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La flexibilité en droit de l'urbanisme

Flexibility in urban planning law

SOUS LA DIRECTION DE
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– CHAPITRE II –
BELGIQUE / FLANDRES

FLEXIBILITY IN SPATIAL PLANNING LAW

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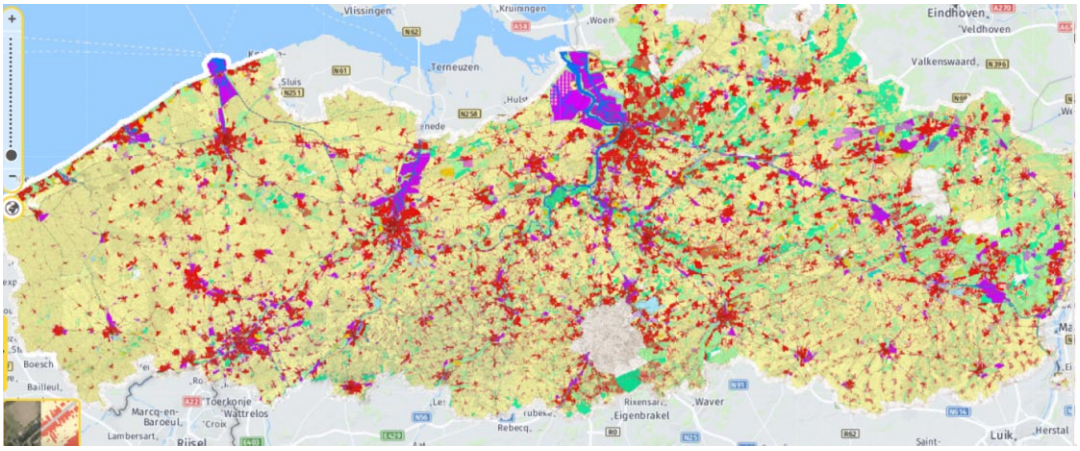
I. Flexibility in establishing spatial planning

In Belgium, spatial plans were only introduced nationally for the first time by the Town and Country Planning Act of 29 March 1962. Previously, only municipal plans existed, but these were rather rare. This meant that there were no rules for permit applications and that, in principle, it was possible to build anywhere.

The Town and Country Planning Act of 1962 introduced "development plans". The national government was responsible for drawing up the so-called "regional plans" and the municipalities could draw up "special plans of development" (SPD). The regional plans were only drawn up a decade later and came into force between 1975 and 1980.

It is unique in the world that the regional plans have allocated the entire territory of Belgium. For Flanders, the map of the regional plans looks as follows.



Each zoning had a colour and a Royal Decree linked an urban development regulation to each colour. These regulations were limited to determining a zoning such as 'residential area' (red), agricultural area (yellow), industrial area (purple), nature or forest area (green), recreational area (orange). All regulations provided for a mono-functional zoning, except for the residential areas, which provided for the possibility of interweaving housing, trade, services, crafts and small businesses, green spaces, socio-cultural facilities, public utilities, tourist facilities and agricultural businesses.

A specific regulation, also unique in the world, is the regulation for residential extension areas: "The residential extension areas are reserved for group housing construction as long as the competent government has not decided on the planning of the area and as long as, according to the case, either that government has not taken a decision to fix the expenditure for the facilities or the promoter has not entered into a firm commitment regarding these facilities". In short, in residential expansion areas, permits can only be granted for group housing construction as long as the government has not decided on the 'planning' of the area. Residential expansion areas are discussed further in the discussion of the key example (Section V).

