Expropriation for Spatial Development

Possible improvements for the expropriation system in the Netherlands evaluated with an assessment scheme

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Preface

This thesis is submitted in partial fulfilment of the requirements for the degree of Master of Science in Systems Engineering, Policy Analysis and Management at Delft University of Technology. It contains work done from September 2016 to April 2017.

During the writing of this thesis I became more and more enthusiastic about the topic of this report, expropriation. Several persons asked me why expropriation is a suitable research topic as graduating systems engineer at the Faculty of Technology, Policy and Management. The fact that expropriation takes place in a multi actor environment in which several interest conflict, makes expropriation an ideal graduation topic for the masters ‘Systems Engineering, Policy Analysis and Management’ with a specialization in spatial development and the built environment.

Readers of this report do not require any prior knowledge. Readers that are interested in the legal framework in which expropriation takes place in the Netherlands, I refer to chapter 2. For those interested in the political, administrative and judicial considerations in the Netherlands in expropriation, I recommend reading chapter 3. Chapter 4 compares the Dutch expropriation process to expropriation processes in other countries. Then, chapter 5 discusses the institutional environment in which the Supplementary Act Land Possession will be embedded and presents an assessment scheme for expropriation processes. Readers interested in the proposed changes in the Dutch expropriation process and the reactions of experts on this proposal, can read chapter 6. Next, chapter 7 discusses alternative proposals. Readers with little time are referred to the conclusions and recommendations in chapter 8 or to the executive summary that starts on the next page.

To conclude I would like to thank a few people. In the first place I would like to thank my graduation committee, especially my first supervisor Herman de Wolff. I admit their dedication to research and education and the enthusiasm they have in helping and challenging students to achieve the highest possible level. Their help has been a crucial contribution to the end result. Second, I want to thank Stijn Berns and the colleagues of Gloudemans for their hospitality on Friday’s. Stijn’s knowledge and expertise with regard to expropriation has proved essential in the emergence of this thesis. Third, I want to thank all other people that have contributed to the thesis, especially the persons I had the chance to interview, Sanne Holtslag-Broekhof (Kadaster) and Rob de Boer (Ministry of Infrastructure and Environment). I also appreciated the help I got from Emma Waring (York University) and Simon Héctor Moreno (University of Rovira i Virgili, Tarragona). Fourth, lots of thanks to all my friends and family who have always supported me during my studies. Last but not least, I would like to thank my parents for their faith and support in all I have done in my life so far and for the opportunities they provided me with.

T.J. Korndörffer

The Hague, April 2017
Summary

Expropriation is “the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society” (FAO, 2008: 5). It is the maximal and most total infringement of property rights (T.M.C. Asser Instituut, 2000). However, it is a necessary and useful instrument for authorities, since “without legal instruments, governments would depend on the willingess of landowners to sell their land in order to realise planning goals” (Holtslag-Broekhof, 2016: 51). Public interest prevails over individual property rights in expropriations.

The way public and private interests are weighed in expropriations is going to be changed in the Netherlands. Via a Supplementary Act Land Possession [SALP], the Expropriation Act [Ow] will be replaced and incorporated in the Environment and Planning Act, in which all instruments the government has at its disposal in land policy will be brought together (Ministerie van I&M, 2016). There is discussion whether there will be a fair weighing of the interests of affected parties in expropriations in the SALP. In literature severe critique is ventilated and also the Council of Judiciary (Raad voor de Rechtspraak) has the opinion that in the minister’s proposal not enough attention is paid to safeguards against expropriation for affected parties (Raad voor de Rechtspraak, 14-11-2016).

This research aims at coming up with recommendations for a better weighing of public and private interests in the new expropriation process, without harming the fair weighing of public and private interests. The question this research answers is:

How could the expropriation process in the Netherlands be improved, without harming the fair weighing of public and private interests?

The research therefore firstly explored how the expropriation process is organized in the Netherlands at the moment and with which (international) rules expropriations in the Netherlands have to comply. Then it looked at how public and private interests in expropriation processes are weighed in the current Expropriation Act and what are the interests at stake. Thereafter the research compared the current expropriation practise in the Netherlands with foreign expropriation processes. From this international comparison and from the analysis of the Dutch expropriation practice, boundary conditions for expropriations, requirements of weighing public and private interests and criteria for the new expropriation system were derived and brought together in an assessment scheme. This assessment scheme is used to test whether the SALP and alternatives for the SALP comply with the institutions that are in place.

The European Convention on Human Rights and Fundamental Freedoms [ECHR] and the Dutch Constitution put limits on property rights, stating that every natural or legal person is entitled to the peaceful enjoyment of his possessions till this enjoyment harms the public interest. Herewith an opportunity for expropriation is created. One of the most fundamental challenges is to determine the extent to which existing property rights can be reduced for other societal goals (Waincymer, 2010).

In the Netherlands, ‘the Crown’ plays a key role in the weighing of public and private interests. Expropriators have to ask the Crown to designate land for expropriation. The Crown consists of the King and the minister that it concerns; it gets advice of the Council of State (Raad van State). In practice, appointed civil servants of Rijkswaterstaat (corporate dienst), which is part of the Ministry of Infrastructure and Environment (I&M), execute the work of the Crown. The Crown assesses whether the expropriation procedure is followed correctly and whether expropriation is in the public interest, necessary and urgent. Against its decision appeal is open at the civil judge.

With the introduction of the Administrative Law Act (Algemene wet bestuursrecht [Awb]) in 1994, the Crown was eliminated from all administrative procedures but expropriation. The Awb contains rules about the weighing of public and private interests in expropriation. In normal Awb procedures, public
decisions that impact an individual citizen are executed by order (*beschikking*). Against this order, appeal is open at the administrative judge and/or the Administrative Jurisdiction Division of the Council of State. So, the expropriation procedure is not in line with general Awb procedures.

From the analysis of expropriation in the Netherlands, England and Spain, the provisions in the ECHR and the Crown criteria can be derived that there are three boundary conditions for expropriation: public interest, necessity and assurance of full and fair compensation. When those boundary conditions are met, expropriation can take place. Weighing of the different interests in expropriations has to take place lawfully and carefully and the result must be open to independent review. From the discussion since the ‘operation free market, deregulation and quality of legislation’ (*marktwerking, deregulering en wetgevingskwaliteit* [mdw]) in 2000 and from the reasons and goals of the SALP, three design criteria for a new expropriation process are derived: speed, simplicity and transparency. This leads to the following assessment scheme (table 1).

<table>
<thead>
<tr>
<th>ASSESSMENT SCHEME: WEIGHING OF PUBLIC AND PRIVATE INTERESTS IN EXPROPRIATION PROCESSES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Are the boundary conditions with regard to expropriation met?</strong></td>
</tr>
<tr>
<td>Public interest</td>
</tr>
<tr>
<td>Necessary</td>
</tr>
<tr>
<td>Fair and full compensation</td>
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<tr>
<td><strong>Are the requirements with regard to the weighing of public and private interests met?</strong></td>
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<tr>
<td>Independent</td>
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<tr>
<td>Careful</td>
</tr>
<tr>
<td>Lawful</td>
</tr>
<tr>
<td><strong>How does the expropriation process score on the criteria?</strong></td>
</tr>
<tr>
<td>Speed</td>
</tr>
<tr>
<td>Transparency</td>
</tr>
<tr>
<td>Simplicity</td>
</tr>
</tbody>
</table>

Table 1 Assessment scheme

Next to the current situation and the SALP, four alternative expropriation processes have been assessed with the scheme in this research.

The minister in the SALP proposes an expropriation process in which the necessity of the expropriation is not assured, since the expropriator is not obliged to keep trying to purchase the property amicably between the expropriation order and the appeal at the administrative judge. Moreover the independency of the weighing of the interests is not safeguarded, since affected parties would have to take action against the expropriation order themselves, on their own initiative. If they do not, the expropriation will be definite after six weeks without interference of a judge. This is a severe deterioration of the position of affected parties in expropriations under the SALP, compared to the Ow. Furthermore in the Ow the Crown is used to conduct a full review of the expropriation process. The bill does not provide assurance of a full weighing of the interests involved in expropriation, since administrative judges normally only conduct a marginal review of an order and the objections of affected parties. Therefore, the carefulness is not fully safeguarded in the SALP. Finally, it is not expected that the SALP will lead to an acceleration of the expropriation process compared to the Ow.

The alternatives that were assessed with the scheme build on an improvement that the minister proposed as a result of the critique that was ventilated on the SALP during the internet consultation: obligatory appeal, lodged by the expropriator. The obligatory involvement of a judge ensures that the weighing of public and private interests is done independently. However, in this new proposal there are still issues with regard to the necessity of expropriations, the carefulness of the weighing of public and private interests and the speed of the expropriation procedure.

All in all the answer to the main research question is as follows. To improve the expropriation process in the Netherlands without harming the fair weighing of public and private interests, a provision should be included in the SALP that attempts to settle amicably have to be continued between the expropriation order and the appeal at the administrative judge. Expropriation can only take place if the possibility of reaching an amicable settlement is fully ruled out. Herewith, the boundary condition of necessity is met.
Next to this, to assure a careful consideration of all relevant interests involved in expropriations, this research suggested to include in the bill or in the explanatory memorandum a provision that the administrative judge has to conduct a full review of the expropriation order. This assures a weighing of interests that is comparable to the current assessment by the Crown.

The assessment scheme shows a trade-off between the carefulness of the weighing of the different interests and the speed of the expropriation procedure. Both elimination of the advice and/or elimination of higher appeal could lead to a faster expropriation process. However, speed of the expropriation procedure must be subordinate to carefulness of the consideration of the interests involved. The assessment scheme does not provide an optimal balance between carefulness and speed. This trade-off should be dealt with in the political arena.

On the basis of this research, three recommendations have been done. In the first place it is recommended to use the assessment scheme in the further development of the bill. The scheme depoliticizes the debate and shows the possible negative consequences of proposed improvement measures. Furthermore it is recommended to monitor the discussions that are taking place about the expropriation system in England and Spain. Also in these countries discussions are going on about the costs, complexity and bureaucracy of expropriation. Finally, it is recommended to issue a research to compare the Dutch expropriation procedure with foreign expropriation procedures. From a study to expropriation systems in other countries, best practices may be derived.
# Introduction

1.1 Problem exploration ........................................................................................................ 2
1.2 Knowledge gap .................................................................................................................. 3
1.3 Problem statement ............................................................................................................. 3
1.4 Scientific and societal relevance ....................................................................................... 3
1.5 Scope .................................................................................................................................. 3
1.6 Research objective ............................................................................................................ 4
1.7 Research questions ............................................................................................................ 4
1.8 Research methods per question .......................................................................................... 4
1.9 Thesis outline ................................................................................................................... 7

# Legal Framework: expropriation in the Netherlands

2.1 Expropriation Act in the Netherlands ................................................................................. 8
  2.1.1 Expropriators .................................................................................................................. 9
  2.1.2 Affected parties ............................................................................................................. 9
  2.1.3 Financial implications of expropriation for the private party ....................................... 11
  2.1.4 Expropriation process ................................................................................................... 11
  2.2 Rules that govern the Dutch expropriation process ......................................................... 12
    2.2.1 European rules ........................................................................................................... 12
    2.2.2 Constitution of the Kingdom of the Netherlands ...................................................... 13
    2.2.3 General Administrative Law Act [Awb] .................................................................... 13
  2.3 Conclusion ....................................................................................................................... 14

# Determining and weighing of public and private interests in expropriations in the current situation in the Netherlands

3.1 Determining possible interests of the actors involved ......................................................... 16
  3.1.1 Determining the public interest .................................................................................... 16
  3.1.2 Possible interests of expropriated actors in an expropriation process .......................... 18
  3.2 Weighing of the different interests in the current situation ............................................ 19
    3.2.1 Political supervision: determining the public interest ................................................. 19
    3.2.2 Administrative supervision: Criteria of the Crown .................................................. 20
    3.2.3 Judicial supervision .................................................................................................. 22
  3.3 Conclusion ....................................................................................................................... 22

# The Dutch expropriation system in an international perspective

4.1 Expropriation in England .................................................................................................. 24
4.2 Expropriation in Spain ..................................................................................................... 29
4.3 Conclusion ....................................................................................................................... 34

# General standards of weighing public and private interests in expropriations

5.1 Williamson’s institutional framework ............................................................................... 35
  5.1.1 Institutional alignment .................................................................................................. 36
  5.1.2 Application of Williamson’s framework in this research ............................................. 36
  5.2 Layer 1: Boundary conditions for expropriation ............................................................ 37
  5.3 Layer 2: Requirements of a fair weighing of public and private interests ......................... 38
  5.4 Layer 3 and 4: Criteria for a new expropriation process ................................................ 39
    5.4.1 Problems in current expropriation practice ............................................................... 39
    5.4.2 Reasons to change the current expropriation practice .............................................. 40
  5.5 Assessment scheme ........................................................................................................ 41

# Consequences of the proposed changes in the expropriation process for the weighing of public and private interests

6.1 The current situation reviewed with the assessment scheme .......................................... 42
6.2 Proposed changes in the expropriation process ............................................................... 43
6.3 Consequences of the proposed Supplementary Act Land Possession for expropriation .... 45
  6.3.1 Consequences for boundary conditions for expropriation ........................................ 46
  6.3.2 Consequences for requirements of a fair weighing of public and private interests ....... 46
  6.3.3 Score of the proposed process on the criteria for the new expropriation process .......... 48
6.4 Conclusion ....................................................................................................................... 49

# Measures to let the proposed expropriation process comply with general standards

7.1 Alternative 1: Improved proposal by the minister ............................................................ 50
Introduction

Land is an essential asset in the execution of projects in the public space. Provinces and municipalities in the Netherlands determine in their land policy how building land is divided. To realise, use and maintain the physical living environment (fysieke leefomgeving), provinces and municipalities can use different forms of land policy: facilitating land policy, in a public private partnership or active land policy (Rijksoverheid, 2016). It is up to lower governments to choose the desired land policy and to carry the financial implications of their choice. The role of the national government is to provide lower governments with the instruments to execute their land policy (Minister of I&M, 2015).

Since the beginning of the economic crisis, the use of active land policy has declined because of the financial risks that it carries (Buitelaar, 2015). In active land policy lower governments have the land in their possession. As a result of that, they have maximum control on the area development. If, for the realization of a project in the public interest, it is necessary to use land of others, the government has the possibility to acquire this land amicably. When amicable attempts to acquire the land fail, law provides governments with a few instruments to involuntarily get ownership of the land. One of these instruments is expropriation\(^1\). Expropriation is “the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society” (FAO, 2008: 5).

Expropriation is an extreme form of limitation of property rights, because the property in fact is taken away from the owner (Hobma, 2010). It is the maximal and most total infringement of property rights (T.M.C. Asser Instituut, 2000), since property is the most universal right a person can have on something (article 5:1, paragraph 1, BW\(^2\)). Expropriation can cause disturbance in the market because the government to a certain extent brings itself in a monopoly position (De Wolff, 2013). Also landowners have a monopoly position in the land market, since they own a unique parcel of land on a unique location. As Holtslag-Broekhof (2016) concludes on the basis of Miceli (2007), Arch (2014) and Heller (2013), the landowners’ monopoly position enables a strategy in which the landowner deliberately frustrates cooperation, which makes it sometimes impossible for authorities to realise their plans. Therefore, "without legal instruments, governments would depend on the willingness of landowners to sell their land in order to realise planning goals" (Holtslag-Broekhof, 2016: 51). For this reason, an instrument like expropriation is necessary and useful for governments to have at their disposal.

In the Netherlands expropriation has taken place on average 47 times a year over the last five years. Around 60% of the expropriation took place for spatial development (appendix I)\(^3\). Most of the cases, around 90%, is already settled amicably before judicial expropriation takes place (Berns, personal communication). Various cases are settled even before the Crown designates the land for expropriation.

The Crown consists of the King and the minister that it concerns. In practice, appointed civil servants of Rijkswaterstaat (corporate dienst), which is part of the Ministry of Infrastructure and Environment (Infrastructuur en Milieu [I&M]), execute the work of the Crown. The Council of State

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1 The instrument of expropriation is also called compulsory purchase, eminent domain, takings or resumption. In this thesis the word ‘expropriation’ is used.
2 Burgelijk Wetboek, Civil Code
3 This is the number of Royal Decrees. In one Royal Decree, several affected parties can be expropriated.
advises the Crown. Expropriators can request the Crown to designate land for expropriation. Affected parties are allowed to ventilate their view to the Crown, which considers all objections submitted.

1.1 Problem exploration
The Netherlands has a long tradition in the use of expropriation for planning purposes; the current system for expropriation has been primarily developed between 1851 and 1901 (Korthals Altes, 2014). Since 1851 the Ow has changed considerably. The changes went hand in hand with advice reports and ample (political) consideration. Yet several times the minister is encouraged to review the Ow (Sluysmans & Wiegerink, 2016). Discussions take place about how fundamental these changes should be. Some authors propose quite fundamental changes (e.g. De Groot & De Snoo, 2009b; Sluymans, 2009), whereas others (e.g. De Jager & Hoekstra, 2012) are more conservative and claim that the Ow, with slight adaptations can still last for a while.

25 November 2015 the Minister of Infrastructure and Environment sent a letter to parliament indicating her plans with regard to the national land policy in the new Environment and Planning Act (Omgevingswet). Via some Supplementary Acts (Aanvullingswetten) the new national land policies will be incorporated in the Environment and Planning Act. Expropriation will be part of the Supplementary Act Land Possession (Aanvullingswet grondeigendom [SALP]).

In the SALP, which has to be in place in 2019 (figure 1), the minister brings together the instruments for land policy in order to “achieve a coherent approach to the physical living environment in policy making, decision making and regulation” (Ministerie van I&M, 2016: 12). There is some discussion about the necessity of a fundamental change of the Ow. Some experts argue that the special characteristics and severe impact of expropriation plead for a separate act. The minister could have chosen to leave the instruments separately organized. Currently, the toolbox for land policy is organised in separate laws, which does not cause any trouble. The instruments therefore could have been adapted in their own separate acts.

The current Dutch Expropriation Act (Onteigeningswet [Ow]) will be subject to a lot of changes. According to De Jager and Hoekstra (2012) however, the expropriation practice (the people that are working with the Ow, such as judges, lawyers, civil servants etc.) suggest that fundamental changes in the Ow are not necessary at the moment. They conclude that people working with Ow are still satisfied with it and that the Ow, despite it is old, still works well (de Jager & Hoekstra, 2012). On the contrary, according to Buitelaar (2016) there are also organizations that are satisfied with the proposed changes in the bill, for example VNG (Vereniging Nederlandse Gemeenten, Dutch Municipality Association, 2017) and IPO (Interprovinciaal Overleg, Interprovincial Umbrella Organization).

In the internet consultation (1 July 2016 - 16 September 2016), various respondents (e.g. Nysingh advocaten, Vereniging voor Onteigeningsadvocaten etc.) repeat that in their opinion it is not necessary to revise the Ow as drastically as the minister proposes. In a considerable number of reactions organizations express the worry that safeguards and control mechanisms for dispossessed owners are taken away (e.g. Gemeente Tiel, Nysingh advocaten, Melkveehoudersbond etc.). Also the House of Representatives (Tweede Kamer) has doubts about the protection of affected parties in the bill (e.g. motion Veldman/Ronnes). In addition the Council of Judiciary (Raad voor de Rechtspraak) has the opinion that in the SALP there is not enough attention for safeguards against expropriation for affected parties (Raad voor de Rechtspraak, 14-11-2016).

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4 The proposed SALP will be referred to as ‘the bill’
5 Parliamentary Documents 29383 nr. 262. Year 2015-2016
1.2 Knowledge gap
The way public and private interests are weighed in expropriations will change with the bill. There are doubts whether there will be a fair weighing of the interests of affected parties in expropriations in the SALP. This research contributes to knowledge about weighing public and private interests in an expropriation process. It investigates how the weighing of interests in the bill changes compared to the current Ow and assesses the consequences of the bill for the consideration of the different interests involved in an expropriation process.

1.3 Problem statement
There is some discussion about the SALP, which is also shown by the 27 public reactions during the internet consultation. More reactions have been sent to the ministry without being published. A fierce debate is going on about the safeguards for affected parties in the proposed expropriation process. In literature, some experts ventilate concerns that the position of affected parties will deteriorate in the SALP (e.g. De Roos, 2015; Nijman, 2016; Sluysmans, 2016; NVM, 2016). The Council of Judiciary even advises the minister to not submit the SALP to parliament for approval, if no changes are made to the current proposal.

There is discussion about the way public and private interests will be weighed in the expropriation process of the proposed Supplementary Act Land Possession.

1.4 Scientific and societal relevance
This study is relevant from a scientific perspective because it contributes to existing knowledge about expropriation processes and especially to knowledge about the tension between public interest and private property in spatial development. The research will be part of a broader scientific field of quality control of government actions and safeguards for civilians in these actions. It also contributes to discussions about decentralization and speed versus carefulness in government processes.

From a societal perspective this research is relevant as well. Property rights to land play an essential role in a society. Holtslag-Broekhof (2016: 13) considers them as “a driver for economic developments”. Property rights are essential during spatial developments. Expropriation is one of the most radical instruments that a government has at its disposal, it is a severe infringement in the private life and property rights of an individual citizen. The impact on the private life of an affected party therefore could be big. This research is relevant from a societal perspective because it contributes to knowledge about a fair weighing of public and private interests in expropriations. It will come up with recommendations to improve the SALP in this respect.

1.5 Scope
In the Ow different expropriation titles (onteigeningstitels) are determined. These titles are the ground on which the authority requests an expropriation at the Crown. In the SALP, the titles will disappear. This thesis is limited to the current title IV which deals with expropriation in the interest of the spatial development, housing, public order and the enforcement of the Opium Act. In practice, most of the times expropriation is done to make possible spatial development and housing. Within this title, the thesis focusses on expropriation on the basis of (provincial) land use plans (inpassingsplan and bestemmingsplan) and Environment and Planning permits (omgevingsvergunning).

This thesis will only focus on the first part of the expropriation process, from the decision to expropriate onwards till the expropriation is definite. This means that this research looks into the assessment whether expropriation for spatial development yes or no is lawful, given that full compensation is provided to the owner whose property is taken away. The reason to look only into the rightfulness of the expropriation is that this is the process that will change in the current plans of the minister. Moreover, in this phase the administrative considerations are made.
1.6 Research objective
This research contributes to existing knowledge about the way different interests are considered in an expropriation process. The research aims at coming up with recommendations for a better weighing of public and private interests in the new expropriation process. Therefore, an assessment scheme for expropriation processes will be developed. The scheme will be applied on the Supplementary Act Land Possession and on possible alternatives, in order to compare them.

1.7 Research questions
Since there is discussion about the way public and private interests will be weighed in the expropriation process of the proposed Supplementary Act Land Possession, the question this research will answer is:

How could the expropriation process in the Netherlands be improved, without harming the fair weighing of public and private interests?

The question is divided in six sub questions that together will provide an answer to the main question.
1. What is the legal framework in which the government has to operate in expropriations?
2. How are public and private interests weighed in the current Expropriation Act in the Netherlands?
3. How does the Dutch way of weighing public and private interests compare to expropriation systems in other countries?
4. What are general standards of weighing public and private interests in expropriations?
5. What are the consequences of the proposed changes in the expropriation process for the weighing of public and private interests?
6. Which measures could be taken to let the proposed expropriation process comply with the general standards of weighing public and private interests in expropriations?

1.8 Research methods per question
1. What is the legal framework in which the government has to operate in expropriations?
The first step in answering the main research question, is to explore in which legal context expropriation takes place. Not only national rules are relevant, but also international legislation with regard to expropriation has to be explored. National legislation is looked up in the Ow, while Crown policy is consulted in the Expropriation Guide of Rijkswaterstaat (2010; 2016). To determine the important notions in international treaties, the report of the T.M.C. Asser Instituut (2000), ‘De Nederlandse Onteigeningswet in rechtsvergelijking perspectief’ (The Dutch Expropriation Act in a legal comparison) and chapter 9 of Sluysmans’ dissertation (The influence of European law) are used as a starting point. From there, the relevant provisions in both the European Convention on Human Rights and Fundamental Freedoms [ECHR] and the Constitution of the Kingdom of the Netherlands are looked up.

2. How are public and private interests weighed in the current Expropriation Act in the Netherlands?
The second step is to find out the interests at stake in expropriations. It will be researched how the interests of both expropriators and affected parties are weighed, who weighs them and what are the considerations in weighing them in the current expropriation process in the Netherlands.
A case study is conducted to show every step towards an expropriation in practice. Moreover, in order to determine the different interest four Title IV and two Title IIA Crown decisions were analysed (appendix IV). Thereafter, S.M. Holtslag-Broekhof and S. Berns were interviewed to verify the interests that were found in the case study and the analysis of the Royal Decrees.

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6 Interviews were tape-recorded, with permission of the interviewees.
3. How does the Dutch way of weighing public and private interests compare to expropriation systems in other countries?

The third research question takes a look abroad to examine how public and private interests are weighed in expropriation processes in other countries. A comparison with foreign expropriation systems can encourage reflection on the national expropriation process.

The research in this thesis is focussed on the expropriation systems in England and Spain. The English system is interesting to look into because the legal system differs from the legal system in the Netherlands. England is a Common Law country, whereas the Netherlands and Spain have a French-inspired civil law tradition (Sluysmans, Verbist & Waring, 2015). Moreover, there is no language barrier and it is a European country. The research also focusses on Spain, partly because of the same reasons: for the researcher there is no language barrier and it is a European country. Furthermore, it will be investigated because the last years some disputes about expropriations took place, which were also discussed in the European Parliament (e.g. Nieuwsblad 29-07-2004⁷, Guardian 26-08-2008⁸ and European Parliament 18-12-2015⁹). On top of that, in the Dutch House of Representatives questions were asked about expropriations in Spain¹⁰.

The English expropriation procedure is described in the ‘The Chichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion’ (2015). For the Spanish expropriation process, the Expropriation Act (Ley de 16 de diciembre de 1954 sobre expropiación forzosa) has been consulted in the Government Gazette (Boletín oficial del estado).

Literature that is used as a starting point to place the Dutch system in an international perspective is the book ‘Expropriation Law in Europe’ of Sluysmans, Verbist and Waring (2015). Another source that is used is a legal comparison of the Dutch Ow that was conducted in 2000 by the T.M.C. Asser Instituut (2000).

Additionally, there has been personal contact by e-mail with expropriation experts from Spain (Héctor Simón Moreno, Postdoctoral researcher in Civil law at University Rovira i Virgili (Tarragona, Spain), the writer of the book chapter about Spain in ‘Expropriation Law in Europe’) and England (Emma Waring, lecturer York Law School, the writer of the book chapter about England in ‘Expropriation Law in Europe’).

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⁷ http://www.nieuwsblad.be/cnt/gf87mhas
⁸ https://www.theguardian.com/world/2008/aug/26/spanish.land.laws
¹⁰ https://www.rijksoverheid.nl/documenten/kamerstukken/2010/02/10/beantwoording-vragen-van-de-leden-van-de-camp-en-ormel-over-onteigeningen-in-spanje
4. What are general standards of weighing public and private interests in expropriations?

From this international comparison and from the analysis of the Dutch expropriation practice, boundary conditions for expropriations, requirements of weighing public and private interests and criteria for the new expropriation system have been derived and brought together in an assessment scheme. This scheme has to be able to test whether the proposed expropriation system in the SALP is in line with other institutions that are in place. In order to develop an assessment scheme for expropriation processes, this research used the institutional framework of Williamson (1998) as a starting point.

5. What are the consequences of the proposed changes in the expropriation process for the weighing of public and private interests?

The minister published the bill at the start of the internet consultation. To fill out the assessment scheme, the public reactions that were ventilated during the internet consultation and the comments of the Council of Judiciary\(^{11}\) are analysed. From the analysis of the SALP with the assessment scheme, shortcomings with regard to the general standards were discovered.

In an interview (21-11-2016), Rob de Boer, who is part of the team of civil servants of the Ministry of I&M that writes the SALP and is part of the inter-ministerial programme ‘Simply better’ (interdepartementaal programma ‘Eenvoudig beter’), clarified some choices that were made when in the design process of the bill. De Boer also reflected on the comments that were ventilated by the respondents in the internet consultation.

6. Which measures could be taken to let the proposed expropriation process comply with general standards of weighing public and private interests in expropriations?

