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The concept of non-financial compensation: What is it, which forms can be distinguished and what can it mean in spatial terms?

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Abstract

Non-financial compensation increasingly receives attention in both planning practice and science across the world. Non-financial compensation exists when a government compensates a person or company with an interest in land for the loss of one or more of his property rights therein by creating a new property right that he can either use or sell. It also exists when a government provides an incentive for developers to realise certain planning goals either on their land or on the land of others and the government does not directly subsidise that realisation but creates a property right that they can use or sell when they have realised the goals.

We distinguish between single-purpose and multi-purpose types of non-financial compensation. A single-purpose type of non-financial compensation exists when the non-financial compensation-scheme is not a planning tool in itself but only exists as a way to compensate the landowner for his loss. It relates to the compensation of a loss of right and could be considered as a passive instrument as it is only used to compensate. A multi-purpose type of non-financial compensation exists when the scheme not only compensates the landowners, but is also used as a tool to reach a certain spatial planning development goal. This type of scheme relates to an opportunity to develop something additional and implies an actively deployed scheme.

The paper elaborates on why government has to and wants to compensate and why government can recapture added value in spatial planning cases.

1. Why governments use non-financial compensation-schemes

Non-financial compensation (NFC) increasingly receives attention in both planning practice and science across the world. It means that a government does not directly subsidise or compensate a landowner or developer for his loss or his endeavours. Non-financial compensation exists when a government compensates a person or company with an interest in land for the loss of one or more of his property rights therein by creating a new property right that he can either use or sell.

It also exists when a planning authority provides an incentive for developers to realise certain planning goals either on their land or on the land of others and the government does not directly subsidise that realisation but creates a property right that they can use or sell when they have realised the goals. These types of incentives are non-financial incentives.

We, however, use the term non-financial compensation for both situations. The reason is that we take the point of view of government in this paper and not the point of view of the private parties. In other words: in both cases government creates a new property right to compensate the developers and private parties to compensate them for their losses or their endeavours. It would be interesting to take the position of the private parties in account and focus on situations where they choose to or are forced to compensate for externalities of their market strategies in kind instead of paying for them. That is however not the focus point of this paper. The example of the European legislation on nature compensation through the Birds (1979/409) and Habitat (1992/43) Directives (European Commission, 1979; 1989) thus does not fit in the framework set out in this paper.

Non-financial compensation is therefore used to compensate a (natural or legal) person with an interest in property for the loss of a property right or, the other way around, to create an incentive for developers to realise certain planning goals. An example of the first case is when a plot of land that could be developed in many ways becomes subject to rules that confine its development to low rise-buildings. In some countries the landowner has to be compensated for this loss of opportunity. When the planning authority (usually a local government) that took away the right does not have the financial resources, it may give the private landowner a new right that he can sell on the market or that gives him the right to develop property elsewhere instead of compensating for the 'partial taking'.

In this paper we will further discuss the concept of non-financial compensation. We will discuss why governments (i.c. planning authorities) use non-financial compensation as a planning tool, why governments have to compensate for the loss of a property right and – the other way around – why governments have the right to recapture increased market value.

We distinguish between single-purpose and multi-purpose types of non-financial compensation. A single-purpose type of non-financial compensation exists when the non-financial compensation (NFC)-scheme is not a planning tool in itself but only exists as a way to compensate the landowner for his loss. It relates to the compensation of a loss of right and could be considered as a passive instrument as it is only used to compensate. A multi-purpose type of non-financial compensation exists when the scheme not only compensates the landowners, but is also used as a tool to reach a certain spatial planning development goal. This type of scheme relates to an opportunity to develop something additional and implies an actively deployed scheme.

An example of a single-purpose type on non-financial compensation is the famous Penn-central case in New York where the owner of the station was also granted the right to use his unused development rights off site, but here the motive was only to compensate him for his loss of development rights, not to promote the construction of a new high density neighbourhood.

The case of Tokyo Station is an example of a multi-purpose scheme. Tokyo Station is a historic building next to the Central Business District of Marunouchi in Tokyo. The owner of Tokyo Station had the right to build at a Floor Area Ratio (FAR) of 9 where the station was built at only FAR 2. His plan to build two towers next to the station was protested since the buildings would 'overshadow' the historic building of the railway station. He was then granted the right to sell the development rights he had left to other sites in the Central Business District of Marunouchi that was rezoned because the city of Tokyo wanted to encourage development in the highest possible densities. The two motives therefore were conservation of the Tokyo station and promotion of the construction of high-density buildings in the areas that could receive the TDR (Chorus, 2008). The Highline-project in New York City is also an example of a multi-purpose NFC-scheme. Here, when it was decided that an elevated rail track would not be demolished but converted into a public park, TDRs were used not only to compensate landowners for their loss of development rights. In addition the scheme was used to promote the construction of high-rise buildings at a special zone in the borough of Chelsea.