The municipal plans (SPD) had to lay down the zoning and development regulations in a very detailed manner. By law, they could not be flexible and they could not deviate from the underlying regional plan. The

graphic plan of a SPD was very detailed, and detailed urban development regulations were attached to each colour. For example:

In 1996, the instrument of 'structure plans' was introduced. A structure plan is not a zoning plan, but is (only) a policy document that sets the framework for the desired spatial structure. It provides a long-term vision for the spatial development of the area in question. These are plans with a certain level of abstraction that provide answers to various crucial but complex questions. How many dwellings will there be in five years? Where are we going to build them? How much space are we creating for businesses? What kind of places are best suited for this? How much green, how much forest, how much agricultural land? In what kind of places are we going to do that? Spatial structure plans are drawn up for the territory of Flanders, for the territory of each province and for the territory of each municipality.

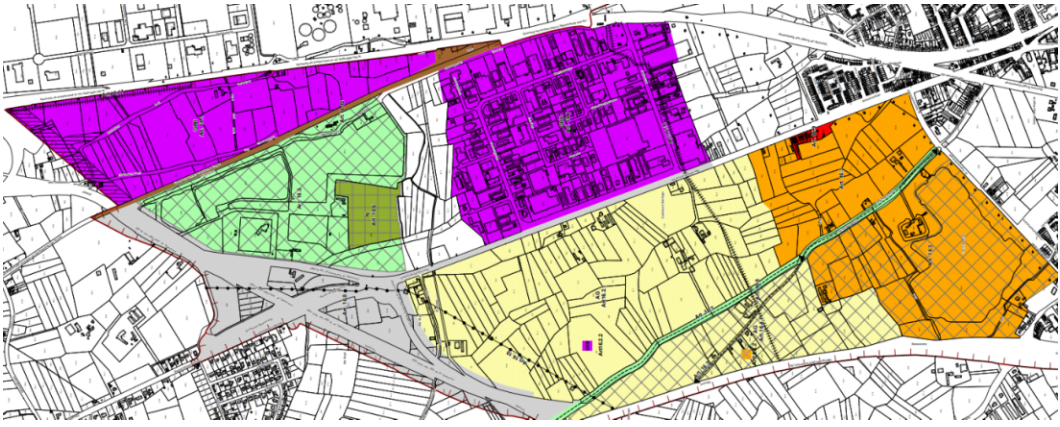
In 1999, the instrument of spatial executing plans (SEP) was introduced. This was a new type of zoning plan, intended to replace the plans of development (regional plan and SPD). However, the former regional plans and special plans of development (SPD) remain in force until they are replaced by a spatial executing plan (SEP).

A spatial executing plan can be drawn up on three levels (instead of two levels before): the Flemish Region, the provinces and the municipalities.

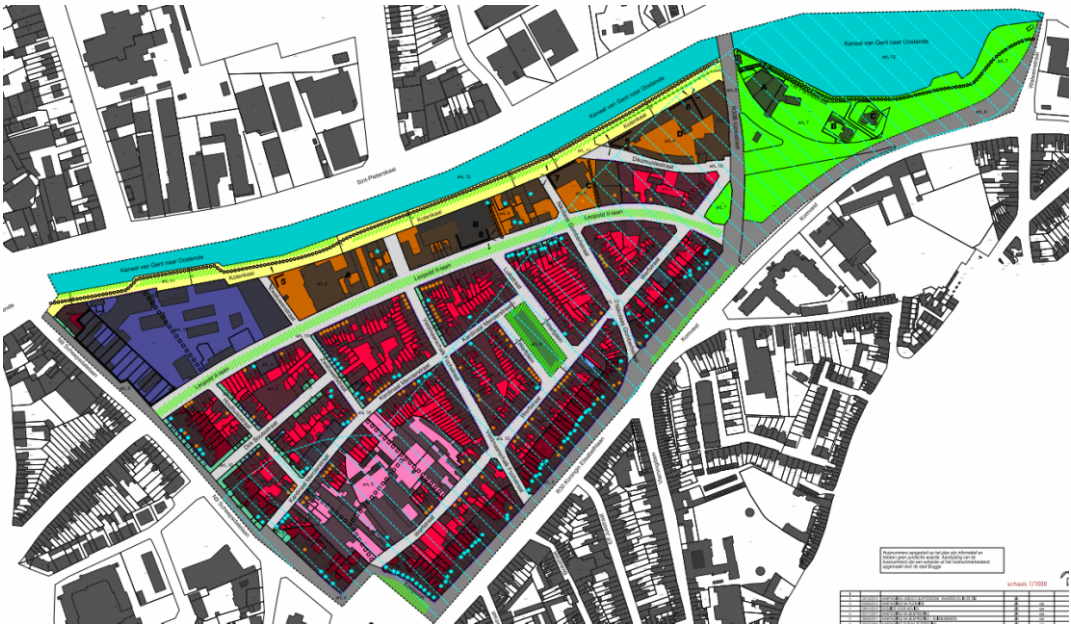
The old development plans were considered too rigid and the intention was that a SEP would show more flexibility. In practice, however, the new instruments have proved not to be very different from the old ones:

- The regional special executing plans (SPI) are very similar to the former regional plans where often only a zoning regulation is provided with very limited development regulations,
- A municipal SEP is very similar to a former special plan of development (SPD) with very detailed zoning and development regulations.
- The provincial SPI's sometimes look like a regional plan and sometimes like a SPD.

Example of a regional spatial executing plan:



Example of a municipal spatial executing plan:



Also new was that a spatial executing plan must comply with the spatial structure plans. A spatial executing plan may not deviate from the spatial structure plans, unless due to unforeseen developments or because of urgent social, economic or budgetary reasons, and provided that a thorough justification is given. Jurisprudence strictly supervises the justification of a deviation.

This is an important novelty in the light of the theme of flexibility. Previously, the planning authority was not bound by any rule to amend a regional plan or a SPD (except that a SPD could not deviate from the underlying regional plan). Since the introduction of structure plans and spatial executing plans, a regional plan, a SPD or a SPI can only be replaced or changed if the spatial executing plan (SPI) is in accordance with the vision of the structure plan.

In 2018, the Act was amended again and the instrument 'spatial policy plans' was introduced as a successor to spatial structure plans. The law provides for a long transitional arrangement, which means that in practice spatial structure plans will remain in force for a long time. So far,

only one municipality has a definitive spatial policy plan. No province has a spatial policy plan yet, and the Flemish Region does not yet have one either.

Like spatial structure plans, spatial policy plans form higher binding frameworks for drawing up spatial executing plans. Only in the case of unforeseen developments or urgent social, economic or budgetary reasons, and with thorough justification, can a spatial executing plan deviate from a spatial policy plan.

If the government wants to change a zoning plan, a number of material conditions apply.

- A spatial executing plan may not deviate from spatial structure plans (see above). A municipal spatial executing plan must be in accordance with its own structure plan and with the provincial and regional structure plan. A provincial SEP must be in accordance with its own structure plan and with the regional structure plan. A regional SEP must be in accordance with its own structural plan. As mentioned above, deviations are only possible in exceptional cases and with thorough justification. Similar rules - somewhat less strict - apply to the relationship between a spatial executing plan and future spatial policy plans.
- A spatial executing plan must comply with the so-called ‘objectives article’ of the Flemish Codex on Spatial Planning, which puts sustainability and spatial quality first: "Spatial planning aims at sustainable spatial development in which the space is managed for the benefit of the current generation, without compromising the needs of future generations. In doing so, the spatial needs of the various social activities are balanced simultaneously. It takes into account the spatial carrying capacity, the impact on the environment and the cultural, economic, aesthetic and social consequences. In this way, spatial quality is pursued."
- The planning authority must justify the choices made in the SPI in relation to the article on objectives. There is no formal obligation to give reasons, only a material obligation to give reasons: the dossier must show that the reasons are sufficient. Jurisprudence checks the justification of the objectives only marginally.

- An important limitation to the possibility of amending a zoning plan is the translation of the results of the environmental impact assessment into the spatial executing plan. Case law on this subject is very strict. Case law states that the 'principle of due care' requires that the planning authority must take the necessary measures to solve problems that emerge from the environmental impact report in the spatial executing plan itself. The planning authority may not pass the solutions on to the licensing authority.