Finally possible measures will be proposed to fix shortcomings with regard to the general standards of weighing public and private interests in expropriations. An expert panel is asked to review\(^{12}\) the proposed measures and to rank alternative expropriation processes. The panel consists of two experts that earlier in the research have been interviewed (Berns and Holtslag-Broekhof) and A.C.M.M. van Heesbeen, former president of the Netherlands Association for Land Agents and currently an expert in the field of expropriation at Gloudemans.

All in all, this leads to the research approach presented in table 3.

<table>
<thead>
<tr>
<th>Research Questions</th>
<th>Research Methods</th>
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<tbody>
<tr>
<td></td>
<td>Legal analysis</td>
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<td>1</td>
<td>X</td>
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<td>2</td>
<td>X</td>
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\(^{11}\) Also the president of the Supreme Court, the attorney general of the Supreme Court and the Dutch Association of Judiciary (Nederlandse Vereniging voor Rechtspraak) were invited by the minister to submit their comments on the bill. At the moment this thesis was written, only the reaction of the Council of Judiciary had been published.

\(^{12}\) The form that is used to assess the alternatives, is included in appendix X. The experts were asked to rank six alternatives and were asked to assess the consequences of the alternatives for the requirements and criteria of the assessment scheme. The alternatives can be found in appendix XI.
1.9 Thesis outline
Chapter 2 examines the judicial environment for expropriation in the Netherlands, it determines the legal framework in which the government has to operate in expropriations. Furthermore it explores how the expropriation process is organized in the Netherlands at the moment and with which (international) rules expropriations in the Netherlands have to comply. Then chapter 3 describes the current expropriation practise in the Netherlands. It looks at how public and private interests in expropriation processes are weighed in the current Expropriation Act in the Netherlands and what are the possible interests at stake in expropriations. It also studies who weighs the different interests and what are the considerations in the weighing of the interests. Chapter 4 compares the Dutch expropriation process to foreign expropriation processes. Subsequently chapter 5 analyses the institutional environment in which the SALP will be embedded and comes up with an assessment scheme to tests for the institutional alignment of expropriation processes. Thereafter Chapter 6 describes the proposed changes in the expropriation process and assesses its consequences for the weighing of public and private interests with the assessment scheme. Then chapter 7 comes up with measures to let the proposed expropriation process comply with the general standards of expropriation. Finally chapter 8 sums up the conclusions of the research and provides recommendations to improve the weighing of public and private interests in the new expropriation process in the Netherlands.

Figure 2 Thesis outline
Legal Framework: expropriation in the Netherlands

In expropriations an authority wants to acquire land for the public gain. Law plays a role as an umpire in order to balance competing rights: the private property rights and the right of the government to intervene in this right (Payne, 2010). National laws describe in detail the purposes for which expropriation can be used, the agencies and officials with the power to expropriate, the procedures to be followed, the methods for determining compensation, the rights of affected private parties and how problems are to be addressed (FAO, 2008).

Expropriation legislation however not only consists of national rules, it is also regulated by international rules and treaties. This chapter looks deeper into both the national and the international rules in order to investigate how the weighing of the different interests is anchored by law. In doing so, the first research question will be answered:

What is the legal framework in which the government has to operate in expropriations?

First paragraph 2.1 discusses the general provisions of the Expropriation Act and the expropriation process in the Netherlands. Thereafter paragraph 2.2 examines the national and international legal context in which expropriation takes place.

2.1 Expropriation Act in the Netherlands

In the Netherlands, expropriation can only take place in the public interest. The government defines the public interest in its decisions. On the basis of that, an expropriation title will be chosen. The title is the basis to expropriate in the Dutch Ow. The Ow distinguishes a few different titles:

- **Title II** Land- and coastal defence works;
- **Title IIa** Roads, bridges, embankments, roadside ditches, canals, railways, ports, works to combat pollution of surface waters, extension of rivers and works for aviation;
- **Title IIb** Public drink water supply and waste disposal;
- **Title IIc** Extraction of surface mineral resources;
- **Title III** War, fire or flood;
- **Title IV** Spatial development, housing, public order and the enforcement of the Opium Act;
- **Title V** Patents of invention;
- **Title Va** Rights deriving from an application for a patent;
- **Title VII** Land (spatial) organization.

This thesis is limited to the use of Title IV. The relevant articles in the Ow for this thesis are articles 1 till 4 (general provisions), 5 till 61 (Title I about expropriation under normal circumstances) and 77 till 96 (Title IV).
2.1.1 Expropriators

Article 1 Ow rules that the national government, provinces, municipalities and water boards are entitled to request the Crown to expropriate (paragraph 1) in order to conduct a project that serves a public interest. Furthermore, also natural persons (natuurlijke personen) or legal bodies (rechtspersonen) pertaining to private law, to whom, for the execution of the works that require expropriation, total entitlement to enjoyment of rights (volledige rechtsbevoegdheid) are allowed to send an expropriation request to the Crown (article 1, paragraph 2). The Crown will in the end decide to yes or no designate the request to expropriate land.

2.1.2 Affected parties

Article 3 Ow determines the rightful claimants in the determination of the compensation. This research takes the actors that are summed up in article 3 as a starting point, since the research only focusses on the phase in which the decision to expropriate is taken. In this phase all claimants that are an affected party (belanghebbende) in the sense of article 1:2 Awb are taken into account. The expropriator has to conduct a research to find parties that might have an interest related to the parcel of land that will be expropriated. In practice this includes a search for owners and renters in the municipal administration (Gemeentelijke Basis Administratie), a search for companies at the Chamber of Commerce and a search for people with a right in rem at the land register [Kadaster] (Rijkswaterstaat, 2016). Other people with a right in rem on the land to expropriate can be found by asking the land owner during the negotiations. When the affected parties are known, the expropriator notifies the affected parties and sends a list of affected parties to the Crown (Rijkswaterstaat, 2016).

Article 3 paragraph 1 Ow states that the one named in the cadastral registers is considered as the owner of the parcel. With ‘owner’ the legislator means the judicial owner (rechthebbende) and he should recover his damage from the judicial owner on the basis of unfair enrichment (ongerechtvaardigde verrijking, article 6:78 BW), according to De Graaf-Kouijzer (2016).

Besides the owner, the persons that have right in rem (zakelijk rechthebbenden), as stated in article 4 paragraph 1 Ow are considered as an affected party. This right in rem concerns building and planting rights (recht van opstal), ground lease (erfpacht), usufruct (vruchtgebruik), use, occupation or eternal ground lease (beklemming).

Also third parties can be rightful claimants (article 3, paragraph 2 Ow). Third parties have limited (personal) rights, such as (sub) tenants, (sub) leasers, possessors, owners in the case of shared possession (mandelijkheid, article 5:60 paragraph 2 BW), creditors (article 6:252 BW) and those who have seized (beslag gelegd) the property that will be expropriated or a right to which this property is subject (de Graaf-Kouijzer, 2006).

On top of what is stated in the Ow, can be thought of other actors involved that might come up in the research for interested parties that an expropriating body has to conduct. In practice the Crown considers a party as affected if their interest is bounded to the land (grondgebonden belang). There are a few examples of parties that can be considered ‘affected’ but are not a rightful claimant in the expropriation process. Illegal users for example are no rightful claimants, but do have an interest in continuing their illegal use. Furthermore, neighbours can be affected by an expropriation. If their neighbour (the person that is expropriated) loses his property, this might result in a road or other kind of maybe undesired (spatial) development. In expropriation neighbours do not have a direct interests, but a derived interest. This will be compensated if they claim the damage caused by planning (planschade). Also customers of a shop or business have a derived interest that is not taken into account in the...

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13 In this thesis with ‘owner’ the judicial owner is meant. The difference between judicial and economical ownership is the difference between purchasing and delivering a good. Somebody is economical owner of the land from the moment he bought the parcel, whereas he is judicial owner from the moment the change of ownership is subscribed in the land register (Minister of Justice, 14-12-2012).
expropriation procedure. If for example in a small village the only supermarket will be expropriated and the next supermarket is five kilometres away, customers have a clear interest in keeping this supermarket close to their homes. However, this is not an interest that is considered in the expropriation process, but in the planning process.

In a recent Crown decision (20 December 2016, nr. 2016002261) the Crown did not consider a group of people living in the neighbourhood of an expansion of a lock (Sluis Eefde, Lochem) as affected party. The group turns against the expropriation because in their view the expansion will have disastrous consequences for the living conditions and climate of life. The Crown however declared their view inadmissible, because nobody of the group has (rights on) land that is included in the expropriation. A party can be considered ‘affected’ if it has an interest bounded to the land included in the expropriation.

Another category of affected parties are interest groups and advisors. Interest groups (and umbrella organizations) try to influence legislation. Examples of interest groups are LTO (Land- en Tuinbouw Organisatie Nederland, agricultural lobby group), VNG, VEH (Vereniging Eigen Huis, lobby group for owner-occupiers) and the Society for expropriation lawyers (Vereniging voor Onteigeningsadvocaten). Advisors assist public or private parties in expropriations.

Table 4 Actors involved

<table>
<thead>
<tr>
<th>Private actors</th>
<th>Semi-public actors</th>
<th>Public actors</th>
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<tbody>
<tr>
<td>Owners</td>
<td>Natural persons or legal person with total entitlement of rights</td>
<td>Legislative bodies</td>
</tr>
<tr>
<td>Persons with a right in rem – zakelijk gerechtigden</td>
<td></td>
<td>House of Representatives</td>
</tr>
<tr>
<td>(Eternal) ground lease</td>
<td></td>
<td>Senate</td>
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<tr>
<td>Building and Planting rights</td>
<td></td>
<td>National government</td>
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<tr>
<td>Usufruct</td>
<td></td>
<td>Ministry of Infrastructure and Environment</td>
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<tr>
<td>Mortgage lenders</td>
<td></td>
<td>Crown</td>
</tr>
<tr>
<td>Third parties</td>
<td></td>
<td>Provincial parliament</td>
</tr>
<tr>
<td>(Sub) tenants</td>
<td></td>
<td>Municipality council</td>
</tr>
<tr>
<td>(Sub) leasers</td>
<td></td>
<td>General management of the water board</td>
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<tr>
<td>Illegal users</td>
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<td></td>
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<tr>
<td>Neighbours</td>
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<td>Costumers</td>
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<tr>
<td>Interest groups</td>
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<tr>
<td>Advisors</td>
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</table>

Table 4 divides the public actors according to the trias politica of Montesquieu. It shows that the role of the Crown is debatable in this respect. Since it belongs to the Ministry of I&M, it is part of an executing body. However, the Crown also makes its own policy by means of their judgements. So it is also a combination of a legal and legislative body. The most poignant example of the double role that it plays is when the minister of I&M is expropriating. In this situation the fox is guarding the chickens, since the same civil servants that prepare the expropriation for the minister will have to decide if their own request decision can be designated. Paragraph 2.1.4 elaborates more on the role(s) of the Crown and the status of the Crown in both national and international law.
2.1.3 Financial implications of expropriation for the private party

All direct losses that the interested party suffers by the loss of his property have to be compensated (article 40 Ow). The dispossessed has to maintain the same income and financial position. For an owner this means besides a compensation for the value of his property, a compensation for the costs of the purchase of new property, moving expenses etc. (Gloudemans, 2016). Financial damage (vermogensschade) occurs because of the transfer of property rights. Besides financial damage, somebody that is expropriated can suffer income damage (inkomstenschade), for example when he loses (a part of) his agricultural land or if an entrepreneur has to move his business. The Ow provides that all these kind of losses have to be compensated.

An expropriated person can also suffer immaterial damage. However, article 40b Ow provides that the actual value (werkelijke waarde), the objective market value, will be reimbursed (articles 40b-f of the Ow). Taxation plays an important role in objective valuation. This means that immaterial damage is not taken into account in the determination of the compensation in expropriations in the Netherlands.

2.1.4 Expropriation process

Article 77 paragraph 1 Ow determines when an owner can be expropriated on the basis of Title IV. The most important basis to expropriate is the land use plan, the provincial land use plan or the Environment and Planning permit. An expropriation can take place to maintain a situation as described in a land use plan or to execute a new plan.

Article 78 paragraph 1 till 8 describes the expropriation process (figure 3). The Handreiking Administratieve Onteigeningsprocedure (2016) provides expropriators with additional clarifying information on how to submit expropriation requests to the Crown (appendix II). The expropriation process is bound to strict rules and terms. If these rules are violated and/or terms are exceeded, the expropriation request will be rejected by the Crown.

Verzoekbesluit (request decision)

An expropriation request on the basis of a plan will be send to the Crown within three months after it has been taken by the expropriator empowered by article 78 Ow, this is called a request decision. Article 78 Ow not only enables bodies pertaining to public law to expropriate, but also legal persons enabled by article 19 of the Housing Act (Woningwet), for example a residents’ association. This request decision has to be supported by all the documents required by article 79 Ow. Within those months the request can be changed if desired. During the procedure, the expropriator has to try to reach an amicable settlement with the owner.

Administrative procedure (expropriation title set by Crown)

The administrative procedure starts when an expropriator sends the request decision to the Crown. When the request reaches the Crown, the expropriator will be asked to publish the request in the usual manner for six weeks (articles 3:11 till 3:13 Awb14). Affected parties will be informed personally. During those six weeks, stakeholders can send their objections to the Crown. The preliminary decision will be published in the Government Gazette and will be available in the municipality or province that it concerns.

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14 Algemene wet bestuursrecht, General Administrative Law Act
and in the ministry. To come to its decision, the Crown uses the procedure that is described in section 3.4 Awb (Uniforme Openbare Voorbereidingsprocedure [UOV], Uniform Public Preparation procedure).

Within six months after this period of objections a formal decision has to be made by the Crown. The Crown asks advice of the Council of State and assesses both the formal aspects (the procedure) and the material assessment criteria to take a decision about the expropriation request (next chapter). After consideration of all interests involved the Crown takes a ‘title decision’ (titelbesluit), which will be published in the Government Gazette. This decision is also called ‘Royal Decree’ or ‘Crown decision’.

**Judicial procedure (determination of the compensation)**

In the end the civil judge has to endorse the Royal Decree. Within two years after the Crown decision, the land should be bought by amicable settlement or affected parties that refuse to sell will be summoned, which is the start of the judicial procedure at the civil judge (article 78 section 8 Ow). In this summons the offered compensation has to be mentioned. The authority that wants to expropriate has the obligation to try to reach an amicable settlement between the Crown decision and the start of the judicial procedure. The civil court has basically two tasks. The first task is to review and endorse the title decision; the second task is to determine the compensation.

### 2.2 Rules that govern the Dutch expropriation process

The Dutch Ow is not the only legal constraint for expropriation. Both international treaties and the Dutch Constitution apply as well. On top of that, there is the Awb, which, next to formal procedural rules about the relation between government and private parties, contains some principles of good governance where government’s actions, and therefore also expropriations, have to comply with.

#### 2.2.1 European rules

The relevant European law with regard to expropriations is not the general law of the European Union, but the ECHR (Barclay, 24-9-2010). All member states of the Council of Europe have ratified the ECHR (Europa Nu, 2017). So, the ECHR is not a treaty of the European Union, but all EU member states did ratify it\(^{15}\). The Treaty of Lisbon enabled the EU to become in its entirety a member of the ECHR. However, a ruling\(^{16}\) of the Court of Justice of the European Union interfered with this intention. Renegotiations about the accession of the EU to the ECHR are still going on.

On the basis of article 1 First Protocol [FP] ECHR every natural or legal person is entitled to the peaceful enjoyment of his possessions till this enjoyment harms the public interest. The latter articulation raises one of the most fundamental challenges, namely, the extent to which existing property rights can be reduced for other societal goals (Waincymer, 2010).

Furthermore article 6 of the ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In the Benthem case\(^ {17}\), the ECtHR ruled that the Crown is not a judicial body as required by this article. In the first place because “the Royal Decree was not susceptible to review by a judicial body as required by Article 6 paragraph 1”. In the second place the Court considered the revision of the Crown as an administrate act rather than the judicial act that is required by article 6. Although the Benthem case was about a permit of an LPG station, also for expropriation it was a relevant case because property rights, and therefore expropriation cases, are part of ‘civil rights and obligations’ that are mentioned in the article (Barkhuysen \& Van Emmerik, 2006). Next to this, in the Benthem case the role and legal status of the Crown are at stake. Since the ECtHR ruled that the Crown is not an independent and impartial judge as provided by Article 6 ECHR, the judicial review of expropriation by the civil judge in the Netherlands is extended with an endorsement of the expropriation decision by the civil judge (Crooijmans, 2013). Before Benthem, the Crown was involved in many more administrative procedures. It for example decided about the land use plan. After Benthem, eventually with the introduction of the Awb in 1994, the Crown was removed from every administrative procedure but expropriation (Bolmer, 2015).

\(^{15}\) All EU member states are also member of the Council of Europe

\(^{16}\) ECLI:EU:C:2014:2454

\(^{17}\) ECtHR, 23-10-1985, nr. 1/1984/73/111: Benthem v Staat
Additionally Payne (2010) and FAO (2008) mention the importance of article 8 ECHR, of which the second paragraph provides that under several circumstances interference in a person’s private life and home is legitimate. What those circumstances can be, is determined in national legislation.

Finally article 13 ECHR requires the state to provide its citizens with an effective national remedy to investigate “an alleged violation of the ECHR” (Barkhuysen, 2004: 32). In the Netherlands, since the Bethem judgement, the current expropriation procedure has the option to fight a violation of the ECHR at the civil judge. After that, it is possible to appeal to the Supreme Court.

With the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union (Handvest van de grondrechten van de Europese Unie) [the Charter] became operative (Article 6 paragraph 1 Treaty of the European Union). The Charter contains notions that are relevant from the perspective of expropriation (Sluysmans, 2011). Article 17 paragraph 1 of the Charter (protection of property) contains a provision that is similar to article 1 FP ECHR. Additionally, article 47 of the Charter (fair trial) resembles article 6 ECHR.

2.2.2 Constitution of the Kingdom of the Netherlands

Article 14 of the Dutch Constitution provides a possibility for expropriation, only in the public interest and with prior assurance of full compensation. The rulings in the Ow determine the rest of this constitutional right and determine under which circumstances an authority can expropriate and what should be seen as public interest (the titles). The assurance of the compensation is guaranteed with article 54n first paragraph Ow, providing that the registration of an expropriation verdict will not happen until the proof of payment is submitted.

2.2.3 General Administrative Law Act [Awb]

The weighing of interest at a concrete level is, in the main, regulated by the Awb (Stoter, 2000). The Awb contains important norms with regard to the investigation of relevant facts and interests, the weighing of interests and the result and recognisability hereof (section 3:2 Awb). In the weighing of interest, the principles of good governance (algemene beginselen van behoorlijk bestuur)18 play an important role (Stoter, 2000). This are general and binding guidelines - the rules of the game - for the government. They reduce the abuse of power in expropriations (FAO, 2008).

In the Netherlands, some of those principles are incorporated in the Awb, others are not. Due to case law, both the Civil Code and the Awb are complemented with a notion that actions of a government acting under private law cannot conflict with (un)written rules in public law (Boogers, 2014). An administrative judge can test whether the governments’ decisions comply with those principles (KWJZ, 2016). In expropriations however, the administrative judge is (currently) not part of the process. Therefore, if a claimant brings up the principles of good governance, the Crown and the Council of State have the task to assess whether those are violated.

The current expropriation procedure in the Netherlands however is not in line with usual procedures in the Awb (see: ‘operation free market, deregulation and quality of legislation’ (marktwerking, deregulering en wetgevingskwaliteit [mdw]) in 200019). Moreover, the Ow is on the negative list of the Awb (section 8:5), which means that no appeal is open to expropriation in the way that is common in the Awb, at the administrative judge, with higher appeal at the Administrative Jurisdiction Division of the Council of State. However, as elaborated upon before, objections against the expropriation can be submitted at the Crown, which will assess them. Thereafter, a civil judge has to endorse the Royal Decree.

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18 The Dutch Knowledge Centre for Legislation and Judicial Affairs [Kenniscentrum Wetgeving en Juridische Zaken, KWJZ] (2016) distinguishes principles of good governance that apply in the Netherlands: the duty of care principle (zorgvuldigheidsbeginsel), the duty to state reasons (motiveringbeginsel), the fair play principle, the principles of legal certainty (rechtszekerheidsbeginsel), the principle of legitimate expectation (vertrouwensbeginsel) and the principle of equality (gelijkheidsbeginsel). Other principles of good governance are the prohibition on acting arbitrarily, the prohibition on abuse of power and the principle of proportionality. Over the last years, a few times principles of good governance have been topic of discussion in the Netherlands in relation to title IV (Appendix III).
19 Parliamentary Documents II, 24 036 Nr. 174, year 2000/01
2.3 Conclusion

Rules limit expropriation power and determine the power of property rights. Figure 4 shows the legal framework in which the Dutch authorities have to operate in expropriations. The ECHR and the Constitution put limits on property rights, “first noting the need for minimum property standards and second the entitlement to subordinate such rights to the needs of the broader society” (Waincymer, 2010: 279). So, ‘public interest’ is an important boundary condition for expropriation, provided for by the ECHR and the Dutch Constitution.

The Awb plays a key role in the weighing of public and private interests in expropriation. It contains principles of good governance, which provide binding rules with regard to the consideration of the different interests involved in expropriations. In normal Awb procedures, public decisions that impact an individual citizen are executed by order (beschikking). Against this order, appeal is open at the administrative judge and/or the Administrative Jurisdiction Division of the Council of State. In expropriations however, the expropriator has to request the Crown to designate land for expropriation and appeal for affected parties against the Royal Decree is open at the civil judge. So, expropriation is not in line with general Awb procedures in this respect.
Determining and weighing of public and private interests in expropriations in the current situation in the Netherlands

One of the key issues in discussing expropriation is its justification (Azuela & Herrera-Martín, 2009). This justification is found in the public interest (chapter 2). What ‘public interest’ is exactly and how this is weighed with private interests, is different in every case. Sometimes these interests are corresponding, but in expropriations public interest conflicts with private property rights.

How are public and private interests weighed in the current Expropriation Act in the Netherlands?

This chapter shows all considerations and possible moments of opposition during the determination of the interests and the weighing of those interests in the expropriation process in the Netherlands. Paragraph 3.1 describes the possible interests of the actors involved in expropriation and how those interests are determined. When the interests of the different possible actors are known, it is important to know how these are taken into account at the moment in the Netherlands. Paragraph 3.2 therefore elaborates on the considerations that are made in the current Dutch system and by whom those considerations are made. A case study is conducted to show clearly every step towards expropriation.

Sluis is a city in the province of Zeeland (figure 5). The province of Zeeland determined land use plan ‘Waterdunen’ with a decision of the provincial parliament (1 October 2010). However, at the moment the provincial parliament took the request decision to expropriate (17 December 2010), the provincial land use plan was still not irrevocable because of an appeal that was lodged. Within three months after the request decision (27 January 2011), the provincial governments submitted the required documents to the Crown.
3.1 Determining possible interests of the actors involved

In every expropriation case the actors involved are different. There is a big difference in the goals and means of the private and public actors. In this paragraph the possible actors are divided in two groups, expropriators (public actors) and expropriated (private actors). This paragraph investigates the different interests actors might have and how these are determined.

3.1.1 Determining the public interest

The WRR (2000) defines public interest as a societal interest in which the government interferes in the situation because it believes that otherwise the interest will not be safeguarded sufficiently. Public interest (algemeen belang) is not the same as societal interest (maatschappelijk belang). Societal interests are interests that are important for the entire society, such as sufficient nutrition, a healthy living environment and security (Potters et al., 2015). So, not every societal interest is a public interest. A public interest is a societal interest which only by competition is not sufficiently safeguarded. Therefore, government interference is needed to protect the public interest, as is the case in expropriations.

The public interest in spatial development is determined by, amongst other things, the land use plan. In Dutch spatial policy the land use plan plays a crucial part, because it sets out the land uses that can and cannot be permitted (Priemus & Louw, 2003). Land use plans are legally binding, both for citizens and for companies (Priemus & Louw, 2003). Policy strategies (structuurvisies), plans and impact assessments (effectrapportages) underlie the land use plan. In the build-up to the land use plan, extensive discussions about those reports take place in the provincial parliament to determine the public interest. The land use plan is the final result of these discussions.

The province decided in 2008 to draft a land use plan because of the important national and regional interest involved. One of the important national interests that is served with ‘Waterdunen’ according to the province of Zeeland, is the improvement of the coastal defence in West Zeeuws-Vlaanderen. Furthermore there are a few other supralocal interest, such as an economic impulse for the region. The region has to deal with a declining population and a shortage of work. A recreation and green area can change this and fit in the desire of the province to improve the spatial quality in the region by means of an innovative cooperation between public and private parties.

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The ‘Waterdunen’ plan area (figure 6) is around 350 ha. and is situated at the west side of Breskens. The northern border of the plan area is the Westerschelde. Right now this area is used for agricultural purposes. In the north-eastern part of the plan area operates a recreation park, the ‘Molecaten Park Napoleon Hoeve’. The province of Zeeland made an agreement with Molecaten Groep B.V.. They will have to move from their current location but will get back a bigger plot and will be enabled to build more vacation houses.

Figure 6 Plan area

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20 In this chapter the provincial land use plan is discussed. When the national government expropriates, this is the national land use plan. When a municipality expropriates, it is called ‘land use plan’. When water boards expropriate, a project plan is the basis to do so. The political bodies that decide in those cases are the minister, the municipality council or the general management of the water board (algemeen bestuur).

21 Sources case study Provinciale Staten Zeeland (1-10-2010), Provinciale Staten Zeeland (17-12-2010), Staatscourant Nr. 21774 (12-12-2011), Royal Decree 21774 (15-11-2011)
The Zeeland case shows that in determining the land use plan not only spatial interests but also economic interests have to be considered. One of the questions that the provincial parliament had to answer is for example whether it is permissible to take land from a person to give it to a company, even if the company promotes development projects from which the community would benefit. Berns (personal communication, 4-11-2016) considers the spatial and economic interests intertwined. Intermezzo 1 makes a jump from the public interest in general to the consideration of the public interest versus the interests of affected parties. It clarifies the precarious and arbitrary boundaries of what can be called ‘public interest’.

**INTERMEZZO: KELO v. CITY OF NEW LONDON**

One of the most famous expropriation cases in the United States is the case of *Kelo v. City of New London* in 2005, commonly known as the *Kelo or Little Pink House* case. The legal issue with this case is whether the city council had abused its expropriation power by forcefully taking private property in order to convey it to another private owner (Crow, 2007). In the Kelo case, Susette Kelo was expropriated by the municipality in favour of a large pharmaceutical company that had several offices in the municipality and wanted to expand. The municipality was inclined to provide the necessary space for this expansion. The case ended up at the Supreme Court in 2005, where with a five against four majority was decided that this expropriation was lawful. It caused major disturbance amongst citizens in the United States, because it was seen as a dangerous precedent in which every home could be in jeopardy of expropriation since every business instead of a house can generate more tax revenue and therefore would be more in the public interest (Benedict & Bullock, 2010). As a consequence, 43 states did reform their expropriation laws.

The Kelo case is an affirmation that planners and city councils determine the public interest. According to the Supreme Court’s decision, “the city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue”. Although it serves private interests it certainly also serves public interest since the goal of the expropriation is to promote economic development in the municipality. The claim of Kelo therefore, according to the Supreme Court, “is supported by neither precedent nor logic” since “promoting economic development is a traditional and long accepted governmental function”.

In Germany, regarding article 14 of the German Constitution, expropriation of the federal planning law must not be applied in favour of private companies, even if the overarching purpose is the creation of jobs and the improvement of the regional economy (Davy, 2012)\(^\text{22}\). So, the German court is more restrictive than the US Supreme Court in *Kelo vs. New London*, because it does not allow the taking of private property for the improvement of regional and local economic development (Davy, 2012). In the Netherlands, expropriation for economic development does take place. Moreover, it actually is even more common practice than in the United States. This is evidence for the connection between spatial and economical interest. Those interest in this thesis will be considered intertwined, called a **spatial development interest**.

Furthermore, authorities have an interest in making sure the execution of a project that is considered to be in the public interests. This interest in can be served without expropriation, if the current owner can realise the project himself or if amicable settlement is possible. If the current owner cannot realise the project himself, the expropriator has to become the owner of the site in order to be able to execute the desired project. Authorities therefore have interests in having an instrument to do so, expropriation, at their disposal. In this thesis, this combination between the project and the instrument is called the **effectivity interest**.

