



Recovery of Utrecht City Centre groundwater remediation costs

Application of Part 6.4 of the Spatial Planning Act (Wet ruimtelijke ordening, Wro) to the costs of groundwater remediation related to construction developments in the centre of Utrecht



Summary

The integrated approach goes beyond technical solutions for the remediation of large scale pollutions. This report is an example of a financial exploration to make use of the Dutch spatial planning act to force users of the area to contribute to sustainable urban development (push factors). Although this is a typical Dutch example, these results can be an inspiration to other countries to investigate and deploy similar opportunities. This is highly recommended in the exploratory phase of an area oriented approach.

The municipal authority of Utrecht has established a remediation plan (bio-washing machine) for the centre of the city in the context of large-scale groundwater decontamination plus a policy for an area-oriented approach to this. This has a two-pronged objective: on the one hand to improve the quality of the groundwater and on the other hand to improve the possibilities of construction developments and to make Aquifer Thermal Energy Systems (ATES) easier to access. Owners or operators of sites with these (planning) construction opportunities and ATES systems have, as a result of the bio-washing machine and the municipal authority policy for an area-oriented approach, seen lower costs in the execution phase. One consequence is that in a number of cases, the financial impossibility is reversed and the development becomes achievable. The municipal authority approach goes hand-in-hand with very high costs. The cost recovery tools under the Soil Protection Act have in recent years appeared not to offer any solace. The municipal authority has therefore commissioned research into whether the range of cost recovery tools under section 6.4 of the Spatial Planning Act (land development) can help in recovering a proportion of the costs. This is the specific question now in and around the city's station area where planning for new construction opportunities is being facilitated.

This report advises on the cost recovery tools within the Spatial Planning Act. Firstly (in chapter 2), these opportunities are set out. Secondly (in chapter 3) the tools are applied to this case and the question as to whether in this case there are practical opportunities for a move to cost recovery is examined. An indication is also given of the steps that need to be taken to get there.

This report is based on the Dutch situation and the opportunities within Dutch legislation are examined. The findings may well also be of interest to other countries within Europe because it is easy to examine whether elements of the applicable legislation are in line with or deviate from the Dutch situation, which may well lead to the rules being modified.

The conclusion is that it is advisable to first make an indicative assessment as to whether it could be financially interesting to apply the avenue set out under section 6.4 of the Spatial Planning Act. In order to do this, planned economy investigations will be required. As part of this, there will be prior examination as to whether the macro-capping under art. 6.16 of the Spatial Planning Act will be relevant. If the conclusion of this activity is that the avenue under section 6.4 of the Spatial Planning Act is not sufficiently financially interesting, the activities under step 2 will be unnecessary.

Step 2 If the investigation shows that this avenue could be of interest, establishing a structural vision is legally the most secure route; such establishment is recommended. Attention must then be paid to the elements of par. 3.3.1.

It is also necessary to establish a policy document for financially supported public utility building costs. This is part of the structural vision and should be seen as giving concrete shape to the proportional allocation of the remediation costs among the areas that will benefit and thus as a policy-oriented corroboration for both negotiating anterior agreements as well as for any operating plans which it is mandatory to draw up.

The municipal authority needs to decide whether it is prepared to defer the planning decisions to facilitate the development of building plans which may contribute to the remediation costs until such time that the policy document for financially supported public utility building costs has been developed.

In the meantime, a tactic can be developed for a combination of planning decisions to facilitate construction planning, delineation of the areas affected by these planning decisions and the negotiations with owners of land where building plans may be facilitated in the future, either on the initiative of the municipal authority or on the initiative of the owners. Part of this tactic is also to establish a communication process so that owners who want to build something in the future know in advance that they are expected to make a contribution to the remediation costs.

Step 3: Another step is research into an alternative to the system of plan income tax. This could be the same as step 1 or in parallel with step 2. There can be investigation into whether the idea of introducing a plan income tax could help specifically in recovering part of the costs of area-oriented groundwater remediation. If this results in an indication in favour of introduction, the idea for such introduction will be presented to the Association of Dutch Municipalities (VNG) and perhaps also directly to the Ministry for Infrastructure and the Environment.

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1 Introduction

1.1 Pretext

The municipality of Utrecht has adopted a plan for the area-oriented remediation of its city centre, due to large-scale groundwater contamination. In addition to improving soil quality, the plan is intended to optimise the possibilities for construction developments and to enable ATES (Aquifer Thermal Energy Storage) systems. As a consequence, the owners or operators of parcels with these (planning) building opportunities and ATES systems will incur lower costs in the operation phase. Another consequence is that initiatives are financially more feasible.

The remediation involves very high costs. It has become clear in recent years that the cost recovery instruments of the Soil Protection Act (Wet bodembescherming, Wbb) do not provide adequate relief. Therefore, the municipality wishes to have an analysis performed of whether the set of cost recovery instruments of the Land Development part of Spatial Planning Act (Wet ruimtelijke ordening, Wro) can help to recover a portion of the costs. This question presents itself specifically as new building opportunities are currently still being made possible in and around the station area.

This report provides advice on the set of cost recovery instruments of the Wro. In doing so, I will not offer a general treatise about the Land Development part. This part will be focused as much as possible directly on the centre of Utrecht. In the first instance (chapter 2), the possibilities will be identified. In the second instance (chapter 3), the possibilities will be applied to this case and an assessment will be provided of the question as to what practical options there are in this case for proceeding with cost recovery. Moreover, I will indicate which paths must be followed for that purpose.

For the sake of convenience, this advice will be limited to the recovery of remediation costs within the area designated as 'contaminated area'¹. The Station Area phase-1² largely falls within the contaminated area, but the latter is larger. As new construction possibilities are potentially also being made possible in that larger area, it is advisable for (the research into) the recovery of costs to be based on that larger area and not limited to an unnecessarily small area.

Based on this case, the report is also prepared for the Interreg IVB NWE CityChlor project.

In this report, various necessary digressions about the subject matter have been presented in a smaller font.

¹ The demarcation of the 'contaminated' area is indicated on the map of the municipal Soil Information System of 17 June 2009.

² Indicated on the same map as referred to in the preceding footnote.

2 Option for recovery of groundwater remediation costs

2.1 Relevant parts of the statutory regulation

Part 6.4 of the Wro contains an obligation to recover costs for designated building plans (Article 6.17 in conjunction with Article 6.12 of the Wro). This concerns the costs of land development. For a proper understanding of the matter: no possibilities under public law for creaming off income of the land development have been created with this part. The costs that belong to the land development have been provided for in Articles 6.2.3 up to and including 6.2.5 of the Spatial Planning Order (Besluit ruimtelijke ordening, Bro). As appears from Article 6.2.4, paragraph b, of the Bro, this also includes the cost of soil remediation (which must be deemed to include groundwater remediation).