An important element is the emergence of a right to compensation (called 'plan damage compensation') if a change of use results in the loss or reduction of the possibility of obtaining a permit through a spatial executing plan.

For the change of destination from residential area, the plan damage compensation is limited to 50 meters behind the building line of the equipped road. This restriction does not apply to the rezoning of other 'hard' destinations such as industrial area or recreational area.

It is unique in the world that this possibility of compensation is unlimited in time, regardless of the age of the amended zoning plan and regardless of the length of time someone owns the land whose use is changed.

The legislation does not provide a formal possibility for stakeholders or third parties to take an initiative for the preparation or revision of a spatial executing plan. Of course, a third party can always make a request to the planning authority to take an initiative, but the government is not obliged to deal with this request.

The legislation provides one exception, namely for zone-foreign companies, which are companies that are not located in the appropriate zoning area or that have an expansion need outside the appropriate zoning area. These companies can request a 'planning certificate'. After obtaining this certificate, the companies can apply for a permit for short-term needs. For long-term needs, the government must take the initiative to start up a procedure for drawing up a spatial executing plan within one year.

Only the materially competent authority can take the initiative to draw up an executing plan. A competent authority (e.g. the Flemish Region) can delegate its planning authority to another planning level (e.g. the municipality).

The procedure for drawing up or amending an executing spatial plan is complex and lengthy. Realistically, it takes about two years (or more) between the decision to draw up a spatial executing plan and its final adoption.

The procedure is similar for the plans of the three levels (municipality, province, Flemish region).

1 The preparatory phase: designation of the planning team. The government is bound by public procurement rules and must consult several design offices. Sometimes planning authority administrations make the plan themselves, but this is rather rare. Case law is very strict on the question of whether a stakeholder can bear the financial costs of preparing a spatial executing plan, since a spatial executing plan is supposed to serve the public interest and not private interests.

2 The format of a starting note and a process note. A starting note describes the intentions of the planning authority and, in principle, leaves several options open.

3 The starting note is subject to consultation with the public, advisory bodies and advisory councils.

4 This leads to the drafting of a scoping note for the impact assessment (including the environmental impact).

5 The next step is the preparation of a preliminary draft SEP and impact assessments, with (optional) a plenary meeting with all advisory bodies and/or a written consultation round.

6 The draft SEP and impact assessments are then prepared and the SEP is provisionally adopted.

7 A public enquiry will be held on this.

8 The last step is the final decision on the SEP and the final quality assessment of the impact assessments.

9 The spatial executing plans of municipalities are subject to administrative supervision by the province and the Flemish Region. Provincial plans are subject to administrative supervision by the Flemish Region (see also Section IV).

10 Eventually, the spatial executing plan will be published, after which it will enter into force.

In 2018, a simplified amendment procedure was introduced with a view to increasing spatial efficiency. This procedure has fewer steps and can, in principle, be completed in six months.

The procedure is primarily intended to amend old special plans of development (SPD), as these plans were very rigid. The procedure can also be applied to spatial executing plans (SPI), but only to change the design regulations and not the zoning.

The material conditions for the simplified procedure are very numerous and complex, which is why the procedure is almost never applied in practice, among other things because of the restrictions to change zoning regulations (also for the special development plans).

It can be concluded that the possibility of amending zoning plans in Flanders is not flexible because of a combination of factors: an amendment must comply with the vision of the spatial structure plans or spatial policy plans, only the government can take an initiative, the procedure is complex and takes a long time, and the government risks having to pay compensation for planning damage if it reduces the possibilities of obtaining a permit.

II. Flexible plans

The Flemish Codex on Spatial Planning stipulates that a spatial executing plan can impose property restrictions, and provides for the possibility of modulating the urban development regulations in a number of ways.