Another example is the Space for Space-programme in the Netherlands (Ruimte voor Ruimte). In this programme, developers agreed that they would only receive the right to develop expensive housing projects after compensating those farmers

financially, who (on a voluntary basis) decided to stop their intensive livestock industries and have their lands converted into natural parkland or agricultural land. The right to develop one's land is a property right that the developers have to buy from the farmer who quits his intensive livestock farming activities. Since there may be a problem of phasing, the right is not directly purchased from the farmers; instead the money is paid to a farmers' compensation fund. In the Dutch legal system some legal barriers rise with a system that forces the developers to purchase the rights directly from the farmers. The programme is regarded as an example of non-financial compensation because the government does not pay the farmers to stop farming in the area. It gives them a property right (the right to develop housing projects). For the developers the programme is an example of non-financial compensation, because they receive the right to develop profitable housing projects when they pay for conversion or agricultural land into nature land.

The examples show that a planning authority may use a non-financial compensation-scheme to compensate landowners for their loss of economic value or to provide an incentive for them to realise a certain planning goal. Such planning goals include goals like social housing, environmental goals, conservation of historic sites, conversion of sites, or the prevention of urban sprawl (Pruetz, 2003). These goals could add up to an infinite list but we take a more abstract point of view and focus on the motives why planning authorities use NFC-schemes. We discern four general motives:

- a) Compensation for lost opportunities
- b) Lack of public resources
- c) Increasing ineffectiveness in the management of urban plans
- d) Improvement of the overall quality of urban and regional space

The first two motives will generally be examples of single-purpose NFC-schemes, since they are only meant to compensate. The latter two can result in multi-purpose NFC-schemes. The four motives do not exclude each other; they can apply to the same case at the same time. This would be the case when an existing land-use plan does not result in reaching the results for which it was drawn up. It does, for example, not succeed in its aim to protect the green zones from the expanding city. A new plan is now drawn-up at a regional scale in which the surrounding green zones of the city are protected while at the same time higher-rise buildings will be allowed in an area where the planning authority wants to create a high quality mixed neighbourhood including both office and residential use. As a result some property owners who already made some investments in the legitimate expectation that they could build residential low-rise buildings in the green zone, are now left with land that is virtually worth nothing. The city does not possess any financial resources to compensate these landowners; therefore it decides to compensate the landowners with development rights that they can either use or sell in the neighbourhood where the city wants to promote the construction of high-rise buildings. In such a case, the reasons to use the NFC-scheme would be: compensation of lost opportunities of the landowner in the green zone, the lack of financial resources as the local government does not have money to compensate and cannot accomplish the goals itself, ineffectiveness of the former urban plan as this did not succeed in protecting the green zone and the

improved quality of space through concentration of urban growth within the boundaries of the existing city and the safeguarding of the green zones.

The popularity of NFC-schemes falls within a trend that at least exists in the Western world and western based systems (Asian tigers) whereby the traditional borders between state and market have eroded, now a complex web of relationships between governments and the market exist. Keywords of this relationship are public private partnerships, negotiated development and (to some extent) neo-liberalism. Sometimes the planning authorities themselves are mixed entities that have characteristics that are traditionally associated with the market (making profit) and with the state (promoting public, not private benefits).

Davy speaks of the trend of negotiated developments or planning by agreements: "Negotiated developments are land uses for which a planning authority grants specific zoning or planning permissions as the result of a negotiated agreement between the municipal government, the developer, and other stakeholders" (Davy, 1998, p. 1). This strikes us as a good definition of the trend although we should note that the American planning systems are traditionally more oriented towards a strict demarcation between the planning authorities and the developers. TDR systems are often as-of-right (Booth, 2003). The point is that the use of NFC-schemes may add due to trend of negotiated developments but a NFC-scheme is not necessarily an example of it. Again, we take the position of the government as our point of view since a NFC-scheme that involves a tradable right will generally involve a price-negotiation between market parties.

Davy (1998) raises the question if negotiated developments, whether formalised or informal, improve or corrode spatial planning and land use control. A first group of arguments against negotiated development is directed against zoning and spatial planning and questions the legitimacy of negotiable restrictions on land uses. A second group of arguments criticise negotiated developments for more political reasons. Since development negotiations consume substantial resources, the uncertain result of the negotiation process puts into question whether resources are employed wisely. A final group of arguments against negotiated developments draws upon the traditional outlook of the planning profession. Although 'planning' means different things to different people, the vast majority of professional planners consider themselves defenders of the public best. Planning by agreement is more flexible than planning in classical way (by detailed legislation); it allows governments to define the goals and purposes of development whereas the market will achieve an optimal distribution of development rights. It thus combines the best of two worlds; it overcomes the social injustices of the market and the inefficient rules of the government. In this conclusion we also find the reason why NFC-schemes are so popular, they also aim to have the best of 'more than one world'. That means that, when planning involves compensation, NFC-schemes are more efficient, more effective and cheaper than traditional planning tools.

Having defined the concept of NFC we now will have a closer look at the reasons why governments have to compensate (paragraph 2), and sometimes want to compensate (3) and why they can recapture values that has increased because of the act of a planning authority (4). Conclusions will see to why the NFC-concept helps to compare NFC-schemes in different planning systems and legal systems. NFC is a new term that is not used in any country-specific planning or legal system, and can therefore be used by academics and planning practitioners throughout the world as a neutral concept without a country-specific burden.