The costs are recovered from cost centres. In terms of Part 6.4 of the Wro, those cost centres are building plans. Article 6.2.1 of the Bro provides for the meaning of 'building plans'. Each new building is a building plan. So are extensions of existing buildings with at least 1,000 m² of gross floor area, as well as conversions for certain types of different functions³. The recovery obligation is linked to making a building plan possible from a planning perspective. In that case, this concerns making a planning decision⁴. For the sake of convenience, I will hereinafter limit the types of planning decisions to the structure of the zoning plan. In the adoption of a zoning plan, a land development plan must be adopted, unless the recovery of costs and the possibly required site requirements⁵ have been ensured otherwise.

In addition to cost recovery, Part 6.4 of the Wro also makes it possible to set site requirements in development plans. Site requirements concern requirements for works and activities for construction site preparation, installing utilities, the layout of the public space, working with phasings and/or links or the designation of land for specific house building categories⁶. In view of the problem definition, I limit myself hereinafter to the cost recovery aspects while ignoring the

³ Works such as sewerage are not part of building plans.

⁴ This concretely pertains to the adoption of zoning plans, an amending plan, or a decision to deviate from the zoning plan or a management bye-law, subject to Article 2.12, subsection 1, under a, under thirdly, of the Environmental Licensing (General Provisions) Act (Wet algemene bepalingen omgevingsrecht, Wabo).

⁵ Site requirements are understood to mean the type of requirements and rules of Article 6.13, subsection 2, of the Wro, as well as phasing and linking rules as referred to in Article 6.13, subsection 1, under c, under fifthly, and Article 6.13, subsection 3, of the Wro.

⁶ Site requirements are made possible in Article 6.13, subsection 2, of the Wro and as far as phasings and links are concerned, Article 6.13, subsection 1, and 6.13, subsection 3, of the Wro.

possibilities of Part 6.4 concerning site requirements. However, I will deal with questions concerned the boundaries between cost recovery on the one hand, and general levies on the other hand.

Cost recovery takes place via land allocation agreements and/or development agreements. A development plan must be adopted if the cost recovery is not assured in another manner. More precisely, the criterion of "assured in another manner" is satisfied when 1) the municipality, through its land allocation, factors the cost recovery into the purchase price (and also lays down this factoring in the purchase agreement) and/or 2) when the municipality, prior to making the planning decision, has concluded an agreement on cost recovery, the so-called anterior agreement (anterieure overeenkomst) on land development. To distinguish such anterior agreement, reference is sometimes also made to a posterior agreement (posterieure overeenkomst). A posterior agreement is an agreement entered into after the adoption of a development plan. In such cases, the agreement must comply with the development agreement as far as costs and site requirements are concerned⁷.

If a development plan has been adopted, then a payment instruction will be included in the environmental permit for the construction. In that instruction, the payment of the development contribution is made mandatory. The payment instruction will not be included if it concerns land allocated by the municipality or for which an anterior or posterior agreement has been concluded (Article 6.17, subsection 1, of the Wro).

Non-payment is subject to hefty sanctions, such as halting the construction or revoking the environmental permit for the construction or collection by way of a writ of execution⁸.

The purport of the Wro is thereby that one should formally reason from the perspective of the possible obligation to adopt a development plan. As a result, in practice, the cost recovery will have to be assured in another manner before a planning decision is made, if you want to avoid a development plan. For negotiations between the municipality and potential developers, this means that a potential development plan is preceded by its "shadow" and that it is wise to keep a draft development plan in mind when conducting those negotiations.

Prior to all sorts of issues concerning the application of Part 6.4 of the Wro, it is important to verify whether this large-scale area-oriented remediation does not entail such common benefit for a wider area that a general levy should in fact be considered. This issue will be dealt with first (section 2.2). Next, I will review the limitations on the application of cost recovery (section 2.3).

⁷ Art. 6.24 lid 2 Wro

⁸ Art. 6.21 Wro.

2.2 Is the remediation suitable for the cost recovery of Part 6.4 of the Wro?

In the previous system of the WRO and the betterment levy scheme until 10 July 2008, multi-district costs could not be recovered. Part 6.4 of the Wro does not have this limitation. In the previous system, if the costs of public utility facilities would benefit a large area, it could be deemed to be a general levy. In other words: the larger the benefiting area, the higher the chance that the betterment levy bye-law would be declared void, because the levy would in fact be more of a general levy. If all parcels in a neighbourhood benefit, then it is more a case of common benefit from the performance of municipal tasks. That is what the owners pay for via the property tax. General municipal levies must have a basis in the Municipalities Act (as is the case for e.g. the betterment levy and tourist tax). The question is whether a more general nature could be under discussion in this case, having as a consequence that the application of Part 6.4 of the Wro cannot be under discussion. This question is relevant here as the area of the groundwater remediation comprises a considerable section of Utrecht's city centre.

There is no known case law in this respect. Until now, the only reference point can be found in the ruling of the Administrative Law Division of the Council of State regarding the Woonwijk Westelijk Beverwijk development plan of 9 February 2011. In this ruling, there was already a matter of a bypass and a green area, among other aspects. These public utility facilities can both be characterised as rather sizeable. In both cases, there were various residential areas that benefited from these facilities. The fact that parts of the appeal against the allocation of the related costs were upheld was not caused by the large-scale nature itself (this was also not advanced as an argument). As far as the bypass is concerned, the municipality had not indicated the districts for which this bypass would specifically be built in any prior policy document. As far as the green area is concerned, the Division ruled that the argument of the surplus value of this area for the Woonwijk Westelijk Beverwijk had not been substantiated.

As it appears from section 2.2.4 concerning compensation between plans, cost recovery for large-scale developments has expressly been considered in the legislative history of Part 6.4. As long as there is no case law foiling such application, I will assume in the remainder of this report that the cost recovery for this area-oriented groundwater remediation is possible in principle. The possibility that areas other than the areas with new building plans benefit from the remediation will in principle not change this. After all, the criterion of proportionality prevents the municipality from recovering disproportionately high costs on developers of land with building plans.

2.3 Limitations on use of cost recovery

The cost recovery scheme of Part 6.4 is subject to a number of limitations.

2.3.1 Cost recovery only for designated building plans

First: The preceding signifies that the cost recovery of Part 6.4 of the Wro is only possible in the case of building plans that are still being made possible planning-wise and not for existing buildings. That is different from the application of the betterment levy pursuant to Article 222 of the Municipalities Act. This is an important limitation for the recovery of the costs of the groundwater remediation. Due to this remediation, parcels have since benefitted because planning building opportunities were effectively made financially feasible or could be executed more cheaply as a consequence thereof. To the extent that building plans have been realised since the start of the groundwater remediation, the related costs cannot be recovered from these parcels via Part 6.4 of the Wro.

Supplementary cost recovery via the betterment levy is not possible insofar as such building plans have been made possible planning-wise after 1 July 2008. Article 222 of the Municipalities Act has been amended in the Implementation Act for the Wro. That article contains the betterment levy scheme. Subsection 1 specifies that the betterment levy cannot be levied if the expenses of facilities have been or are being paid pursuant to an agreement or have been or should be paid subject to Article 6.17, subsection 1, of the Wro.