\(^{22}\) The German Bundesverfassungsgericht decided accordingly in 1987 in the ‘Boxberg’ case (http://www.servat.unibe.ch/dfr/bv074264.html#Rn002)
Finally, a government has to be reliable and has to act in good faith, following the principles of good governance. The Dutch government wants good judicial safeguards for its citizens, which is one of the principles of a constitutional state. Next to this, the Awb and Ow oblige expropriators to be transparent and accurate. In summary, this is called the legitimacy interest in this thesis.

3.1.2 Possible interests of expropriated actors in an expropriation process

The province of Zeeland decided to ask the Crown to expropriate and sent the relevant documents to the Crown. Those documents were available for public inspection from the 14 April 2011 to 25 May 2011 in the municipality of Sluis and at the ministry of I&M. In addition, the draft expropriation decision of the Crown was published in 'Zeeuws Vlaams Advertentieblad' and 'PZC' by the mayor of Sluis. The minister published the draft expropriation decision in the Government Gazette (13 April 2011), nr. 5617. Affected parties were notified personally by the minister with a letter (4 April 2011, BJZ 2011042059). They were invited to submit their views.

Nine claimants submitted their views to the Crown. The first claimant challenges the basis of the expropriation, saying that the underlying planning is unlawful. Next to this, he mentions that involuntary expropriation goes against national, provincial and municipal policy. The claimant however is a lobby group that does not represent an affected party. Therefore, the claimant is inadmissible according to the Crown. Also claimants two, three and four challenge the basis of the expropriation and submitted several reports to show that the underlying planning is based on invalid arguments. The fifth claimant does also not agree with the planning that underlies the expropriation. Besides, he does not agree with the expropriation instrument as such. He points at several policy documents of the province in which the principle of amicable settlement is mentioned as basic principle of land use planning. On top of this, the fifth claimant has six procedural arguments on the basis of which the Crown should not grant the expropriation in his view. In the fourth place, the claimant argues that there have not taken place sufficient attempts to settle amicably. The fifth argument is the lack of urgency of the expropriation. In the documents for public inspection is mentioned that the coastal defence should be ready in 2015, whereas in the policy documents the year 2020 is mentioned according to the claimant. The sixth argument of the claimant is that an important part of the expropriation is done for the benefit of (private) recreation. After expropriation, the land will be handed over to Molecaten for a price that is not in line with the prevailing market price. In claimant's view there are indications that unlawful state aid takes place. To conclude, the fifth claimant disagrees with the public interest and necessity of the expropriation, since the minister in a letter to parliament wrote that government should exercise restraint in expropriation for nature. The sixth claimant agrees with claimant number five and adds that also in his case the negotiations were stopped too soon. The seventh claimant is the owner of a camping place nearby 'Waterdunen'. Since the parcel of the claimant is not situated in 'Waterdunen' the Crown did not take his view into consideration. Also the eighth claimant is not an affected party in the sense of the Awb according to the Crown. The ninth and last claimant is a drinking water company. The province had promised, already before the Crown’s decision to reimburse all costs involved with the replacement of several pipes and mains.

The arguments brought up in the Zeeland case and in the analysis of the Royal Decrees (appendix IV) are rather formal, judicial. The advisors and lawyers thought that with these arguments they served the interests of the affected party that they represent. However, it is unlikely that those arguments are a full representation of the interests involved because expropriation is an emotional process in which feelings play an essential and non-deniable role (Holtslag-Broekhof, personal communication). If emotion is handled incorrectly by the land purchaser, affected parties could delay the expropriation process out of anger, which can be a loss of valuable time and money.

The emotional interest is sometimes intertwined with the financial interests (Holtslag-Broekhof, personal communication). People that are expropriated are entitled to a fair and full compensation. In the end, according to Berns (personal communication) and Holtslag-Broekhof (personal communication), landowners care the most about the financial aspect, about the money. If person X has a neighbour that gets a lot more compensation for his land than person X himself, with a similar plot of land, this will feel unfair to X, although he might was inclined to agree with the compensation offered. Affected parties want to perceive the expropriation as fair and just (appendix IV; Holtslag-Broekhof, 2016).
Holtslag-Broekhof (personal communication) in this respect found ‘injustice’ as a factor that influences the expropriation process. In her dissertation\(^{23}\) she dived deeper into this rather vague, intangible feeling of injustice and determined three core values that strongly relate to the perceived feeling of (in)justice. The first core value is ‘justice’. This means that the work that expropriators do must be legitimate and lawful. Another value is ‘equality’. People want to be treated in the same way as others, there should not be arbitrariness. Laws and the principles of good governance safeguard the equal treatment of civilians. The last value is ‘carefulness’. The procedures should be followed correctly and the expropriation has to be lawful. It is important to approach affected parties in the correct manner: to listen, to be open and to be transparent about the expropriation process. Affected parties want to be treated as a valuable party. All in all, those interests of affected parties in this thesis will be called an interest in a careful process.

Finally, affected parties have an interest in continuing use. People that are expropriated would not have had a problem if they would have been able to continue to use their property as they did before, if they were not expropriated. Those people might not have objections against the project as such, but against the project being executed on their land. This interest is reimbursed by the compensation.

In relation with the interest of continuing use and the financial interests, Berns (personal communication), in line with Sluysmans (2011), mentions the importance of the “right to be expropriated”. He states that sometimes it could be worse for affected parties to be not or only partly expropriated. This counts for example for somebody who owns a plot of land where a road will be realised which will leave him with two separate pieces of land. The road can cause severe disturbance (see for example the Bladel case, Government Gazette 57231, 14-11-2016). In this case, it might be in the interest of the owner to fully expropriate him.

Article 38 Ow, which according to Berns (personal communication) is used only seldom, provides rules for this. It provides that real estate should be expropriated fully if the owner demands this and when the plan is to expropriate only partly. Next to this, if the plot of land is reduced by more than 25% or if the plot becomes smaller than 1000 square meters, full expropriation can be demanded. However, land purchasers have the freedom to do what they think is ethically correct and in the best interest of everyone if the requisites of article 38 Ow are not met. By law is arranged that a decline in value of the remaining land (waardedaling van het overblijvende) has to be compensated. Hence, land purchasers are not obliged to acquire all the land if article 38 Ow is not applicable.

3.2 Weighing of the different interests in the current situation

Now the different interests – of both public and private actors - are known, the next step in answering the research question is to find out who weighs the different interests and at which moment in the expropriation process. Furthermore this paragraph investigates what are the considerations in the weighing of the interests.

3.2.1 Political supervision: determining the public interest

Because the land use plan is established by the provincial parliament, ‘Waterdunen’ is the outcome of a democratic process. In this democratic process the public interest is defined. This is the political supervision of the consideration of the different interests. Property rights do not play a role in this consideration. The determination of the planning policy is not part of the expropriation process itself and therefore will not be discussed further. Appeal to the underlying planning is open for affected parties on the basis of the Spatial Planning Act (Wet ruimtelijke ordening [Wro]), directly at the Administrative Jurisdiction Division of the Council of State.

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\(^{23}\) Although the core values determined by Holtslag-Broekhof (2016) are about the compensation and not about the expropriation decision in itself, there is a relation between those two phases. The compensation that an expropriator offers can be a trigger to sell the property as a result of which expropriation is not needed any more. Therefore in this research the three core values of Holtslag-Broekhof (2016) are combined with the interests found in the Royal Decrees and in the Zeeland case.
Then, if in the end is decided to expropriate, a request decision will be send to the Crown. In the consideration preceding the request decision, property rights play a central role. This is the first time in the process that the different interests are weighed in the expropriation process.

3.2.2 Administrative supervision: Criteria of the Crown

The second step in the supervision is conducted by the Crown, this is the administrative supervision. The Crown controls the request decision autonomously. Even if interested parties did not submit their views, it will assess the request decision on the basis of four assessment criteria.

Compatibility with the law

The Crown controls whether the municipality executed the procedure (UOV, section 3.4 Awb) correctly. It also assesses whether the expropriation is compatible with the Ow and whether the principles of good governance are respected.

Public interest

The Constitution requires that expropriation serves the public interest and that it cannot be used to serve purely private interests. Although the fundamental idea of expropriation is that the community should benefit from the project for which expropriation takes place, it might happen that individuals and businesses profit from an expropriation, as for example is the case in the Zeeland case and in the Kelo case.

With respect to the state aid argument, the Crown acknowledges that with the expropriation the interests of Molecaten are served. This however does not mean automatically that the public interest is not served. The provincial land use plan indicates that the area that it concerns is needed for recreation area. The recreation area is desired to enhance the social economic situation of the region of Zeeuws-Vlaanderen and to improve employment opportunities in the region, which both serve a public interest. According to De Roos (2013) follows from the Zeeland case that the Crown has the opinion that is does not matter whether with an expropriation next to public interests also private interests are served as long as the main goal and aim of the project is to serve the public interest. The Crown’s view is comparable to the US Supreme Court ruling in the Kelo case. Hence, the Dutch expropriation rules in this respect are more liberal than the German rules, in which expropriation can never be applied in favour of a private company. State aid in the raised offer of the province is out of the question since on request of the provincial government the European Commissioner that it concerns informed the province that when the offer to Molecaten B.V. is raised on the basis of an independent taxation, it will not be considered state aid. With regard to the planning arguments of claimants number two till five, the Crown considers that it is not up to the Crown to assess the underlying planning, this is a Wro process.

Necessity

The Crown uses three criteria to test whether an expropriation can be considered ‘necessary’ (Rijkswaterstaat, 2016). In the first place no more land than strictly necessary to execute the project may be expropriated.

To enhance the coastal defence of the Netherlands, to improve the regional economic situation and to improve the regional spatial quality, is chosen for an integral method of spatial development, according to Waterdunen.

With regard to the claim of claimant five that the government should exercise restraint in expropriation for nature, the Crown remarks that the minister in the letter that is referred to was talking about EHS (ecologische hoofdstructuur, main ecological structure) nature. Since the nature in ‘Waterdunen’ is not EHS nature, the provincial government is in charge of the nature and is empowered to decide about expropriation according to the Crown.

Furthermore, a requisite to meet the necessity criterion is that it has to be impossible to purchase the property via amicable settlement. Article 17 Ow requires that an expropriator tries to settle with the expropriated party between the Crown decision and the start of the judicial procedure. Practice shows...
that between the Royal Decree and the judicial procedure a lot of cases are settled amicably, since affected parties start to realise that expropriation is almost inevitable.

According to the Crown’s policy, attempts to settle amicably should be done during the whole expropriation procedure. So, already before the provincial parliament takes a request decision and between the request decision and the Crown decision, negotiations should take place. The negotiations have to be reported to the Crown in a logbook. If the expropriator can show that it is not likely that an agreement with the different affected parties will be reached soon, the municipality can send a request decision to the Crown (Rijkswaterstaat, 2016). At least one offer has to be done on paper to prove the effort of the expropriator. Negotiations continue during the expropriation procedure. The Crown considers expropriation necessary till the moment that the transfer of property rights is subscribed in the land register.

Claimant number 5 challenged the power to expropriate of the province since in their policy documents is said that to realize ‘Waterdunen’ amicable settlement will be used as purchasing method. The Crown did not agree with this view since the authority that drafted the policy document to which the claimant refers, was the provincial government, whereas the authority that expropriates is the provincial parliament. In addition, the instrument of expropriation is always at the disposal of the government as a last resort.

The last criterion to consider an expropriation necessary is that without the purchase of the property it would be impossible to execute the (land use) plan in the way that is serves the public interest the most. Expropriation is only justified when an expropriator shows that it is necessary to execute the project in the way that is proposed by the expropriator and that the goals cannot be reached by executing the project in another way. According to the Minister of I&M (2015) this demonstrates the “last-resort-character” expropriation has. Owners not only have to be informed about the plan itself, but also about the way the plan will be executed (Rijkswaterstaat, 2016). According to Dutch planning rules authorities may not issue expropriation orders if a landowner is able to realise the plan himself. Expropriation is the last option, this means that when the current owner can execute the plan of the municipality himself, expropriation is not necessary.

De Groot (2007) summarizes the more or less fixed pattern that the Crown uses to determine whether self-realisation seems reasonable. The Crown has the opinion that the right to self-realization cannot be addressed if the way of plan execution that the owner/developer has in mind differs from the plan of the expropriator. Next to this, the Crown will also reject a self-realization request if the property of the owner/developer is scattered in such a way that the owner cannot effectively execute (a separate part of) the whole realization. On top, if public facilities have to be realized, the Crown considers it desirable that the government takes the lead. The last requisite is that the plan has to be implemented integrally in conjunction and that the necessary ground has to be completely in possession of the owner/developer.

So, from several Crown decisions can be deduced that an owner/developer, provided that none of the aforementioned obstacles arise, is eligible for self-realisation if he meets the following three requisites (De Groot, 2007; T.M.C. Asser Instituut, 2000). First, he has to be willing to realize the plan. This means, among other things, that he can show a concrete plan. Moreover, the owner has to be in a position to realize the plan; he should have enough knowledge, experience and money to realize the plan. The plan however can be executed in co-operation with a third party. Finally, the plan must be executed as proposed by the expropriator. Often this means that the owner/developer has to reach an agreement with the expropriator about the type of dwellings, time planning etc.

Urgency

The expropriation has to be urgent. In practice the Crown wants to know if the project will be executed within five years. Expropriators have to prove this with concrete project plans and planning, aimed at execution (Rijkswaterstaat, 2016).

The ‘Waterdunen’ project is included in appendix I of the Chw. The coastal defence has to be ready before 2015, according to the plan. To ensure this, the project has to be started at last in 2013/2014. To do so,
the land should be in ownership of the province in 2012. The execution of the land use plan therefore fits within the term the Crown uses to assess the urgency, since this case took place in 2011. Claimant number five that opposed the expropriation by stating that there is no urgency because in the coastal defence plan 2020 is mentioned as the latest possible finish time of the project. However, the Crown discovered that the plan clearly mentions that the project has to be executed as soon as possible, but at last has to be ready in 2020. Since in the plan is mentioned that it has to be executed as soon as possible, and because the coastal defence is part of a bigger and integral project, there is a clear urgency to execute the project in the opinion of the Crown.

The term of five years is composed of a term of two and a term of three years. According to articles 64a paragraph 4 and article 78 paragraph 8 Ow two years after the Crown decision, amicable settlement has to be reached with affected parties or they have to be summoned. Article 61 Ow becomes relevant if this threshold is not met. If, after three years after the expropriation took place the expropriator did not start with the works, the expropriated can claim its property back. This also counts if works are stopped for more than three years or if due to other circumstances can be proved that the work that was the reason for expropriation, will not take place within three years. The expropriator has to offer the former owner his (former) property back, in the current state, under the condition that the former owner is inclined to return a proportionate part of the compensation. If the expropriator does not make this offer, the former owner could claim its property back and is entitled to additional compensation.

3.2.3 Judicial supervision
The civil judge endorses the Royal Decree and sets the compensation. If a claimant does not agree with the title that is set, he can ask the civil court to marginally review the Royal Decree. In the marginal review the civil judge reviews whether the Crown, in weighing the different interests, “reasonably” could have come to its judgement (Crooijmans, 2013: 26). Legal aid will be refunded if necessary.

In the Zeeland case no title was challenged. One claimant ended up at the Supreme Court24 because of a dispute about the elimination rule. Since this is part of the compensation, this is not further discussed here.

3.3 Conclusion
Public and private interests conflict in expropriations. Authorities want to serve the public interests and therefore effectively and with due speed want to realize a project in a legitimate way in order to meet a spatial development interest. On the other hand, affected parties have an interest in continuing the use of their property. This interest can be compensated, which is their financial interest in the expropriation process. An expropriator has to take into account that expropriation could be an emotional process for affected parties. The expropriation process should therefore be careful, which implies that the weighing of the interest should be legitimate and that the expropriation should not be arbitrary. Laws and regulations ensure this (chapter 2).

The different interests of the actors involved in expropriation are weighed and safeguarded at a few moments in the expropriation process in the Netherlands. First, politicians consider all interests involved and decide about asking the Crown to expropriate or not. Then, the Crown considers whether the expropriation is compatible with the law and if it is in the public interest, urgent and necessary. Public goals can be realized by private parties, even when private parties benefit in doing so. If a private party benefits, this does not automatically mean that the public interest is not served. What the public interest is, is up to politicians to decide. The last weighing of the interests is conducted by the civil judge, if the expropriation title that is set by the Crown is challenged.

The Dutch expropriation system in an international perspective

The limited right of the state to expropriate the private property of citizens is recognised in lots of other countries\(^25\) (Payne, 2010). Also internationally both justification and weighing of interests are a point of discussing in expropriations. A lot of constitutions over the world that recognize private property at the same time determine that authorities can take property from individuals, normally under two conditions: that just compensation is paid and that the purpose of the expropriation is to satisfy public interest (Azuela & Herrera-Martín, 2009). It is interesting to investigate foreign expropriation processes because international comparison could encourage reflection on the national situation.

<table>
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<th>How does the Dutch way of weighing public and private interests compare to expropriation systems in other countries?</th>
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Although expropriation legislation differs between countries, the basic principle of the legislation is comparable (Holtslag-Broekhof, 2016). By investigating the expropriation process of two other countries, foreign ideas about the way the interests of private parties and the public interest is weighed in expropriation processes will be extracted.

The analysis of the English and Spanish system is structured by five questions:

- **Legal**: What are the relevant international treaties and what are the constitutional and legal constraints with regard to expropriation?
- **Basis**: What are the possible grounds for expropriation?
- **Process**: Who weighs public and private interests and how is this weighing executed?
- **Appeal**: What are the possibilities to raise objections against the expropriation decision?
- **Problems**: Which problems of the weighing methods of the different interests are mentioned by experts and in literature?

The questions are a little broader than only the weighing of public and private interests in England and Spain. The reason hereof is that to understand the weighing of public and private interests in expropriations other countries, it is inevitable to describe and explain the system in meticulous detail. Furthermore, Mamadouh, De Jong and Lanelis (2003) point out that, in order to assess foreign solutions, attention should be paid to legal and institutional compatibility. Therefore this chapter discusses the differences and similarities with the Dutch system from a broader perspective. The chapter aims to extract feasible ideas to improve the weighing of public and private interests in expropriations in the Netherlands.

\(^{25}\) For example, in England – Planning and Compulsory Purchase Act, 2004; In France – Article 7 Declaration of the Rights of Man and of the Citizen, 1789; In Germany – Article 14 Basic Law for the Federal Republic of Germany (Payne, 2010).
The ambition of this chapter is however not to give a complete overview of all ins and outs of the English and Spanish expropriation system. It only describes the most common expropriation procedure that is used to expropriate for spatial development and it points out the considerations in the weighing of public and private interests.

4.1 Expropriation in England

Legal
The United Kingdom does not have a constitution, but it has some constitutional documents (T.M.C. Asser Instituut, 2000). The different steps in the process to expropriate are organized by different laws. England has an Anglo-American type structure of law, so legal decisions are binding and create a precedent (T.M.C. Asser Instituut, 2000). Therefore next to legislation, case law is an important source of law. The overarching law in expropriations is the domestic Human Rights Act 1998, which incorporates the ECHR in national law (Waring, 2015).

Basis
Lord Denning summarizes English expropriation law in the Prest case Waring (2015: 129): It is “a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands. If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen.” Expropriation can only take place for the promotion or improvement of the economic, social or environmental well-being of the area (Crichel Down Rules, 2015).

There are no documents that contain all possible grounds for expropriation in England (Waring, personal communication). Parliament both grants the power to expropriate and defines the limits of expropriation. In granting the power, Parliament requires “some level of public benefit” in expropriations (Waring, 2015: 133). Courts normally do not interfere with the Parliament’s judgement to grant expropriation power to a lower authority (Waring, 2015).

Process
Since there is no Expropriation Act in place in England, different methods can be used for expropriation. This paragraph discusses the most frequently used procedure for spatial development, on the basis of public general acts of parliament and CPO, following the six stages of the Crichel Down rules.

Stage 1: Choosing the right expropriation power
In the first stage, the right expropriation power is chosen. In England, United Kingdom’s Westminster parliament grants the power to expropriate by enacting authorising statutes (Waring, personal communication). Parliament determines when the power of expropriation can be used and who can use it. Expropriation of land requires the approval of a confirming minister (Crichel Down Rules, 2015).

In general public acts, authorities or bodies can be provided with the power to expropriate for a particular purpose or an authorisation statute can be drafted (Waring, 2015). The terms of these statutes are normally rather broad - it allows for most things to be authorised by the statute since almost any expropriation would satisfy these requirements (Waring, personal communication). The real limitation of the expropriation power comes in the next steps.

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26 Prest v Secretary of State for Wales
27 For example: Transport and Works Act 1992 and Works order or Nationally Significant Infrastructure Projects.
28 Waring (personal communication) in this respects points at the Town and Country Planning Act 1990 [TCPA 1990] in which not just local planning authorities but also national parks, urban development areas etc. have the power to expropriate land in a variety of very broad circumstances. Section 226 TCPA 1990 for example states that “A local authority […] shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land [and] is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated”.

24
**Stage 2: Justifying a compulsory purchase order (CPO)**

Before a CPO can be drafted, a planning authority weighs public and private interests. They assess whether there is a compelling case in the public interest. The expropriator has to decide how best to justify its proposal under a particular act (Crichel Down Rules, 2015). The acquiring authority might need to defend the proposal at any inquiry or through written representations and, if necessary, in court.

The Crichel Down Rules (2015) provide certain fundamental principles that a minister should consider when deciding whether a CPO can be confirmed. The first principle is that “a CPO should only be made where there is a compelling case in the public interest” (p. 11). The acquiring authority should be sure that the purposes for which the CPO is made, justify interfering with the human rights of those with an interest in the land affected (Crichel Down Rules, 2015). Particular consideration should be given to the provisions of the ECHR (Waring, personal communication). A confirming minister does not require the acquiring authority to demonstrate that it urgently needs the land, but it does need to demonstrate a clear plan with the land that is proposed to be expropriated. Furthermore evidence should be provided to show that sufficient funding can be made available to expropriate (Crichel Down Rules, 2015). Finally, the Crichel Down Rules (2015: 12) require that the “acquiring authority will also need to show that the scheme is unlikely to be blocked by any physical or legal impediments to implementation”. This means that the infrastructure to execute the work has to be available and that a planning permission has to be granted, or “the acquiring authority should demonstrate to the confirming minister that there are no obvious reasons why it might be withheld”.

*In the Horada case* the public planning authority of Hammersmith and Fulham wanted to regenerate Sheperds Bush Market. It lined out their plan to do so in the Core Strategy of October 2011. On 30 March 2012 a planning permission was granted for the redevelopment of the market, together with a section 106 TCPA agreement that contained covenants about the future of the market. In 2013 the Council made the London Borough of Hammersmith and Fulham CPO.

Figure 7 shows the further steps in the English expropriation process.

![Figure 7 Steps in CPO process (Crichel Down Rules, 2015)](image)

**Stage 3: Preparing and making a CPO**

Expropriators are obliged to try to purchase the land amicably. If this fails, a CPO has to be made to transfer the ownership of the desired parcel of land involuntarily (figure 8), according to the Acquisition of Land Act [ALA] 1981.

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29 *Horada v Secretary of State for Communities and Local Government*

30 A section 106 agreement is a legal agreement between authorities and developers, in relation with planning permissions. It is drafted when the impact of a decision on the local area is very severe and cannot be arranged by means of conditions attached to a planning decision (Tendring District Council, 2016).
A CPO drafted by the expropriating authority has to determine the land to be acquired (section 10 ALA). The CPO, amongst other things, has to mention the purpose of the expropriation and the proposed pace of it (sections 10 and 11 ALA). The acquiring authority shall in two successive weeks publish a notice in the prescribed form in one or more local newspapers circulating in the locality in which the land to be expropriated is situated (section 11 ALA). The actors that have to be notified are described in article 12 ALA and are similar to the actors that have to be notified in the Dutch situation. When actors receive the CPO, they are allowed to submit their views.

Stage 4: Consideration of the CPO

The justification of a CPO (figure 9) can be challenged by affected private parties. The Crichel Down Rules (2015) explain that if no objections are made to a CPO, the minister can confirm, modify or reject the CPO without the need for any form of hearing if the proper procedure is followed. “He will [then] consider the case on its merits” (Crichel Down Rules, 2015: 19). This is comparable with the procedure in the Netherlands, where the Crown does not have a hearing if no objections are made.

The fifth and sixth stage will only be discussed briefly because the determination of the compensation is out of the scope of this thesis.

Stage 5: Implementing a CPO

When the CPO is confirmed, the relevant government minister decides if a ‘notice to treat’ or a ‘general vesting declaration’ will be made (Waring, 2015). If the authorisation statute of the expropriation power already identifies the land to be expropriated, there is no need for a CPO (Waring, 2015).

Stage 6: Compensation
The compensation should be fair and full. The value to the owner, not to the acquirer will be compensated (Waring, 2015). According to the Crichel down rules (2015) the value consists of “the market value (Land Compensation Act 1961, section 5, rule 2) added up with the compensation for severance and/or injurious affection (see section 7 of the Compulsory Purchase Act 1965), with the home loss or other loss payments (see sections 29 to 33K of the Land Compensation Act 1973) and with the compensation for disturbance and other losses not directly based on the value of the land (see Land Compensation Act 1961, section 5, rule 6).”

Appeal
Objections against the CPO can be made by affected parties, other qualifying persons and third parties, including members of the public (Crichel Down Rules, 2015). Objections must arrive with the minister within the period specified in the notice, which is at least a period of 21 days (section 12.1c). All objections about the compensation will be disregarded to the Tribunal (section 13.4 ALA). The Lands Chamber has no power to overrule a CPO, such matters are dealt with by the Administrative Court by way of judicial review (Upper Tribunal, 2016). So, objections with regard to the CPO will be dealt with by an inspector appointed by the minister (sections 13.3 and 13.4 ALA). This can be done by a written objection approach, but more common is a public local inquiry under the Compulsory Purchase (Inquiries Procedure) Rules [CPR] 2007 (Waring, 2015).

Section 250 of the Local Government Act [LGA] 1972 provides rules about the public inspections. The authorising authority shall give written notice of its intention to cause an inquiry to be held within five weeks (rule 3 CPR). CPR (rule 4) offers a possibility for a pre-inquiry meeting. If all issues have been solved after this pre-inquiry meeting, the real inquiry starts. In this inquiry all parties have the possibility to defend their case, although on the basis of CPR rule 13 no questions can be asked about “the merits of government policy” to the government’s representation. This is comparable with the procedure at the Crown in the Netherlands, where no objections to the underlying planning will be considered. The inspector is an independent expert appointed by the minister (3.48 booklet Compulsory Purchase Procedure). After the inquiry, the inspector will advise the minister, but the minister has the power deviate from his decision (rule 18 ALA). The inspector’s advice is not public, but rule 19 CPR provides that all people that appeared at the inquiry can request a notice of it.

The inspector’s role is an interesting combination of the roles that in the Netherlands are reserved for the Crown and the Council of State. Since the inspector’s decision is only an advice, his status is comparable with the Council of State’s status in the Netherlands in expropriations. However, since the inspector also arranges hearings and investigates the situation, his role is more comparable to the Crown’s. Section 250 of the LGA provides “that the person appointed to hold the inquiry may by summons require any person to attend” or to give evidence. However, nobody is obliged to do so, unless expenses are paid. This procedure is comparable to the submission of views and the hearing at the Crown.

Horada objected to the CPO on behalf of the Shepherd’s Bush Market Tenants’ Association. In autumn 2013, a public inquiry took place31. In February 2014, a public inspector recommended to the Secretary of State (SoS) to not confirm the CPO. In his advice, he considered whether there was a compelling case in the public interest and whether the public benefits outweighed any private losses that might occur by addressing the following:

The inspector concluded that the land that was being acquired fit in with the adopted planning framework for the area, that the work was viable and that the purpose of the CPO could not be achieved by other means. The inspector’s last consideration is whether the CPO contributes to the economic, social and environmental well-being of the area. He therefore considered the effectiveness of the Section 106 Agreement and concluded that without certainty as to the nature and affordability of the replacement accommodation and whether certain repair works to the Market would be carried out, the plan could not ensure the retention of, if not all, then the majority of the existing traders. While such uncertainties existed, the personal losses and widespread interference of private interests arising from confirmation of the CPO

31 http://uk.practicallaw.com/6-618-5495
could not be justified. Therefore, the inspector concluded that there was no compelling case in the public interest to justify making the CPO.