2. Political motives

Generally speaking market-based planning instruments receive a lot of attention in many countries (Janssen-Jansen et al., 2008). Neoliberalism is used to describe this development. In this context we would describe this trend as characterized by a government that becomes a less active regulator, and instead becomes a facilitator of new developments that are preferably realized by the market. South-Korea is a perfect example of this trend. Choo (2008) states that in South-Korea these instruments are introduced because the regulator hope that such market-based instruments will be used to promote the public interest in a country that is known for its strict regulations.

A general trend seems to be that political support for an active government has been decreasing, and instead market-based planning tools seem to have gained support. However, neoliberalism may not be the best way to describe the various political motivations that various writers found in the case studies of the NFC-study (Janssen-Jansen et al., 2008).

In New York, a strong tradition in market-based planning instruments exists. The reason being not only that the city often lacked funds for direct investments but also that, at least over the last decade, there is no political support for an approach that relies on a more direct involvement of the government (Putters, 2008; Van der Veen, 2009).

This lack of support was not the reason why the Dutch Space for Space programme was implemented with a non-financial compensation instrument. Here the reason was primarily found in the aim to find a way to provide farmers who would loose their farms with full compensation (warme sanering in Dutch). This aim was firmly defended by the Christian Democratic Party (CDA) that usually receives the farmers' votes (Volkskrant, 2001; Janssen-Jansen, 2004).

In Tokyo the reason to implement a non-financial compensation instrument in the Marunouchi-district was that individual landowners enjoy an almost untouchable position in Japan. Landownership is highly respected since emotional values are attached to it (Chorus, 2009:46). Due to negative experiences in the past Japanese local government rarely uses the instrument of expropriation. Expropriation contradicts with the Japanese consensus-orientated society. A non-financial compensation instrument could therefore be presented as providing the landowners with freedom to choose between more options.

In the midsized Andalusian city of Almeria the reason to implement a non-financial compensation instrument was that there was political pressure to save historic buildings whereas the city lacked the funds to do so. This was different in Orriols (Valencian Region) where conflicts blocked land readjustment and a non-financial compensation instrument was invented to overcome these conflicts (Blanc, 2008)

Finally, in Italy a strong decentralized tradition in urban planning resulted in a situation where regions could follow their own distinctive philosophies. Corruption and a lack of transparency in planning choices has led to the mediation of interests with satisfactory results for private development, few benefits for the public (Leoni, 2008; Ponzini, 2008).

In short: there are various direct political reasons to use non-financial compensation instruments but there are also some general developments in public policy theory and in the legal system on which we will focus in the remainder of this paper.

3. Why governments have to compensate

In this paragraph we elaborate on the motives why governments have to compensate persons who lose one or more rights to property¹. Sometimes they cannot be compensated in money (because of lack of funds), and therefore have to be compensated in the form of a right elsewhere. In urban and rural land development property rights play a very important role. Spatial changes will always have effects on property. Article 1 Protocol No. 1 European Convention on Human Rights guarantees:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The use of land development tools and planning tools therefore will necessarily find a boundary in the protection of the fundamental right to property (Groetelaers & Ploeger, 2007).

The already mentioned Highline-project in New York City ended a battle over an elevated railway that had become obsolete. In the manufacture district, shop owners underneath the redundant highline had sought ways to have the railway demolished so that they could use the airspace to build new, higher, buildings in one of the last underused areas in Manhattan. They had already reached an agreement with former mayor Giuliani that the railway would be demolished, but things turned out different when mayor Bloomberg promised during his election campaign that he would not tear the railway down. The shop owners under the railway claimed that if the railway would stay, they would lose the opportunity to develop their properties. They demanded compensation, which they received in the form of air rights that they could sell in the district (see www.thehighline.org). This case is interesting for more than one reason, but here we mention it to illustrate the concept of a 'partial or regulatory taking' that was developed in the United States where the constitution protects property in the Fifth Amendment.

The concept of a regulatory taking is related to the concept of a property right. In his work *Contracting for property rights* Gary Libecap (1989: 1-4) defines property rights as: "Property rights are the social institutions that define or delimit the range of privileges granted to individuals to specific assets, such as parcels of land or water. Private ownership of these assets may involve a variety of rights, including the right to exclude non-owners from access, the right to appropriate the streams of rents from use of and investments in the resource, and the right to sell or otherwise transfer the resource to others."

He continues by saying where these rights stem from: "Property rights institutions range from formal arrangements, including constitutional provisions, statutes, and judicial rulings, to informal conventions and customs regarding the allocations and use of property. Such institutions critically affect decision-making regarding use and, hence, affect economic behaviour and performance. By allocating decision-

¹ We do not use the term landowners because the persons that need to be compensated may just as well lease the land.

making authority, they also determine who are the economic actors in a system and define the distribution of wealth in a society. (...) Because certain property rights arrangements can reduce transaction costs in exchange and production and encourage investment in order to promote overall economic growth, they have public goods aspects.”

The definition points the finger at an important aspect of property rights, namely that they do not necessarily refer to the term ownership. Property rights involve much more than the rights of the legal owner; they involve the rights of tenants and other users as well and to a further extent than in civil law countries. Secondly, the final quotation points the finger at another important aspect of property rights: they have public goods aspects. We believe this to be a very important aspect for two reasons. In the first place, it refers to the public meaning of property rights; they function within society that (depending on the country and the specific rights) protects them to a lesser or further extent and even defines property rights that do not as such exist in other countries.