Insofar as the municipality makes new building plans possible, there can be no betterment levy within the development area. If parcels outside the development area⁹ would also benefit, then it is in principle conceivable that the betterment levy would be applied to those parcels¹⁰. This is only possible if the council has decided, before the facilities are initiated, to what extent the expenses connected to those facilities will be recovered via a betterment levy. Such decision will then contain an indication of the area in which the benefiting immovable properties are located. This concerns the so-called funding order and funded area of Article 222, subsection 2, of the Municipalities Act. I am assuming that the council of Utrecht has not adopted such order. As the remediation has already commenced, this too is no longer possible.

2.3.2 Exception to existing unutilised 'building titles'

Costs of land development are also often not recovered on parcels with existing 'building titles' (bouwtitels), even if they are still unutilised. For that matter, a note should be made in this case.

⁹ For a possible application of the betterment levy, the matter of demarcating a development area, within the meaning of Part 6.4 of the Wro, becomes important. In brief, a development area is bound at the most by the area of the planning decision, e.g. the zoning plan area, and therein by the land with designated building plans on the one hand and the land with public space to be newly laid out or modified on the other hand.

¹⁰ We are not familiar with any practical examples of such a situation. They must be considered to be rarely applicable. The challenge of a possible application resides in the demarcation of the area. In that respect, see section 2.3. Furthermore, there often is political resistance to levying a betterment levy because the owners of all parcels that benefit, from an objective perspective, receive an assessment.

Namely, one can imagine a situation in which, when existing building titles are still unutilised, the municipality sees cause for including such parcels in an update of a zoning plan. Insofar as existing unutilised building titles have arisen from a zoning plan that took effect pursuant to Article 10 or 11 of the WRO (hence, before 1 July 2008), the concerned parcels do qualify for the (public-law) cost recovery of Part 6.4 if these parcels are assigned a different designated use scheme in the new zoning plan.

This is a transitional scheme of Article 9.1.20 of the Wro Implementation Act¹¹. Even though this is not stipulated in the law, it is logical that this scheme is interpreted such that the term 'different designated use scheme' should be taken to mean a broader designated use scheme¹².

2.3.3 Criteria of benefit, attributability, and proportionality

Thirdly, the criteria of Article 6.13, subsection 6, of the Wro can engender limitations. This article reads as follows:

"Costs in connection with works, activities, and measures from which the development area or a part thereof benefits and which are attributable to the development plan, are included in the expected running costs."

This refers to the criteria of Benefit, Attributability, and Proportionality, hereinafter abbreviated as the BAP criteria. There is a benefit if the development area benefits from the investment. There is attributability if there is a causal relationship between the investment and the development plan: the investment must be made solely or in part for the development plan.

If other areas (existing building structures or areas to be newly developed) also benefit from the investment, then the costs of the investment cannot be included in their entirety in the expected running costs, but only a proportional part. An apportionment formula will have to be determined for that purpose.

¹¹ This article reads as follows: "To the extent that a building permit could have been granted pursuant to a zoning plan as referred to in Article 10 or 11 of the Spatial Planning Act (Wet op de Ruimtelijke Ordening, Wro) for a building plan that has been designated after 1 July 2008 pursuant to Article 6.12, subsection 1, of the Spatial Planning Act, and no other designated use scheme has been adopted at the revision of the zoning plan after that date, then Articles 6.123 up to and including 6.22 will not be applicable with respect to such a building plan."

¹² One could ask why the transitional law would be applicable in the case of a broader designated use scheme, but not in the case of a restrictive designated use scheme. This concerns the reason for the transitory provision. When building plans have already been made possible planning-wise in the past, the costs of public services and plan development are considered to have already been guaranteed at that occasion. It is not deemed reasonable to tax an owner as yet with land development costs of a new plan while he already has existing building opportunities. In that sense, the scheme is somewhat inconsistent. After all, when an unutilised building opportunity is assigned a broader designated use, then the land subject to the new designated use scheme will be fully included in the cost recovery. The part of the lands with the already existing building opportunities is not excluded thereof. In the case of a broader designated use scheme, an increase in value of the land is created in comparison with the existing zoning plan. It is a fact that the land would be taxed with the cost recovery in the sense of Part 6.4 of the Wro due to that increase in value

This aspect of the proportionality clearly plays a role when it concerns the question of which amount of groundwater remediation costs can be recovered.

2.3.4 Compensation between plans and adopting structural vision

Fourthly, the scheme of Part 6.4 of the Wro concerning compensation between plans can constitute a limitation. At the least, it is a point for attention. It concerns a complex matter, because the provisions in the law are unclear and cause confusion in practice. In order to maintain this report legible, I have dealt with this matter concisely and I further refer to publications I have written on this topic.

The important issue in this case is the question of whether it is wise to adopt a structural vision for the groundwater remediation area in connection with the building plans and Aquifer Thermal Energy Storage (ATES) systems (better) made possible by the remediation.

As stated earlier, the costs of the groundwater remediation constitute a recoverable cost item pursuant to Article 6.2.4, under b, of Bro. Article 6.2.4, under e, of Bro also indicates that such costs can also be recoverable if they are incurred for land outside the development area. They are de facto recoverable if the BAP criteria are fulfilled.

However, as soon as investments are made outside the development area, the question arises of whether there are also costs that are compensated between plans. For a proper understanding of the matter, it is important to clarify, on the one hand, what a development area is and, the other hand, how development areas compare to the area in which the groundwater remediation is performed. A development area is bound by the area of the planning decision, such as the zoning plan, for instance. Therein, a development area is formed by, on the one hand, the land with designated building plans and, on the other hand, the public space to be newly laid out or modified. A single development plan is adopted for such an area, unless such parcels of land lack spatial or functional cohesion. In that case, it is a matter of multiple development areas within one planning decision and multiple development plans must be adopted (obviously unless cost recovery is ensured in another manner and site requirements are unnecessary). I am assuming that multiple spatial decisions will be made over time within the area of the area-oriented remediation and that it will consequently be a matter of multiple development areas. As a result, in comparison with those development areas, the area of the area-oriented remediation can be considered to be multi-district and possibly also outside the plan.

Part 6.4 of the Wro provides for two applications of compensation between plans: one governed by private law and one governed by public law. The application under private law can be found in Article 6.24, subsection 1, regarding the anterior agreement. The application under public law can be found in Article 6.13, subsection 7. The terms are different. Article 6.24, subsection 1, refers to a financial contribution to spatial developments. Article 6.13, subsection 7, refers to costs outside the plan. In both cases, compensation between plans must be based on an adopted structural vision.

The element causing confusion concerns the question of whether compensation between plans only pertains to the compensation between, on the one hand, sites with a surplus on the land development and, on the other hand, sites with a shortfall on the land development (compensation between sites) or whether it also pertains to the compensation of concrete cost items (such as the groundwater remediation item in this case).