A spatial executing plan always contains a graphic plan and the corresponding urban development regulations regarding zoning, design or management. The graphic plan and the regulations have regula-

tory force. Case law has ruled that a spatial executing plan does not always have to contain all three types of regulations. A spatial executing plan can limit itself to one type of regulations.

- There is an important note here: due to the historical situation whereby the entire territory is covered with regional plans, case law has ruled in the past that everyone has the right to a zoning of its land. This means that a spatial executing plan that only provides for design regulations or management regulations must use the technique of an 'overprint' on top of the existing zoning regulation. For example, a regional plan for a 'residential area' or 'industrial area' where a spatial executing plan lays down development regulations to determine how the buildings in the residential area or industrial area should look (height, volume, site occupation, use of materials, etc.).
- Planning regulations may be of such a nature that they allow a temporary use of space, take effect after a period of time, change the content at a certain point in time, or allow a part of a regulation to take effect when the included condition is fulfilled. This provision allows for phased zoning.
- A rule that provides for a use that takes effect only after a certain time or changes at a certain point in time must be carefully worded so that there is always sufficient legal certainty as to when the use will change. A certain period or deadline and/or a fixed or sufficiently clearly identifiable event is an acceptable criterion according to case law. According to case law, a change of use may not be linked to the identity of persons, for example the occupation of a dwelling by a specific person or the operation of a business by a specific (legal) person.
- Initially, case law was very strict about phasing a destination, but since 2014, case law has taken a remarkable turn and allows a lot.
- Initially, case law did not accept, for example, that zoning should be made conditional on the execution of certain infrastructure works in the vicinity, such as the construction of a roundabout or a new connecting road or access and exit complex a bit further down the road. Nor did case law initially accept that a zon-

ing permit for housing could only be issued after a park had been built first. After all, all those conditions are too uncertain: it is not certain when they will be met, or even if they ever will be.

- As of 2014, the case law has changed. Destinations that depend on infrastructure works at another location are acceptable according to the changed case law. Although the time is not 'determined', the time is 'determinable' according to case law. A similar reasoning is made in case law that accepts that a spatial executing plan divides the development of a residential area into phases and stipulates that permits for a next phase can only be granted when a certain percentage of the previous phase has been realised. Case law also accepts that a spatial executing plan imposes that a certain zoning area must be realised in one whole, regardless of the ownership structure.
- In conclusion, the modalities introduced by the Act to allow for flexibility are used in planning practice to impose rigid conditions and thus hinder flexibility. They even hinder sometimes the realization of the given destination of the plan, specifically when the posed condition is never executed.
- The urban development regulations may prescribe modalities that must be observed when planning the area. However, a zoning plan must be enforceable on its own and may not prescribe an additional planning instrument or an additional procedural step.
- According to established case law, a spatial executing plan may require the applicant for a permit to submit a 'design study', provided, however, that the design study is only intended as an informative tool for assessing the permit application.
- Urban development regulations may stipulate that the executing of the spatial executing plan is subject to the adoption or executing of certain instruments, including an urban development ordinance or an agreement.
- Linking an agreement to a spatial executing plan can be useful if, for example, certain infrastructure works need to be carried out to meet the results of the impact assessment. For example,

additional public transport or an additional entrance/exit ramp, etc.

There is a lot of case law on flexibility in spatial executing plans and the relationship with the 'principle of legal certainty' on the one hand and the 'principle of due care' on the other.

- As regards the 'principle of legal certainty', the case law states that the person seeking justice must be able reasonably to foresee the consequences of a particular act at the time when that act is performed. It follows that town planning regulations must be formulated in a sufficiently clear manner. However, the requirement of foreseeability and precision does not prevent these regulations from being interpreted flexibly, or from granting, within reasonable limits, a certain degree of discretion to the licensing authorities when assessing a concrete building permit application.

  The question of when a rule is sufficiently predictable and precise, or too vague and general, is the subject of very casuistic jurisprudence.