Any person aggrieved by a CPO after the minister’s final decision may make an application to the High Court within six weeks after publication of the CPO (section 23 ALA). Self-realisation arguments however, according to Waring (2015: 143), do “not seem to be a formal ground for opposing expropriation”. Waring (2015) and T.M.C. Asser Instituut (2000) distinguish a few main reasons of legal challenges of confirmed CPOs. The first reason is that the expropriation is 

\[ \text{Wednesbury}^{32} \] unreasonable. This means that the expropriation cannot be so unreasonable that no reasonably thinking minister or authority could have come to the decision to expropriate. The second reason is that the expropriation is a violation of article 1 ECHR FP.

The SoS did not agree with the inspector’s decision and therefore confirmed the CPO on 10 October 2014 and published it on 13 February 2015. The SoS considered that the Section 106 agreement could be enforced by the Council to ensure development in the line with the planning framework. Horada challenged the decision of the SoS at the High Court, which decided the following (31 July 2015):

The issue was whether the planning permission and the Section 106 Agreement contained the necessary mechanisms to achieve the objectives. The High Court ruled that it did because the SoS can rely on the Council to solve matters with respect to the details of the design and appearance of the market due to conditions of the planning permission and the Section 106 Agreement. Accordingly, there was no misdirection by the SoS in reaching the decision to confirm the Order. Horada’s challenge failed.

The compensation decision of the Land Tribunal is definite and can only be challenged on judicial grounds (point of law) at the Court of Appeal (T.M.C. Asser Instituut, 2000).

Problems

The Local Government Association (2014), which represents 373 councils in England and Wales, in 2014 expressed critique on the current expropriation procedures in England calling it “costly, overly complex and [a] bureaucratic process that in some cases can take up to eighteen months to carry out”. Also the mayor issue Waring (2015) ventilates is about the complexity of the English system. Both the procedure and the determination of the compensation are overly complex in her view. In this respect, she mentions the Law Commission’s (2004a; 2004b) report ‘Towards a Compulsory Purchase Code’ in which the government is recommended to create a simpler Expropriation Act (Waring, personal communication). However, the government declined the Law Commission’s recommendations (Office of the Deputy Prime Minister, 2015). Therefore, so far no improvements have been made with regard to the costs, complexity and speed of the expropriation process.

There is a number of issues with weighing the public/private interest in England. The first issue is that the public interest is defined quite broadly, by statute, which makes it hard to show that a private interest is more important than the public interest (Waring, personal communication). Whether there is a compelling case in the public interest is fairly flexible because the terms of the authorising statutes are so wide that it is hard to claim that an authority has acted unreasonably (Waring, personal communication). The Horada case in 2015 provided a bit of guidance on this in the sense that it clarifies that, although it is necessary for an acquiring authority in England to show a compelling case in the public interest in order to justify the CPO, it “neither has to prove every detail of the proposed expropriation, nor does it need to show that protection for those affected is absolute” (Graham, 2015).

Additionally, it is difficult to challenge a decision to expropriate once it has been made in England. Judicial review cannot really do much because it is hard to show an authority has acted beyond the powers or unreasonably when the authorising statute is so broadly worded (Waring, personal communication).

Finally, a debate is going on in England about the question whether the right to be heard at an inquiry, the right of participation, is a sufficient protection against the expropriation decision. Some

\[ ^{32} \text{Associated Picture Houses Ltd v Wednesbury Corporation} \]
authors agree with this, while it has been questioned by others “since the right of participation in an inquiry does not ensure that objections can be made (it is time-consuming, expensive etc.)” (Waring, personal communication).

4.2 Expropriation in Spain

Over the last years some disputes have taken place about expropriation in Spain. Most of these disputes occurred in the region of Valencia, where the Coastal Defence Act was used to expropriate (mostly foreign) owners of holiday cottages. Also expropriation in which owners had to contribute to public utilities in the spatial development and therefore sometimes lost their compensation immediately, caused trouble. Those expropriations occurred on the basis of the Valencian LRAU (Ley Reguladora de la Actividad Urbanística), a law that encourages spatial development. In 2007 the European Parliament condemned the abusive planning practices on the basis of LRAU, which in some other regions of Spain exists in a comparable way. Afterwards, in 2009, the European Parliament condemned the expropriations via the Coastal Defence Act with a motion.

Legal

The constitutional basis for expropriation is article 33 of the Spanish Constitution (Constitución Española [CE]), which recognises the right to private property in its first paragraph. The second paragraph rules that the rights someone has on its property are determined by the “social functions of those rights”. Furthermore, the third paragraph determines that nobody can be deprived of its private property without a justified reason of public utility or social interest.

Four safeguards for expropriation can be derived from article 33 CE. García de Enterría and Ramón Fernández (2013) name that the authority to expropriate has to be attributed by law and that the procedure must be regulated by law. Moreno (2015) mentions the two remaining safeguards: the need for a legal reason to expropriate (public interest) and payment of appropriate compensation (justiprecio).

The Spanish Expropriation Act, la Ley sobre expropiación forzosa [LEF], provides national rules about expropriation. Generic, local and sectoral laws further elaborate on expropriation for specific causes. The second article LEF determines the authorities that have the power to expropriate. In principle, expropriation is done by the state, a province or a municipality (paragraph 1). However it may also be done in the public interest by another entity that is given expropriation power (paragraph 2) or by whatever natural or legal person that is given full entitlement of those rights in the public interest (paragraph 3). This is comparable with the Dutch situation.

Basis

Article 1 LEF stresses again the importance of article 33 CE repeating that expropriation can only take place for public utility or social interest. However, LEF does not mention different grounds on which can be expropriated in Spain. Determining the basis of the expropriation is actually the first step in the Spanish expropriation process. Therefore, this step will be discussed already in this sub paragraph.

Stage 1: Declaration of the public utility (la causa expropiandi)

A first and indispensable step in expropriations is to declare the public interest wherefore a citizen has to be deprived of its property (article 9 LEF). Article 10 LEF states that all public works and services of the government implicitly serve a public interest. The recognition of the public interest in each specific case must be made by agreement of the Council of Ministers, unless for certain categories of works, services or concessions for which the laws provide something else (Moreno, personal communication). In those other cases a law has to specify the public utility or social interest (article 11 LEF). Such laws have to be approved by Congress (Congreso de los Diputados) or by one of the parliaments of the Autonomous Communities (Comunidades Autónomas). The parliamentary control of the designation of the expropriation power is not so strict, since the law allows lower (regulatory) rules to determine the concrete cause of the expropriation (Moreno, personal communication). Therefore, in the end it is the

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executive body of a (lower) government that could concretize public utility or social interest. For example in the LRAU, article 109 provides the declaration for public utility. It states the works to execute plans that are drafted under this law, implicitly are in the public interest. Since the works are needed to execute works that are in the public interests, expropriation is necessary according to article 109 LRAU.

Process

The expropriation process is described in Title II (articles 9-58 LEF). It consists of four steps that are also bound to the Regulation of the Forced Expropriation Act of 1957 (el Reglamento de la Ley de Expropiación Forzosa [REF]):

1. Declaration of public utility or social interest – chapter 1 LEF
2. Declaration of the need for occupation – chapter 2 LEF or Declaration of urgent occupation (article 52 LEF)
3. Determination of a fair compensation (justiprecio) – chapter 3 LEF
4. Payment and occupation – chapter 4 LEF

Also the urgent procedure (article 52 LEF) will be described, since it is commonly used in practice. The main advantage of the urgent procedure for authorities is that occupation can take place before the justiprecio is determined. Although it is a procedure that is meant to be used only in exceptional circumstances, the urgent procedure has become very generalized, not to say the normal procedure (Vida Fernández, 2009; Moreno, 2015).

Stage 2: Declaration of the need for occupation

After the declaration of public utility or social interest is set, the declaration for the need for occupation has to be made (article 15 LEF). The declaration contains a list of goods and rights that have to be expropriated (article 17 LEF). The list will be published in the Government Gazette for fifteen days (article 18 LEF). Affected parties will be informed personally (article 18.2 LEF). Then, according to articles 20 and 21 LEF, within twenty days a resolution declaring the need for occupation will be drafted by either the Government Delegate (Autonomous Community) or the Government Sub-Delegate (Province). This declaration will be published in the same way as the list of goods (article 18 LEF). Affected parties again will be notified personally (article 20.3 REF). Appeal can be lodged on the basis of article 22 LEF (see figure 10).

When the declaration of the need for occupation is definite, the expropriation starts. It formally declares that the goods and rights included in the declaration are “left subject to the public utility or social interest that legitimises the expropriation” (Moreno, 2015: 440). Here, the period of six months to settle the fair price begins.

Urgent procedure

The Council of Ministers or the Governing Council of the Autonomous Community can choose to make a declaration of urgent expropriation (article 52.1 LEF). Also this procedure starts with a public information phase of fifteen days (article 56 REF). The declaration is open to appeal at the contentious...

Figure 10 Process of getting a declaration of need for occupation or urgency
administrative court. Also article 54 LEF provides a possibility to declare urgency. Sectorial laws can declare urgent all projects that take place within a sector.

The third and fourth step will only discussed briefly because the determination of the compensation is out of the scope of this thesis.

**Stage 3: Determination of a fair compensation (justiprecio)**

In the third step (figure 11), parties have fifteen days to reach an agreement about the price (article 24 LEF). If they fail, the affected party has twenty days to submit a counter offer (article 29 LEF). Thereafter, the expropriator has twenty days to assess the counter offer and to prepare a final offer (article 30 LEF). If the owner does not accept this final offer within ten days, an Expropriation Panel will establish the price (article 31 LEF). The Panel sets a binding minimum and maximum price. It consists of: a chairperson (magistrate appointed by High Court), a State Attorney, two technical functionaries, a representative of the Chamber that represents the economic interests that the expropriated good is in regard to, a Notary Public and a regional Comptroller (article 32 LEF). During the valuation of the Panel, the negotiations between the owner and the expropriator go on. The fair price has to be established six months after the declaration of the public utility (article 56 LEF).

**Stage 4: Payment and occupation**

The payment of this fair price has to be done within six months after the establishment of it (article 48 LEF). After payment, occupation can take place (article 51.1 LEF). If the expropriator does not use the expropriated land for the determined cause, the land can be claimed back (article 56 LEF). After six months, interest have to be paid over the fair price by the expropriator (article 57 LEF). If after four years the expropriator still does not have transferred the money (with interest), a revaluation has to be done (article 58 LEF).

**Urgent procedure**

In the urgent procedure (see figure 13), the property can be taken before the fair price has been paid. Eight days before the occupation, an Acta Previa de Ocupación [APO] has to be drafted (article 52.2 LEF) and affected parties have to be notified. The APO also has to be published. The APO is an official deed that describes and delimits the property that is object of expropriation. Furthermore, it describes the specific conditions that the expropriation entails and mentions the interlocutory proceedings with

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34 Contentious-Administrative Courts in Spain have general jurisdiction at first or single instance on appeals based on administrative law regarding certain decisions taken by local entities or the regional or state authorities (Uría Menéndez, n.d.: 10).

35 For example the Energy Law (Ley 54/1997, de 27 de noviembre, del Sector Eléctrico) in which article 54 provides that the declaration of urgency implicitly means that expropriation of the land or rights is necessary and urgent, which implies that the expropriation procedure to follow is the procedure of article 52 LEF.
regard to the establishment of the fair price (Castillo Martín, 2012). Furthermore, to be allowed to occupy
the property, the expropriator has to pay a deposit. The deposit equals the fiscal value of the parcel,
which is less than the real value (Vida Fernández, 2009). From the moment the deposit is paid onwards,
the expropriator has fifteen days to occupy the property (article 52.6 LEF). Discussions about the fair
price continue. According to García de Enterría and Fernández (2013), if the urgent expropriation
procedure lasts six months without the fair price being set, it should be considered as an abuse of law.
Article 52.7 LEF urges the government to set the fair price as quickly as possible.

Appeal
The first and only possibility to oppose the expropriation (see figure 12) is during the public information
phase, when the list of goods is published (article 19 LEF). Everyone can bring in allegations in this
phase, so affected parties that have not been included in the list of goods to be expropriated, can come
forward. Opposition can only be presented based on factual or formal questions with regard to the
necessity of the expropriation (Moreno, 2015; Vida Fernández, 2009). The expropriator will assess the
allegations and will make the declaration of the need for occupation. If the expropriation is only partial,
a request for full expropriation can be sent to the expropriator (article 23 LEF). If the expropriator refuses
to purchase the whole parcel, the decline in value of the remaining land will be reimbursed (article 46
LEF). Those provisions are comparable to those in the Dutch Ow (Article 33 Ow).

Article 22 LEF provides affected parties with a possibility to lodge an appeal at the ministry that
it concerns against the declaration of the need for occupation within ten days after its publication. The
appeal will be dealt with within twenty days. In any case it has a suspending effect until the minister has
taken its decision. For a long time, no appeal has been open at the contentious-administrative court
(article 22 LEF paragraph 3). However, Moreno (2015) and Cosculluela Montaner (2016) point out that
this provision was declared unconstitutional since it breaches articles 24 and 106.1 CE. Therefore,
judicial control of the declaration of public utility and the need for occupation is opened at the
contentious-administrative court. Also higher appeal is possible, at the Supreme Court (Tribunal
Supremo, Sala de lo Contencioso-Administrativo).

One of the arguments to oppose an expropriation is the self-realisation argument (Moreno,
2015). When an owner requests self-realisation, expropriation stops and a process of compulsory
assignment starts. Since this procedure is very different from the expropriation procedure, it will not be
discussed further in this research. It is however important to be conscious of the existence of the
possibility to request self-realization in Spain.
It is also possible to oppose the *justiprecio*. However, the property rights at that moment in time can already be transferred. If the Expropriation Panel has set a fair price, this can be appealed to by affected parties before a contentious-administrative court (article 126.1 LEF).

**Urgent procedure**

In the urgent procedure, the need for occupation can be found implicitly in the approval of the corresponding project. Therefore, the need for expropriation cannot be questioned and only appeal on formal grounds is open (article 19 LEF). Factual arguments, for example with regard to the *causis expropriandi*, should have been brought up in public information phase to approve the works project in question (Escuin Palop, 2004). The ban on presenting opposition on factual grounds in the urgent procedure, is an attempt to prevent for the duplication of administrative processes (Moreno Gil, 2009). However, if a project changes over time, an affected party has to have the possibility to oppose it (appendix V).

**Problems**

The first problem of the weighing of public and private interests in the Spanish expropriation process is the generic declaration of public interest (article 10, 12, 13 LEF). According to Moreno (2015), it creates legal uncertainty since it can be unclear who will be affected by expropriation. Moreover, in particular on the land market, where spatial and economic interests are interwoven (chapter 3), governments play a double role as both regulator and player (e.g. Buitelaar, 2010; Segeren, 2007). Authorities therefore have two interests to serve, according to Buitelaar (2015). On the one hand the authority has to serve the public interests, but on the other hand the authority wants an as high as possible revenue when selling land. This double role pinches and can lead to perverse incentives in Buitelaar's (2015) view. Although the revenue that could be earned is in the public interests, for an expropriation it is important to consider the necessity in this respect. It is therefore quite curious that in Spanish expropriation law, precisely on the land market, is stated that every action of the government implicitly serves the public interest (article 10 LEF).

In Spanish literature (e.g. García de Enterría & Fernández, 2013) a debate is going on about those generic declarations. Since articles 52 LEF and 56 REF require consideration of interests on project level, it would be strange to consider all projects that an authority conducts ‘in the public interest’. These generic declarations are also in place in several laws to declare automatically urgent any project under that law. This has led to a standardization of the urgent expropriation procedure.

When the urgent procedure is used, another problem occur with regard to basic guarantees available to affected parties in terms of their protection against actions by authorities. In the urgent procedure, prior compensation is not required (Moreno, 2015). The property can be taken by the expropriator before the fair price is set and paid and even before appeals took place.

The time between occupation by the authorities and actual payment of the compensation can be considerable, because of the delays that occur in the establishment of the fair price. The period of six months that the Expropriation Panel has to determine the fair price, cannot be met very often in practice (Moreno, 2015). If the fair price is challenged at a contentious-administrative court, this leads to even more delays. According Vida Fernández (2009) in Spanish literature a debate is going on about the provision of article 33 CE that provides for expropriation by means of compensation ("mediante indemnización"). According to many authors, this provision should be replaced by a possibility for authorities to take property rights by means of prior compensation ("previa indemnización").

The Valencian LRAU, which was discussed at the beginning of this chapter, allowed developers to act as ‘urbanizing agents’ that were allowed to propose developments on land they did not own, even land that was inhabited, with minimal compensation paid and a bill to the former land owner for the installation of unwanted services such as street lighting (European Parliament, 2016). The agent could ask for land to be expropriated (Gielen & Korthals Altes, 2007).

As explained in this chapter, expropriation is a statutory power of government bodies mentioned in article 2 LEF. Expropriations that took place under the LRAU have been subject to the same
consideration of interests as explained in this chapter. More problematic issues took place with regard to compulsory land readjustment cases. Since land readjustment is not the topic of this thesis, interested readers are referred to a recent report of the European Parliament (2016) and the paper of Gielen and Korthals Altes (2007). Moreover, over the last years the Spanish government adopted legislation that has strengthened land owners’ protection against bad practices of the agents both in Spain generally and in Valencia (European Parliament, 2016).

4.3 Conclusion

Compared to Spain and England, the Dutch expropriation system has a less clear separation between the decision about expropriation and the determination of the compensation, since in the Dutch expropriation procedure both expropriation and compensation are dealt with by the same judge, the civil judge. In England for example, it is the High Court that deals with appeal with regard to the expropriation itself and it is the Court of Appeal that deals with matters related to the compensation.

An important similarity between the systems is the condition that expropriation can only take place in the public interest. However, the definition of the public interest in both England and Spain is quite broad and generic, which makes it hard in those countries to claim that an authority has acted unreasonably. Another similar condition compared to the Dutch expropriation system is the assurance of a fair and full compensation. In England and in the Netherlands the compensation has to be priory assured, whereas in the urgent procedure in Spain this principle is breached.

With regard to the expropriation system as such, in England discussions are going on about the costs, complexity and bureaucracy of the system. Also in Spain delays of procedures is seen as a mayor problem. These are important criteria to take into account in the change of the Dutch expropriation system.
General standards of weighing public and private interests in expropriations

Not only formal means as laws, but also by informal means as values, norms and attitudes shape interaction and behaviour in the expropriation practice. Those means can have both a public and private character, as Koppenjan and Groenewegen (2005) remark. The systems of (social) rules that structure behaviour and social interaction between parties, are referred to as ‘institutions’ (Correljé, 2014).

Not every set of rules or agreement is an institution though (Koppenjan & Groenewegen, 2005) remark. Following Goodin (1996) and Bush and Tool (2003), a rule or agreement is an institution when it is widely accepted by those involved, used in practice and has a certain degree of durability.

What are general standards of weighing public and private interests in expropriations?

5.1 Williamson’s institutional framework
Williamson (1998) developed a framework (figure 14) in which he distinguishes four levels of institutions based on two criteria, pace of change and purpose of change.

The top level of Williamson’s model is the social embeddedness level. Institutions located in this level change slowly, since they are mostly informal and socially and culturally inherited through many generations (Künneke, 2008). At this level, change occurs spontaneous, according to Williamson (1998). A disruptive event may be the cause of spontaneous change. The Kelo case (chapter 3) is a good example hereof, since due to the judicial ruling people and politicians were shocked that in their opinion economic interests of a company prevailed over the property interests of several inhabitants. As a consequence, the expropriation law was changed in 43 states.

The second level is what Williamson (1998) refers to as the institutional environment. It contains formal rules of the game, such as policies and laws. This level, according to Künneke (2008) is the product of intentional political activity.

Taking the formal legal arrangements of Level 2 as given, level 3 deals with the “governance structures” or “the play of the game” (Künneke, 2008). The third level is where the institutions of...
governance are located and where actors have their own perspective on how “the game” should be played.

Level 4 moves from discrete structural to marginal analysis, focusing on resource allocation and employment of scarce resources (Williamson, 1998).

In literature several critical remarks have been made with regard to Williamson’s model. Künneke (2008) for example remarks that the differentiating criteria of Williamson’s model (purpose, frequency and level of analysis) cannot always be clearly operationalized or even empirically proved. The pace of change therefore should be considered as a rough indication rather than a hard scientifically proved number.

On top of that, in his framework, Williamson drew relations between the different levels, without further elaboration. Koppenjan and Groenewegen (2005) did analyse interrelations and point out the embeddedness of institutions in higher institutions. They stress that institutions should be ‘appropriate’, congruent with other institutions at other levels, because otherwise they will not function properly or they will be unstable (Koppenjan & Groenewegen (2005)).

5.1.1 Institutional alignment
Institutions are embedded in a larger context and as a result, they are often difficult to influence and are mostly characterised by incremental change (Denzau & North, 1994; Aoki, 2000). A change of the law is a quite abrupt change in the institutional environment. For a law to be successful and effectively achieves its goals, it therefore has to be well-aligned with existing institutions.

This implies that the proposed law should be the result of discussions about problems that take place in the expropriation practice. It has to take away those problems and it should respect other laws that are in place. In addition, it must respect general norms and values.

5.1.2 Application of Williamson’s framework in this research
This is an important insight with regard to the analysis of the changes proposed in the expropriation process in the SALP. An analysis of the institutional context in which the SALP will be embedded is required. Table 5 explains the method that is used, elaborating upon how Williamson’s framework will be applied.

<table>
<thead>
<tr>
<th>Level</th>
<th>Application</th>
<th>Label</th>
<th>Paragraph</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>ECHR rules, Constitutional provisions, norms and values with regard to expropriation</td>
<td>Boundary conditions for expropriation</td>
<td>5.2</td>
</tr>
<tr>
<td>2</td>
<td>Legal requirements with regard to a fair weighing of public and private interests. Those requirements will not change, but their application changes due to the SALP. The SALP is a level 2 institution, a law. Part of this layer are also the choices that were made in the making of the Environment and Planning Act, of which the SALP will be part. The goals of this act have an influence on the practical implementation (uitvoeringspraktijk) of the SALP that is discussed in layer 3. ‘Requirements’, in accordance with De Heij (2008) are considered ‘knock-out criteria’. If the requirements are not met, there could be an alignment problem with regard to other institutions of weighing public and private interests.</td>
<td>Requirements for a fair weighing of public and private interests</td>
<td>5.3</td>
</tr>
<tr>
<td>3</td>
<td>The third layer consists of the expropriation practice. It is the practice of layer 2. Since 2000 (mdw-report) the Ow has been a topic of discussion in the Netherlands. As a consequence of the Chw,</td>
<td>Criteria for a new expropriation process</td>
<td>5.4</td>
</tr>
</tbody>
</table>
the Ow was subject to a major reform in 2010. Also in the preparation of the bill, discussions have taken place about the actor's perspectives on the ideal expropriation practice.

4 Within this practice, problems occur. Layer 4 consists of the law in action. The marginal analysis of expropriation in layer 4 for example focusses on costs, time and number of expropriations. Layer 4 serves as feedback from current on future law. It therefore also notices possible undesired side effects of the SALP in the expropriation practice. Therefore, paragraph 5.4 discusses layer 3 and 4 together. It discusses both the problems of the current expropriation practice and the effect of the bill on those problems.

5.2 Layer 1: Boundary conditions for expropriation
Some values and norms are deeply rooted in society and have a pervasive influence on change (Künneke, 2008). With respect to expropriation these norms are determined in international treaties and in constitutions (chapter 2). Within this process of change in the Dutch expropriation process, those norms are beyond questioning. Not only because they are not part of the discussion, but also because they are widely accepted in society.

The European Court of Human Rights [ECtHR] over years in case law has developed three conditions to assess whether expropriations comply with article 1 FP ECHR: public interest, proportionality and lawfulness (Mellenbergh & Schueler, 2006). According to Sluysmans (2011) the Court’s proportionality condition concerns the compensation. It also bears the necessity criterion that the Crown uses in the Netherlands, because if an expropriation would be disproportional it is also unnecessary (chapter 3). The proportionality condition therefore will be split in two separate boundary conditions for expropriation. The lawfulness condition of the court is considered a requirement of a fair weighing of public and private interest in this thesis, since the boundary conditions for expropriation have to be incorporated in a law to guarantee a fair weighing of public and private interests.

Public interest
The first boundary condition is that expropriation can only take place in the public interest. Internationally, in the jurisdictions of almost all countries, the public interest clause is an important limit on the exercise of the power of expropriation (Azuela & Herrera-Martín, 2009). The public interest clause is a historically embedded condition, which was already recognised by Grotius, who in his De Jure Belli et Pacis (1625) wrote that property can only be taken by the state if the public interest is at stake (Du Plessis, 2009). Also article 1 FP ECHR mentions public interest as a legitimate justification for expropriation.

England, Spain and the Netherlands recognize in their judicial system that expropriation can only take place in the public interests. Spain (article 33.3) and the Netherlands (article 14) have incorporated this in their constitutions and in the first articles of their national Expropriation Acts, while England does not have a constitution and ensures this in a number of statutes and the Human Rights Act 1998.

Fair and full compensation
The FP makes no reference to compensation at all because, according to Allen (2010), the member states of the ECHR agreed to disagree about this. However, the ECtHR has stated that a property right would be ‘largely illusory and ineffective’ if it did not guarantee full compensation in all but exceptional circumstances36 (Allen, 2010). When an owner is offered no or too little compensation, this could be a violation of article 1 FP ECHR (Sluysmans, 2011). The Court declared that any interference with the

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36 James v United Kingdom; Lithgow v United Kingdom.
right to the peaceful enjoyment of possessions must strike a “fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”\(^ {37}\). This means that expropriation without compensation that is reasonably related to the value of the property, would normally violate the owner’s rights under the FP (Allen, 2010).

Article 14 of the Dutch Constitution requires prior assurance of full compensation before expropriation can take place. The assurance of the compensation is guaranteed with article 54n first paragraph Ow, providing that the registration of an expropriation verdict will not happen until the proof of payment is submitted. Also in England and Spain laws provide for a fair and full compensation in expropriations.

In addition, in literature ‘compensation’ is broadly acknowledged as a boundary condition of expropriation (e.g. Du Plessis, 2009; Sluysmans et al., 2015). The Food and Agricultural Organization of the United Nations endorses this: “Laws should ensure that affected owners and occupants receive equivalent compensation, whether in money or alternative land” (FAO, 2008: 6).

**Necessity**

In the Netherlands, the Crown considers, next to the public interest, the necessity and urgency of the expropriation (chapter 3). An expropriation is only considered necessary if it is a measure of last resort. Proportionality and necessity of the expropriation are strongly related. In the assessment scheme those requirements will be considered the same, because when an expropriation is proved disproportional, it has not been the appropriate instrument to reach the goals of the underlying planning. Also urgency will not be considered as a separate requirement, since an expropriation can be considered unnecessary when it is not urgent, as for example is the case in Spanish legislation.

Therefore, the expropriator has to attempt to buy the required land in good faith before the power of expropriation can be used. Furthermore, when a government in the end takes ownership and physical possession of the land, this can only be for the intended purpose that legitimized the expropriation (FAO, 2008). If the land would not be used for the intended purpose, there was apparently no necessity for expropriation. Consequently, an opportunity for restitution of land has to exist if expropriated land is not used for the intended purpose. In England, Spain and the Netherlands there is a possibility for restitution of the land.

The proportionality condition of the ECtHR is provided for by article 8 ECHR. In the Netherlands, section 3:4 Awb obliges that a government body weighs all the interests involved and that the result of this weighing must be proportionate (principle of proportionality). When a judge reviews whether the proportionality principle is violated, it considers three elements\(^ {38}\) (Gerards, 2007): appropriateness, subsidiarity and necessity. Even if the previous requirements are met, an expropriation can be found inadmissible if no reasonable consideration is conducted between the goals of the underlying planning and the interests that might be harmed by achieving those goals. This weighing of those interests takes place at the second level of Williamson’s framework.

**5.3 Layer 2: Requirements of a fair weighing of public and private interests**

Williamson (1998) argues that there are only very rare windows of opportunity to reform formal institutions in the second layer of his model. The integral reform of national land policy with the introduction of the Environment and Planning Act is, according to the minister, a window of opportunity to integrate in one act all the different instruments for land policy that municipalities have at their disposal, including expropriation (Ministerie van I&M, 2016). According to Künneke (2008: 241), a gradual change is “difficult to orchestrate because of the many different actors and interests involved, the complex nature of these formal institutions and the accompanying decision processes”.