There is a difference of opinion regarding the answer to this question. Most authors believe that compensation between plans only pertains to compensation between sites. I believe that the legislative history prevents this assertion from being made. There are namely examples of the use of compensation between plans mentioned in the legislative history. In addition to examples of compensation between sites, the legislative history also mentioned large-scale public utility facilities¹³. Various municipalities and authors have requested further clarification. Case law concerning this matter has been absent to date¹⁴.

When one adopts the position that compensation between plans is possibly not limited to compensation between sites, a second confusing element arises. In that case, one is namely confronted with the question of how the 'costs outside the development area' of Article 6.2.4, under e, of the Bro compare to the 'costs of spatial developments' and the 'costs outside the plan' of Article 6.24, subsection 1, and Article 6.13, subsection 7, respectively. The question will then arise of whether there is somewhere a boundary of the area where costs outside the planning area can reside and whether spatial developments/cost items outside the plan are then located outside that boundary. The fact that mention has been made in the legislative history of large-scale developments (regional green and recreational projects) could give rise to the presumption that this is a criterion, but the wording in the legislative history indicate that they are not limited to that¹⁵. For practical purposes and due to a lack of case law, I deem conceivable to use the attribute of a large scale as a criterion for the distinction between, on the one hand, 'costs outside the planning area' and, on the other hand, 'costs of spatial developments/costs outside the plan'. This does not affect the fact that there can actually be a matter of overlap between the both.

¹³ For an extensive discussion of this matter, refer to sections 6.2.8 and 6.2.9 in E.J. van Baardewijk, *Wegwijzer exploitatieplannen 2010*, Alphen aan den Rijn, Kluwer 2010.

¹⁴ On 10 August 2011, the Administrative Law Division of the Council of State (Afdeling Bestuursrecht van de Raad van State, ABRS) ruled in an appeal against the development plans 'Zuidplas Noord deel Wonen Moerkapelle' and 'Zuidplas Noord deel Glastuinbouw&Bedrijven', no. 200905661/5/R1. See BR 2011, number 157, with note E.J. van Baardewijk. In this case, the municipality itself had indicated in the development plans that the construction of a road outside the development area was included as a cost item outside the plan. A structural vision was absent, allowing the Division to swiftly conclude this part of the appeal: conflict with Article 6.13, subsection 7, of the Wro. This does not really clarify much. Things would have become clear only if the municipality had not included the costs of the road as a cost item outside the plan, but as costs outside the area covered by the plan within the meaning of Article 6.2.4, under e, of the Bro.

Multi-district allocations also came up for discussion in the ruling on the Woonwijk Westelijk Beverwijk development plan, ABRS 9 February 2011, no. 20090489/1/R1. See BR 2011, no. 87, with note by E.J. van Baardewijk and M. Fokkema. This development plan included costs for a bypass and a green area under the heading of 'costs outside the development area'. Appellants disputed the accuracy of that allocation, but not with the argument that it concerned costs outside the plan. It concretely concerned the application of the criteria of attributability and benefit.

¹⁵ I am referring to the words 'primarily also' in the passage: "In this case, in addition to redevelopment sites, it primarily also concerns the realisation of regional green and recreational projects." From the Parliamentary Papers II, 2004/05, 30218, no. 3, p. 24-25.

The difference is relevant, because the law requires a structural vision when it concerns the application of the Articles 6.24, subsection 1, and 6.13, subsection 7, of the Wro. The application of Article 6.13, subsection 7, furthermore requires the structural vision to provide indications for the use of fund contributions for costs outside the plan.

When financial contributions to spatial developments are included in anterior agreements, without the developments having a basis in the structural vision, then the contribution is contrary to the law and a developer can reclaim the contribution paid for this part afterwards as an amount which has been unduly paid. If a fund contribution for costs outside the plan has been included in the expected running costs of a development plan without instructions for the use of that fund contribution in the structural vision, then that fund contribution is contrary to the law and such development plan risks nullification. If a cost item outside the development area has been included in the expected running costs of the development plan and the Council of State rules on an appeal that it is a cost item outside the plan, then the development plan risks nullification if that cost item outside the plan is not based on a structural vision in that case.

I believe that the highest risk in this regard resides in the anterior agreements referred to. The term 'spatial developments' in Article 6.24, subsection 1, is so vague that an opposing party can swiftly argue that the municipality wrongly included the related financial contribution in the agreement. As long as the municipality has not included such developments in a structural vision, it is wise not to mention this in the contract stipulations, but to refer to 'costs outside the development area pursuant to Article 6.2.4, under e, of the Bro'. In that case too, an opposing party can obviously try to argue afterwards that it in fact concerned a spatial development and that this should have had a basis in a structural vision. However, it is then up to the opposing party to prove that it concerned a spatial development instead of a cost item outside the development area.

As appears from the decision-making and the corresponding map, the area-oriented groundwater remediation is of such considerable size that I certainly would refer to a large-scale character. From my vantage point, this provides an indication that the adoption of the structural vision should (at the least) be considered for the area of this remediation.

The above indicates that the absence of a structural vision can entail certain risks. In chapter 3, I will deal more in detail with the practical aspects and challenges that could surface in that case.

2.3.5 Macro-capping

Fifthly: Costs can only be recovered up to the level of the land yield. This limitation has been included in Article 6.16 of the Wro, the so-called 'macro-capping' (macroaftopping). This article reads as follows:

"If, in a development plan, the amount of the costs connected to the development, reduced by subsidies received or to be received by the municipality in respect of that development and contributions from third parties, is higher than the amount of the revenues of that development included in the development plan, then the municipality can only recover those costs up to the amount of those revenues."

If the costs are higher and the development plan therefore contains a shortfall, then that shortfall is at the expense of the municipality. In addition to proceeds from land allocations, subsidies expressly also play a role in this regard. They are included on the income side pursuant to Article 6.2.7, under b, of the Bro. Subsequently, they are first subtracted from the costs before being compared to the income.

If it concerns this macro-capping, it is conceivable that the allocation of a share in the cost of the groundwater remediation would lead in individual cases to a shortfall in the (draft) development plan when making building plans possible planning-wise. In such cases, it is of course wise in negotiations to induce the owners to assume this shortfall. If they are not prepared to do so, then the municipality is presented with the choice of concluding that the (draft) zoning plan is economically not feasible and will therefore not be adopted or of concluding that the (draft) zoning plan will be amended to such an extent that there is no longer such shortfall. This might include modifying the block plan, adjusting the plan boundaries, so that expensive parts are postponed or cancelled. This requires implementation of various land development and (draft) development plan calculations in order to identify in advance where possible shortfalls could arise.

