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 willingness 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 practice 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 1 Assessment scheme

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

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.