

Public Law Information Regarding Land; Dutch proposal for registration

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ABSTRACT

The legal status of land is not only determined by its ownership situation and by the existence of limited private use rights. Public authorities may also impose public law restrictions on land, mainly with regard to its use (these restrictions are limitations in the admissible use of real estate or encroachments on the property-rights of real estate caused by official decisions which are based on specific statutory laws). Registration of these restrictions is in the interest of potential buyers as it aims at preventing them from buying real estate they can not use the way they intend to. It is also in the interest of the authorities, for checking if people live up to them and for incorporating them in (physical) plans.

The paper presents the structure of the registration system that is proposed in the Netherlands and the results of some pilot projects. The bill to introduce the system is accepted by the Government and is likely to be discussed in Parliament in 2002. The proposed system gives important roles to both the Cadastral Agency and the municipalities. It uses the existing cadastral map as a geometric base.

The proposed system is compared with international developments, especially those found in 'Cadastre 2014'. The concept 'land object' is compared to the rather administrative approach in the Dutch proposal.

Some recommendations are given to both the Dutch authorities and the international forum.

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1. INTRODUCTION

In the Netherlands the Agency for Cadastre and Public Registers ('Cadastral Agency') is empowered to register the parcels of real estate and the rights upon these derived from private law (like ownership, superficies, condominium, lease, servitude). So far only a limited number of public law restrictions are registered in this system. Based on the daily practice of conveyance it has been stated and studied at numerous occasions that more public law restrictions should be registered. With public law restrictions we mean limitations in the admissible use of real estate or encroachments on the property-rights of real estate caused by government decisions which are based on specific statutes. The most complete overview of the issue at stake, including a detailed proposal on how to create a system of registration of such public law restrictions, can be found in the three Ravi-reports published around 1990 (see De Jong and Zevenbergen 1991). After a pilot project, which added little to the reports, the most involved authorities and agencies reached an agreement on how to further structure a registration system. In 1996 this led to a 'temporary regulation' which allows municipal, provincial and national authorities to inform the Cadastral Agency on a voluntary basis of the existence of public law restrictions, which will be acknowledge in the cadastral database. Participation was diverse, and mainly an one-time endeavor. The information does not seem to be regularly up-dated. In 1997 an additional study was undertaken by Coopers & Lybrand in order to determine the need, the structure and the costs of a registration system. Based on all of this the responsible Deputy-Minister of Housing, Physical Planning and the Environment started the preparation of a bill (likely to be presented to Parliament this year). Simultaneously three municipalities are running pilot projects to work out the practicalities of the proposed system, which will be an important input for the drafting of the governmental regulations later on.

In this paper the importance of registration of these restrictions and the Dutch proposal for a registration system are explained. A few possible complications are described that might be tackled when a more geometric approach would be used. Such an approach is also one of the international trends regarding the registration of public law restrictions which are presented. The paper ends with a few final remarks.

2. IMPORTANCE OF REGISTRATION

A better registration of public law restrictions mainly serves two objectives:

- Interests of the parties to real estate conveyance
- Interests of the governmental (land) administration.

2.1 Interests of the Parties to Real Estate Conveyance

Considering the conveyance of real estate it is important to have complete and accurate information about all legal aspects concerning real estate. This goes for the aspects caused by private law as well as for the aspects caused by governmental interference. Both can cause severe limitations and encroachments on the rights of an owner to use and to convey his property. It can be very important for a person who is considering to buy a certain real property to know about any restrictions in advance, because he might have aims with the property which are not admissible due to certain government decisions. Registration makes it possible for this possible buyer to obtain this kind of information before taking the decision of buying the property. At present it is debated among Dutch lawyers if it is the seller who is obliged to inform the buyer, or the buyer who has to inquire about the existence of public law restrictions of public law nature. With regard to existing restrictions of private law nature, it is undisputed that the seller has to inform the buyer of their full extent (art. 7:15 BW (Dutch Civil Code)). An important argument used by those treating the public law restrictions differently than the private law restrictions, is the lack of systematic registration of the former.

All in all it can be said that at present the chances for a disappointed buyer who was not aware of a public law restriction to dissolve his contract or to claim damages are small. At present it would also be hard for him to make full inquiries before entering in the contract. This would be very elaborate and time consuming. The time that would be needed is often not available in the very active and strained real estate market in the Netherlands. And even then certainty will no be reached, since the information is often only supplied verbally or with a disclaimer.

Although one would expect differently, so far there have been very few court cases instigated by disappointed buyers. It is assumed that this is caused by the combination of uncertainty of the interpretation of the law, problems of evidence as to what has and has not been said by the civil servants, and –especially with regard to authorities- the fear by some for a disrupted relation with those.