As the importance and the amounts of property rights grow, the loss of such rights provides a ground for compensation. It makes sense that governments look for ways that prevent them from having to compensate at a ‘fair market value’ but rather create new property rights to compensate the owners.

The concept of a partial or regulatory taking has gained importance in European countries. The European court of Justice seems to use a concept of taking that is analogous to the American concept (Groetelaers & Ploeger, 2007). In the James-case (James and others v the United Kingdom (21 February 1986) the European Court of Justice mentioned the term ‘property right’, when it stated that: (...) “the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the ‘public interest’, even if they involve the compulsory transfer of property from one individual to another.” The line between the concept of indirect expropriation and non-compensable regulatory governmental measures has not yet been systematically articulated. However, a close examination of the relevant jurisprudence reveals that in broad terms, there are some criteria that tribunals have to use to distinguish these concepts: 1) the degree of interference with the property right, 2) the character of governmental measures, i.e. the purpose and the context of the governmental measure, and 3) the interference of the measure with reasonable and investment-backed expectations” (OECD, 2004).

When a landowner loses an opportunity to use his property profitably, this is considered as a partial taking. The theoretical background hereof is that ownership in common law countries is not thought of as one undividable right, but rather as a bundle of sticks. Those sticks represent rights and interests in the property. Some of the sticks (the right to make binding rules, the right to take land for public uses) are reserved for the legislator/sovereign whereas others are for the private parties. If the government takes away a stick – in the Highline-case the opportunity to develop the space above the shops – it leaves the owner with fewer rights to the land than it previously had. The government must compensate the owner for this loss.

Governments however do not always have financial resources to compensate the landowners for their loss. Therefore they sometimes compensate the landowners by giving them the right to sell a development right on the market to a different landowner on a location where there is no such restriction. This is what happened

in the Highline-case. In that case compensation is even a little more complicated because the land was rezoned so that the development rights could be sold but could also be used on site. In that case the building has to be constructed over the highline (see Figure 1).



Figure 1: West Chelsea District, Highline Project, New York City. Source: www.nyc.gov

A regulatory taking is a taking that does not expropriate the landowner but takes away a property right of an individual right that is of economic value. Here the difference between the police power and eminent domain are of importance since the first does not require any compensation, whereas the latter demands full compensation made for damages that occurred as a result from regulatory actions by the governmental agency with regard to plots nearby.

The following factors are determinative to a (regulatory) taking: “the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.”(Bruce, 1998, 336)². With regard to the taking itself it is not clear if the whole property is taken into account, or only the stick. But TDRs, albeit the Supreme Court has until now not dealt with them directly, are said to be in line with the constitution. TDRs provide a way to compensate an owner for the loss of one of his sticks by giving him a development right to use on one of his other parcels or to sell.

Three other cases serve to illustrate what American law considers a taking situation and how it deals with it. The first deals with a constitutional requirement of a state that owners of shopping centres allow individuals to exercise their free speech and petition rights. The retail owners said that this policy involved a taking. The court ruled that the right to property includes the right to exclude others, but the right to exclude others was said to have no economic importance in a shopping mall. Therefore the policy did not involve a taking. When a governmental agency once used trade secrets of a company, this was considered as a taking. Trade secrets give a company an advance on the markets and therefore, using it was depriving the

² The quotation here is normally used in numbers of cases.

company of a stick that had economic value. Finally, in New York, the physical invasion resulting from a cable installed on an apartment owner's roof (authorized by New York law) constituted a taking of the apartment's owner property without just compensation. Here the governmental action was said to involve a taking "per se"³.

4. Why governments *want* to compensate

Sometimes governments want to compensate developers by providing them with a property right for their endeavours or sufferings. The reason may be found in political reasons (property rights movements) but here we focus mostly on situations where the market solves inefficiencies that are due to the nature of planning. In other words, governments want to compensate developers for their endeavours because the market can sometimes solve inefficiencies or reach results that are out of the reach of planning authorities. A compensation-scheme in this respect will have the character of an incentive-scheme. Governments may add value to rights that before were not worth anything. This however is not enough for a NFC-scheme that also needs a compensation element. A market where rights are sold is not in itself an example of NFC. Suppose that the government, to protect the environment, limits the quantity of energy that may be used per square meter of office building. Suppose that it allows owners who stay below that limit to sell whatever they have left of it to those who need more. The government wants to compensate those who use less energy for their endeavours (and probably investments in energy-saving building materials and installations) by granting them a right that they can sell. It may have been hard for the government to reach this result (promoting sustainable development without losing economic vitality) by regulation.

Micelli (2002) puts it in this way: "The weak efficiency of urban planning can be attributed – at least in part – to the authoritative nature of the tools for implementing and managing plans. As a result, there is great interest in creating innovative planning tools – in particular through real estate taxation and the creation of new markets – that do not replace the market (as command-and-control tools do), but are limited to intervening to correct its failures" (Lanotte & Rossi, 1995; Stellin & Stanghellini, 1997, both in Micelli, 2002, 143).