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\(^ {37}\) *Sporrong and Lönnroth v Sweden*

\(^ {38}\) First, the expropriation must be an effective mean to serve the goal that is aimed for with the underlying planning (appropriateness). Second, expropriation has to be necessary to reach the goal of the underlying planning (necessity). Third, if a less disruptive instrument could be used this is required, otherwise the expropriation would be disproportionate (subsidiarity).
Stoter (2000) conducted a research to the judicial approach of the consideration of interests at a concrete level and consideration of interest in legislating. From the Awb, the SALP and Stoter’s research, requirements with regard to a fair weighing of public and private interest will be derived. In line with Stoter (2000) these requirement focus on the different aspects of the consideration of interests: the investigation before the weighing of interests, (the result of) the weighing of interests itself and the possibilities to oppose the result of the weighing.

Lawful
According to Sluysmans (2011) the ECtHR does not quickly thwart the weighing of interests on the national level. National authorities have a wide margin of appreciation in this respect. Therefore, the boundary conditions of the first layer should be incorporated in national laws or regulations to ensure that expropriation occurs lawfully and legitimately. Also the way interests have to be weighed must be arranged by law, in order to prevent for arbitrary expropriations.

Careful
Expropriators have the obligation to look out for affected parties to the best of their ability. The Awb, in section 3:2, contains important norms with regard to the duty of care principle that is discussed in chapter 2. It provides that the preparation of the expropriation has to be careful and fact-based. So, both the preparation of the expropriation and the weighing of interests in expropriations have to be ‘careful’. This is an interest of affected parties that has been mentioned in chapter 3 as well.

Moreover, affected private parties have to be carefully notified about the result of the consideration of the interests. In accordance with articles 3:46 and 3:47 (duty to state reasons), the result of the weighing of the interests involved should be well motivated and transparently communicated to the affected parties. The government has to act logical and consistently has to apply applicable policies and laws (principle of legal certainty). On top of that, it has to act unprejudiced, impartial and unbiased (fair play principle, article 2:4 Awb).

Independent
Finally, affected parties must have an opportunity to object to the expropriation at an independent body if they do not agree with the result of the consideration of the interests. According to Sluysmans et al (2015), the most substantial protection against expropriation one can rely on is judicial review on both the internal and external legitimacy of the act of expropriation. A possibility for appeal is provided for by article 13 ECHR that requires the state to provide its citizens with an effective opportunity to appeal both the expropriation as well as the underlying planning that serves as a basis and the amount of compensation offered. Sluysmans et al. (2015) add that affected parties must have the right to be heard.

5.4 Layer 3 and 4: Criteria for a new expropriation process
The SALP will be located in the second layer of Williamson’s framework, since it is a law. The third layer of the framework is concerned with getting the governance structure right, it deals with the actors’ perspectives and the expropriation practice. The problems that occur in the expropriation practice of layer 3 are situated in layer 4 of Williamson’s framework, which is about getting the marginal conditions right. Discussions about changes of the governance structure around expropriation in order to solve the problems in the current expropriation practice have taken place since 2000.

5.4.1 Problems in current expropriation practice
In 2000, the former Minister of Justice ventilated the official government's opinion with regard to the mdw-report. The minister stated that “in a new expropriation procedure a new balance will have to be found between the desired simplification, acceleration and effectiveness of the procedure on the one hand and necessary safeguards for carefulness on the other hand”. Furthermore, the former minister

39 A marginal condition is the minimal performance level of a criterion that must be fulfilled to achieve the required improvements in the expropriation process.
pointed out that expropriation has to keep taking place decentralized. In 2000, lower governments decided about expropriation themselves and the Crown had to approve the decision instead of to designate an expropriation request in Title IV. In a debate\textsuperscript{41} about the ideas of the mdw-committee with regard to expropriation, the minister repeated that in an expropriation process to a ‘sufficient’ extent the individual interests of land owners should be considered (appendix VII). The minister also recognised the on-time execution of projects for which land has to be expropriated. Furthermore the minister stressed that in all circumstances a fair balance has to be found between on the one hand the individual interests of land owners and on the other hand the public interest. In addition, the minister repeated the need for simplification and clarification of procedures and laws.

In 2010 the principle of decentralisation was abandoned because of the economic crisis. The arguments of ‘simplification’, ‘acceleration’ and ‘clarification of procedures and laws’ were brought up again and were drivers for the realized change of the Ow. The acceleration had to be realized by enhancing the ‘efficiency of the procedure’ through centralization. The Chw uniformed the procedures of title IIa and title IV and reduced the time for designation of the Crown from nine to six months. According to the national government, this centralization was justified because of the great societal interest to speed up procedures in order to recover from the economic crisis. Experts warned the minister that the foreseen acceleration of procedures was uncertain, because of the expected accumulating workload of the Crown (e.g. Sluysmans & Bosma, 2010). Moreover, due to this workload, quality could deteriorate. In the end, the accelerating measures turned out to have no effect because there is no sanction on exceeding of terms by the Crown (Visser & Frikkee, 2012).

In the build-up to the Chw a fierce debate took place about the expropriation basis, which is the underlying planning. From this discussion (appendix VII) could be derived that the expropriation basis is required to be definite. This is an important boundary conditions with regard to the acceleration of the procedure that should be taken into account in the proposal of the new expropriation procedure: the expropriation process can be accelerated, but it can only be undertaken as the underlying planning is irrevocable and when the public interest is certain.

5.4.2 Reasons to change the current expropriation practice
The explanatory memorandum addresses the problems that occur in the expropriation practice in layer 3 and thereby will have an impact on the marginal conditions that are situated in layer 4.

\textit{Simplicity}

According to De Boer (personal communication) the current expropriation procedure is complex, since in fact there are three interwoven procedures: planning, expropriation and compensation. Some of the procedures have to be ended for other procedures to begin. Moreover, the links and relations between the procedures are often not understood by affected parties. Therefore, the bill proposes measures to simplify the procedure.

Expropriation law consists of many case law, which makes it difficult to apply (de Boer, personal communication). Since the ECtHR ruled that the Crown is not a legal body in the sense of Article 6 ECHR, the Crown’s decision at the moment is irrevocable according to Dutch law, but the expropriation title can still be challenged at the civil judge. This leads to an, according to the minister, ‘undesired’ interwoven process in which arguments against the expropriation itself can be brought up over and over again: first at the Crown, then at the civil judge and later on in cassation at the Supreme Court (De Boer, personal communication).

The SALP is, according to the minister, an opportunity to incorporate this case law and to separate the processes of expropriation and compensation (Ministerie van I&M, 2016). An important principle in the design was to make a new procedure that is ‘simply better’ (\textit{eenvoudig beter}) for everyone, in particular for the person that is expropriated (De Boer, personal communication). For the Ow this means that it will be more in line with the Awb and that the procedures will be modernised in order to comply better with common procedures in planning law (Minister of I&M, 2015), such as the

procedure around land use plans. With her proposal the minister wants to meet the need that she sees for harmonized and simpler rules for land ownership by “increasing the transparency, predictability and ease of planning law” (Ministerie van I&M, 2016: 12).

**Transparency**
A principle of the current Dutch national government is ‘decentralized, unless’ (decentraal tenzij). Since the crisis is over and since the foreseen acceleration of the Chw is not achieved, there is an opportunity for the national government to decentralize again.

A goal of the SALP is to “enable a better cohesive balance of interests at local level” (p. 12). An administrative consideration of the expropriation decision at the local political level, can increase the transparency because it means that administration will be accountable for its decision, which enhances the democratic value hereof. This could have a positive effect on the trust in government’s decisions (Boonstra, 31-1-2012). Therefore one of the minister’s goals with the SALP is to decentralize the expropriation power from the Crown to lower authorities (Ministerie van I&M, 2016). Since local authorities are the closest to civilians and know the local situation best, they are better able to weigh the different interests at stake in expropriations, according to the minister (De Boer, personal communication).

**Speed**
Finally, the minister states in her proposal that she wants to “accelerate and improve decision-making on projects in the physical environment” (Ministerie van I&M, 2016: 12). The acceleration of the expropriation process is an important wish of municipalities and provinces (Buitelaar, 2016). Expropriation is a time consuming process, so if terms would be shorter, development can go on faster.

It is remarkable that in the explanation of this improvement goal the minister mentions explicitly that acceleration of decision making processes is not a goal in itself. This seems a contradiction between the goal and the explanation. However, the minister mentions that an acceleration may be a consequence of the SALP “because the instrumentation is more tailored to the current and future challenges in the physical environment” (Ministerie van I&M, 2016: 14).

Speed is an important criterion for both affected parties and expropriators. They both have an interest in clarity about the expropriation as soon as possible if the requirements for a fair weighing of public and private interests are met. Also in the Spanish and English expropriation system the speed of the procedure is a topic of discussion. Speed however is subordinate to carefulness of the consideration of the interests involved.

### 5.5 Assessment scheme
All in all, this leads to the following assessment scheme (table 6).

<table>
<thead>
<tr>
<th>ASSESSMENT SCHEME OF METHODS TO WEIGH PUBLIC AND PRIVATE INTERESTS IN EXPROPRIATION PROCESSES</th>
<th>Public interest</th>
<th>Fair and full compensation</th>
<th>Necessary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are the boundary conditions with regard to expropriation met?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are the requirements with regard to the weighing of public and private interests met?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>How does the expropriation process score on the criteria?</td>
<td></td>
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</tbody>
</table>
Consequences of the proposed changes in the expropriation process for the weighing of public and private interests

After all the discussions that took place over the last years, the first of July 2016 the minister published a bill that proposes a fundamental reform of the expropriation process. The objective of this chapter is to answer the following question:

Paragraph 6.1 reviews the current situation with the assessment scheme in order to get a benchmark (nul-alternatief) for the SALP and the alternatives. After all, change is not desirable if it would lead to a deterioration of the expropriation process with regard to the general standards. Then paragraph 6.2 explains the proposed changes in the expropriation process. Thereafter paragraph 6.3 assesses the consequences of the bill with regard to the weighing of public and private interests, with the assessment scheme.

6.1 The current situation reviewed with the assessment scheme
Currently the Crown assesses the public interest and necessity of an expropriation. Furthermore, the Dutch constitution provides that fair and full compensation is required. The Crown conducts carefully an autonomous and full (not only of the claims) review of the expropriation. The Crown is however not a legal body in the sense of article 6 ECHR and not all its policy is embedded in law. The Crown works independently, but is part of the ministry and is therefore by definition not fully independent. With regard to the criteria, the current process is neither simple nor transparent. It is not in line with Awb procedures and the democratic accountability of the expropriation decision is poor, since it is the Crown that has the decisive power and not the authority that is expropriating. Also with regard to the speed improvements are possible, since the desired acceleration of the decision making process with the Chw was not reached. Table 7 shows my personal interpretation on how the current Ow should be interpreted in the assessment scheme.

<table>
<thead>
<tr>
<th><strong>ASSESSMENT SCHEME: CURRENT EXPROPRIATION PROCESS IN THE NETHERLANDS</strong></th>
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<tbody>
<tr>
<td><strong>Are the boundary conditions with regard to expropriation met?</strong></td>
</tr>
<tr>
<td>Public interest</td>
</tr>
<tr>
<td>Fair and full compensation</td>
</tr>
<tr>
<td>Necessary</td>
</tr>
<tr>
<td>Lawful</td>
</tr>
</tbody>
</table>
6.2 Proposed changes in the expropriation process

The House of Representatives debated with the Minister of I&M about the Environment and Planning Act (21-1-2016). In this debate, the Members of Parliament had the opportunity to react on the minister’s letter about the SALP. Afterwards, eight experts (see appendix VIII) were invited by the House of Representatives for a special hearing about expropriation (20-4-2016). They submitted a position paper. The input of those occasions is used to make the draft SALP.

The main influence these debates had on the SALP is in the first place that the draft SALP according to the Members had to contain a provision that arranges for compensation of the procedural costs. Since affected parties did not ask for an expropriation, the costs of the procedure have to be reimbursed no matter the outcome of the appeal, according to the Members. Citizens normally have to pay the costs for the involvement of the judge themselves, so expropriation would be an exception in this respect. Another important influence of the debates is the motion Veldman/Ronnes, which states that the legal protection for affected parties cannot be deteriorated in the SALP. The motion urged the minister to keep the safeguards for affected parties as good as they are right now, or to improve them.

In the SALP a sharper distinction is made between the public-track in which an expropriation decision is taken and the civil track in which the compensation is determined (see figure 15). The separation is recognized in the Environment and Planning Act by dividing the procedures over two different chapters.

Figure 15 Proposed expropriation process in SALP (De Boer, 24-3-2016)

42 The red square indicates the focus of this thesis. Readers that want to memorize the current process can take a look at appendix II.
From the minister's proposal can be derived that the new expropriation procedure will be part of chapter 11 of the Act, while the compensation process will be part of chapter 15. Since this thesis is limited to the decision to expropriate and the weighing of the interest in this decision, the analysis in this paragraph is limited to the proposed new chapter 11, which replaces the current administrative phase. Moreover, it only discusses the consequences of the changes for the weighing of public and private interests.

**Expropriation by order of administration**

Municipalities, water boards, provinces and ministers get the power to decide on expropriations in the SALP. Expropriators are going to designate land for expropriation by order (beschikking). The order will be prepared using the procedure that is explained in section 3:4 Awb (UOV). The expropriation order, a decision within the meaning of article 1:3 Awb, has to comply with several rules that are similar to the current Crown decision. Normally, statutory powers in administrative law are executed by order and the consequences of the order can be challenged at the administrative court. With this proposal, the government wants to streamline expropriation with normal procedures pertaining to public law.

**Appeal at the administrative judge**

Expropriated parties can, within six weeks, lodge an appeal against the order at the administrative court. If the appeal period (six weeks) expires without the right holder filing a notice of appeal, the expropriation decision at that time already becomes irrevocable. To avoid long uncertainty about the legality of the expropriation, the period in which the administrative court must take its decision, is set at six months (article 16.87a SALP). By opening the possibility to appeal against the expropriation decision at the administrative court, the government wants to ensure that an affected party gets legal protection that is equivalent to the current system with the Crown (motion Veldman/Ronnes). Higher appeal can be lodged at the Administrative Jurisdiction Division [AJD] of the Council of State. With their ruling, the expropriation decision becomes irrevocable and may be registered in the public registers.

If articles 8:51a or 8:51d Awb are used, within six months a provisional decision has to be made whereupon six months later the final decision has to be made. These articles provide for an ‘administrative loop’ (bestuurlijke lus) in which an administrative judge provides the government with a chance to repair the shortcomings in the decision that is appealed to without annulling the expropriation decision.

**Independent commission**

As additional guarantee for a careful decision, the minister will set up an independent commission that provides the expropriating body with a formal advice about the expropriation. Before the expropriation order can be adopted, the proposed decision as it is after the incorporation of the views that were ventilated during the public inspection and the hearing, along with the required documents, will be submitted to the advisory committee. The commission will advise the government within four weeks. The commission’s role is more than tick off a checklist of required documents, but it explicitly does not make policy considerations (De Boer, personal communication). It will advise about the application of the rules laid down by law with respect to the expropriation decision. If the expropriator takes a decision that differs from the opinion of the commission, it must state the reason for the deviation in the order.

The role of the independent commission cannot be compared to the role of the Crown. In the proposal, the commission takes a role that is comparable to the current role of the Council of State,

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43 Furthermore, private or semi-public bodies that in the Ow were granted with full entitlement of expropriation rights and had to request the Crown to expropriate, in the SALP have the possibility to request an authority with expropriation power to expropriate. Then, the authority decides and can ask the other public or private body with entitlement of rights to negotiate an amicable settlement on their behalf. The final decision about the expropriation order however, will always be taken by an authority with expropriation power. The bill provides the possibility to lower governments to expropriate on behalf of a higher government if a lower government would be able to expropriate more efficiently and more effectively.

44 A reference to the cadastral description of the land, the names of the owner(s), the (legal) basis of the order and a more detailed statement of the public interest, necessity and the urgency of the expropriation have to be part of the order.
since the Council of State possibly will have to judge expropriation in higher appeal (De Boer, personal communication). The commission is explicitly not a voice for people that did not submit a view (De Boer, personal communication). The commission’s advice is an advice in the sense of the Awb, like the commission MER\textsuperscript{45}. If motivated, the government can deviate from the advice.

At the moment this thesis was written, there were still some uncertainties with regard to the commission’s role. It was for example neither known yet who will take a seat in this commission nor how it will be financed.

\textit{Incorporation of Crown’s criteria}

The assessment criteria of the Crown – public interest, necessity and urgency - will be incorporated in article 11.4 of the bill, with an elaboration of the criteria in articles 11.5-11.7. Article 11.5 elaborates on the public interest. Next to this, in article 11.6 is stressed that expropriation is a measure of last resort. If less disturbing instruments can be used, they should be used. This guarantees the ultimum remedium character of expropriation. The urgency safeguard will be adopted in a slightly adapted way. Instead of the current five years that the Crown uses to assess this criterion, the SALP proposes four years (article 11.7). The term in which the civil court has to be asked to determine the compensation, is shortened from two to one year (article 11.9 SALP). The rules for restitution of the expropriated land if the works wherefore expropriation took place are not executed (soon enough), remain unchanged in the bill.

In summary, the minister’s proposal for the administrative phase is shown in figure 16.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{expropriation_process.png}
\caption{Proposed expropriation process in internet consultation}
\end{figure}

\textbf{6.3 Consequences of the proposed Supplementary Act Land Possession for expropriation}

Ten out of seventeen respondents in the internet consultation (1, 8, 10, 13, 16, 19, 20, 21, 23, 26) ask the minister why she is proposing such a fundamental reform of the Ow, while there is, according to those respondents, no need for a drastic reform of the Ow whatsoever. Respondent 1 for example does not see any added value of integrating expropriation in the Environment and Planning Act. Respondent 21 has the opinion that the current system is functioning well.

This paragraph discusses the most important reactions on the bill that were ventilated during the internet consultation. In appendix IX the different respondents are listed, with a summary of their reactions. The analysis in this chapter is focussed on the changes that have an impact on the assessment scheme that is presented in the previous chapter.

\textsuperscript{45} The m.e.r. (\textit{milieu-effectrapportage}/environmental impact assessment commission) advises authorities about the content and quality of the environmental impact assessments that are made for projects. They are an independent commission, whose advises are published publicly. Neither they write environmental impact assessments, nor take final decisions about projects. If an authority wants to deviate from the commission’s decision, they have to motivate this (Commissie voor de Milieueffectrapportage, 2016).
6.3.1 Consequences for boundary conditions for expropriation

Public interest

Since the land use plan will be replaced in the Environment and Planning Act, article 11.5 states the three proposed possible new bases for expropriation: the environment and planning plan (omgevingsplan), an environment and planning permit for a deviation activity or a project decision. Those plans should be irrevocable. So, the public interest in which expropriation takes place has to be determined beforehand, which means that the first boundary condition for expropriation is met.

Necessity

Also in the new Environment and Planning Act, expropriation will be a measure of last resort (De Boer, 2016). Another safeguard that remains intact is that should be tried to purchase the land via amicable settlement before expropriation can take place (De Boer, 2016). The necessity criterion that the Crown uses does not change according to De Boer (2016). Article 11.6 of the bill incorporates the criteria of the amicable settlement and self-realisation. However, there is some fierce critique of experts who argue that the necessity criterion changes compared to the current Ow.

Several respondents (19, 21, 23, 26) regret that article 17 Ow, which requires an expropriator to continue to try to settle amicably between the expropriation order and the start of the compensation procedure, does not return in the bill. They consider this a severe deterioration of the necessity criterion. In the current situation the Crown decision is an impulse for affected parties to try to reach a settlement with the expropriator, since expropriation seems to get inevitable after the Crown decision. This impulse lacks in the bill. Additionally, the double independent test of the amicable settlement procedure (Crown and civil judge) is taken away, since expropriators in the proposal will assess themselves if they have done enough attempts to settle amicably, under political supervision. This is the fox that guards the chickens, in the view of some respondents.

Furthermore, since the obligation to keep trying to purchase amicably between the Crown decision and the endorsement of the civil judge is eliminated, the necessity of the expropriation is not (enough) safeguarded in the bill, according to several respondents. Since administrative judges conduct a review ex tunc, it does not provide a possibility to assess the developments between the expropriation order and the review of the administrative judge, if an appeal is lodged. According to respondent 26, the current situation proves that expropriators do not always respect the obligation to try to settle amicably.

Finally, respondent 21 thinks that as a consequence of the administrative loop, the expropriation instrument could be used too thoughtless, since repairing possible shortcomings in a later stage would still be possible. This would mean that expropriation can be started without the necessity yet being clear. Since the administrative loop will result in a new expropriation order, there have not taken place a test for self-realisation preceding the new order and the process of amicable settlement should be restarted since the conditions of the expropriation changed. Moreover, respondent 21 fears that it can lead to different expropriation orders within the same project if one affected party lodges an appeal and another does not.

Fair and full compensation

Articles 15.1 and 15.2 of the bill include provisions that assure full compensation in expropriations. Therefore, the third boundary condition for expropriation is met. There is however some discussion (appendix IX) about compensation of the costs and about purchase of the remaining (overneming van het overblijvende), the current article 38 Ow.

6.3.2 Consequences for requirements of a fair weighing of public and private interests

The consequences of the bill for the weighing of public and private interests involved in expropriation will be assessed in this paragraph.

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Lawful
The new expropriation process will be arranged by law, by the SALP. The Crown’s criteria will be incorporated in the law, which ensures that the boundary conditions for expropriation will be respected. The Awb is not be subject to change, so a lawful weighing of the interests involved in expropriation is guaranteed.

Careful
The Council of Judiciary in its advice agrees with the minister’s choice to shift decisive power from the Crown to the administrative judge. The Council considers that the administrative judge is the appropriate judge to assess orders and decisions of the government. However, the Council and some other respondents (e.g. 6, 16, 22) fear a deterioration of the safeguards for affected parties if the administrative judge would only test the lawfulness of the expropriation order and the objections of affected parties, whereas the Crown is used to conduct a full review of the expropriation process. The bill does not provide assurance of a full test of the interest involved in expropriation. Therefore, changes in this respect seem to be necessary.

In the proposed situation, the autonomous test of the expropriation decision that is currently conducted by the Crown, will disappear. The tests of appropriateness (doelmatigheidstoets) and rightfulness are going to be conducted by the expropriator itself. Authorities will be both in charge of the expropriation order and of the underlying planning. As a consequence, for the motivation of the expropriation order, it can refer to its own decision (De Boer, personal communication).

The elimination of the Crown comes with a greater responsibility for the expropriator. Authorities are going to decide themselves if enough attempts have been done to settle amicably, supervised by political control. The minister counts in her proposal on dualism within (lower) governments (De Boer, personal communication). In for example a municipality, it is the executive board (mayor and aldermen) that leads the expropriation and it is the municipality council that controls it.

However, in the Environment and Planning Act, the executive board of a lower government can take a decision to, for a specific project, deviate from the environment and planning plan. In this particular case, the dualism within the planning process is harmed, since the provincial government or municipality council does not have to approve the decision. In the expropriation however, the dualism is not harmed, since if, for the execution of the deviation decision, expropriation is needed, the municipality council will decide about it. Therefore, there is still a legitimate consideration of interests to start expropriations.

Another point that relates to the carefulness of the weighing of public and private interests in expropriations, is the independent commission. At the moment this thesis was written, it neither was known how the commission would be financed nor who would take place in the commission. Respondent 6 urges the minister to not let lower governments pay for the advice, since this could harm the independency.

Since an expropriator can deviate from the commission’s advice, the commission is not a full safeguard for a careful expropriation process as the Crown used to be, according to respondent 26. This is another reason to doubt the carefulness of the weighing of interests in the bill.

Independent
The most heavily debated problem of the bill is that affected parties have to take action against the draft expropriation order themselves, on their own initiative. They have to submit a view, lodge an appeal and pay a court fee beforehand. If they do not, the expropriation will be definite after six weeks. Although this procedure is fully normal in an administrative context, the Council of Judiciary thinks that “those impediments in the taking of property rights, the most comprehensive right that somebody can have on something, wrongfully can block judicial assessment of the expropriation order”. Also almost all respondents (e.g. 1, 5, 6, 13, 15, 16, 19,
21, 23, 26) think that this is a severe deterioration of the position of affected parties in expropriations under the SALP, compared to the Ow.

Moreover, six weeks is a rather short term for affected parties to submit their views, according to several respondents. Some even say this term is too short.

An additional point of critique of some respondents (e.g. 23) is that the notification is sent by normal mail, instead of recorded delivery or handed over by a bailiff. Respondent 19 adds that since it is key to be considered as affected party later on in the process to submit objections, it should be 100% sure that the affected party received the draft expropriation order. The UOV is no assurance hereof. However, delivery of orders by regular mail is the normal procedure in administrative law.

Although De Boer (personal communication) cannot imagine that people will not lodge an appeal against the expropriation order, in the proposed situation it becomes possible that somebody is expropriated without judicial interference. Respondent 13 stresses that expropriation is a severe infringement of property rights and therefore there should be an obligatory judicial intervention. The desire of the minister to unify procedures should be subordinate to the principle of judicial interference in expropriations, according to respondent 13. This is a fundamental and legitimate critique of several respondents and the Council of Judiciary. Therefore, change with regard to the independency of the weighing of the different interests in the expropriation process is required.

6.3.3 Score of the proposed process on the criteria for the new expropriation process
The criteria for the new expropriation process are no knock out criteria. Some processes are simpler, more transparent or faster than others. Therefore the criteria will be rated on a scale.

**Simplicity**
The minister in the end decided to propose fundamental changes that will change the whole specific character of the Ow, in order to bring expropriation in line with general procedures in the Awb. On top of this, the minister is trying to remove all ‘dead letters’, articles that are hardly ever used (De Boer, personal communication). In doing so, the minister tries to enhance the readability of the law and wants to realize a simplification of the expropriation procedure. By clearer separating the expropriation from the compensation and opening a possibility to lodge an appeal at the administrative judge, the expropriation procedure becomes more in line with general procedures in the Awb. This is the first clear simplification.

Furthermore, the bill narrows possibilities for expropriation stating that an “interest of developing, using or maintaining the physical living environment” is required in expropriations (article 11.4). This statements guides the possibility for expropriation provided by article 14 of the Constitution. As a consequence only immovable property can be expropriated. Also the different expropriation titles disappear in the bill. All expropriations therefore will follow the same procedure. This is the second clear simplification.

In the internet consultation, some critique was ventilated on the elimination of the titles. Since titles are eliminated in the bill, respondents 1 and 27 ask what will happen with title III and Va. The new SALP does not provide a possibility to expropriate for those titles (expropriation in special circumstances and expropriation of patents). The Council of Judiciary in its advice says that it did not read any reasons to eliminate those possibilities for expropriation. The elimination of these titles is problematic, since it means that the SALP would not provide special procedures for expropriation during war or flood.

The third simplification is realized by eliminating the possibility to expropriate certain rights in rem. This change, according to experts will not result in more expropriations, since expropriators in practice hardly ever use the possibility to expropriation only a right in rem (Berns, personal communication). In fact it is a dead letter that is removed.

**Transparency**
The transparency of the expropriation procedure gets better with the current bill. With the elimination of the Crown and the incorporation of the Crown criteria in the law, not only the lawfulness, but also the
transparency of the procedure increases because the assessment criteria of an expropriation become clearer since they will be written down in the law and not in policy.

The Crown over years has developed a refined policy to assess expropriation requests. Despite this consideration is careful, local authorities are not accountable for the Crown’s decision, which decreases the democratic value of the expropriation. With the bill, expropriators themselves become responsible for the quality of their decision, the throughput time and the involvement of the different actors (Ministerie of I&M, 2016). This also increases the transparency, since lower authorities become accountable for their own decision and cannot hide behind a higher authority anymore (De Boer, personal communication).

**Speed**

With regard to the speed, the minister clearly mentions that it is not a goal in itself to accelerate the expropriation procedure. However, in all discussions since 2000 speed has been the mayor driver for change. The municipalities of Tiel (respondent 20) and Rotterdam (respondent 24) express the fear that expropriation in the proposed SALP is going to take even longer than it already does right now. Also the Council of Judiciary in its advice warns for a deceleration of the expropriation process. However, the Council is satisfied that the minister chooses to prevail the possibilities for appeal, control and decentralization above speed.