2.4 Interim conclusions:

As soon as new building plans are made possible via planning decisions, Part 6.4 of the Wro applies and the recovery of the costs of the land development is possible and also mandatory. If it concerns unutilised building opportunities that originated under the old WRO and that are given a new function via a new planning decision, then cost recovery cannot be applied to this, at least not via the development plans. The actual application via development plans is subject to a number of criteria in order to actually be able to recover costs:

- There must be a causal relationship between the costs and the development of a construction site;
- The site must also benefit from it;
- If multiple sites derive a benefit, then a proportional amount of the costs can be recovered;
- Costs can only be recovered up to the level of land development yield.

These criteria do not apply to the actual application via anterior agreements, but they do have an impact on the negotiations for such agreements. Under certain circumstances, costs are deemed to be outside the plan and their recovery takes place via compensation between plans. In that case, it is necessary to record the connection in a structural vision. In the case of this remediation, it is legally safe to also effectively record this.

3 Focus on opportunities and limitations for cost recovery

The legal possibilities and limitations were outlined in chapter 2. In this third chapter, I will compare these possibilities and limitations to the concrete situation of the Utrecht area-oriented groundwater remediation, on the one hand, and the intended new (re-)development plans and ATES systems, on the other hand.

As far as the question of the actual possibilities for application of Part 6.4 of the Wro is concerned, it is important to recognise that the municipality has already made most new construction sites or expansion sites possible planning-wise. Because the potential possibilities of Part 6.4 of the Wro had not yet entered the picture, there is no longer an option to apply Part 6.4 for those sites afterwards. Hence, the following only applies for building plans that the municipality still wants to make possible planning-wise.

For the application of the cost recovery, the question arises regarding ATES systems of whether these can be designated as a building plan. If this is not the case, then the costs of groundwater remediation cannot (at least not under public law) be apportioned also to the ATES systems. In the following, I assume that ATES systems are building plans, because they are part of a dwelling or other principal building (due to the ATES system housed therein). The boreholes for the purpose of pumping the groundwater are connected with the ATES systems in the dwellings/principal buildings and together constitute a single ATES system¹⁶. When multiple buildings are connected to a single ATES system, all these buildings can be included in the cost recovery to the extent that they are a new building plan within the meaning of Part 6.4 of the Wro.

3.1 Can the criteria of attributability and benefit be fulfilled?

As appears from section 2.2.3, it must be verified whether the BAP criteria have been fulfilled. In this section, I test against the criteria of attributability and benefit.

¹⁶ For the sake of good order, a verification is required of whether this connection can indeed be technically and physically designated as stated here.

3.1.1 Attributability

The criterion of attributability means that there must be a causal relationship between the investment (the remediation) and the (draft) development plan¹⁷. At the preliminary talks on 9 August 2011, I was given to understand that the area-oriented remediation has in part been set up to enable new construction or redevelopment as well as the construction/operation of ATES systems.

The groundwater contamination is situated down to approximately 5 metres beneath the ground level. The remediation is set up in part to prevent that remediation measures should be taken in the case of groundwater extractions. Should these measures be necessary after all, then (re)developments will not be possible or only at high extraction costs. This broadly clarifies the causal relationship.

The same applies to the creation of opportunities for the construction of ATES systems. The construction and operation of the so-called 'open systems' engenders groundwater flows. The benefit of this is that ATES systems contribute to the pace of the remediation (the effect of the bio-washing machine). However, the contaminated groundwater can migrate to sections of the area where the groundwater is currently still (sufficiently) clean¹⁸. As a consequence, the construction of such systems is currently not (adequately) feasible and those possibilities are created or improved by the area-oriented groundwater remediation. Whether this also applies to BTES systems depends on whether there is a possibility that groundwater must be displaced during the installation of the pipes and whether the remediation (better) facilitates the work in that respect.

It was not exactly known in advance where are all those (re-) developments would (could) take place. The municipality was barely able to (comprehensively) determine this in advance, because this case concerns an existing urban area where infill and expansion of existing buildings as well as a redevelopment of existing laid-out areas can occur throughout that urban area. In such situations, the municipality cannot be expected to be able to identify all building plans within the

¹⁷ In this case, I am not so much interested in the adoption of the development plans, as in the reasoning from the perspective of the development plan situation: negotiations proceed as if there were a matter of the future adoption of a development plan. This means that an area boundary must be determined. A building plan or a spatially/functionally connected conglomerate of buildings plans falls within that boundary in any case. If public utility facilities are required for the purpose of the realisation of such building plans, then the boundary will be drawn around the lands of those facilities. In brief, it thus concerns an allocatable and public area. The test question is whether the groundwater remediation (and possibly other investments) is performed in part for the purpose of such (as yet fictitious) development plans. If yes, then negotiations with the owners of the land affected by these building plans can take place on that basis.

¹⁸ In this regard, the issue to be explored is whether this applies to all locations in the remediation area. It is conceivable that the construction of an ATES system at the edges of the remediation area causes the contamination to be displaced beyond the boundaries of the remediation area. For the sake of good order, it should be verified whether this also applies to the construction of ATES systems at the centre of the remediation area.

meaning of Article 6.2.1 of the Bro when making a decision to launch an area-oriented remediation.

The same applies to enabling ATES systems. In its decision to launch an area-oriented remediation, the municipality did not have a plan for the designation of concrete sites for such systems. It concerned making them possible.

This point is relevant in view of the aforementioned ruling of the Division on the Woonwijk Westelijk Beverwijk development plan. The municipality had not referred specifically to this residential area in its decision to construct the Westelijke bypass nor in the adoption of the zoning plan for the bypass. However, it did indicate in the notes to the zoning plan that the construction of the bypass is expected due to existing problems as well as anticipated developments. The Division manifestly deemed this to be insufficient¹⁹.

This is an indication of great significance for the area-oriented remediation. I am not familiar with the text of the decision-making in that respect, but it appears from comments of the municipality that the latter did neither mention the concerned construction sites nor the sites for the installation of potential (open) ATES systems in that decision, nor in other decisions.

Yet, I do have a map, dated 17 June 2009, of the boundary of the system area of the area-oriented remediation as well as of the contaminated area and the boundary of the station area phase 1. These boundaries suggest that the station area phase 1 is mentioned in the decision-making as the area for which the remediation takes place (in any case). This is certainly important when the decisions refer to such relationships. But it is uncertain whether it is sufficient.

The question is whether more assurance can be obtained by making a more detailed and specific decision. Again, this is only relevant for building plans that the municipality still wants to make possible planning-wise. In such specific decision, one could consider a kind of Multi-District Costs Policy Document, focused in this case on the allocation of the remediation costs. Therefore, this concerns a policy document on the allocation of area-oriented groundwater remediation. If the municipality opts for adopting a structural vision, as referred to in section 2.2.4, then that structural vision will precede such multi-district costs policy document.

In such policy document, the allocation will be made as specific as possible. The purpose of adopting such policy document is to involve all building plans, which are made possible planning-wise after the adoption of this policy document, in the cost recovery. The same goes for all (open) ATES systems. It remains uncertain whether cost recovery is legally feasible for building plans made possible planning-wise between, on the one hand, the decision on area-oriented remediation and, on the other hand, the adoption of this policy document. Again, this depends on the precise wording of the decisions on the area-oriented remediation.