Coase (1960) states that the establishment of a property rights market can replace direct forms of public intervention in order to solve the economic inefficiencies due to market failures. This may thus help to solve the increasing ineffectiveness in the management of urban plans. Many trends and developments have intensified the need for effective and expedient spatial planning instruments and schemes, linked to adequate financial constructions. Creative financial constructions are in particular needed for the realisation of green and blue zones in urbanised areas, which usually have economically weak functions (De Jong & Spaans, 2009). This type of NFC-schemes further elaborates the utilisation of betterment or planning gain in land value accrued from a change in land use to an economically more profitable one (European Communities, 1997).

³ *Pruneyard Shopping Center v. Robbins*, 444 U.S. 164 (1979), *Ruckelshaus v. Monsanto Company*, 104 S. Ct. 2862 (1984), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). All cited in edit. Bruce (1998), p. 332-334.

Before dealing in more detail with this planning gain issue, we follow public choice economists who point out that there also is such a thing as ‘government failure’ or ‘public failure’. Government failure is the public sector analogy to market failure and occurs when a government does not efficiently allocate goods and/or resources to government consumers. Such consumers are typically citizens, but may be non-citizens in certain contexts. A government failure is not a failure of the government to bring about a particular solution, but is rather a systemic problem that prevents an efficient government solution to a problem. Some economists believe that even with good intentions governments seldom get their policy application correct. They can tax, control and regulate but the eventual outcome will be a deepening of the market failure or even worse a new failure may arise (www.tutor2u.net). Public value failure occurs when: mechanisms for values articulation and aggregation have broken down; ‘imperfect monopolies’ occur; benefit hoarding occurs (i.e. public domain benefits and public goods have been captured by groups, limiting distribution to the population); there is a scarcity of providers of public value; a short time horizon threatens public value; there is a focus on substitutability of assets that threatens conservation of public resources; social and market transactions threaten fundamental human subsistence (Bozeman, 2002). In planning practice a very common phenomenon for example are the constantly adjusted zoning regulations to accommodate ‘forces of market’. Municipalities compete with their neighbours for the settlement of new businesses. In this respect, Coase (1960) shows that not only public intervention is needed for securing collective action, but that also voluntary market agreements are possible. Although individuals may, in principle, be willing to pay a certain amount to secure a certain quality of public open space, semi-public open space, regulative control over building quality or over bad-neighbour uses, of future land use information, none is likely to be able to afford any quantity of such goods on their own and collective action strategies are required to elicit the goods (Webster, 1998: 62-63). A NFC-like instrument might be used as an incentive to strengthen the collective action initiatives.

Regulative development control planning is traditionally concerned with the production of policy goods that in the end are designed to reduce the level of present and future externalities in a city (Webster, 1998: 55). Increasingly, the regulatory system is also being employed to lever the private production of tangible (as opposed to policy) public goods. With impact fees, planning charges, linkage exactions, planning consent application and cost-raising conditions on planning approvals it is tried to reduce the quantity of consumption of certain built environmental goods (Webster, 1998: 55). The sustainability rationale is one of the most important rationales of urban planning. It rests on externality and public goods arguments. Planning engages in negotiation with developers to exact privately financed public goods, rationalised either as a compensation payment for negative externalities or as a repayment of unearned⁴ betterment value (Webster, 1998: 55). Both forms should result in maximizing total gain (ibid. 62).

⁴ Land rent is often referred to as ‘unearned’ income, in the sense that they are not the result of individual action or forbearance. It is useful to keep in mind that there is no logical connection between ‘unearned’ and ‘undeserved’ (Fischel, 1985: 12-13). Other words for this are betterment (UK), unearned increment, plus value, windfalls (USA). Partly related concepts are planning obligations, planning gain, developer obligations, plus value capture.

Another reason why government is keen on using NFC-schemes in spatial planning is the aim of a higher quality of space⁵ without the necessity of using public funds to realise this. For several years the ambition to improve the quality of space has run into the problem of diminishing state funding and inadequate regional resources. This situation created a need for new methods that would guarantee a better quality of space and the means to fund it. An important source of inspiration came from the American concept of the Transfer of Development Rights (TDR). In the USA TDR was related to the Smart Growth Theory, which focuses on a long-term development perspective that accepts economic growth, but advocates that steps be taken to ascertain how – with the revenues originating from this growth – the negative consequences of growth can be absorbed rather than ignored or passed on to the next region (Janssen-Jansen, 2004). However, Smart Growth is largely associated with the fight against urban sprawl, whereas many NFC-schemes have a broader scope and are designed first and foremost to improve the quality of space in urban, rural and mixed-use areas. The prevention or containment of urbanisation is simply one of the purposes that co-exists with the realisation of improvements to natural or landscape values. These schemes also utilise the planning gain that may accrue from the acceptance of a certain urbanisation in designated areas (De Jong & Spaans, 2009). Be that as it may, the theory and practice of Smart Growth can teach us useful lessons on how to develop these methods for spatial interventions at the regional level further and, more importantly, how to flesh out the NFC-scheme (Geoghegan, 2002). The idea of using planning gain for related or wider development goals is not accepted everywhere. It is contested as much from an economic point of view as from a legal perspective. From an economic perspective it is argued that the obligations essentially are a specific, indirect taxation of betterment. It might be more effective, efficient and fair to developers and other stakeholders to tax the betterment directly and earmark the revenues for special purposes (Crook & Whitehead, 2002). Several countries have such a taxation scheme, be it on the local or state level. The problem is that such taxation schemes seldom result in a programme with direct revenues (subsidies and grant) for local governments confronted with external costs of development and accepted community needs. From a legal perspective there is the requirement of a necessary statutory basis of planning obligations and agreements, the procedural equity between developers