2.2 Interest of Governmental (Land) Administration

For the government it is also important to know the possibilities and impossibilities caused by public law restrictions. This can be of great importance while preparing, deciding on, formulating and implementing public policy, especially with regard to physical planning and land development plans. Certainly when the information is necessary at different places within a governmental body and even more when it concerns different levels of government, a well defined system of registration is useful. The improved access to the information will also make it more likely that citizens are aware of the public law restrictions, and will obey them. And when citizens would deliberately ignore them, the improved access to the information will increase the awareness of the existence of these within government, making it much more likely that this is discovered and more easy to develop an enforcement policy.

3. PROPOSED REGISTRATION SYSTEM

The public law restrictions which should be registered according to the proposals are based on the 'list of 65' from 1991. This list will have to be updated. About half of the types of restrictions is vested by municipal authorities, but these concern about 85% of the affected parcels. It is also assumed that these municipal restrictions change more often than the others. Not counting the municipal zoning plans, a rough estimate is that one million parcels are effected on a total of about 6 million. With regard to 1/3 of the types of public law restrictions, registration in one form or another is presently taking place in a mandatory way, and another 1/3 can be registered voluntarily as a result of the 'temporary regulation'. For a better understanding of the problem some examples of government imposed public law restrictions are given in the text box.

EXAMPLES OF GOVERNMENT IMPOSED LEGAL RESTRICTIONS

The Expropriation Act

According to this statute several governmental authorities can decide on the expropriation of certain premises. The acquisition of property by the government however requires under this statute an elaborate procedure. Firstly the governmental administration has to control the reason (the title) for the expropriation and then the judicial authorities have to take the final decision including indemnification for the owner. In practice most decisions on expropriation are being taken by the municipal government on approval of the central government. These decisions should safeguard further urban development. When taking decisions on expropriation the cadastral information on the properties concerned plays an important role. As well the municipal decision as the central government approval are feasible for registration in the proposed system. Under present law only the final court decision is subject to registration.

The Municipal Pre-emption Act

This statute aims at the easy acquisition of real estate by the municipal government in case of urban renewal or large-scale development. It provides the municipality with the right of pre-emption (preference) in case of sale of real estate in specifically designated areas. The act holds a rather complicated procedure as to protect the rights of the owner-seller of the property. On the basis of cadastral information as to all the parcels concerned, the municipal government has to take a special decision, whereby the right of pre-emption is imposed on the listed parcels. This statute already requires the registration of the municipal decision at the Cadastral Agency, although the right takes effect the day upon publication in the State Gazette.

The Act on Historical Monuments

This statute serves the protection of historical monuments. On the one hand it imposes limitations as to the capability of the owner of a monument to change the property, on the other hand the owner has a right to special tax-reductions and subsidies in order to uphold his property. The decision on the assignment as historical monuments can be taken at all three levels of government. The decision taken by the central government is already subject to registration at the Cadastral Agency. Registration of the decisions by the provincial and municipal authorities is part of the proposed system.

The Soil Protection Act

This statute serves to protect the quality of the soil and to regulate the clean-up of contaminated sites. An important instrument for the latter is the provincial decision to declare a site as a severe and urgent case, which needs to be cleaned. After identifying the cadastral parcels which this site covers (wholly or partly) this is registered at the Cadastral Agency. Registration of requisitions or other orders are under consideration.

An efficient and effective form of organizing the registration of these restrictions has to comply with three criteria: suitability (the combined demands of the ones supplying the information), consultability (the combined demands of the ones using the information) and limitation of costs (in everyone's interest). These criteria can be met with a flexible system in which we distinguish between indicating the existence of a public law restriction on a certain parcel in an automated information system (without giving detailed information about the restriction) and storing the document containing the decision founding the public law restriction. Every parcel will be supplied with as many indications as there are public law restrictions on that parcel; each indication containing the kind of restriction and the place where the document can be found.

To have a uniform entry toward the registration it was decided to use the cadastral parcel, which plays an important role in the process of conveyance, as the unit of registration. This was done even though a number of decisions establishing public law restrictions contain maps or addresses only and not parcel numbers. It is however possible to match these maps or addresses to the relevant parcel numbers. This can sometimes be elaborate, but automation of the processes is feasible.