According to De Boer (personal communication) it is not likely that the new expropriation process will be faster. From a research that De Boer and his team did, can be concluded that on average an expropriation procedure takes 700 days currently. Title IV expropriations currently take 800 to 850 days, so a considerable acceleration could be achieved in expropriation for spatial development, depending on whether an appeal is lodged. However, with regard to title II expropriations (prepared by the minister), which currently take only 600 days on average, a deceleration takes place. All in all can be concluded that on average the expropriation neither will be slower nor faster in the situation proposed by the minister (De Boer, personal communication).

### 6.4 Conclusion

In the SALP, there are issues with regard to the necessity of expropriations, the carefulness of the weighing of public and private interests, the independency of the weighing and the speed of the proposed expropriation procedure. On the other hand, the lawfulness of the weighing of public and private interest gets better with the SALP, since the Crown criteria will be incorporated in the law. Also the simplicity and transparency of the expropriation procedure enhances.

Table 8 Assessment scheme of the SALP

<table>
<thead>
<tr>
<th>ASSESSMENT SCHEME: EXPROPRIATION PROCESS PROPOSED IN THE SALP – ALTERNATIVE 1</th>
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<tbody>
<tr>
<td>Are the boundary conditions with regard to expropriation met?</td>
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<td>Public interest</td>
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<td>Fair and full compensation</td>
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<tr>
<td>Necessary</td>
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<tr>
<td>Are the requirements with regard to the weighing of public and private interests met?</td>
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<tr>
<td>Lawful</td>
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<tr>
<td>Careful</td>
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<tr>
<td>Independent</td>
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<tr>
<td>How does the expropriation process score on the criteria?</td>
</tr>
<tr>
<td>Simplicity</td>
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<tr>
<td>Transparency</td>
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<td>Speed</td>
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Measures to let the proposed expropriation process comply with general standards

In the SALP, there are issues with regard to the necessity of expropriations, the carefullness of the weighing of public and private interests, the independency of the weighing and the speed of the proposed expropriation procedure. Measures are needed to solve those issues and to let the bill comply with general standards for expropriation processes.

Which measures could be taken to let the proposed expropriation process comply with general standards of weighing public and private interests in expropriations?

Paragraph 7.1 discusses the minister’s reaction on the critique that was ventilated in the internet consultation. Thereafter paragraph 7.2 presents two alternatives for the expropriation process that is proposed by the minister. Then paragraph 7.3 considers the effect of measures that accelerate the expropriation process on the carefullness of the weighing of public and private interests. Subsequently paragraph 7.4 contemplates measures to improve remaining problems with regard to the assessment scheme. Paragraph 7.5 elaborates on the use of the assessment scheme. Finally paragraph 7.6 draws conclusions about measures that could be taken to let the proposed expropriation process comply with the general standards of weighing public and private interests in expropriations.

7.1 Alternative 1: Improved proposal by the minister

The minister reacted with a letter47 (20-1-2017) on the reactions that were submitted during the internet consultation. From the reactions, the minister derived that the main part of the respondents prefers an obligatory interference of a judge in expropriations. Although the minister also feels some support for the bill in the submitted reactions and in literature, the minister expects that there would not be enough support for the SALP without the obligatory interference of a judge.

Therefore, “to prevent for every glimpse of a deterioration of the position and the legal protection of affected parties”, the minister “wants to improve the bill in such a way that the administrative judge will be involved in every expropriation”. The role to involve the administrative judge will be at the expropriator, who has to lodge an obligatory appeal (figure 17).

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47 Parliamentary Documents II 33 118, Nr. 84
7.1.1 Alternative 1.1: Obligatory appeal

The Council of Judiciary (2016) advises with regard to this alternative to end a failed attempt to settle amicably with an explanation in which should be stated why the affected party does not want to voluntarily transfer its property rights on a parcel. The expropriator has to submit those objections officially in the UOV and afterwards to the administrative judge. The affected party preserves the right to change or withdraw the appeal.

All in all, this change leads to an assurance that the affected party will not lose its property without independent intervention of a judge. This means that the requirement of independency in the consideration of the interests is met.

With regard to the other problems of the SALP (previous chapter) nothing changes.

Table 9 Alternative 1.1

| ASSESSMENT SCHEME: EXPROPRIATION PROCESS PROPOSED IN THE SALP – ALTERNATIVE 1.1 |
|---------------------------------|---------------------------------|
| Are the boundary conditions with regard to expropriation met? | Public interest | Fair and full compensation | Necessary |
| Are the requirements with regard to the weighing of public and private interests met? | Lawful | Careful | Independent |
| How does the expropriation process score on the criteria? | Simplicity | Transparency | Speed |

In this alternative, which clearly improves the independency of the weighing of public and private interests, the necessity, carefulness and speed of the expropriation process remain points of attention (table 9). The obligatory appeal that is proposed by the minister returns in the next variants and alternatives.

7.1.2 Alternative 1.2: Obligatory appeal in one instance at the Council of State

There are several possibilities to accelerate the expropriation process compared to alternative 1.1. A few respondents (1, 19, 21, 23) suggest to open only one possibility for appeal, at the Administrative Jurisdiction Division of the Council of State, in line with the procedure around the determination of the land use plan. This uniformization makes the process more understandable and therefore simpler.

Those respondents claim that legal protection does not get better when two possibilities for appeal are open. They are afraid that many higher appeals will be lodged at the Administrative Jurisdiction Division of the Council of State, since costs are reimbursed anyways, also when the case is lost by the affected party. Therefore, affected parties could lodge a higher appeal to deliberately deaccelerate the process, a situation that the minister precisely wants to prevent with the introduction of the SALP. Those appeals would lead to severe delays, pressure on administrative judges and higher
costs, according to opponents of a possibility for higher appeal. It is therefore worth to consider a variant of the first alternative (figure 18; table 10)

Figure 18 Alternative 1.2

Table 10 Alternative 1.2

| ASSESSMENT SCHEME: EXPROPRIATION PROCESS PROPOSED IN THE SALP – ALTERNATIVE 1.2 |
|-----------------------------------------------|-----------------------------------------------|
| Are the boundary conditions with regard to expropriation met? | Public interest | Fair and full compensation | Necessary |
| Are the requirements with regard to the weighing of public and private interests met? | Lawful | Careful | Independent |
| How does the expropriation process score on the criteria? | Simplicity | Transparency | Speed |

The elimination of the possibility for higher appeal has a positive impact on the speed of the expropriation process. However, on the contrary, it negatively impacts the carefulness of the weighing of public and private interests. Holtslag-Broekhof (expert panel) for example has the opinion that expropriation is such a severe infringement of property rights, that two possibilities for appeal should be open. Berns (expert panel) does not agree with this and think that one possibility for appeal is enough, since he fears a repetition of arguments.

Higher appeal has two important functions. Higher appeal provides parties with a second chance to present their case and have it assessed independently (reconsideration; herkansing). Furthermore, higher appeal offers the possibility to assess the arguments of the parties on the basis of a continued debate in which the views of parties are definite (finalization. finaliseren) (Van der Wiel, 2012).

The elimination of higher appeal has consequences for the carefulness of the consideration of the interests. It increases the speed of the procedure, but the carefulness of the weighing of public and private interests would deteriorate.

7.2 Alternative 2: A different form of advice to improve the carefulness

In the variants of the first alternative, a commission will advise the authorities about the expropriation. The respondents differ in their opinion about the need for a commission that advises the expropriator. For example in the opinion of respondent 24, the advisory commission is redundant since authorities in his opinion do not need advice about the expropriation procedure. Berns (expert panel) agrees to this. Holtslag-Broekhof (expert panel) mentions in the survey that advice from her point of view is not necessary if it is not binding.

Furthermore, several respondents (e.g. 1, 8, 21) notice that the time for the commission to finish the advice is quite short – four weeks. They fear that the advice will neither be profound nor thorough. In addition, there are no consequences for a violation of the terms, which could result in delays (respondent 8).
An alternative form of advice could be to involve the Stichting Advisering Bestuursrechtsspraak (Advisory Council Administrative Law [StAB]) or a comparable organization. This is in line with the advice Modernisering Gemeentelijk Grondinstrumentarium [modernisation municipal instruments for land policy] of 2000. It would imply that not the expropriator gets advice, but the administrative judge. It would make land policy procedures more uniform, since it is comparable to the procedure in the determination of the land use plan. Berns (expert panel) stresses that the people of the StAB or a comparable organization should be appointed and should be independent.

### 7.2.1 Alternative 2.1: Obligatory appeal with advice of the StAB

In alternative 2.1 (figure 19), there is again a possibility for higher appeal. So, with regard to the speed of the process, this alternative is equal to alternative 1.1. The advice of the StAB makes the procedure a little bit simpler, since it is more in line with the land use plan procedure. With regard to the transparency nothing changes.

![Figure 19 Alternative 2.1](image)

#### Table 11 Alternative 2.1

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<tr>
<th>ASSESSMENT SCHEME: EXPROPRIATION PROCESS PROPOSED IN THE SALP – ALTERNATIVE 2.1</th>
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<td>Public interest</td>
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Respondent 23 proposes to only open a possibility for appeal at the Administrative Jurisdiction Division of the Council of State (in one instance). Since the term for the administrative judge to assess the objection is relatively short, it is practically not possible to ask for advice of the StAB.

### 7.2.2 Alternative 2.2: Obligatory appeal with advice of the StAB in one instance

If appeals could only be lodged at the Administrative Jurisdiction Division of the Council of State, the integral term for the decision could be extended in order to make room for the advice (respondent 23). He proposes a term of one year (figure 20), conformant with the procedure of the determination of land use plans. Again, this uniformization leads to a simplification. With regard to the speed there may be an acceleration, since there will be only one possibility for an administrative loop.

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48 The task of the StAB is to impartially and independently provide on request advice to administrative judges about cases related to the the Wro, the Nature Conservation Act (Wet milieubeheer), the Act General Provisions Environment and Planning Law (Wet algemene bepalingen omgevingsrecht) and the Water Act (Waterwet) (StAB, 2017).
With regard to the carefulness, this other form of advice in my opinion does not lead to a considerable more careful weighing of public and private interests. At the moment this thesis was written, it was unclear what would be the exact task of the independent commission that the minister proposes. Therefore, a full comparison of the ways advice would take place is impossible. An important difference of the advices is the obligation to include an advice in the process. Administrative judges can request the StAB for advice, but this is not obligatory. On the contrary, the advice that the minister proposes for the expropriation authorities is compulsory. A similarity between the forms of advice is that it is possible for both authorities and the administrative judge to deviate from the advice of respectively the independent commission and the StAB.

### 7.3 Carefulness versus speed of the weighing of public and private interest in expropriations

Both the Council of Judiciary and some respondents (e.g. 6, 16, 22) fear a deterioration of the safeguards for affected parties if the administrative judge will only test the lawfulness of the expropriation order and the objections of affected parties, whereas the Crown was used to conduct a full review of the expropriation process. The bill does not provide assurance of a full test of the interest involved in expropriation.

The forms of advice that have been discussed can both contribute to the carefulness of the process. The independent commission could be valuable to expropriating authorities in order to prevent mistakes. The StAB could be valuable to judges in order to provide them with more insight on the facts. However, neither form of advice guarantees the carefulness.

Elimination of advice could speed up the expropriation process, but would be a loss of valuable independent input for or expropriating authorities or the administrative judge. This shows the trade-off between carefulness and speed.

So, another measure is needed to safeguard the carefulness of the weighing of public and private interests. Preferably a measure that does not harm the speed of the expropriation process.

In this respect, the Council of Judiciary (2016) advises to add a sentence to the explanatory memorandum or an article in the law that the administrative judge has to conduct a full assessment of the expropriation. The Council not only thinks this test is desirable, but also possible, since in the
expropriation order not the desirability of the work wherefore expropriation takes place is at stake, but only the question if expropriation is necessary to execute the work and if the executing of the work is of such a public interest that an infringement of property rights is justified (Raad voor de Rechtspraak, 2016).

On the contrary, Berns (personal communication) and De Boer (personal communication) do not fear for a deterioration of the safeguards for affected parties. They expect that the administrative judge will conduct a full review, comparable to the current revision of the request decision by the Crown. The only difference with regard to the carefullness of the weighing of the interests would be that decisions of the administrative judge are jurisprudence, whereas the entirety of Crown decisions is policy.

Since ‘carefullness’ is a requirement of the weighing of public and private interest in expropriations, it is important that the administrative judge not only reviews the lawfulness and the objections of affected parties. Therefore, it is recommended to include a provision in the SALP that assures that the administrative judge will conduct a full review of the expropriation order.

### 7.4 Measures to ensure the necessity of expropriations in the new expropriation process

The remaining problem of the alternatives with regard to the assessment scheme is the necessity of the expropriation. The minister clearly states in the bill the intention to keep expropriation a measure of last resort, which is a safeguard for the necessity of expropriations.

Furthermore, the bill provides an obligation (article 11.6 SALP) to try to settle amicably before the expropriation order is taken by the expropriator (figure 21). However, amongst respondents in the internet consultation and in the expert panel, there are doubts whether the administrative judge will test the situation at the moment the expropriation order was taken (black dot in figure 21) or if he will also test the negotiations between the expropriation order and the review by the administrative judge.

![Figure 21 Amicable settlement in SALP](image)

This fear is grounded, since the administrative judge normally conducts a review ex tunc. Currently, the Ow provides the obligation to continue the attempts to reach an amicable settlement between the Crown decision and the start of the compensation procedure (article 17 Ow). The Crown has the policy that also before the request decision negotiations with the affected party must have taken place.

It is possible that in the end the administrative judge will consider the attempt to settle amicably between the order even without a provision that requires this (Berns, personal communication). However, since ‘necessity’ is a boundary condition for expropriation, it is recommended to include a provision that the attempts to settle amicably should continue between the expropriation order and the appeal at the administrative judge, like the current article 17 Ow.

### 7.5 Use of the assessment scheme

The assessment scheme has proven to be a useful tool to review the alternatives with regard to content. In the first place, the scheme provides a quick-scan to check whether boundary conditions for expropriation are met. In the second place, it shows the trade-offs that exist between the requirements of a fair weighing of public and private interests and the criteria for expropriation processes.
There is a wide variety of possible alternatives to improve the bill. The assessment scheme is not enough detailed to precisely assess all pros and cons of the different alternatives. It provides a content-wise guidance to stakeholders involved in the design process of an expropriation act. The assessment scheme is a process instrument that forces stakeholders to have a substantive debate about the (consequences of) design choices. It therefore depoliticizes the debate and shows the possible negative consequences of proposed improvement measures.

7.6 Conclusion
To assure that expropriation can only happen if it is necessary, it is recommended to include a provision that the attempts to settle amicably should be continued between the expropriation order and the appeal at the administrative judge. Expropriation can only take place if the possibility of reaching an amicable settlement is fully ruled out. Herewith, the boundary condition of necessity is met.

Due to the change that the minister proposes to the SALP, expropriators obligatory will have to lodge an appeal at the administrative judge. With this measure, the requirement of independent weighing of public and private interests is met.

Next to this, to assure a careful consideration of all relevant interests involved in expropriations, a provision that the administrative judge will conduct a full review of the expropriation order should be included in the bill or in the explanatory memorandum. This assures a weighing of interests that is comparable to the current assessment by the Crown.

Those measures can be taken in relative isolation, without a considerable influence on the other aspects of the assessment scheme. The assessment scheme exposes a trade-off between the requirements of weighing public and private interests in expropriations on the one hand and criteria of the expropriation process on the other hand. The scheme stimulates a substantive debate about measures to improve the bill.
Conclusions & Recommendations

8.1 Conclusions
The main question of this research is as follows:

How could the expropriation process in the Netherlands be improved, without harming the fair weighing of public and private interests?

In order to answer the main question, six research questions were answered.

What is the legal framework in which the government has to operate in expropriations?
Rules limit expropriation power and determine the power of property rights. From the European Convention on Human Rights and Fundamental Freedoms [ECHR] and the Dutch Constitution can be derived that ‘public interest’ is an important boundary condition for expropriation. The Administrative Law Act (Algemene wet bestuursrecht [Awb]) contains rules about the weighing of public and private interests in expropriation.

How are public and private interests weighed in the current Expropriation Act in the Netherlands?
Expropriators have to ask the Crown to designate land for expropriation. The Crown assesses whether the expropriation procedure is followed correctly and if expropriation is in the public interest, necessary and urgent. Against this decision appeal is open at the civil judge. Expropriation is therefore not in line with general Awb procedures, since in normal Awb procedures public decisions that impact an individual citizen are executed by order (beschikking). Against this order, appeal is open at the administrative judge and/or the Administrative Jurisdiction Division of the Council of State.

How does the Dutch way of weighing public and private interests compare to expropriation systems in other countries?
Compared to Spain and England, the Dutch expropriation system has a less clear separation between the decision about expropriation and the determination of the compensation, since in the Dutch expropriation procedure both expropriation and compensation are dealt with by the same judge, the civil judge. An important similarity between the systems is the condition that expropriation can only take place in the public interest. Another similar condition compared to the Dutch expropriation system is the assurance of a fair and full compensation. With regard to the expropriation system as such, in England discussions are going on about the costs, complexity and bureaucracy of the system. Also in Spain delays of procedures is seen as a mayor problem.

What are general standards of weighing public and private interests in expropriations?
From the analysis of expropriation in the Netherlands, England and Spain, the provisions in the ECHR and the Crown criteria can be derived that there are three boundary conditions for expropriation: public
interest, necessity and assurance of full and fair compensation. When those boundary conditions are met, expropriation can take place. Weighing of the different interests in expropriations has to take place lawfully and carefully and the result must be open to independent review. From the discussion since the midw report in 2000 and from the reasons and goals of the Supplementary Act Land Possession [SALP], three design criteria for a new expropriation process are derived: speed, simplicity and transparency. This leads to the following assessment scheme (table 13).

<table>
<thead>
<tr>
<th><strong>Table 13 Assessment scheme</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>ASSESSMENT SCHEME FOR THE WEIGHING OF PUBLIC AND PRIVATE INTERESTS IN EXPROPRIATION PROCESSES</strong></td>
</tr>
<tr>
<td><strong>Are the boundary conditions with regard to expropriation met?</strong></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Are the requirements with regard to the weighing of public and private interests met?</strong></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td><strong>How does the expropriation process score on the criteria?</strong></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

**What are the consequences of the proposed changes in the expropriation process for the weighing of public and private interests?**

The minister in the SALP proposes an expropriation process in which the necessity of the expropriation is not assured, since the expropriator is not obliged to keep trying to purchase the property amicably between the expropriation order and the appeal at the administrative judge. Moreover the independency of the weighing of the interests is not safeguarded, since affected parties would have to take action against the expropriation order themselves, on their own initiative. If they do not, the expropriation will be definite after six weeks without interference of a judge. This is a severe deterioration of the position of affected parties in expropriations under the SALP, compared to the current Expropriation Act (Onteigeningswet [Ow]). Furthermore, since the Crown is eliminated in the SALP, the bill does not provide assurance of a full weighing of the interests involved in expropriation, because administrative judges normally only conduct a marginal review of an order and marginally review the objections of affected parties. Therefore, the carefulness is not fully safeguarded in the SALP. Finally, it is not expected that the SALP will lead to an acceleration of the expropriation process compared to the Ow.

**Which measures could be taken to let the proposed expropriation process comply with the general standards of weighing public and private interests in expropriations?**

Next to the current situation and the SALP, four alternative expropriation processes have been assessed with the scheme in this research. Those alternatives built further on an improvement that the minister proposed as a result of the critique that was ventilated during the internet consultation: obligatory appeal, lodged by the expropriator. The obligatory involvement of a judge ensures that the weighing of public and private interests is done independently. However, in this new proposal there are still issues with regard to the necessity of expropriations, the carefulness of the weighing of public and private interests and the speed of the expropriation procedure.

All in all the answer to the main research question is as follows. To improve the expropriation process in the Netherlands without harming the fair weighing of public and private interests, a provision should be included in the SALP that attempts to settle amicably have to be continued between the expropriation order and the appeal at the administrative judge. Expropriation can only take place if the possibility of reaching an amicable settlement is fully ruled out. Herewith, the boundary condition of necessity is met.

Next to this, to assure a careful consideration of all relevant interests involved in expropriations, this research suggested to include in the bill or in the explanatory memorandum a provision that the
administrative judge has to conduct a full review of the expropriation order. This assures a weighing of interests that is comparable to the current assessment by the Crown.

The assessment scheme exposes a trade-off between the carefulness of the weighing of the different interests and the speed of the expropriation procedure. Both elimination of the advice and/or elimination of higher appeal could lead to a faster expropriation process. However, speed of the expropriation procedure must be subordinate to carefulness of the consideration of the interests involved. The assessment scheme does not provide an optimal balance between carefulness and speed. This trade-off should be dealt with in the political arena.

8.2 Recommendations
The assessment scheme has proven to be an appropriate process instrument to review both the SALP and the alternatives with regard to content. It is a useful tool that forces stakeholders to have a substantive debate about the (consequences of) design choices. The scheme depoliticizes the debate and shows the possible negative consequences of proposed improvement measures. In the first place, the scheme provides a quick-scan to check whether boundary conditions for expropriation are met. In the second place, it exposes the trade-offs between the requirements of a fair weighing of public and private interests and the criteria for expropriation processes.

It is recommended to use the assessment scheme in the further development of the bill. In sessions with experts that are held in the ministry, the scheme could be used as a tool to generate a substantive debate about the bill. Also Members of Parliament could use the assessment scheme, to evaluate the bill.

Furthermore it is recommended to monitor the discussions that are taking place about the expropriation system in England and Spain. Also in these countries discussions are going on about the costs, complexity and bureaucracy of expropriation. The improvement measures that will be proposed in these countries, might be interesting to consider to improve the Dutch expropriation system as well.

Additionally, it is recommended to again issue a research to compare the Dutch expropriation practice with foreign expropriation practices. The last legal comparison of the Dutch expropriation system with foreign expropriation systems has been conducted in 2000. Since then, both the Dutch and the foreign systems have changed considerably. From the measures that other countries have taken to improve their expropriation process, best practices may be derived.


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Appendices

Appendix I Number of Crown decisions per year

Table 14 shows the number of Crown decisions taken in the last years. Via https://zoek.officielebekendmakingen.nl/zoeken/ is searched in the Government Gazette with search words 'besluit onteigening' with a period of a year and two months (for example 1-1-2011 till 1-3-2012), to also include decisions that are published later than they are taken. To determine the number of Title IV expropriations, search words 'Title IV' (years 2011 and 2012) or 'artikel 78' (rest of the years) were added.

Table 14 Number of Crown decisions

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Crown decisions</th>
<th>Title IV</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>47</td>
<td>24</td>
</tr>
<tr>
<td>2014</td>
<td>44</td>
<td>32</td>
</tr>
<tr>
<td>2013</td>
<td>41</td>
<td>30</td>
</tr>
<tr>
<td>2012</td>
<td>47</td>
<td>24</td>
</tr>
<tr>
<td>2011</td>
<td>55</td>
<td>30</td>
</tr>
</tbody>
</table>
### Appendix II Current expropriation process

Table 15 is to a large extent adopted from the *Handreiking Administratieve Onteigeningsprocedure* (Rijkswaterstaat, 2016: 37-38).

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Development of the draft Royal Decree and preparation of the notification of the draft.</td>
<td>Depending on expropriator</td>
</tr>
<tr>
<td>2</td>
<td>Notification about coming public inspection (terinzagelegging) and draft documents published in one or more newspapers or free local papers and in the Government Gazette.</td>
<td>The request decision expires within <strong>three months</strong> (article 79 Ow)</td>
</tr>
<tr>
<td>3</td>
<td>Sending the draft decision and notification to affected parties and to the applicant for expropriation</td>
<td>Without pre-test (voortoets) around six week till three months. With pre-test: around six weeks</td>
</tr>
<tr>
<td>4</td>
<td>Public inspection of the draft decision and the expropriation documents at the municipality that it concerns and at the Ministry of Infrastructure of Infrastructure and Environment (Rijkswaterstaat / Corporate Dienst)</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>Possibility for stakeholders to submit their views (zienswijze), written or orally</td>
<td><strong>6 weeks</strong> (article 3:11, fourth paragraph, in combination with article 3:16, first paragraph, Awb)</td>
</tr>
<tr>
<td>6</td>
<td>Possibility to hear the affected parties / hearing (hoorzitting)</td>
<td>The Crown decision has to be taken <strong>6 months</strong> after the completion of step 5 (article 78, sixth paragraph Ow)</td>
</tr>
<tr>
<td>7</td>
<td>Completion of the draft Royal Decree and submission of this draft to the Council of State for advice</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>After advice of the Council of State: preparation of the detailed report followed by sending the final Royal Decree to the King to get his signature</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>After completion of the Royal Decree: communication of the Royal Decree in the Government Gazette</td>
<td>Around 4 to 6 weeks</td>
</tr>
<tr>
<td>10</td>
<td>Publication of the Royal Decree by sending it to the affected parties and to the applicant for expropriation</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Royal Decree will be made available for public inspection</td>
<td></td>
</tr>
</tbody>
</table>
Appendix III Principles of good governance in expropriation

An important take away of the Crown decision discussed below is that apparently the Crown takes into account the factual situation, despite the actual situation may be different. Next to this, it is remarkable that the Crown does not refer directly to the principles of good governance in its ruling. The duty of care principle (article 3:2 Awb) provides that the preparation of the expropriation has to be careful and fact-based. It also requires that the government needs to prevent for conflicts of interests.

In Royal Decree number 12.000655 (23 March 2012, Government Gazette 2012, #7361) a parcel of agricultural land is expropriated to realise a disclosure of a neighbourhood to provincial road N201 in the municipality of Aalsmeer. The claimant’s parcel will be divided in parts due to the expropriation. As a result of this, the northern part of his parcel will not be accessible by public road any more. Therefore, in claimant’s view, the expropriation violates the duty of care principle and the principle of proportionality because the municipality does not provide measures to make the northern part of the parcel accessible after the expropriation.

The Crown, after additional research, discovered that the entire parcel in the past was accessible via a public road, the Stommeerkade. The front part of the former parcel was sold separately to a third party in the past, without right of way (recht van overpad) for the claimant. This led to a situation in which at the moment of the sell the parcel of the claimant in fact became unreachable already.

In the near future a road for which is expropriated at the moment, will cross the remaining parcel of the claimant and will create two parts, one of 3.350 m² and one of 827 m². The biggest part will be made accessible due to a planned urban area. According to the municipality, the smaller part does not have to be connected to public infrastructure, since the claimant caused the situation of inaccessibility of his parcel himself by selling the front part of his land without a right of way.

The Crown in the end ruled that claimant has to stipulate the right of way himself, with his neighbour. The expropriation does not change the situation in this respect.

In the build-up process of the next Royal Decree that is discussed below, the Council of State advised, after reading the draft Royal Decree, that the Crown’s considerations about the principles of good governance needed more elaboration.

In Royal Decree number 2016001393 (23 August 2016, Government Gazette 2016, #47624), the central question is if earlier agreements between the municipality and the claimant prohibit expropriation for a road on the basis of land use plan Harselaar (Title IV). The municipality of Barneveld has had consultations with the claimant over more than twenty years which led to various agreements. The Crown remarks that in the agreements have not been mentioned that the instrument of expropriation will not be used in the future. Therefore, the agreements do not hinder expropriation. In addition, the Crown remarks that assessment of the explanation and validity of this kind of agreements have to be done by a civil judge.

Next to this, claimant argues that it is indeed the right of the municipality to determine a new land use plan. However, he claims that this violates the principles of good governance (in particular the principle of legitimate expectation, the principle of legal certainty, the duty of care principle, the duty to state reasons and the fair play principle) in asking the Crown to expropriate.

The Crown does not agree with this view. "Progressive insight" (voortschrijdend inzicht) led to administrative and planning considerations to determine the land use plan on the basis of which this expropriation takes place. The Crown rules that considering the process that preceded the determination of the land use plan, and therefore the basis of the expropriation, claimant could have had expectations that his expectation would not be met. If the Crown in this respect weighs if the principles of good governance are violated, it gives an opinion about the planning procedure, which is not up to the Crown but has to be brought up in Wro procedures. Claimant used this possibility, in which his claims were thrown out (ongegerond verklaard).

The other principles of good governance that were referred to in this claim, were the principles of legal certainty, the duty to state reasons (article 3:46 Awb) and the fair play principle (article 2:4 Awb). The

49 The Royal Decrees discussed in this chapter were found on the website for official governmental publications (www.officielebekendmakingen.nl) using the combination of search words ‘onteigening’ and ‘algemene beginselen van behoorlijk bestuur’.
principle of legal certainty provides the citizen with the safeguard that the government acts logical in expropriations and consistently applies applicable policies and laws. It also implies that a government cannot take harmful measures in retroaction. The duty to state reasons requires an expropriation decision to be fully, sufficiently and clearly motivated. The government has to give insight in how the expropriation decision is established. At last, the fair play principle provides citizens with a safeguard that a government acts unprejudiced, impartial and unbiased. For expropriation this might imply that government officials that have a personal interest in the expropriation, cannot be able to influence the decision to expropriate.