⁵ Quality of space is a broad and often contested concept. The Roman architect Vitruvius was one of the first to write about the issue. In his handbook on architecture he started from basic physical and esthetical values, writing that quality of space should be 'realistic, beautiful and solid'. Nowadays the concept of quality of space is approached in a much broader sense. Place, time, scale level, social conditions and cultural scope determine how quality of space is perceived. The task of spatial interventions is to avoid spatial conflicts, and to encourage mutual reinforcement of forms and uses by combining these in space and time. The surplus value in doing this is often identified as quality of space. Quality of space may, for example, be described as smart growth, preventing uncontrolled urbanisation, but also as the architectural quality of the public space in a neighbourhood. In this article we use quality of space in its broader meaning, considering it from a regional perspective and including both public and private space. At the same time we realise that quality of space in this broader meaning becomes vague and less operational. Whereas quality of space is considered to depend on a number of factors, these principles may vary between countries. Large suburbanisation land-use patterns may be considered undesirable in one country, in another country they may be approached positively (De Jong & Spaans, 2009).

and the required relation between the planning or development purpose and the agreed obligations. Do planning obligations have to reasonably and fairly relate to the planning purpose or is a wider relation acceptable? Some argue that with acceptance of the latter the system allows for developers to buy permission for profitable developments (Healey et al., 1995). In the Dutch planning system utilisation of planning gain in most cases requires a formal legal basis and apart from that a reasonable relation between planning goal and obligation (Tweede Kamer, 2001; 2005) (De Jong & Spaans, 2009).

5. Why governments can recapture added value

When is it legitimate for government to intervene in private real estate markets? Cho (2008) brings forward that the traditional argument regarding land use and urban development justifies regulatory planning intervention based on the concept of market failure – a concept where the pursuit of private interest does not lead to an efficient use of society's resources, on the one hand, and equity, on the other. The market failure view posits that the sources of market failure – public goods, externalities, natural monopolies and information symmetries – impede the allocative efficiency of the market system and therefore, public intervention in land use and urban development is required. On the other hand, the equity argument contends that markets achieve a high degree of efficiency but at the expense of equity and consequently, regulations are necessary to achieve an appropriate degree of redistribution (Richardson & Gordon, 1993).

Under the influence of the market failure view, urban development is in large part driven by a variety of government regulations, which comprise not only traditional land use controls such as zoning and subdivision regulations, but also growth management techniques such as concurrency requirements, growth phasing programmes, urban growth boundaries, rate-of-growth programmes and restricted development zones. Despite the extensive use of such regulatory tools, however, the evidence suggests that regulation efforts often fail to bring about efficient and fair outcomes in development decisions. For example, restrictive urban containment policies have produced various negative consequences, such as the outward expansion of urban areas, the rising prices of housing, a highly dispersed leapfrogging pattern of development, longer commuting distances and the decline of central cities. Thus, the idea of restrictive regulation watching out for the correction of market failure and also distributional justice is not creditable in many cases. Given the persistence of adverse consequences of regulatory intervention, the view that only through the enhanced government regulation public purposes can be attained is open to question.

Then, the argument of market failure in support of regulatory intervention into private real estate markets, as grounded on the correction of inefficiency and unsatisfactory distributions of land resources, must be viewed as only partial explanation for the appropriate government role. The sufficient forms of public intervention should not cause consequences that would inflict greater social costs than social benefits. Accordingly, identification of the costs of government intervention needs an understanding of the ways collective action can fail, which can be facilitated by the perspective that includes government failure as well as market failure (Weimer & Vining, 1992).

Theoretical underpinnings of government failure are primarily drawn from public choice theory, which presents an attempt to apply economic models of reasoning to the analysis of collective choice and democratic decision-making. Public choice

theory examines the role of economic incentives within the political market of planning intervention and by exploring the institutional structures of liberal democracy, challenges the merits of government regulation (Olson, 1965; Tullock, 1977; Buchanan, 1986). Challenging the market failure rationale for government planning, it argues that the identification of market failures is not adequate to justify government intervention. More specifically, if the economic case for planning is to be made, then planners can obtain the necessary information of correcting market failures and furthermore, they have sufficient personal incentives to act on the basis of the information (Buchanan, 1986; Anderson & Leal, 1991). If these conditions cannot be met, it is misplaced to suggest that the alternative to imperfect markets is government intervention immune from similar, if not more serious, institutional failings (Demsetz, 1969; Pennington, 2000). This perspective emphasizes the inadequacy of government as a mechanism for allocating resources, contending that markets may not be perfect as an institution of resource allocation but they still offer important advantages over governments. Then, the argument of government failure obviously leans toward anti-planning, pro-market sentiment in support of market approaches to urban development.