¹⁹ Referred to in judicial ground 2.23.5.

When drafting the aforementioned policy document (and, if selected, the prior structural vision), it is important to make a list of the sites where building plans are in principle permissible. If conditions are attached to those potential sites, then these must be mentioned in the policy document in order to clarify the relationships as much as possible.

A practical and difficult issue is the question of how many years in advance such list must be made. Despite being challenging, a decision will have to be made in that respect.

The farther the horizon is in time, the more new developments could potentially contribute. On the other hand, the following also applies: the farther the horizon is in time, the more uncertain the actual development will be. For the cost recovery, there is after all no public-law duress to pay when no environmental permit for the construction is applied for. By selecting a long term, the municipality might believe that it can involve comparatively more sites in the cost recovery, but the recoverable costs must (due to the criterion of proportionality) then in any case also be apportioned among all these sites. If a proportional apportionment of costs is arranged among all these sites, but a number of these locations ends up cancelled in the end, then that part will disappear from the actual cost recovery. In section 3.2, I will further deal with this in detail as far as the application of the criterion of proportionality is concerned.

3.1.2 Benefit

The benefits of the remediation experienced by the lands with new building plans reside in the fact that, without that remediation, the (re-) developments would not be possible or would only be possible at high groundwater remediation costs due to groundwater extractions (buildings) or due to groundwater displacements (open ATES systems). Or vice versa: The remediation makes (re-) developments feasible or feasible at considerably lower costs.

In doing so, the benefit criterion appears to have been fulfilled. The confirmation question is whether this applies to all potential new building plants. The question is whether each of those (re-) development sites requires groundwater extraction for the construction and therefore groundwater remediation. That question is relevant because the groundwater is located on average at a depth of 5 metres²⁰.

The test of whether the criterion of benefit is fulfilled must be based on facts as they are or as they are anticipated to be. It concerns a factual approach. As far as the ATES systems are concerned, it should also be noted that they would not be possible without this groundwater remediation. This means that lands on which ATES drilling is performed in order to provide ATES systems with heat and cold can benefit from this remediation.

²⁰ If building developments are possible by using the soil down to a shallower depth, groundwater extraction is manifestly not required. I am assuming that the remediation does not yield a benefit in such situations. In that case, such building plans do not rank high enough for inclusion in the cost recovery.

3.2 Test against the criterion of proportionality

Before considering the questions regarding the criterion of proportionality more in detail, it is recommended to first dwell on the question of whether the amount to be ultimately recovered is worth the effort in view of the costs that must be incurred in order to collect development contributions. Subsequently, I will deal with the question of which areas can be matched to potential building plans and with the question of whether there are other areas, in addition to the former, that benefit from the groundwater remediation.

3.2.1 Can the level of the cost recovery be estimated?

Before the municipality opts to initiate a process for the actual recovery of the costs of the groundwater remediation, it is wise to make an indicative estimate of the (approximate) amount of the costs that could actually be recovered. Once that indication has been obtained, it can be considered whether the 'acquisition costs' are in proportion to the potential proceeds from the cost recovery.

As far as those acquisition costs are concerned, the following can be considered:

Structural Vision

Especially if the municipality should opt to prepare a structural vision for the remediation area, a cost item of approximately EUR 50,000 should be taken into account.

Draft development plans

Furthermore, costs are incurred in working on draft development plans. That work mainly consists of the determination of boundaries of the various development areas within the relevant part of the city centre and of the preparation of the corresponding expected running costs. As far as the latter is concerned, it must then be determined whether the municipality itself (in the first instance) prepares indicative estimates for the value of the contributions or whether it will use external assessors for this purpose. On the other hand, the work on draft development plans is certainly done not just for the cost item of the groundwater remediation, but potentially also for other recoverable costs items. To be considered in any case are the so-called planning costs (to be estimated by means of the planning costs scan) and possibly also the costs of preparing zoning plans. In a number of cases, there will be costs of building public-utility facilities. I am also assuming that, in a number of cases, the negotiations will not merely deal with cost recovery in the case of self-realisation, but also with the sale or exchange of municipal land.

This is it as far as the acquisition costs are concerned. Next up is the estimate of the costs to be actually recovered. An important part of making an estimate is the preparation of an exploration into building plans that the municipality intends to make possible in the next years, on the one hand, and the determination of the benefiting areas, on the other hand. Both parts are important

for verifying what the outcome would be of the application of the criterion of proportionality of Article 6.13, subsection 6, of the Wro. I will be devoting attention to both parts in the next section. For the determination of the acquisition costs, if so desired, I propose that this effort is organised internally within the municipality. This seems to be something for urban planning economists of the municipal land agency (Grondbedrijf).

3.2.2 Determining future building plans

The municipality has decided to perform the area-oriented remediation in order to enable (re-) developments and ATES systems in the station area phase 1. For the application of the cost recovery, as explained in section 2.1, it concerns building plans within the meaning of Article of the Bro and decisions that make such building plans possible from a planning perspective. In section 2.1, those decisions were limited to zoning plans for the sake of convenience, but it is relevant to be comprehensive at this point in the report. As appears from Article 6.12, subsection 2, of the Wro, it concerns

1. The adoption of a zoning plan;
2. An amending plan as referred to in Article 3.6, subsection 1, under a, of the Wro;
3. Or a decision to deviate from the zoning plan or a management bye-law, subject to Article 2.12, subsection 1, under a, under thirdly, of the Wabo.

The decisions pursuant to Article 2.12, subsection 1, under a, under thirdly, of the Wabo refer to the decision to grant an environmental permit for the construction in conjunction with the deviation from a zoning plan or management bye-law. To understand this structure, it is recommended to think about procedures pursuant to Article 19 of the WRO, which this Wabo provision resembles. These kinds of decisions are probably highly relevant for the recovery of groundwater remediation costs. In the station area, I am assuming that this will often concern facilitating requests of companies to make construction possible planning-wise on their land. If it concerns the land of a single company or a single owner, this structure is swiftly selected under the Wabo. When exploring the sites assumed to be subject to new building plans in the future, the municipality must therefore not just base itself on its own intent to adopt zoning plans. An assessment will also have to be made of land where public initiatives are anticipated with a request for planning assistance.

Furthermore, it is important for this exploration that the municipality verifies whether powers to introduce amendments are included in existing zoning plans. In so far as this is the case, it must then be assessed whether actual use of this power should be anticipated²¹. Concerning those plan parts for which the adoption of amending plans can be expected, the building plans to be made possible therein will be included in the cost recovery.

²¹ For these amending plans, it does not matter whether the power to introduce amendments is included in a zoning plan adopted under the WRO (hence, before 1 July 2008) or under the Wro (from 1 July 2008).

3.2.3 Determining benefiting areas

In addition to the areas referred to in section 3.2.2, other areas could in principle also benefit from the groundwater remediation. In order to explore whether this is the case, two kinds of questions must be answered.