The proposed registration system distinguishes between public law restrictions vested by municipal authorities, and public law restrictions vested by other authorities (like provinces and national agencies and ministries). The document containing the decisions by municipal authorities to vest, change or lift a restriction will be registered in the new municipal restriction registers. The municipalities are also encouraged to create a computerized municipal restriction registration for indicating the existence of public law restrictions in a parcel-based manner. This registration will have an online link to the cadastral registration, which holds the indications for the public law restrictions of other authorities. These non-municipal authorities will also have to register their documents in the public registers at the Cadastral Agency. The Cadastral Agency will create or update the indications in the cadastral registration based on these documents. The scheme provides also for a transitory solution for municipalities that have limited experience with ICT. They will have to set up the restriction register, but can refrain from setting up a computerized municipal restriction registration and offer lists of parcel-based indications to the Cadastral Agency for inputting them into the cadastral registration. The operations of the system are organized in a similar way as the one for the notarial deeds of conveyance. Contrary to private rights, it is not necessary to register a document vesting a public law restrictions to have the restriction become effective. Nevertheless failing to register it in time (a few days are suggested) will make the authority liable for the damage a buyer incurs due to a restriction he did not know of.

The municipal and cadastral registration will have to be linked in order to allow the user to get a complete overview when accessing the system. The Dutch cadastral registration has been accessible through a closed network at all notaries, many real estate agents and municipalities and several other places for quite some years, and linking the municipal restriction registrations to the cadastral registration opens up a large amount of outlets for the proposed system. The costs of an inquiry will be low. When inquiring through the Cadastral Agency the normal cadastral fees will have to be paid (about 5 Euro per parcel, regardless of

the data found). At the municipality one will have to pay for written information. These fees will be set by the municipal council and are likely to be in the same range.

4. IMPLEMENTATION PROBLEMS

During the preparation of the proposals for the system two main problems were foreseen. The first one deals with getting the existing public law restrictions into the system, and the second one deals with the effect of subdivisions on the correctness of the indications.

Many authorities have vested public law restrictions through the years. Awareness of this is fragmented throughout the public sector, and it is expected that there will be quite some cases in which no active awareness of certain public law restrictions exists. This means that during the implementation phase of the system authorities need to collect information from many places in their organizations, and even have to go back into their archives to see what 'forgotten' restrictions they have. The complexity of this has also been confirmed by the municipalities undertaking the pilot projects. It can be assumed that there will be situations in which the public law restriction has lost its meaning in real life, or is no longer considered useful. If this inventory of existing public law restrictions is made in time, the 'unnecessary' public law restrictions can be repealed, and do not have to be entered into the system. Once the documents of public law restrictions that are still valid are identified, they need to be linked to the affected parcels. This is likely to cause complications, even for the documents in which the affected parcels were mentioned due to subdivisions and other parcel-changes.

Keeping the proposed registration up-to-date is not only a matter of processing the documents that vest, change or lift a public law restriction, but also making sure that the indications are placed with all the affected parcels, and only with affected parcels. The parcellation in the Netherlands is based on the ownership situation and the existence of a limited number of property rights. No separate parcels are formed due to public law restrictions (see Figure 1).

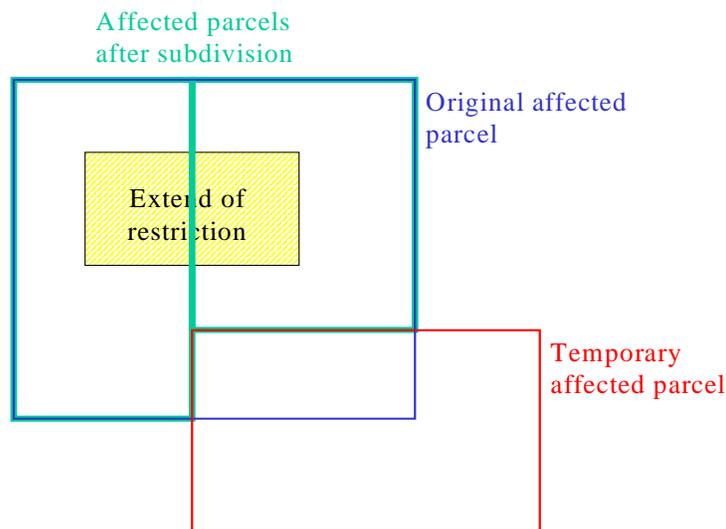


Figure 1 Parcels affected by a restriction before and after subdivision

This means that often only a part of parcel is really affected by a restriction. But since the restrictions are only indicated in the municipal or cadastral (administrative) registration, one has to study the documents to find out which part of a parcel is affected. This means that after subdivision it is not easy to determine which of the newly formed parcels are affected by the restriction and which ones are not. Just to be on the safe side the indications will be placed with all newly formed parcels immediately upon subdivision. Subsequently the authority responsible for the restriction will be informed of the subdivision, and will have to report back which parcels are really affected, and for which parcels the indications will have to be removed. This mode of operation is already prescribed for the state monuments, but with limited success so far. For the municipalities this will be more complex since the Cadastral Agency will not know which parcels are affected by a municipal public law restriction. Therefore the municipalities will have to process the complete monthly overview of parcel-changes in their territory to be able to keep these links up to date. Even under ideal circumstances this would mean that their parcellation can run behind up to 6 or 10 weeks. This means that an inquiry regarding a recently formed parcel in the municipal restriction registration through the cadastral registration has to use both the present and the former parcel identifiers. More recent ICT-developments (like distributed databases) will make it possible to come to faster solutions in the near future.