In recognition of the inadequacy of public regulation for urban development, the pro-market argument posits that market forces can be harnessed to encourage more efficient and equitable development patterns that ensure the maximum satisfaction of the preferences and desires of individuals. Thus, market-oriented thinking espouses the premise that the public interest is best served by market institutions that can process and meet the needs and preferences of all individuals within community rather than prescribing outcomes that represent the vision or desires of regulators and narrow special interests (Staley & Scarlett, 1998; Pennington, 2000)⁶.

Recapturing added value of land

This leaves the question why a government would have the right to recapture added value of land. Added value of land can be caused by the rules of market, by private improvements, by government intervention or public improvements. The extent to which the government may tax or otherwise recapture the added value differs per country. We take a closer look at the situation where the added value is a result from a 'planning decision'.

Added value of land (or lost value) is described by terms as windfall and wipeouts or worsenments. "Windfalls and wipeouts – called betterments and worsenments by the British – are often attributed to governmental projects and regulations. But windfalls and wipeouts can exist independent of government. Activities of neighbours can cause a windfall or a wipeout. Consequently, windfalls and wipeouts are increases or decreases in the value of land or real estate that also are community caused – i.e., caused by someone other than the landowner, whether that someone be government or a private party in the community" (Hagman & Misczynski, 1978: p. xxix).

The question if and to which extent a government can recapture added value of land for public uses is often debated. In the USA the discussion is related to the property rights-movement. "Some may regard windfall recapture as un-American. Many Americans consider it right that increases in value publicly conferred

⁶ For the first part of this paragraph we greatly appreciate the input of Cheol-Joo Cho (2007).

(through rezoning or from nearby public projects) belong to the private property owners” (Hagman & Misczynski, 1978: executive summary, p. xxxi). Most governments, however, claim to have the right to recapture added value. In England the legal explanation of the right to recapture value is found in the Town and Planning act of 1947 that nationalised all development rights. A landowner only owns the existing uses of his land, if he wants to develop it differently, he has to acquire that right from the government owns the right to develop the land. A complex process of negotiation then starts whereby the planning authority demands the creation of public goods and payments for, e.g., social housing for its right (Booth, 2003; Cullingworth & Nadin, 2006). The discretionary power, based on the ownership of the development rights, is vested in the local government in formulating a development plan make it possible to agree with developers on so-called planning obligations (Healey et al., 1995). These obligations mostly enable the provision of infrastructure and services directly related to the development. More recently contributions to wider community needs like the provision of affordable housing (on or off-site), the creation of mixed communities and the redevelopment of brownfields can also be seen as the results of planning obligations (Crook & Whitehead, 2002).

In many countries the idea of recouping this surplus value of planning decisions grows in importance. More value as a result of a planning decision (such as the change of a land-use plan) should be recaptured to the society. The idea in many countries behind that is that no individual property owner or resident has a legal right to a particular zoning ordinance. Thus, zoning is not a personal property right; it is a community property right (Fischel, 1985: 36). Recapturing would result in more distributive justice (as the gain is unearned), reduce the temptation to misuse planning decisions to enrich individuals, might reduce land speculation by reducing its gains; might increase trust in governmental planning decisions, might reduce growing public objections to new development. Micelli (2002: 141) argues that in the debate of urban economists and planners about the possibility of using innovative methods and tools in managing urban plans in order to increase their effectiveness, “a major step would lie in shifting from the use of authoritative tools towards those that employ market levers to implement public policies and, as economists say, to restore conditions of efficient resource allocation.” This kind of levy is more just than alternative fiscal sources. There is money to compensate, because the market will only develop if this is profitable (Alterman, 2005). Linked to the recapturing value discussion in the Netherlands is the question to what extent a community can require new developments to finance municipal services. Only direct apportioned costs can be attributed to new developments according to existing Dutch law. New law seems to broaden the grounds for cost recovery. NFC-schemes might be a manner to recoup plus value. An important presumption is the belief that transaction costs can be changed into transaction changes (Van der Heijden & Slob, 2006).

In Figure 2 Whatmore (1994) sketches a simplified political economy of the flows of economic value between different parties in the land development process. Within this framework, planning gain can be understood as one of the several possible mechanisms for regulating the burden of development costs and benefits between individual and communal interests.

Hagman & Misczynski (1978) indicate that they know of no other country which used the US legal explanation to recapture added value. Although it is based on the common law view of ownership as a bundle of sticks, the US-states have never

stated that they would own development rights to land, the right to recapture a windfall is based on general explanations of fairness and not all states agree that such a right exists. An example in a European country is Spain where 10% of the land on a development site is designated for affordable housing purposes – apart from the public spaces and infrastructure. Many countries require conveying the land for public spaces and facilities to the local government. Since the seventies the comparable construction of the development impact fee has emerged in the USA. Many local governments, confronted with rapid growth in their community, have adopted it as an alternative to an increase in property taxes (Evans-Cowley & Lawhon, 2003; Jeong, 2006; Nicholas & Conrad, 2003). In all these constructions the trade-offs basically refer to the specific development plan, or local level, and the obligations are more or less closely related to the development goals (proximity principle) (De Jong & Spaans, 2009).