Firstly: does the remediation only benefit land on which potential new construction is possible or are there conceivably other situations in which existing built-up land might benefit. I have been given to understand by Mr. G. Kremers that the remediation is not performed for the purpose of the general health of Utrecht's residents. After all, the contamination is situated in a soil layer with which there is no physical contact. This means that not all land within the groundwater remediation area would generally benefit from the remediation. At this point, I propose that the municipality deliberates internally regarding this question for the purpose of verification.

Secondly: have buildings been erected since the beginning of the remediation, so that they have since benefited from the remediation as they did not have to perform the earlier and necessary groundwater extraction? It is necessary to make a list of the lands of these buildings. Even though these lands can no longer be included in the cost recovery, as they do benefit from the remediation, the remediation costs cannot entirely be recovered from the future building plans.

Thirdly, I point out that phase 2 of the area-oriented remediation constitutes a point of attention in this respect. As soon as it is decided to set up the remediation also for phase 2, the same questions apply for the area of phase 2.

3.2.4 Combining future building plans and other benefiting areas

The lists of the lands as referred to in sections 3.2.2 and 3.2.3 must be combined. An apportionment formula must be determined for these lands, e.g. the number of m² of allocatable area or the number of m² of constructible surface. It is best to determine an apportionment formula by the time that this list has been completed. This enables an assessment of the dimensions of the building structures (footprint, height, number of layers).

Once these lists have been combined, it can be determined by means of the apportionment formula to be selected how much of the remediation costs can be allocated to sites that can still be made possible planning-wise. I will clarify this with an example.

Example

Suppose that the remediation has made construction covering an area of up to 1,500 m² possible planning-wise at two sites, each 2,500 m² large. And suppose that, between the moment of the adoption of a structural vision (suppose on 1 January 2013) and 1 January 2025²², building

²² An arbitrarily assumed time horizon of the structural vision.

structures covering an area of up to 1,500 m² will be made possible planning-wise on 8 sites that are each 2,500 m² large, within 12 years. Furthermore, assume that the remediation costs amount to 5 million euros. In that case, this example contains 10 benefiting sites of the same size and with the same building opportunities. For two of those sites, actual cost recovery is no longer possible, but it is still possible for the 8 future sites. Therefore, 80% of 5 million euros is recoverable in this example, or 4 million euros. Apportioned among the 8 sites of the same size, that is 0.5 million euros per new building site. This does not yet mean that each of those sites will effectively contribute 0.5 million euros. The application of the macro-capping to these sites must still be verified, as indicated in section 2.2.5.

3.2.5 Selection of apportionment formula

The reality will obviously be much more complex. In determining the apportionment formula, you could opt for the number of built-up and to be built up (maximum planning-wise) m² of floor area. The maximum number of m² of floor area to be built up is obviously difficult, if not impossible, to determine over the relatively long term of the 12 years selected here. A more simplified method consists of making an estimate of the number of m² of allocatable area in which construction will be made possible (planning-wise) in the future. Even this estimate of the m² to be newly allocated will still be complex.

3.3 Structural vision and policy document on multi-district costs

If the consequence of an indicative estimate is that the recoverable amounts in the application of the cost recovery are 'lucrative' enough to effectively follow the path of Part 6.4 of the Wro, then all the preceding steps are important. In that case, realising a structural vision and a policy document on multi-district costs is relevant. It is also important to internally reflect on the question of whether it is desirable to make new building developments possible before the structural vision and the policy document have been adopted. The absence of that determination would legally destabilise the actual allocation, as made clear above by means of the 'Beverwijk' matter.

3.3.1 Structural Vision

For this purpose, it is necessary to determine which area is being demarcated as the structural vision area. It is recommended in this regard to verify whether this being limited to the 'contaminated area' as referred to in section 1, or whether a potential future expansion of that area will be included.

In the structural vision, attention is devoted to:

1. The connection between the sites with new building plans and the groundwater remediation;
2. The introduction of a fund in which cost recovery contributions of new construction sites are deposited. The structural vision provides, in conformity with Article 6.13, subsection 7, of the Wro, indications for using the fund contributions. In this matter, that is straightforward: the fund contributions are used to cover the costs of the groundwater remediation;
3. The question of whether new construction sites are anticipated to show a positive balance on the land development. It is legally not necessary to indicate how large those balances are anticipated to be. However, it is necessary to make approximate calculations. Due to the use of macro-capping, it is after all impossible to make sites with an anticipated shortfall contribute to the groundwater remediation.

3.3.2 Policy document on multi-district costs

This could presumably be prepared for a large part in parallel to the structural vision. In that case, it is important to identify how large the estimated amount of groundwater remediation costs is and which construction sites are benefitting from it.

It is wise for the municipality to have an idea, for internal use, of the amounts that can proportionally be recovered when this would be included in a development plan. In doing so, the municipality has an indication of the amount it can stipulate in negotiations on anterior agreements.

If anterior agreements are not (or not for the entire development area to be formulated) concluded and the municipality after all wants to adopt a zoning plan for certain areas, then a development plan must accompany that zoning plan. As it is an administrative law planning structure, that development plan must contain a substantiated indication that the costs can be apportioned, that the area benefits from it, and what a proportional contribution is. At that moment, it is crucial for the municipality to have a 'cornerstone' available that can be used for the entire breadth of the 'contaminated area'.

Thought should be given to which parts of such a document must be kept internally for negotiation-tactical reasons and which part can be adopted as a public policy document.

3.3.3 Suspend planning assistance until the adoption of the multi-district policy document?

As indicated in section 2.2.1, the cost recovery of Part 6.4 of the Wro is only possible for building plans that are still being made possible planning-wise. Due to the aforementioned case law concerning the Woonwijk Westelijk Beverwijk development plan, I am assuming (for safety's sake) that the municipality must have had the allocation of the multi-district remediation costs recorded in a policy. This means that, if the municipality currently makes building plans possible before that recording in a policy has taken place, these multi-district costs cannot be apportioned among

those sites. If the municipality, by means of an indicative analysis, would reach the conclusion that it is financially interesting to proceed with this cost recovery, then it is wise to suspend the planning decisions to make such building plans possible until that recording as a policy has taken place. The structural vision for the 'contaminated area' must then preferably also have been adopted.

This requires careful internal official and also administrative communication.