  The Council of State always looks at a regulation in the totality of all regulations of the spatial executing plan. A regulation that is flexible or vague on its own can become sufficiently concrete if it is read together with the other regulations and the graphic plan. The indicative indication of roads and paths on the graphic plan is usually accepted by the courts.

  Regulations related to the assessment of 'good spatial planning', such as the concepts of "small-scale", "scale and building characteristics", "aesthetically pleasing closure", as well as objectives such as the pursuit of "spatial quality" and the "safeguarding of good local planning", leave a wider margin of appreciation for the licensing authority, according to case law, but not in a manifestly unreasonable way.
- With regard to the 'principle of due care', case law states that it is not acceptable for the planning authority to remove an aspect that it has itself recognised as being an important point of attention from the spatial executing plan and to postpone it to a later,

undetermined date. The principle of due care requires that a spatial executing plan takes all measures to provide a solution in the plan itself for elements that are essential, such as the accessibility issue in the context of a spatial executing plan for the expansion of a company, the impact of the intended uses on the living environment (e.g. a permanent circulation with training facilities for motorised sports), the established noise and traffic nuisance as a result of the expansion of a party hall complex, an established mobility problem for the surrounding area, …

In 2016, the law was amended to address the strict jurisprudence on this point, which led to many annulments of spatial executing plans. As mentioned above, since 2016, a spatial executing plan can be linked to an agreement or a town planning ordinance that regulates those aspects.

III. Deviating measures

The Flemish Zoning Code contains an impressive number of deviation rules. The reasons for this are twofold: on the one hand, the fact that the entire territory is covered by zoning plans and, on the other, the rigid nature of the plans.

Most deviation rules concern deviations from zoning regulations. This has to do with the fact that the regional plans - which still cover 80 % of the territory - have a mono-functional purpose. The legislation provides for one provision that allows for (limited) deviation from design regulations.

As mentioned above, the instrument ‘plans of development’ (regional plans and municipal SPD) was replaced in 1999 by the new instrument ‘spatial executing plans’. The intention of the legislator in 1999 was that the new plans would be sufficiently flexible so that derogations would become superfluous. Unfortunately, it soon became apparent that, in practice, the spatial executing plans differed little from the earlier plans. This is partly due to the attitude of the higher authorities (the Flemish Region and especially the provinces), which demand a high level of detail from the municipalities. The regulations of spatial executing plans re-

main rigid and very detailed. The legislator is of the opinion that this will cause problems if there is no controlled outlet for this. Therefore, the list of deviation possibilities is still systematically extended.

The possibilities for deviation are listed in the Flemish Codex on Spatial Planning. The rules are sometimes very complex and specific. There is not enough space to discuss all the rules in detail. This is a book-filling topic in Flanders.

If someone wants to use a derogation for a permit application, he has to justify it and the permit application is subject to public enquiry.

Many of the deviation rules are not allowed in the 'spatially sensitive areas' such as nature reserve, habitat area, forest area, etc.

A. Basic rights for 'zone-foreign' constructions

As mentioned, the first national zoning plans in Belgium were only drawn up from 1975 onwards. Before that, in principle, it was possible to build and subdivide anywhere. This means that in 1975 there was already a great deal of scattered building. Many of those homes and businesses ended up in non-appropriated land uses, such as agricultural or natural areas.
Over time, the legislator has developed various regulations to ensure the preservation of these existing buildings and their function. Today, the legislation provides for "basic rights" for all "wrong-zoned" constructions, i.e. constructions located in a zoning area that is different from the function of the construction. They are called 'zone-foreign' constructions. The most common situations are homes and craft businesses in agricultural areas.
The zoning rights are divided into rules for houses and rules for other constructions. In all cases, a construction must be licensed and must not be dilapidated. All constructions that were built before the regional plan came into force are considered to have been authorised.

- Any licensed, non-demolished house can always be renovated, rebuilt and/or extended to 1.000 m^3.