5. TOWARDS A GEOMETRIC APPROACH

The bulk of the complications mentioned here are caused by the decision to indicate the existence of restrictions through an administrative, parcel-based index system. Around 1990 this choice could be understood, although Bogaerts recommended already in 1991 to include geographical information in the registration system. He did realize that this would require the use of GIS, with which most municipalities had none and the Cadastral Agency had very little experience at that time (Bogaerts 1991: 10). Therefore he suggested that another agency would assist, which would have further complicated the already strained organizational set-up at that time. Ten years further along the path of GIS development and diffusion we wonder (with Avenarius and Pluijmers 2000) if nowadays the use of a geometric index (for instance through the use of the large scale topographic base map (GBKN)) would not lead to a better solution. On the other hand such solutions would still be quite difficult for many of the smaller municipalities, but nothing stands in the way of the ones ready for it to use it to facilitate, and even automate, the linking process. Trying to include this into the present process would again lead to considerable delay, and prove the saying “The better is the enemy of the good”. It is generally understood that the proposed systematic registration system only forms the base, and that it will be expanded in the future. Not only with respect to geometric approaches, but also to the number of government decisions included (one could for instance add permits later on).

6. INTERNATIONAL TRENDS

In general land registers and cadastres do not include public law restrictions. Sometimes a few very specific restrictions might be included (e.g. in the Netherlands appointment according to the Natural Beauty Act 1928, which leads to a number of tax exemptions, when the estate is open to the public). In an important German handbook from the 1950s the

possibility of inclusion of this type of restrictions in the land register and cadastre is commented very critically (Kurandt 1957: 16). Nichols presents in her PhD study a figure on examples of tenure information currently available in most land registration systems, in which she indicates that public rights (restrictions) are rarely included (Nichols 1993: 112). In an Austrian handbook on land registration from 1992 it is indicated that under English and French law the problem is solved much more comprehensive than in the Central Europe (Hofmeister and Auer 1992: 4). A short description of the issue in France and Germany was included in De Jong and Zevenbergen 1991.

The recent (international) trend is to register this type of public law restrictions more and more. In Denmark for instance a few years ago the provinces started to register land use restrictions (Ekner 2001: 9). Others see an increasing role of land registers and cadastres in this (Van der Molen 2001: 1). Furthermore it is one of the items to which the publication 'Cadastre 2014' of the Working Group 1 of Commission 7 of the International Federation of Surveyors (Kaufmann and Steudler 1998) pays specific attention.

7. CADASTRE 2014

In Cadastre 2014 one of the statements is that cadastral systems will increasingly show the complete legal situation on land, including public rights and restrictions. Mainly due to the growing world population and the development of new technologies natural resources, including land, are under increased pressure. To protect these natural resources, restrictions to the absolute right to use them are defined in the name of social necessity. States designate zones where restrictions are in effect. These zones are dubbed 'legal land objects' in Cadastre 2014. The boundaries of these areas are in principle independent of the private property boundaries, but they have an impact on the possible use of the land (and therefore have an impact on the property right of the owner). But in most countries they are not part of the official register and of the principle of publicity. And even when there is a well defined procedure for the definition of the respective boundaries of the rights and restrictions, the results are not publicly known. Interested citizens and organizations must make a lot of efforts to get information about this type of rights and restrictions, which have an effect on the legal situation, through making a survey at different governmental organizations. (Kaufmann and Steudler 1998: 25-28)

“The boundary definition process defined under public law corresponds to the consent principle because it follows democratic legal rules. But there is often no boundary verification, no title verification, and no registration in an official legal register. The principles of booking, of speciality, and of publicity are therefore violated. The high legal security (even more than 100%) for private law rights, contrasts with the near 0% legal security for public law restrictions.” (Kaufmann and Steudler 1998: 28).