The following Royal Decree discusses the remaining principle of good governance, the equality principle

In Royal Decree number 2016001732 (7 October 2016, Government Gazette 2016, #57236), the duty of care principle and the principle of equality are topics of discussion. The municipality of Bodegraven-Reeuwijk asked the Crown to designate land for expropriation to realize the land use plan, which provide for the expansion of a cemetery. Claimant (and after his dead his heirs and their advisor) has the opinion that he reached an agreement with the municipality for a compensation of €15,- per m². However, there still were some disputes about additional aspects of the compensation. After some time, claimant discovers that the municipality offers a compensation of €16,25 per m² to other land owners, which in their view is a violation of the duty of care and equality principle. The municipality denies the claim that they offered different compensations and during the public hearing therefore offered claimant to involve him in the negotiations with the other claimants. If a higher compensation would be a result of this, this would count for all claimants.

As a result of that, the Crown - without discussion the compensation as such, since this is not up to the Crown to decide - ruled that there was no violation of the principles of good governance.

According to the equality principle, the government should treat similar situations equally. In expropriations, it is often hard to consider if a situation is equal, since every parcel of land is different. Most of the times, the equality principle is brought up to show inequality in negotiations. However, also in this respect the government is in an awkward predicament, since the negotiations with the different interested private parties are confidential.
Appendix IV Analysis of Crown decisions

The Royal Decrees are looked up at the website https://zoek.officielebekendmakingen.nl/ by using the search words ‘Titel IV’ and ‘onteigening’. The only three criteria to accept the random selection in the end were that (1) the Royal Decrees should be taken after the last alteration in the Ow, the 30th of March 2010, when the Crisis and Recovery Act (Crisis-en hestelwet [Chw]) was implemented, (2) that among the expropriators should be at least one municipality and one province and (3) that the number of claimants should be reasonable to draw conclusions.

To check the interests that were found, two Royal Decrees in Title IIa are used. The objective of this control is twofold: to check whether there are differences and if so, if they are logical. The two most recent expropriations were selected in the control group. Another check of the analysis of the Crown decisions are the interviews that were conducted with the two experts.

On the basis of four Crown decisions Title IV and two Crown decisions Title IIa (table 16+17), five categories of arguments are defined (table 16). Each category consists of several types of arguments, as table 16 shows.

<table>
<thead>
<tr>
<th>Categories arguments</th>
<th>Types of arguments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injustice</td>
<td>Expropriator is dishonest</td>
</tr>
<tr>
<td></td>
<td>The plan could be realised elsewhere</td>
</tr>
<tr>
<td></td>
<td>Expropriation is an unfair mean</td>
</tr>
<tr>
<td></td>
<td>The claimant feels that he is not taken seriously</td>
</tr>
<tr>
<td>Spatial Planning</td>
<td>The expropriation is unnecessary</td>
</tr>
<tr>
<td></td>
<td>Land use plan is different than plan to expropriate</td>
</tr>
<tr>
<td>Compensation</td>
<td>Too less money is offered</td>
</tr>
<tr>
<td></td>
<td>Expropriator did not start serious negotiations</td>
</tr>
<tr>
<td></td>
<td>Claimant wants something else than money in return</td>
</tr>
<tr>
<td></td>
<td>Expropriation did not try (enough) to reach an amicable settlement</td>
</tr>
<tr>
<td>Procedure</td>
<td>No respect for confidentiality in negotiations</td>
</tr>
<tr>
<td></td>
<td>Mistakes are made during the procedure</td>
</tr>
<tr>
<td></td>
<td>The plan is not clear enough</td>
</tr>
<tr>
<td></td>
<td>The terms are not respected</td>
</tr>
<tr>
<td></td>
<td>The (provincial) land use plan is still not definite</td>
</tr>
<tr>
<td></td>
<td>The expropriator is (very) inaccurate</td>
</tr>
<tr>
<td></td>
<td>The expropriator does not communicate well</td>
</tr>
<tr>
<td>Continuing use</td>
<td>After the expropriation the claimant cannot continue its business</td>
</tr>
<tr>
<td></td>
<td>The claimant will be confronted with a for him unacceptable situation if he is not (fully) expropriated</td>
</tr>
<tr>
<td></td>
<td>In the new situation the claimant cannot use his property as he did before</td>
</tr>
</tbody>
</table>

Those categories are used to label the different arguments that the claimants brought forward in their views.

<table>
<thead>
<tr>
<th>Royal Decree</th>
<th>Expropriator</th>
<th>Category claimant</th>
<th>Category argument</th>
<th>Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>47624, 26 September 2016 Title IV</td>
<td>Municipality Council Barneveld</td>
<td>1 Owner</td>
<td>1 Injustice</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2 Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>3 Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>4 Compensation</td>
<td>No</td>
</tr>
<tr>
<td>2472, 14 February 2012</td>
<td></td>
<td>1 Owner</td>
<td>1 Procedure</td>
<td>No</td>
</tr>
<tr>
<td>Royal Decree</td>
<td>Expropriator</td>
<td>Category claimant</td>
<td>Category argument</td>
<td>Granted</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------</td>
<td>-------------------</td>
<td>-------------------</td>
<td>---------</td>
</tr>
<tr>
<td>Titel IV</td>
<td>Provincial Parliament of Zeeland</td>
<td>2 Spatial Planning</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>3 Spatial Planning</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>4 Self-realisation</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>5 Injustice</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>6 Injustice</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2 Lease</td>
<td>Compensation</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3 Interest group</td>
<td>Injustice</td>
<td>Inadmissibl e</td>
</tr>
<tr>
<td>125, 3 January 2013</td>
<td>Provincial Parliament of Zuid-Holland</td>
<td>1 Owner</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td>Title IV</td>
<td></td>
<td>2 Owner</td>
<td>Procedure</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3 Interest group</td>
<td>Injustice</td>
<td>Inadmissibl e</td>
</tr>
<tr>
<td>12254, 27 May 2015, Title IV</td>
<td>Provincial Parliament of Limburg</td>
<td>1 Owner</td>
<td>Compensation</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2 Owner</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3 Owner</td>
<td>Procedure</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4 Owner</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5 Owner</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6 Owner</td>
<td>Procedure</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7 Interest group</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8 Owner</td>
<td>Procedure</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>9 Owner</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>10 Tenant</td>
<td>Procedure</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>11 Owner</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12 Owner</td>
<td>Procedure</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>13 User</td>
<td>Spatial Planning</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>14 Owner</td>
<td>Withdrawn</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15 Owner</td>
<td>Procedure</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>16 Owner</td>
<td>Withdrawn</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td></td>
<td>17 Entity with a right in rem</td>
<td>Continuing use</td>
<td>No</td>
</tr>
</tbody>
</table>
A control group composed of two Title IIa Royal Decrees, with 23 claimants (65 arguments), led to some interesting observations. Of course the number of arguments about spatial development declined. However, the number of arguments about the compensation increased. It seems affected parties that are expropriated for Title IIa do see more clearly the public interest than affected parties that are expropriated for Title IV, since in Title IV houses can be expropriated to build new houses or the land of a farmer can be expropriated for nature compensation. There was no reason to change the categories due to the control group.

<table>
<thead>
<tr>
<th>Royal Decree</th>
<th>Expropriator</th>
<th>Category</th>
<th>Claimant</th>
<th>Argument</th>
<th>Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>47325, 16 September 2016, Title IIa</td>
<td>Minister of Infrastructure and Environment</td>
<td>Owner</td>
<td>1</td>
<td>Compensation</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Owner</td>
<td>2</td>
<td>Procedure</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Compensation</td>
<td>No</td>
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In the Zeeland case (chapter 3), a few claimants feel a severe injustice when they are expropriated. Also in the analysis of the Royal Decrees some claimants take the view that the difference of power between the expropriator and them is unfair. A few claimants ask questions like ‘why me?’ and ‘why not somewhere else?’.

Furthermore, in the Zeeland case several claimants have the opinion that expropriation cannot be used, since policy documents promote amicable settlement. Other claimants argue that the expropriation is not necessary, because the spatial development that they are expropriated for is not necessary. Another argument that is mentioned a few times, also in the analysis of the Royal Decrees, is that the expropriation plan is different than the (provincial) land use plan. Others just argue that the plan is bad. In the Zeeland case almost all claimants disagree with the underlying spatial planning.

Next to this, although compensation is not discussed in the administrative phase, a lot of arguments are about money, the negotiations of the expropriator or the amount of compensation that is offered. A substantial part of the claimants claims that something went wrong in the procedures, also claimant 5 in the Zeeland case has comments about the procedures. The types of arguments differ from no respect for confidentiality in negotiations to the claim that the expropriator cannot expropriate yet because the (provincial) land use plan is still not irrevocable. On top of this, a few claimants mention that they are not fully expropriated in the plan but at the same time, if the plan is executed, cannot continue using their land as they did before which disturbs them severely. This is an argument of continuing use.

<table>
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<tr>
<th>Royal Decree</th>
<th>Expropriator</th>
<th>Category claimant</th>
<th>Category argument</th>
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Appendix V The Spanish expropriation system: A case study

The following case study provides a clear overview of the different steps and terms in the expropriation process. Moreover, it shows the requisites of both the normal and the urgent expropriation procedure. Since the administrative considerations of the expropriator are not public, only the judicial considerations are discussed.

The 5th of June 2003 the Presidency of the Hydrographic Confederation of Júcar (HCJ) (Presidencia de la Confederación Hidrográfica del Júcar) accepted a resolution to improve the condition of canal María Cristina (Albacete). This public body is comparable to a water board. A public information phase was started with the publication of this resolution in the regional Government Gazette the 10th of October 2003 and in the national Government Gazette the 29th of October 2003. This step is not part of the expropriation, but of the underlying plan. The 5th of March 2004 the president of the HCJ approved the project. Table 19 summarizes the expropriation process.

Table 19 Timeline expropriation process Spanish case

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<th>Date</th>
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<td>11-11-2004</td>
<td>‘Actas previas de ocupación’ drafted and determined</td>
<td>PHCJ</td>
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<tr>
<td>10-12-2004</td>
<td>Declaration of the need for urgent occupation</td>
<td>Council of Ministers</td>
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<td>5-4-2005</td>
<td>Bid for compensation, Declined</td>
<td>PHCJ,</td>
</tr>
<tr>
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<td></td>
<td>Affected parties</td>
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<tr>
<td>15-12-2005</td>
<td>Determination of fair price</td>
<td>Expropriation Panel</td>
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<td>21-7-2005</td>
<td>Initial project modified. Modification decision taken.</td>
<td>President of HCJ</td>
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<td>25-7-2005</td>
<td>Extension of ‘actas previas de ocupación’</td>
<td>President of HCJ</td>
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<tr>
<td>2-6-2006</td>
<td>Public information phase opened in regional Government Gazette of Albacete</td>
<td>President of HCJ</td>
</tr>
<tr>
<td>4-6-2010</td>
<td>Decisions of 5th of March 2004 and 21st of July 2005 annulled</td>
<td>Contentious Administrative Court</td>
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<tr>
<td>10-11-2010</td>
<td>Cassation</td>
<td>State Administrative Court</td>
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<tr>
<td>15-4-2013</td>
<td>Higher appeal rejected</td>
<td>Supreme Court</td>
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The modification of the 21st of July 2005 resulted in a 4.77% bigger surface to expropriate. However, for some parcels it led to an increase of 44% of the surface to expropriate. In addition, the modifications resulted in an increase of the project budget by 19.86%.

After the alteration of the project, the PHCJ opened a period of public information as referred to in article 56 REF. The Administrative Court however ruled that article 56 REF cannot remedy or replace the public information process provided for in articles 17 to 19 LEF.

The Contentious Administrative Court ruled that the modification of the project caused material defencelessness to the affected parties, since they were not enabled to articulate any allegation against the concrete necessity of occupation. The State Attorney had the opinion that a small change of the project does not require a new public information process. In Spanish jurisprudence a distinction is made between a rectification of a project and a substantial alteration of a project. The Supreme Court in the end ruled that the modification was substantial and therefore a public information phase in the sense of article 17 LEF should have started again.

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50 Source: Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 6ª), 15th of April 2013, RJ/2013/2845
Appendix VI Previous expropriation system in the Netherlands

A case study is conducted to show how the different steps of the expropriation process were done in practice before 2010. The investigated case is the Oirschot case (Royal Decree Nr. 65, 3rd of April 2009). This case is selected because it is one of the few cases in which the Crown decided to not assign the expropriation although the municipality council of Oirschot determined an irrevocable land use plan and no procedural mistakes were made.

Oirschot is a village in the province of Noord-Brabant (see figure 22). The 27th of June 2000 the municipality council determined the land use plan “Terrein Teurlincx en Meijers c.a.”. Consequently, 13 February 2001 the provincial government (Gedeputeerde Staten) of Noord-Brabant approved this plan. The 7th of December 2001 the land use plan became irrevocable. The owners of the parcel bought the parcel knowing the land use plan and its possible implications.

In 2006 the municipality granted a permit on the basis of article 19 Wro to the owners of the house (Doctor van Wamelstraat 9) to build a double garage behind their house (see figure 23). In this permission, the municipality included that if De Schaaf would be changed according to the land use plan, the owners would be enabled to continue using De Schaaf as access to the garages.

Sources case study Gemeente Oirschot (25-9-2007), Gemeente Oirschot (29-4-2008), Staatscourant Nr. 65 (3-4-2009)
Also in 2006, the municipality of Oirschot started negotiations for an amicable settlement for the purchase of 165 m² of land of the land owners in order to realize the usage as determined in the land use plan “Terrein Teurlincx en Meijers c.a.”, a public slow traffic route (langzaamverkeersroute). The municipality of Oirschot has to purchase the 165 m² in order to realize a connection of De Schaaf with the Dr. van Wamelstraat to finalize a street towards the pedestrian area of De Loop in order to guarantee a full disclosure of shopping centre De Poort. It has the opinion that, in private ownership, the publicness of the slow traffic route is not guaranteed. Next to this, the municipality wants to guarantee an escape route for the supermarket, since the fire brigade complained about the absence hereof. At the moment a fence closes off the parcel. This leads to grievances with the residents of the apartments in De Poort, which bought the dwellings with the idea that a disclosure to the Doctor van Wamelstraat would be realised. Also other inhabitants, for whom the shortest route to the shopping centre would be the route at De Schaaf, raised written objections to the fencing off. Moreover, the fencing off leads to a socially insecure place close to De Poort, where loitering teens can come together out of sight. All in all, the municipality argues that there is a public interest, necessity and urgency to transfer the ownership of 165 m² of land.

Given the fact that the municipal government did not have faith in a soon amicable settlement at that moment in time, the municipality council decided the 25th of September 2007 to start the expropriation procedure and to start drafting the required expropriation documents in order to prepare the request decision.

The draft municipality council decision and the draft expropriation plan had been available for public inspection from the 2nd of October till the 13th of November. They also were published in the Government Gazette, Eindhovens Dagblad, a regional newspaper, and Weekjournaal, a local newspaper. Moreover, affected parties were informed in writing. In doing so, affected parties are invited to submit their views.

Before 2010 lower governments were allowed to decide about expropriation. The Crown had to review the decision and accept or decline it. Affected parties were allowed to raise objections against the expropriation at the Crown. The Crown had to decide about the expropriation within nine months.

During the public inspection phase, one claimant submitted his view, the owner of the parcel of land, represented by a lawyer. They were invited for a hearing that took place the 25th of March 2008. In this hearing they addressed the following:

- Claimant acknowledges the land use plan and the usage that is foreseen on his parcel of land. However, claimant states that the land use plan provides the municipality with a possibility to expropriate, but not with a direct reason or obligation to expropriate.
- Claimant has the opinion that the current disclosures of the shopping centre are sufficient and that expropriation is not necessary. This implicates that the urgency of the project is lacking as well, according to the claimant.
- Claimant agrees neither with the public interests nor with the necessity nor with the urgency of the expropriation.
  - Claimant already has an agreement with the supermarket about the escape route in emergency situations. Both employees and customers can reach the open access route of the garages from the emergency exit. There is no reason to expropriate to realise an emergency route.
  - The garbage truck currently uses De Beitel to collect the bins. For the inhabitants of the apartment block this is closer than De Schaaf, so there is no necessity to change this.
If there are loitering teens, they would hang around the shopping centre, far away from the claimant’s parcel. The claimant’s fence does not have a relation with the alleged loitering teens.

Next to this, claimant claims to have a special interest. First, his interest is to keep the parcel in the current state. Next to this, in 2006 they realized a double garage with an access route, with municipal approval (permit Wro). In the process of approval, owners talked with the municipality about a possible future transformation of De Schaaf. However, according to claimant, he did not promise to sell his property. Claimant wants to continue using his garages. If a public slow traffic road is realized, this would lead to a dangerous situation. Third, claimant has a disabled son who is used to play at the access road of the garage. If De Schaaf is changed to a slow traffic route, this would cause disturbance of other people, which carries the risk that the disabled son would run away or walk along with some passer-by.

Claimant does not agree with a compensation of 17,500 euro.

The municipal government in her reaction addressed the following:

- The municipality stresses that the claims of the claimant predominantly have to do with the planning process in which the land use plan is determined. Considering the Wro, it would have been possible for the claimant to take action against the plan at that moment in time.
- To serve the public interest, the municipality wants to execute the land use plan. The municipality created certain expectations for other people living in the neighbourhood when the land use plan was determined. The municipality wants to fulfill those expectations. The land use plan refers several times to the importance of the disclosure of the centre, also in relation with De Schaaf.
- In reaction to the escape route, the garbage truck and the dark entry, the municipality remarks the following:
  - The fire brigade considers De Schaaf as an escape route for employees and customers of Emté. The municipality wants to guarantee a public escape route, without private ownership.
  - To collect the garbage of an apartment block at De Schaaf, residents have to place their bins at De Beitel. Consequently, a garbage truck has to enter De Beitel and has to go backwards, causing noise disturbance. This disturbance could be solved if the residents would be enabled place their bins at the Docter van Wamelstraat.
  - The municipality wants to create a corridor, with a constant flow of people and traffic, from De Poort to the Docter van Wamelstraat to prevent for a dark entry that can be attractive to loitering teens and troublemakers.
- In 2006 the claimant was provided with a permit to build and reconstruct on his parcel. A reason for the municipality to grant this permit was that the claimant agreed on transferring the ownership of a part of his parcel to realize a slow traffic route from De Schaaf to De Poort. Right now, the claimant does not want to transfer his ownership anymore. This proves the necessity of the expropriation procedure.
- The municipality stresses that the claimant can expect a full compensation. This compensation however, is not part of the administrative expropriation procedure.

The 29th of April 2008, the municipality council decided to expropriate the required 165 m² of the owners of Doctor van Wamelstraat 9. The Crown was asked to approve this expropriation, followed by actual submission of the request by the municipal government with accompanying documents to the Crown the 27th of May 2008.

In the current situation (after the Chw took effect in 2010), the municipality would file an application for expropriation at the Crown (request decision), followed by actual submission of the request by the municipal government with accompanying documents to the Crown. According to article 79 Ow, the request decision expires three months after the municipality council made it.


Considered this advice, the Crown decided the following with respect to the claimants’ view. Expropriation is the last resort for the municipality to transfer property rights. If public interest is at stake and the owner is not willing to cooperate, a municipality is enabled to expropriate. The municipality has the
opinion that to serve the public interest a slow traffic route to disclose shopping centre De Poort has to be realized at De Schaaf. The land use plan created expectations for residents in the neighbourhood. The Crown does not assess the land use plan as such, it assesses the expropriation, for which the land use plan is the basis.

The question the Crown had to answer was if the requirement ‘necessity’ is met. Next to the spatial development interest, a good disclosure of De Poort, the municipality had some arguments of a more practical character: the escape route, the garbage truck and the possible troublemakers in the dark entry.

According to the explanation of the land use plan, De Schaaf is a slow traffic disclosure route between De Poort and the Doctor van Wamelstraat. In additional research of the Crown was discovered that due to a “changed planning perception” (gewijzigde planologische inzichten) this disclosure will not be realized. Although it remains unclear on which additional research of the Crown this statement is based, the Crown ruled that without realizing the slow traffic route, the goal of the expropriation will not be reached.

Next to this, the municipality granted a permit for a double garage with access road to the owners in 2006. When this permit was granted, the municipality agreed with the owners that they would be allowed to continue using the access road and the garages if De Schaaf would be transformed to a slow traffic route in the future. The Crown has the opinion that in doing so, the municipality created a situation that in its nature conflicts with the desired usage of De Schaaf.

The Crown has the same opinion with respect to the desired usage of De Schaaf close to the supermarket. Additional research shows that the supermarket is supplied from the parking lot between De Poort and the Doctor van Wamelstraat. This causes daily heavy traffic, which conflicts with a slow traffic route. With respect to the loitering teens, the Crown remarks that additional research shows that the neighbourhood does not experience disturbance of loitering teens.

All in all, the Crown had the opinion that the necessity of expropriation is lacking because the situation at De Schaaf is changed considerably since the determination of the land use plan, that. Therefore, the Crown did not approve the expropriation request.

Here the process stopped. It would have been possible to lodge an appeal at the civil judge. The claimants however did not, since the expropriation request of the municipality was declined.
Appendix VII Discussion towards current proposed Supplementary Act Land Possession

Around 2000: operation free market, deregulation and quality of legislation

In 2000 the advisory council of the former ministry of Housing, Spatial Planning and Environment (VROM-raad\(^52\)) advised the minister to increase the efficiency of the Ow and to prevent a repetition of arguments in appeal (both at the Crown and at the civil judge). The Institute for Construction Law (Vereniging voor Bouwrecht\(^53\)) advised in line with the advisory council to eliminate the Crown and to separate the administrative expropriation decision from the civil determination of the compensation. This led to a pre-advice\(^54\) of the Institute. Another revision exercise was executed with ‘operation free market, deregulation and quality of legislation’ (marktwerving, deregulering en wetgevingskwaliteit [mdw]) in 2000\(^55\). Because of elections and severe political disturbance in 2002 in the Netherlands, in the end nothing happened with the advices of 2000.

Around 2010: Crisis and Recovery Act

Expropriation again became a topic of discussion around 2010, when the Netherlands was in the middle of an economic crisis. To recover from this crisis, the national government made the Crisis and Recovery Act [Chw]. Changes were made in the expropriation procedure in order to be able to expropriate a lot quicker than in the old procedure was possible. A quicker procedure would enable lower governments to realise projects and works at a short term, which could contribute to a quick economic recovery. The acceleration of the procedure had to be realized by realizing two goals\(^56\):

- Uniformization and streamlining of expropriation procedures;
- Unlinking planning and expropriation procedure, in order to be able to expropriate faster.

To realize the uniformization, in particular Title IV was changed, based on former article 87 of the Ow. Article 87 was a designation procedure [aanwijsprocedure] of the Crown within Title IV that enabled legal persons without power to expropriate to request the Crown to designate land for expropriation.

In the old Title IV procedure\(^57\), the Crown did not designate land for expropriation, but it had to approve the expropriation decision of lower governments. Expropriations in titles II to Iic already were designating procedures before the Chw. The Chw uniformed those procedures and reduced the time for designation of the Crown from nine to six months. According to the national government, this centralization was justified because of the great societal interest to speed up procedures in order to recover from the economic crisis. Experts warned the minister that the foresaw acceleration of procedures was uncertain, because of the expected accumulating workload of the Crown (e.g. Suyssmans & Bosma, 2010). Moreover, due to this workload, quality could deteriorate. In the end, the accelerating measures turned out to have no effect (Visser & Frikkee, 2012). A reason hereof is that there is no sanction on exceeding of terms by the Crown.

Unlinking planning and expropriation procedures would mean that an expropriation decision already can be taken before the underlying planning is definite. Owners therefore could already lose their property, before the underlying basis for the expropriation is definite\(^58\). This can lead to an acceleration of procedures, but it implies at the same time that when objections to the planning are considered legitimate by a judge, the owner lost his property without legal basis. The idea of the national government to unlink the planning and the expropriation procedure in the end never became reality. The Senate did not agree with unlinking and the Chw almost stranded, partly due to a critical advice of the

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\(^{53}\) Bregman and Lubach (2000)

\(^{54}\) Ten Kate, B.S. (2000)

\(^{55}\) Parliamentary Documents II 2000/01, 24 036 Nr. 174, 210 & 239. Title advice: Het geëigend onteigeningsrecht.


\(^{57}\) Interested readers can take a look at appendix VI, in which a case is worked out following the old procedure, indicating differences with the current procedure.

\(^{58}\) Parliamentary Documents I 2009/10, 32 127, Nr. 3
Council of State\textsuperscript{59}. Therefore, the government decided to give in and removed the unlinking from the Chw\textsuperscript{60}. Not only in the political arena the idea lead to disturbance, also several scientist, experts\textsuperscript{61} and lobby groups such as VNG and IPO declared themselves openly against the unlinking (Bosma, 2010).

\textsuperscript{59} Parliamentary Documents II 2009/10, 32 127 and Parliamentary Documents I 2009/10, 32 127
\textsuperscript{60} Parliamentary Documents II 2009/10, 32 488, Nr. 3
Appendix VIII Comments and remarks on the minister’s letter

Debate House of Representatives

In the debate with the minister (21st of January 2016), some critics were ventilated about the proposed expropriation process in the SALP. Member Ronnes (CDA) stressed the importance of the Crown as an institution that provides carefulness in expropriations. He asked why this safeguard is taken away and if this will lead to a less accurate process. Veldman (VVD) agreed with Ronnes that property rights are very important and need to be safeguarded in the best possible way. Furthermore, Veldman has the opinion that the process of amicable settlement needs to be improved. He also asked questions about the role of the commission that the minister proposes and costs (advice, lawyers etc.) that affected parties might have fighting an expropriation. He thinks that affected individuals should be compensated for those costs if the advice of the commission is negative.

The Minister of I&M endorses the importance of property rights. She explained that when the commission gives a negative advice, the expropriator has to motivate why it wants to deviate from the commission’s advice if it continues the expropriation. Although the Crown will be eliminated, affected parties will have more possibilities to fight the expropriation at the administrative judge and in higher appeal. The minister says that in the new system there is a “double lock on expropriation on improper grounds”. She does not agree with Veldman about problems in the process of amicable settlement.

At the moment, the Crown assesses the amicable settlement. In the new situation the administration itself will have this task (and if an appeal is lodged, the administrative judge and in higher appeal the Administrative Jurisdiction Division of the Council of State). This does not lead to a deterioration of the amicable settlement, according to the minister. She stresses that expropriation continues being a last resort. In the SALP, an administrative judge will decide about the request decision of a (lower) government. Notaries will control the transfer of property rights. The expropriation will be definite when the expropriation deed is registered in the public registers. Before, the decision to expropriate and the underlying planning decision must have become final. The notary can only formalize the expropriation after the compensation process has started. This means in practice that the civil court should already have set a provisional compensation, which is already paid. Moreover, experts should already have conducted an inspection of the site if they want to to expropriate.

The minister proposes a process in which the administration takes the decision to expropriate. Ronnes thinks that is not fair to owners if an expropriator tests and decides about their own ideas. Therefore, he prefers the extra safeguard that the Crown offered. The minister counters this critique saying that the administrative judge, the civil judge and an independent commission will take over the role of the Crown. She thinks that the safeguards for owners will improve. Ronnes forgets the dualism within lower governments, according to the minister. In municipalities it will be the mayor and aldermen that propose an expropriation and it will be the municipality council that judges the proposal and takes a decision about it. The minister promised to take care of the compensation of the costs of experts and lawyers for somebody that is expropriated, at the request of Veldman.

Hearing about expropriation: Position Papers

The House of Representatives organized a hearing about expropriation the 20th of April 2016. Eight organizations and persons were invited (table 20). Their input for this hearing was a position paper. The comments made during the hearing can be organized in four topics: the elimination of the Crown, the separation of the expropriation and the compensation, the notification for expropriated parties and other comments.