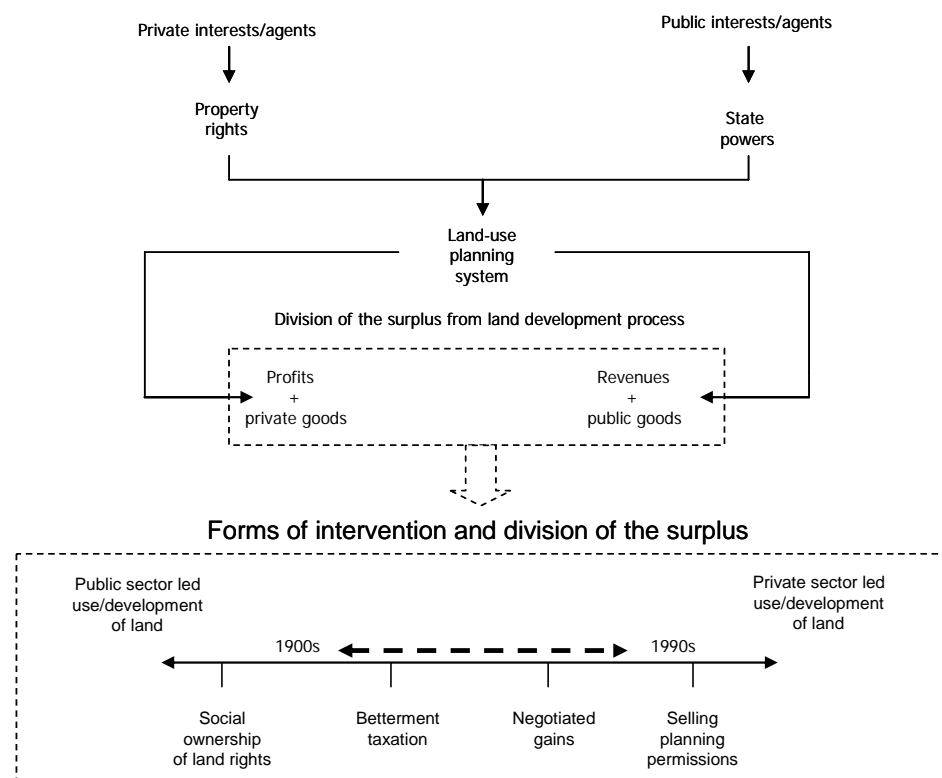


Figure 2: A simplified schema of the political economy of land use planning. Source: Whatmore, 1994

6. Conclusions

We have introduced the concept of non-financial compensation as a concept that allows us to compare different planning schemes in which government does not financially subsidise or compensate landowners and/or developers for their losses or endeavours. We introduced the distinction between single-purpose and multi-purpose NFC-schemes. Whereas the single-purpose NFC-scheme only aims to compensate for loss of economic value, the multi-purpose NFC-scheme serves more goals and provides not only a way to compensate but also to promote

planning goals (such as a more efficient allocation of development rights or prevention of urban sprawl). The division between single and multi-purpose NFC-schemes relates to the reasons why governments have to and why they want to compensate. We saw that the concept of a taking of interference with a property right gains in importance leaving governments with more cases in which they are obliged to compensate for their actions while, at the same time, governments have less financial resources.

Non-financial compensation offers a way to have the market pay for the losses of property owners. The government can compensate those owners by granting them a new property right instead of paying them. The reasons why governments want to compensate (using NFC-schemes) are related to modern insights on the relationship between the private and the public sectors. Sometimes, when governments set the conditions, the market will solve inefficiencies that cannot be solved by public action. We also paid some attention to the question why governments are allowed to have the market compensate for the losses of property owners. In the end a NFC-scheme is about recapturing (or redistributing) added value. We saw that although (to our knowledge) every government recaptures value, there is no clear principle why they are allowed to do so. It is better to say that different countries use (if any) different legitimations. It seems, however, to be generally accepted that windfalls that are caused by government (public) action should at least partly be recaptured for the benefit of society.

We did not pay much attention to the differences between different planning systems. The comparison (and implementation) of planning schemes is difficult because they are all embedded in legal, institutional and economic realities. Urban and rural planning is by definition bounded to the land where it takes place and can therefore never be purely international in the way a sales contract between sellers and buyers in different countries is. Land does not travel. Still, although this makes the nature of our field of research extremely local, it is a fact that people involved in urban and rural planning do learn from each other, do exchange experiences, and draw up legislation that is inspired by (or even copied from) foreign systems. In a forthcoming book we will therefore pay attention to legal, economic and institutional threats and opportunities for institutional transplantation and how, in that respect, countries can be compared.

We conclude that the NFC-concept is a useful contribution to academic discussion because it is not used as such in any legal system. It is therefore neutral and can be developed, whereas a term as TDR will revoke many connotations by academics (and planners) that are used to work with that concept. The NFC-concept allows us to discuss practices on a more abstract level, to move one step away from the terms of our systems, and look at them from a different perspective. The NFC-concept also urges us to rethink the grounds of justification for governments that interfere with property rights and helps us to compare the differences between (planning) systems and in the end, as is our belief, will improve them.

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