“It will be necessary in future for existing and new legal land objects introduced by traditional, private and public law, that the boundary definition and the correctness of this definition are verified carefully, and that the results of the definitions are published in an official register. In this way the security of land tenure, land use, and resource management

will be maintained in view of the land owners and of the societies as a whole.” (Kaufmann and Steudler 1998: 28-29).

This is also in line with the paradigm shifts of the societal demands of cadastres from serving the land market, through being a planning tool to being a land management tool (Ting and Williamson 1999).

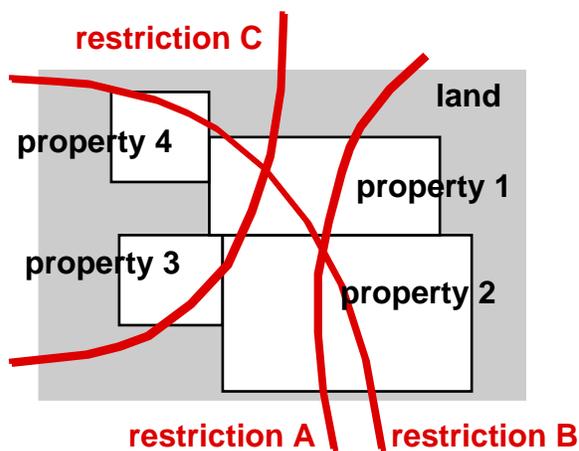


Figure 2 Overlapping legal land objects (Kaufmann and Steudler 1998: 25)

Of special interest in Cadastre 2014 is the use of the word ‘legal land object’, which is a piece of land in which homogeneous conditions exist within its outlines. Different rights and restrictions will have different land objects and boundaries, which can overlap with each other (see Figure 2).

8. FINAL REMARKS

After more than a decade of studies, discussions and proposal writing, the introduction of a bill to Parliament to introduce a systematic registration of government imposed public law restrictions in the Netherlands seems to be near. The work is divided mainly between the Cadastral Agency and the municipalities. The expected improvement in the access to information on the existence of public law restriction will on the one hand improve the position of buyers of real estate. On the other hand it will improve the quality of government, through better informed policy making in the field of physical planning and easier monitoring and policing of the obedience to the public law restrictions.

An important area of complications with the proposed registration system deals with assuring that the existence of a restriction is indicated by all, but not more than all the parcels affected by the restriction. The processes needed to assure this become quite complicated, because of the strong administrative approach in the proposed registration system.

The proposed registration system does not use the idea of legal land objects from Cadastre 2014. The existing cadastral parcels (defined according to private law) form the base, and no separate land objects are defined for the public law restrictions. The proposed system does not even really concern itself with maps, and it is focused on the underlying documents and

an administrative index. Only in a minority of these documents the boundaries of the affected area are presented in a geometric form. In many cases it is even doubtful if these boundaries are defined through the type of process that Cadastre 2014 sees as corresponding to the consent principle. Different public law restrictions are created through very different procedures within the Netherlands. The proposed system leaves this as it is, and is limited to using the outcomes of such procedures as good as possible to improve the access to information for those interested. It does not make the assuring access to this information into an integral part of the procedures. From political and inter-organizational perspectives this pragmatic solution is probably a wise one. Looking at it from the perspective of spatial information management the solution is not optimal, and contributes less to a (national) spatial data infrastructure (SDI) than would probably be (theoretically) possible.

We clearly support to drive towards a systematic registration of public law restrictions in the Netherlands. Our remarks regarding the possibilities of a more geometric approach mainly deal with the work processes that underlie the proposed system. The present proposals -as we see it- do in no way inhibit the use of geometric information to (automatically) update the link between restrictions and parcels by those authorities that want to do so. Trying to prescribe a more geometric oriented approach in the law at this stage would cause a new and prolonged delay, and is likely to challenge authorities responsible for few public law restrictions beyond their capabilities (both financially and technology wise). We would, however, recommend to encourage the use of a more geometric approach in the future.

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BIOGRAPHICAL NOTES

Mr. Zevenbergen and **Mrs. de Jong** belong to the section Geo information and Land Development of the Department of Geodesy of TU Delft, in which prof.dr. De Jong holds the chair of real estate law. Since the early 90s both are involved, in different advisory roles, in the preparation of the Dutch registration system for government imposed public law restrictions in land. This focus on the legal and administrative aspects of geo information in general and cadastres in particular colors much of their other work as well.

De Jong is furthermore involved with legal instruments and policy development in the field of spatial planning and land development, both at the university and as member of the relevant governmental advisory body 'VROM-Raad'.

Zevenbergen is also involved in land registration projects in Eastern Europe, and he is about to defend his PhD study on systems of land registration, based on case studies in four different countries (the Netherlands, Indonesia, Austria and Ghana).