit applications. In essence, this means that a permit application is not tested by a government body, but by a private certification body, the idea being that the quality of the holders’ working process allows them to test the application against the assessment framework. They ensure that criteria for granting permits are satisfied, doing away with the need for testing by a government body. In fact, this form of certification exchanges government testing for private ‘self-regulation’.

7 Ira Helsloot and Arjen Schmidt, Risicoansprakelijkheid als vervanging van overheidstoezicht in de bouw? (Strict liability as a substitution for governmental building control?) CrisisLab, June 2012.
An example of the kind of certification now being experimented with is the Building Decree Assessment (Dutch: Bouwbesluittoets). Traditionally, Local Building Control tested applications for development permits against the Building Decree. Trials are currently being performed in which the assessment is left to private organisations that satisfy the quality requirements of a specific certificate. As long as they satisfy objective quality requirements, the certificate holder can be anything from an architect to another kind of advisor.

5. legislation concerning the private management of urban infrastructures and public spaces

Question 3 reads:
Is there legislation concerning the private management of urban infrastructures and public spaces? Is this legislation restricted to single infrastructures and spaces or does it provide a legal framework for the private management of entire neighbourhoods and other urban areas? Is the management of those neighbourhood and areas restricted to owners or neighbours associations or can concessionaires or other private commercial companies perform it? How does it guarantee municipal or public control of management decisions?

The answer is:
There is only one act relating to private management of public spaces. This act relates to Business Improvement Districts. There is no act relating to private management of urban infrastructures. The act that relates to private management of public spaces (Business Improvement Districts) is restricted to single spaces; it does not provide a legal framework for the private management of entire neighbourhoods. The management of the public spaces is restricted to the businesses who’s customers use the public space. These business will hire a private company to manage the public are for them.

In the Netherlands, the Business Improvement Districts (Experiments) Act (Dutch: Experimentenwet BI-zones) has been in effect since 2009. Within the defined area of a business improvement district (Bedrijven Investeringszone), business owners make joint investments in an appealing and safe commercial environment. Provided there is sufficient support, all of the business owners will be asked to contribute. To this end, the municipal authority imposes a levy and pays the proceeds to the association or foundation implementing the activities on behalf of the business owners.

The activities of a BIZ are meant to complement those of the municipal authority and include, for instance:
- improving traffic infrastructure;
- signage;
- green spaces;

The Building Decree contains regulations concerning buildings (and other structures). It consists of numerous technical regulations for the construction of new buildings as well as for existing ones. The Building Decree regulations express the minimum technical level allowed, concerning such aspects as loadbearing capacity, stability, fire resistance, ventilation, acoustic insulation, energy performance standard, ramps and the minimum amount of daylight in any one room.
- waste collection;
- lighting;
- cleaning;
- maintenance;
- fire safety;
- graffiti removal;
- increasing safety by means of measures such as additional surveillance, fences and closed-circuit television (CCTV) cameras.

It must be concluded that Business Improvement Districts are not widely used in the Netherlands.

Apart from the Business Improvement Districts, there are some other examples of private management of urban public spaces in the Netherlands. The management in those cases is done by private concessionaires. The concessionaires perform their tasks on the basis of private law agreements with municipalities. There is no legislation that applies to this situation.

Management of public spaces by private concessionaires sometimes is a part of a private sector-led urban development project. This is a specific contract type for urban development. It is not the most used contract type for urban development in the Netherlands. In Dutch, private sector-led urban development is labelled as a ‘concession’. A concession can be defined as follows:

“A concession in urban area development is a contract form with clear preconditioned (financial) agreements between public and private parties, in which a conscious choice from the public parties has been made to transfer risks, revenues, and responsibilities for plan development, land preparation, land and real estate development and possible operation for the entire development plan towards private parties, within the previously defined public brief in which the objective is to create an effective and efficient role and task division and a clear separation of public and private responsibilities”.9

In fact, concessions are contracts for the development of an urban area – not for management of urban areas. However, in a minority of cases of use of such concessions, the developer also has the responsibility for the management of the area. In such cases, the developer is a concessionaire who performs management of a neighbourhood. Usually this responsibility, depending on the contract, lasts for a number of years, for instance 5 years. During this period, the developer bares the costs of the management of the urban area. After this period, the management of the area is returned to the municipality.

As said, there is no legislation regulating private sector involvement in management of urban areas. The involvement of private concessionaires in case of private sector-led urban development (‘concessions’) is entirely based on private law agreements between a developer and a municipality. From this, it follows that the guarantee for municipal control of management decisions must be based in the contract between developer/concessionaire and municipality.

6. Conclusion: planning powers of local authorities in perspective

In the first section of this paper I stated that as a result of neoliberalisation and an Anglo-Saxon wind, private sector involvement in urban development practice has grown in the past decades in the Netherlands. Now at the end of this paper, I must conclude that indeed in urban development practice private sector involvement is strong. In terms of legislation however, we cannot recognise the strong private sector involvement.

Public law almost exclusively allocates planning powers, control powers and enforcement powers to governmental bodies. Nevertheless, we must realise that government is heavily dependent on private sector development initiatives. To give an example: suppose that a local land-use plan, holding a new residential area, has been adopted by the municipal council. Indeed, the municipal council has the power to do so. But if the plan neglects developer’s requirements regarding (for instance) density, available parking space and dwelling types, the developer will not apply for a development permit. Thus, the municipality’s will remain a piece of paper.

So, ‘behind’ the strong governmental powers, is a dependency on private sector development initiatives. This explains the practice of negotiations and private law agreements between municipality and developers prior to the start of public law land-use plan procedures. Hence, in practice almost always local authorities will only start a public law land-use plan procedure if prior to that a private law agreement has been concluded with the property developer(s).

The agreement shall at least relate to the developer’s financial contributions to (among other things) public amenities in the development area (such as infrastructure and sewage). But it is common that the agreement goes further and for instance stretches out to the program to be realised on the land. After an agreement has been closed, the municipal executive will offer a draft land-use plan to the municipal council that is in agreement with the previously concluded agreement. This type of agreements have a specific name. They are called ‘land-use plan agreements’. Land-use plan agreements usually constitute part of an agreement that is concluded between a municipality and developers.

This practice, in itself raises all kinds of legal questions, for instance relating to the point of 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, however, 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).’ This comment 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.

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All in all this puts the great planning powers of local authorities in perspective.