Table 20 Position papers meeting House of Representatives 20-4-2016

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<th>Name</th>
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<tr>
<td>1</td>
<td>dr. ir. A.G. Bregman, Instituut voor Bouwrechts (IBR)</td>
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<tr>
<td>2</td>
<td>IPO</td>
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None of the participants raised objections against the elimination of the Crown. Participant 1 for example notices that the minister’s proposal to separate the expropriation from the compensation procedure is in accordance with literature (e.g. Bregman & Lubach, 2000; Vereniging voor Bouwrecht, 2012). Some participants (3, 4, 5) however have the opinion that it is undesirable that expropriations can take place without interference of a judge. Participants 4 and 5 fear the situation in which expropriation is the result of an administrative decision and not of a legal decision. Expropriation without interference of a judge is considered undesirable by those participants.

Participant 5 is even more dead set against the minister’s proposal. The participant has strong objections against the idea the governing bodies will get the power to expropriate. This can lead to an inaccurate decision making process since the administration can start expropriation without independent approval. Participant 5 sees legal security for citizens as a key stone for a constitutional state. In such a state, civilians should be protected against government’s actions in a proper way.

Participant 8 has a more fundamental objection and advice against the idea that the administrative judge will endorse the expropriation. A transfer of property rights should be assessed by a civil judge. In the proposed situation in SALP, affected parties have to take action themselves if they want the expropriation to be reviewed independently.

A considerable number of participants (2, 3, 4, 7, 8) advises the minister to improve safeguards for owners in the notification. At first, the term of six weeks in which an appeal has to be lodged seems quite short to several participants (2, 3, 8). Participant 8 for example worries about affected parties that are unaware of the term and do not lodge an appeal although they want to oppose the expropriation. Other participants, for example participant 7, has the opinion that a normal letter with the draft expropriation order is not sufficient. An expropriation decision should be brought in person by a bailiff.

Some other comments are the following.

Participant 2 (IPO) and participant 6 (VNG) are positive about the changes that the minister proposes, because it decentralizes the power to expropriate towards expropriators. VNG is also positive about the commission, because the commission in VNG’s view can safeguard the carefulness of the process. However, it is still not clear for VNG what will be the role of this commission exactly. The last remark of VNG is about self-realisation. VNG would like to have a mean to expropriate when self-realisation is not conducted according to the arrangements.

Next to this comment, a concern of participant 7 is the efficiency of the proposed procedure. The costs, both for the expropriator and for the person(s) that is/are expropriated will be higher than in the current procedure. In the new situation two procedures have to be gone through (which can cause delays). Participant 7 thinks that the costs of the lawyer of the expropriated party should be fully reimbursed. Furthermore, administrative appeals should be eliminated and only an appeal at the civil judge should be open. Participant 4 agrees with this. Finally, participant 4 asks why the minister is reforming the Ow; according to participant 4 this is not necessary and there is no need for a fundamental revision of the Ow.
Appendix IX Comments and remarks on the bill

The internet consultation ended 16 September 2016 with 27 public respondents of which seventeen had remarks about expropriation. In total, around 40 organizations and persons reacted in the internet consultation\(^{63}\).

Elaboration with respect to the reactions of the consultation round can be found in chapter 6. Table 21 describes the reactions, without reflecting on them.

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<th>Sent by</th>
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<tr>
<td>1</td>
<td>Houthoff Buruma</td>
<td>Houthoff Buruma does not see any added value of integrating expropriation in the Environment and Planning Act. Since titles are eliminated in the SALP, the respondent asks what will happen with title III and Va. The new SALP does not provide the possibility to expropriate for those titles (expropriation in special circumstances and expropriation of patents). Furthermore, the respondent has the opinion that the time that the new commission gets to advise municipalities, is quite short. On top of this, Houthoff Buruma thinks that the position of the affected parties will deteriorate in SALP. According to the lawyers of Houthoff Buruma, it is undesirable that an affected party actively has to lodge an appeal, since it makes it harder to involve a judge. Finally, the respondent asks why appeal and higher appeal has been made available. Since the costs of the procedure are reimbursed, it can be expected that every claimant will also lodge a higher appeal. Herewith a lot of valuable time will be lost, while the legal protection for claimants does not get better.</td>
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<td>2</td>
<td>N.V. Nederlandse Gasunie</td>
<td>Gasunie requests power to expropriate, since the majority of their work is conducted in the public interest. Next to this, it points out that the elimination of the possibility to expropriate only rights in rem has negative consequences for Gasunie. It results in a reestablishment of those rights in rem after every expropriation, since rights for the benefit of the gas network normally do not have to be expropriated in order to realize the desired work.</td>
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<tr>
<td>3</td>
<td>Antea Group</td>
<td>The role of the notary in the SALP is controversial. Why does the civil court not take the crucial role notaries have in SALP?</td>
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<tr>
<td>4</td>
<td>Kuiper Compagnons</td>
<td>Does not mention expropriation.</td>
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<td>5</td>
<td>LTO Nederland</td>
<td>LTO has two principal comments: 1) An affected party has to take action himself if he wants to let a judge test the expropriation decision, which is undesirable in LTO’s opinion; 2) LTO proposes compensation of all costs related to the expropriation for the affected party.</td>
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<td>6</td>
<td>Nederlandse Melkveehouders Vakbond [NMV]</td>
<td>The NMV is worried that the fox is going to guard the chickens when the advisory commission would advise the (lower) government. On top of this, the NWV worries that the administrative judge will only conduct a marginal review. The expropriation order should be sent by recorded delivery or handed over by a bailiff, according to NMV. With regard to the advisory commission, NMV has the opinion that it should not be paid by the expropriator. Furthermore, NMV thinks that costs of the expropriation procedure should be reimbursed to affected parties. NVM also points out the considerable role notaries get in the new process. The NMV is worried that the role is too big.</td>
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<td>7</td>
<td>BAR-organisatie</td>
<td>Does not mention expropriation.</td>
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\(^{63}\) Parliamentary Documents II 33 118, Nr. 84
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<td>8</td>
<td>Nysigh advocaten-notarissen</td>
<td>According to Nysigh, there is no need for a fundamental change of the Ow. There are two fundamental principles of expropriation: land must be purchased with due speed and legal protection for affected parties must be arranged. The proposal harms both principles. Neither there are consequences when the terms are violated by the advisory commission, nor when a judge violates the term passing a sentence. Furthermore, the position of affected third parties will deteriorate in particular, since article 20 of the current Ow will be eliminated and affected third parties only will be considered as interested party in the compensation procedure.</td>
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<td>9</td>
<td>Gemeente Apeldoorn</td>
<td>Does not mention expropriation.</td>
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<tr>
<td>10</td>
<td>Arcadis Nederland B.V./Adviesgroep Rentmeesters &amp; Taxateurs</td>
<td>There is no need for a fundamental change of the Ow, according to Arcadis.</td>
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<tr>
<td>11</td>
<td>Gemeente Roermond</td>
<td>Does not mention expropriation.</td>
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<td>12</td>
<td>Netwerk Notarissen</td>
<td>Does not mention expropriation.</td>
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<td>13</td>
<td>Van der Feltz advocaten [VdF]</td>
<td>Want to keep expropriation out of the Environment and Planning Act. Furthermore, VdF points out the special character of expropriation. It is a severe infringement of property rights and therefore there should be judicial intervention without the expropriated party asking for it, although in normal administrative procedures it is common practice to not have a judge involved automatically.</td>
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<td>14</td>
<td>NEPROM</td>
<td>Does not mention expropriation.</td>
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<td>15</td>
<td>Kadaster</td>
<td>If an affected party does not know that an expropriation order has been drafted, this leads to an undesirable situation in the view of Kadaster. According to the Kadaster, the newly introduced expropriation deed is not sufficiently worked out in the bill. Kadaster proposes to take part in the advisory commission to assure a procedural safeguard with the influx of good and certified data.</td>
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<td>16</td>
<td>Federatie Particulier Grondbezit [FPG]</td>
<td>The legal protection of affected parties must not be deteriorated in the SALP. According to FPG, 99% of the expropriations are settled during the amicable settlement phase. Therefore, in that particular 1% of the cases, the carefulness of the expropriation should not get worse. FPG considers undesirable that the administrative judge only conducts a marginal review of the points that are brought up by the affected party. FPG is afraid that in the new situation, there will not be a full test of the expropriation any more. The municipality council takes the expropriation on the basis of its own planning decisions. The decision will therefore not be taken independently is the view of FPG. Furthermore, the term in which the affected party must lodge an appeal is too short (6 weeks), according to FPG. Finally, the FPG objects to the compensation procedure that already can start before the expropriation itself is irrevocable. For FPG, this gives the impression that the expropriation decision is only a formality.</td>
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<td>17</td>
<td>Gemeente Westland</td>
<td>Reaction not accessible.</td>
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<td>18</td>
<td>Leerstoel Grondbeleid, Faculteit</td>
<td>TU Delft asks to consider whether the elimination of the titles leads to a shift in possibilities for which expropriation is possible, in particular should be assessed whether expropriation for spatial development will get harder and</td>
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<td>Bouwkunde TU Delft</td>
<td>expropriation for environmental purposes will get easier in the new situation. Furthermore, since the Crown will be eliminated, the autonomous review of the Crown will disappear. TU Delft therefore asks to reconsider the legal protection against expropriation in the proposed new situation.</td>
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<td>Geelkerken Linskens Advocaten N.V. [GLA]</td>
<td>The special characteristics of expropriation are ignored in the bill, according to GLA. Expropriation is more a process pertaining to civil law than to administrative law. GLA pleads for a separate Expropriation Act. Furthermore, in the bill, the expropriator will control if the expropriator has done enough attempts to settle amicably. This is the fox that guards the chickens, in the view of GLA. Moreover, since the obligation to keep trying to purchase amicably between the Crown decision and the endorsement of the civil judge is eliminated, the necessity of the expropriation is not (enough) safeguarded in the bill. Furthermore, GLA proposes to eliminate the notary from the proposed procedure and to let the civil judge subscribe the transition of property. Next, GLA remarks that the bill does not provide an article comparable to article 17 Ow, which requires an expropriator to continue attempting to reach an amicable settlement between the time that expropriation order is established and the compensation procedure starts. This harms the principle of necessity according to GLA. Additionally, GLA remarks that in the new procedure it is crucial to submit objections against the draft expropriation order in order to be considered as affected party later on in the process. However, the UOV is no assurance that the draft expropriation order will reach all possible interested and affected parties. Furthermore, GLA advises to take the notary out of the process and replace his proposed tasks to the civil judge. GLA also advises to open only one possibility to lodge an appeal, at the Administrative Jurisdiction Division of the Council of State. Since the costs will be reimbursed, it can be expected that all affected parties will lodge a higher appeal to deliberately deaccelerate the process. In addition, GLA remarks that there is no provision in the bill that assures reimbursement of the costs when no appeal is lodged. The minister, as a result of the discussion in parliament, did only include a provision for an arrangement in which the courts require the expropriator to reimburse the costs. It is however not clear what happens if no appeal is lodged. Finally, GLA mentions the change of article 38 Ow, which provides the possibility to ask the expropriator, if certain requirements are met, to expropriate fully instead of only a part of the parcel. In the bill, article 11.8 contains a similar provision. However, nothing is mentioned about the consequences if an expropriator refuses to meet the request.</td>
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<td>Gemeente Tiel</td>
<td>Wants that expropriation becomes an easier and faster applicable instrument, taking into account the different interests of owners. The respondent has doubts whether the SALP would realize this.</td>
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<td>Vereniging voor Onteigeningsrecht [VvOR]</td>
<td>VvOR stresses that, according to their members, there is no need for a fundamental reform of the Ow. The current system is functioning well. However, the VvOR agrees with the change that the power to expropriate is decentralized. VvOR advises to incorporate an article comparable to article 3 Ow in the SALP. Without this article, the tasks of the expropriator become heavier, the procedure might take longer and the position of the owner could be undermined. The expropriator would have to conduct a complicated research for possible rightful claimants. The second objection of the VvOR is the elimination of article 17 Ow, which requires an expropriator to continue to try to settle amicably between the expropriation order and the start of the compensation procedure. The Royal Decree in the current situation is an...</td>
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<td>impulse for affected parties to try to reach a settlement with the expropriator, since expropriation seems to get inevitable after the Crown decision. This impulse lacks in the bill and the double independent test of the amicable settlement procedure is taken away, since expropriators in the proposal will test their own attempts to settle amicably. Furthermore, the VvOR considers troublesome that the new system does not provide for an obligatory interference of a judge in expropriations. Therefore, the notification of affected parties is very important. The current proposal does not meet the VvOR’s expectations with regard to the notification. Additionally, the VvOR requests the minister to further elaborate on the replacement of article 38 Ow. Next, VvOR does not think four weeks are sufficient for the commission to advise the expropriator. Moreover, in the bill, there is no sanction if the advice is published too late. On top of that, the bill does not prevent for expropriation without intervention of a judge, which is undesired according to the VvOR. Although the bill provides two possibilities for appeal, the legal protection does not get better, says VvOR. VvOR is afraid that many higher appeals will be lodged at the Administrative Jurisdiction Division of the Council of State, which would lead to severe delays, pressure on administrative judges and higher costs. Finally, the VvOR remarks that the administrative loop can be used in the proposed expropriation process. As a consequence, the expropriation instrument could be used too thoughtless, since a possibility is open to repair possible shortcomings in a later stage.</td>
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<td>Koninklijke Notariële Beroepsorganisatie [KNB]</td>
<td>The KNB in its reaction focusses on the role that notaries get in the proposed process, in particular on the requirements of the expropriation deed. Since this has nothing to do with the weighing of the different interests involved in the expropriation process, it is out of the scope of this thesis and will not be discussed further. In its reaction, KNB however does also gives its opinion about the involvement of the administrative judge in the expropriation process. In the opinion of the KNB, the involvement of the administrative judge leads to a deterioration of the safeguards for owners, since the administrative judge will only test the lawfulness of the expropriation order and will test the objections of affected parties, whereas the Crown conducted a full review of the expropriation process.</td>
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|  | Vereniging van Onteigenings-Advocaten [VOA] | VOA is not convinced of the necessity to change the current Ow. Furthermore, VOA stresses that the term to submit objections in the bill is (too) short. This is problematic, all the more since submission of an objection is key to be considered as affected party later on in the process. Therefore, there should be strict requirements for expropriators to notify affected parties about the expropriation order. In the current proposal, VOA does not see those requirements sufficiently embedded in the bill. In addition, administrative judges conduct a review ex tunc, which does not provide a possibility to assess the developments between the draft expropriation order and the case coming up for trial (as article 17 Ow does). On top of that, the VOA thinks that an appeal that can only be lodged at the Administrative Jurisdiction Division of the Council of State (in one instance), would be more efficient. Since the term for the administrative judge to assess the objections is relatively short, it is not possible for the judge to ask help of the StAB. However, their advice could be useful for an administrative judge to assess the technical aspects of the case (for example to assess a self-realisation request). If appeals could only be lodged at the Administrative Jurisdiction Division of the Council of State, the
integral term for the decision could be extended in order to make room for the advice. Finally, the bill provides an arrangement for the costs of the amicable settlement process and for the costs of the preparation of the objections that an affected party might have to spend on judicial assistance. The administrative judge has to assign those costs to the expropriator. However, the SALP does not provide for an arrangement if the affected party decides to not lodge an appeal. An undesired side effect could be that somebody lodges an appeal only to claim his costs. Therefore, VOA advises the minister to provide an alternative arrangement with regard to the compensation of the costs.

24 Gemeente Rotterdam

In the opinion of the municipality of Rotterdam, the advisory commission is redundant. Procedures have to be shorter and faster, which is not the case in the current proposal.

25 Radboud Universiteit

Does not mention expropriation.

26 NVM (Dutch Association for real estate agents)

NVM emphasises in its reaction that expropriation has to remain a measure of last resort. According to NVM, the independency of expropriations is in jeopardy when an administration is going to decide itself about expropriation. The advisory commission is, in the opinion of the NVM, not a full alternative for the safeguards that are taken away with the elimination of the Crown, since the municipality can (with motivation) deviate from the commission's advice. Furthermore, NVM fears that the notification of affected parties will become inaccurate since dead people, people that are in hospital or live abroad and third parties could miss the notification of the draft expropriation order. In addition, NVM thinks that the interests of affected parties are severely harmed since the affected party has to take the initiative to lodge an appeal in the new situation. If he does not within six weeks, he can be expropriated without any interference of a judge, which is considered troublesome by NVM. NVM expects that the administrative judge will only conduct a marginal review of the objections made by affected parties. A full test of the expropriation order therefore will disappear. In addition, in the proposed SALP, the compensation procedure can be started before the expropriation order is irrevocable. NVM considers this undesirable, since it does not respect the last resort characteristic of expropriations. Moreover, according to the NVM, it seems that the administrative phase is only a formality when the compensation procedure would already start before the order is definite. Finally, NVM points out that the current situation proves that expropriators do not always respect the obligation to try to settle amicably. If, in the new situation, the administration has to assess its own attempts to reach an amicable settlement, this can lead to a deterioration of the consideration of the interests of affected parties. All in all, the NVM does not see any necessity to change the Ow because the proposed system does not have a lot of advantages compared to the current system.

27 P de Lange

Asks to reconsider the elimination of titles, in particular title Va

Possibilities for expropriation

A discussion takes place about a possible expansion of possibilities for expropriation in the new situation. The environment and planning plan is a plan about the physical living environment, whereas the land use plan is only about spatial planning. Respondent 18 asks if this would result in more complicated expropriations for spatial development purposes. According to De Boer (personal communication) and Berns (personal communication), it will not. Expropriation on the basis of the environment and planning plan indeed means that expropriation becomes an available instrument for,
for example, cutting down trees or water collection. However, the minister is not afraid that in the end expropriation will be used to realize those goals, since the bill states clearly that expropriation is an ultimatum remedium and since a lot of less infringing instruments are at the disposal of the governments to realise the public goals that are mentioned in those examples (De Boer, personal communication). Also experts are not afraid that this change will result in more expropriation, since the administrative judge will always test the proportionality of the expropriation instrument (Berns, personal communication).

Reimbursement of the costs
In the debate in the House of Representatives that preceded the draft SALP (see appendix VI), the minister agreed to incorporate a provision to reimburse procedural costs for affected parties. Finally, the bill provides an arrangement for the costs of the amicable settlement process and the preparation of the objections. The administrative judge has to assign those costs to the expropriator. However, the bill does not provide for an arrangement if the affected party decides to not lodge an appeal. An undesired side effect could be that somebody lodges an appeal only to claim his costs. Therefore, respondent 19 and 23 advise the minister to provide an alternative arrangement.

Future of article 38 Ow
Respondent 19 and 21 mention the change of article 38 Ow, which provides the possibility to ask the expropriator, if certain requirements are met, to expropriate the full instead of only a part of the parcel. In the bill, article 11.8 requires an expropriator to expropriate also the remaining part of the parcel if the affected party requests the expropriator to do so. However, nothing is mentioned in the SALP about the consequences if an expropriator refuses to meet the request. Since the expropriation order will be definite if the affected party does not request purchase of the remaining, the affected party has to bring up the request of purchase of the remaining in the first six weeks after the notification of the draft expropriation order, when he submits its objections against the draft expropriation order. This is quite early, but if an affected party does not, the request cannot be included in the expropriation order anymore.

As a consequence, a strange situation is created in which an affected party that wants to oppose the entire expropriation has to make a request of expropriation of the entire parcel at the same time. This would be a contradictory request of which an affected party might think that it diminishes his arguments against the expropriation as such. Moreover, a request for purchase of the remaining will depend on the price that is offered. In essence, it is more about compensation than about the expropriation order itself. Therefore, it is at least odd that the administrative judge will decide on this matter. However, if the civil judge will do so, the expropriation order has to change.

Respondent 21 proposes to open up a possibility to claim purchase of the remaining in a later stadium, during the appeal. The expropriator then has to make an additional expropriation order to incorporate the remaining part of the parcel in the expropriation.

Separate act
A few respondents and experts plead for a separate Expropriation Act. For example respondent 13 and 19 who have the opinion that the special characteristics of expropriation are ignored in the bill. Expropriation is more a process pertaining to civil law than to administrative law since it considers an issue related to property rights, according to this respondent.

Relation between the separate procedures
According to respondent 16 and 26, it is undesirable that the compensation procedure already can start before the expropriation itself is irrevocable. That would suggest that the expropriation decision is only a formality. According to Berns (personal communication) the first coordination possibility, between planning and expropriation will not be used very often. At the moment this possibility exists as well, but is barely used.
"Independency in jeopardy when expropriation takes place decentralized"
Respondent 16 is afraid that in the new situation there will not be a full test of the expropriation any more since the administration cannot take an independent decision to expropriate if it has to refer to its own plan to motivate this. It is however common practice in administrative law to refer to a plan to motivate a decision. Also respondent 26 fear that the independency of expropriations is in jeopardy when decision making about it takes place decentralized.

Search for affected parties
Article 3 Ow provides that the person considered owner in the expropriation, is the person that is mentioned in the land register of the Kadaster. In the bill this provision does not return, which, according to respondent 21, can be problematic since it makes the role for the expropriator heavier and can lead to longer procedures because the expropriator has to conduct additional research to find the owner.

In addition, the obligation for expropriators to appoint a third representative (derde vertegenwoordiger) that is mentioned in the current article 20, in the bill only returns in the compensation procedure. In the administrative procedure this obligation should also be in place according to respondent 21 and the Council of Judiciary. Otherwise, the position of (relatives of) dead people and people living abroad of which no acting manager (zaakwaarnemer) is known could be deteriorated since their interest will not be represented in the best possible way and the expropriator would not have a representative of the affected party to negotiate with in order to settle amicably, which hampers the expropriation process.
Appendix X Survey about alternatives

Validatie oplossingsrichtingen administratieve onteigening

ANTWOORDEN

Naam ..................................................................................... / Anoniem

Algemeen


    #1 ... Voorbeeld: #1) 5
    #2 ... #2) 6
    #3 ... #3) 4
    #4 ... #4) 3
    #5 ... #5) 1
    #6 ... #6) 2

Opmerkingen64 ........................................................................................................................................

Eisen aan belangenafweging

2. Vindt u dat de belangenafweging zorgvuldig plaatsvindt in de voorgestelde oplossingsrichtingen?

   Zet een kruisje in de tabel onder ieder nummer bij ja of nee.
   Maak in de vierde rij een ranking van de oplossingsrichtingen als u alleen de zorgvuldigheid in acht neemt.

   # 1  2  3  4  5  6
   Ja
   Nee

Opmerkingen ........................................................................................................................................

3. Vindt u beroep in één instantie voldoende?

   □ JA
   □ NEE, toelichting: ................................................................................................................................

4. Ziet u de Kroon als onafhankelijk?

   □ JA
   □ NEE

Opmerkingen ........................................................................................................................................

5. Vindt u de belangenafweging in de voorgestelde oplossingsrichtingen legitiem (wettig en aanvaardbaar)?

   # 1  2  3  4  5  6

64 Opmerkingen en toelichtingen zijn facultatief.
Wensen met betrekking tot het onteigeningsproces

6. De wensen met betrekking tot het onteigeningsproces die de discussie de afgelopen 17 jaar beheerst hebben, zijn snelheid, eenvoud en transparantie.
   a. Onderschrijft u het belang van deze criteria?
      □ JA
      □ NEE, toelichting: ......................................................................................................................
   b. Welke overige criteria vindt u belangrijk met betrekking tot het onteigeningsproces?
      □ GEEN
      □ ........................................................................................................................................
      ........................................................................................................................................

7. Wat vindt u van de haalbaarheid van de termijnen die zijn aangegeven in de oplossingsrichtingen?

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8. Wat vindt u van de eenvoud (in termen van begrijpelijkheid voor burgers) van de oplossingsrichtingen?

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   a. Welke vorm van advisering acht u wenselijk?
      □ Advisering van bestuursorgaan door commissie zoals voorgesteld in Aanvullingswet grondeigendom
      □ Advisering van bestuursorgaan door commissie met langere termijn voor advies
      □ Advisering van bestuursrechter door Stichting Advisering Bestuursrechtspraak of door vergelijkbaar adviesorgaan
      □ Geen advies
      □ Anders:......................................................................................................................................
   b. In welke mate draagt advisering in uw ogen bij aan een zorgvuldige besluitvorming?
      zeer beperkt o o o o zeer aanzienlijk

10. De volgende vragen hebben betrekking op kennisgeving
    a. De termijn om in beroep te gaan tegen de onteigeningsbeschikking is in de Aanvullingswet Grondeigendom vastgesteld op zes weken. Wat vindt u van deze termijn?
       □ Precies goed
□ Te kort, beter zou zijn ... weken  
□ Te lang, beter zou zijn ... weken
b. De onteigeningsbeschikking wordt in de Aanvullingswet grondeigendom verzonden met gewone post. Welke manier van verzending prefereert u?
□ De voorgestelde manier, per gewone post
□ Per aangetekende brief  
□ Per deurwaarder  
c. In welke mate draagt een zekerdere vorm van kennisgeving in uw ogen bij aan een betrouwbare proces? In hoeverre neemt in uw ogen de betrouwbaarheid van het proces bijvoorbeeld toe als niet per aangetekende brief maar per deurwaarder bezorgd zou worden?

zeer beperkt ○ ○ ○ ○ ○ zeer aanzienlijk  
Opmerkingen ........................................................................................................................................

11. In de reacties op de conceptversie van de Aanvullingswet grondeigendom is er veel kritiek op het verdwijnen van artikel 17 Onteigeningswet (onderhandelingsverplichting tussen kroonbesluit en civiele rechter). Hoe belangrijk acht u het dat er onderhandeld wordt in de tijd tussen de onteigeningsbeschikking en het beroep bij de bestuursrechter dan wel Raad van State?

zeer onbelangrijk ○ ○ ○ ○ ○ zeer belangrijk  
Opmerkingen ........................................................................................................................................
Appendix XI Ranking of alternatives by expert panel

#1 – Alternative 0

- 6 mnd – 1 jaar
- Kroonbesluit
- Onteigning
- Titelbetwisting bij civiele rechter
- Cassatie bij Hoge Raad
- Advies RvS

#2 – Alternative 1

- 4 wkn
- Onteigenings-beschikking door gemeenteraad
- Indienen beroep
- Beroep bestuursrechter
- Hoger beroep AB RvS
- Advies commissie

#3 – Alternative 1.1

- 4 wkn
- Onteigenings-beschikking door gemeenteraad
- Verplicht beroep bestuursrechter ingesteld door bestuursorgaan
- Hoger beroep AB RvS
- Advies commissie

#4 – Alternative 1.2

- 4 wkn
- Onteigenings-beschikking door gemeenteraad
- Verplicht beroep in één instantie bij AB RvS ingesteld door bestuursorgaan
- Advies commissie
**Table 22 Borda Count Ranking Alternatives**

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# List of figures

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<tr>
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<tbody>
<tr>
<td>1</td>
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<td>Proposed expropriation process in internet consultation</td>
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<td>Alternative 1.1: Obligatory appeal (Proposed expropriation process after 20-1-2017)</td>
<td>51</td>
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<td>Guts, Schaal, Beitel</td>
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</tr>
<tr>
<td>24</td>
<td>Photos Doctor van Wamelstraat 9</td>
<td>75</td>
</tr>
</tbody>
</table>
List of tables

Table 1 Assessment scheme ........................................................................................................... vi
Table 2 Interviews .......................................................................................................................... 5
Table 3 Research Approach .......................................................................................................... 6
Table 4 Actors involved .................................................................................................................. 10
Table 5 Application of Williamson's model .................................................................................... 36
Table 6 Assessment scheme for expropriation processes ............................................................ 41
Table 7 Alternative 0 ....................................................................................................................... 42
Table 8 Assessment scheme of the SALP ..................................................................................... 49
Table 9 Alternative 1.1 .................................................................................................................... 51
Table 10 Alternative 1.2 .................................................................................................................. 52
Table 11 Alternative 2.1 .................................................................................................................. 53
Table 12 Alternative 2.2 .................................................................................................................. 54
Table 13 Assessment scheme ........................................................................................................ 58
Table 14 Number of Crown decisions ........................................................................................... 65
Table 15 Current expropriation process ....................................................................................... 66
Table 16 Categories of arguments ................................................................................................. 69
Table 17 Analysis Crown decisions Title IV .................................................................................. 69
Table 18 Analysis Crown decisions Title Ila ................................................................................ 71
Table 19 Timeline expropriation process Spanish case ............................................................... 73
Table 20 Position papers meeting House of Representatives 20-4-2016 ....................................... 80
Table 21 Reactions internet consultation ..................................................................................... 82
Table 22 Borda Count Ranking Alternatives .................................................................................... 93