3.4 Conclusions

In summary, the following is important for the actual possibilities for application of the cost recovery pursuant to Part 6.4 of the Wro:

1. Causal relationship and benefit. There is a causal relationship between the groundwater remediation, on the one hand, and the possibilities (to be made possible planning-wise) for installing ATES systems and realising buildings, on the other hand. Such developments consequently also benefit from the remediation. As far as the buildings are concerned, it has to be figured out whether groundwater extraction must be assumed to be necessary for all of them and that, as a result, there is a matter of remediation measures (that are prevented by the area-oriented remediation). That question is also important for determining the benefit.
2. Policy-oriented record. For the cases that have this causal relationship, it is recommended to record this as a policy. In this case, we can concretely consider a multi-district costs policy document. It is advisable to only start with the allocation of costs to building plans that still have to be made possible planning-wise until such policy document has been adopted. Prior or in parallel to that, it is recommended to record the relationship of the remediation and the benefiting new construction sites in the structural vision. If a structural vision has already been adopted under the Wro, then a section concerning compensation between plans could be added to this part via a partial amendment of that vision.
3. Moment of making new building developments possible planning-wise. An issue to consider is to suspend making new building developments possible planning-wise until after the cost recovery has been recorded policy-wise in a structural vision and a multi-district policy document.
4. Usefulness of sorting out further. All that is obviously only useful if there is effectively an adequately substantial amount to be recovered.
5. Verification of benefiting areas. As far as the question of what a proportional amount is for the recovery of the remediation costs on building plans to still be made possible planning-wise is concerned, it is necessary to verify which other areas with building plans have benefited from this remediation. As soon as this and the size of those areas is known, one can look for an apportionment formula for the costs in order to be able to determine a proportional allocation of the costs for the new developments.
6. Practical translation. In the practical sense, the aforementioned can be translated into a number of actions. These are described in chapter 5.

4 Alternatives

It is conceivable that the exploration of the path of Part 6.4 of the Wro reveals that this path will yield insufficient cost recovery. In principle, the possibilities of cost recovery will cease to exist in that case, at least in contrast with the current legal system. In the past, the municipality has had research performed into the question of whether the municipality could recover the costs of the area-oriented remediation on the basis of the concept of unjust enrichment by owners who are able to develop in a more affordable manner as a consequence of the remediation. This has led to the conclusion that proceedings on the basis of unjust enrichment are not feasible. Even if there is enrichment, the question namely remains whether that enrichment is unjust.

It is likely that a possibility might arise in the future for authorities to impose a 'planning betterment levy' (planbatenheffing) for the development of land that generates a profit on land development. In 2010, the then Ministry of Housing, Spatial Planning and the Environment (Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, VROM) received a report containing an analysis of the possibilities for a so-called planning betterment levy. A planning betterment levy system is currently being used in Flanders. The question is whether it is useful to plead with the Ministry (currently Infrastructure and the Environment (Infrastructuur en Milieu, IenM)) for the introduction of a planning betterment levy system. In that case, the confirmation question is whether such a system would effectively not have the same outcome as proceedings based on unjust enrichment. I will not take the latter question into consideration here²³, but it could be an interesting matter for the municipality to compare these two items and based on the outcome of the comparison, to assess whether it makes sense to plead with the Ministry for the introduction of a planning betterment levy system. For that matter, the proceeds of the planning betterment levy can be used for many more purposes than just to cover the remediation costs (in this case).

A planning betterment levy shall be taken to mean the following:

When owners can experience losses from planning decisions because these can result in a planning-related deterioration for them, then the Dutch system grants them the right to compensation for loss resulting from government planning decisions. Vice versa, there is no obligation to contribute in situations in which their lands have experienced an increase in value. That increase in value is present when a profit can be made on the land development, after

²³ This matter falls outside the problem definition and therefore outside my consultancy engagement. Moreover, I am not familiar with the reports of the research into the possibilities for proceedings based on unjust enrichment.

deduction of all land development costs (including the cost of acquisition of the unimproved vacant land²⁴).

The cost recovery scheme provides possibilities for recovering costs, but not for creaming off increases in value of land. That would be one step further. In the case of the Utrecht groundwater remediation, for land for which the municipality wants to make building plans possible, a situation could also arise in which those lands experience an increase in value and generate a profit on the land development. In that case, the municipality of Utrecht could benefit from a system of planning betterment levies. For this remediation, the municipality could somewhat elaborate such a system and urge the Ministry to implement it. The municipality could possibly discuss this in advance with the Association of Netherlands Municipalities (Vereniging van Nederlandse Gemeenten, VNG) and coordinate this with other municipalities that are confronted with comparable remediation tasks. The idea of the implementation could possibly also be submitted to the Ministry, in parallel or after discussion with the VNG. Making ATES systems possible has not yet been included in the mentioned research, but it could possibly shed a new light on the idea for a planning betterment levy.

It is conceivable that the implementation of the system of planning betterment levies would (largely) be too late to be of use in the Utrecht situation. In that case, it would likely be of interest to other municipalities. Moreover, again, planning betterment can also be used to cover other municipal cost items, depending on whether the law allows this.

²⁴ In this context, unimproved vacant land shall be taken to mean: the costs of acquiring lands without them having been prepared for construction of building structures in conformity with the new zoning plan. It can also concern land with buildings or structures erected on it that have to be demolished due to the development

5 Elaboration issues and actions

In this section, the elaboration issues and actions, as distilled from the preceding sections, are summarised.

Step 1

As indicated in section 3.2.1, it is recommended to first make an indicative assessment of whether it could be financially interesting to effectively apply the path of Part 6.4 of the Wro. This will require urban-planning economical explorations. In doing so, it should be assessed in advance whether the macro-capping of Article 6.16 of the Wro will be on the agenda.

If the conclusion of this action is that the path of Part 6.4 of the Wro is insufficiently financially interesting, then the actions of step 2 can be omitted.

Step 2

If that exploration reveals that this path could be interesting, then the adoption of the structural vision is the legally safest route. This adoption is recommended. In doing so, attention must be devoted to the elements referred to in section 3.3.1.

The adoption of a multi-district costs policy document is also required. This document goes with the adopted structural vision and must be considered as the specification of the proportional allocation of the remediation costs to the benefitting areas and thereby as the policy-wise substantiation for the negotiations on anterior agreements as well as for development plans that potentially must be adopted.

The municipality must decide whether it is prepared to suspend the planning decisions regarding making possible building plans that could contribute to the remediation costs, until after the structural vision and the multi-district costs policy document have been adopted.

In the meantime, a tactic can be created for a combination of planning decisions for making building plans possible, the demarcation of the areas of those planning decisions, and the negotiations with owners of land for which building plans will be made possible in the future, either on the initiative of the municipality or on the initiative of those owners. That tactic also includes the creation of a communication procedure, so that owners who want to build something in the future know in advance that they will be expected to contribute to the remediation costs.

Step 3

Another step is the research into an alternative to the system of planning betterment levies. This can be done at the same time as step 1 or also in parallel to step 2. It could be verified whether the idea of introducing a planning betterment levy could help in making namely the costs of area-oriented groundwater remediations partially recoverable. If this results in an indication for implementation, then the idea of such implementation will be presented to the VNG and possibly also submitted directly to the Ministry of Infrastructure and the Environment. Before the municipality proceeds with this, it is advisable to compare the research performed earlier into possible proceedings on the basis of unjust enrichment with the idea of partially creaming off profits on private land development. The confirmation question in this case is whether this pertains to the same elements or whether there are relevant differences after all.



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