- Any other construction that is licensed and not dilapidated can always be renovated or rebuilt within the existing volume. Extensions are in principle not possible, except for some strict exceptions (e.g. for companies to meet environmental conditions or for health reasons of the employees, …).
- There is a regulation for buildings destroyed by force majeure (e.g. a storm).
- In spatially sensitive areas, only renovations are possible, not reconstructions or extensions.

B. Zonal-foreign function changes

In principle, the function of a building cannot be changed if the new function is not in conformity with the zoning regulations in the spatial plan. Flemish legislation provides a list of a limited number of possibilities for deviating from the zoning regulations to change the function of a building.

The most common non-conform function change is the conversion of a vacant farmhouse into a dwelling. This can be combined with the basic zone-foreign rights which means that the farmhouse can be rebuilt into a 1.000 m³ home and that all farm buildings can be renovated or rebuilt into residential outbuildings, e.g. for storage, garage, hobby room, indoor swimming pool, etc.

In buildings with heritage value, any function can be permitted, provided that the structure of the building is preserved. A combination with rebuilding is therefore not possible here.

Some other possibilities are e.g. storage in former agricultural buildings, noisy indoor recreation in industrial areas, tourist accommodation (maximum 8), …

C. Limited deviations from certain design regulations

A permit may, after a public enquiry, allow limited deviations from urban development regulations regarding 1° plot dimensions, 2° the dimen-

sions and location of constructions, 3° the shape of the roof and 4° the materials used.

Deviations may not be granted with regard to: 1° the destination, 2° the maximum possible floor area index, 3° the number of building layers.

Case law strictly enforces that the deviation is 'limited', as required by law.

Case law states that the possibilities for derogation are exhaustively listed. Anything that is not in the law is not eligible for a deviation. A deviation from a parking standard, for example, is not possible.

D. Varying deviation possibilities from the zoning regulations

1. Finishing rule

A permit for a single-family dwelling may nevertheless be issued for a plot that is not intended for residential construction, if all of the following conditions are satisfied:

1 the new dwelling is of:

   a. or the three-gable type, in which case it is built onto a waiting wall of an existing house on an adjacent plot,
   b. or the closed type, in which case it is built on a plot located between two guard walls;

2 the plot on which the new residence is to be built has a surface area of no more than 650 m²;

3 the building volume of the new residence shall be no more than 1.000 m³;

4 the adjoining existing dwelling(s) is (are) as of 1 September 2009 at the time of the permit application for the new dwelling mainly licensed and not dilapidated.

2. *Social or recreational co-use and temporary use pending the realisation of a destination*

In all zoning areas, activities aimed at socio-cultural or recreational co-use can be permitted under certain conditions, as long as they do not jeopardise the realisation of the general zoning by their limited impact.

In areas for business activities located in the port areas, activities aimed at noise sports (e.g. motocross) may be permitted under certain conditions on land where the business zoning has not yet been realised.

3. *Co-use of nature*

In all zoning areas, activities can be authorised that are aimed at the preservation, development and restoration of nature and the natural environment and of landscape values, in so far as they do not interfere with the realisation of the general zoning due to their limited impact.

4. *Protected monuments, town and village landscapes and landscapes*

In a permit concerning an existing, mainly licensed construction that is protected as a monument, or is part of a protected city or village landscape, cultural-historical landscape or archaeological site, it is possible to deviate from urban planning regulations, insofar as the actions concerned are advised by the policy field of immovable heritage.

The same applies, under certain conditions, to activities in the vicinity of a protected monument, such as the construction of a visitors' car park or reception infrastructure.

5. *Acts of general interest*

The Flemish Government has drawn up a list of works of general interest for which deviations from zoning regulations are possible. The list contains mainly infrastructure works.

There are two possibilities for derogation.

A permit for acts in the public interest may deviate from urban development regulations as soon as the authorising administrative body has

knowledge of the results of the public enquiry regarding a new spatial executing plan draft with which the acts in the public interest are compatible (so called 'positive anticipation').

- In a permit for acts of public interest that have a spatially limited impact, it is allowed to deviate from urban planning regulations. Acts of general interest can have a spatially limited impact because of their nature or size, or because they only entail a modification or extension of existing or planned infrastructure or facilities. The list of the Flemish Government clarifies which works are considered to have a limited spatial impact (e.g. a bicycle path, a municipal road of maximum 1 km, …). If a work of general interest is not on the list of works with limited spatial impact, a so-called 'project meeting' with all advisory bodies can decide on a case-by-case basis whether a work of general interest has a limited spatial impact or not. The case law on this is strict.

6. *Operations in industrial areas*

Craft enterprises or small and medium-sized enterprises can be admitted in areas that do not exceed three hectares and that are designated as one of the following areas in the regional plans:

1 area for environmentally harmful industries or for polluting industries;

2 regional business park, regional business park with a public character or regional business park, set up by the public authorities.

If the areas mentioned are larger than three hectares and do not exceed ten hectares, the derogation scheme can be applied provided that at least half of the area in question is already occupied by businesses.

Non-environmentally harmful regional companies can be admitted under certain conditions in areas larger than 10 hectares that have been designated as local business areas with a public character in the regional plans.

7. Stables for grazing animals

In areas with an area designation belonging to the category `agriculture', in so far as there are no existing stabling possibilities, a permit may be issued for the erection of one stable for grazing animals that is not related to an effective professional agricultural holding, if all the following conditions are met:

1. the stable is entirely erected within a radius of fifty metres from a primarily licensed or deemed licensed residential or business residence;
2. the barn has a maximum cornice height of 3.5 metres;
3. the barn has a maximum floor area of 120 square metres per hectare of grazing land, with an absolute maximum of 200 square metres.

8. Derogations for green energy

Under certain circumstances, the authorising administrative body may deviate from the regulations of a regional plan when granting a permit for wind turbines and wind farms, as well as for other installations for the production of energy or energy recovery.

Attention: this regulation does not apply to spatial executing plans. These new plans must determine for themselves whether wind turbines are allowed or not. The regulation is specifically meant for the old regional plans, which were drawn up at a time when green energy sources did not yet exist.

9. Derogations from special development plans (SPD) older than 15 years

In 2018, the legislator introduced general derogation options to deviate from special plans of construction older than 15 years. As mentioned above, these plans were very detailed and often hindered new developments and prevented good spatial efficiency.

The regulation provides many conditions. For example, it is only possible to deviate if the underlying regional plan has a 'hard' purpose (the law provides an exhaustive list of zoning regulations) and if the SPD itself

also has a 'hard' purpose. Thus, deviations from the zoning for agricultural area or spatially sensitive area are not possible, nor are deviations from the zoning for recreational area. This applies to both the zoning of the underlying regional plan and the zoning of the SPD. Neither are deviations possible for provisions from the SPD about roads, public greenery and heritage values. The regulation is not possible if the SPD deviates from the underlying regional plan.

The regulation is quite complex and case law interprets it very strictly. As a result, it is almost impossible to deviate from the zoning regulations of a SPD, except if the underlying regional plan is residential. The regulation is, outside the residential areas of the underlying regional plan, only applicable to deviate from the design regulations of a SPD that is older than 15 years.

10. Planning certificate

This has already been mentioned above (see Section I). A foreign-zoned company that wants to expand can request a planning certificate. If he receives this certificate, he can request a permit to deviate from the zoning regulations for his short-term expansion need. For long-term expansion needs, the competent authority must draw up a spatial executing plan.

IV. Administrative supervision and judicial control of flexibility

The questionnaire on control of 'flexible plans' is not really relevant in the Flemish context. There is only one type of spatial executing plan. There is no formal distinction between a flexible plan and a non-flexible plan. The procedure is always the same.
Every spatial executing plan of a lower authority is always subject to administrative supervision by the higher planning authorities. A municipal plan is subject to the supervision of the province and the Flemish Region, and a provincial plan is subject to the supervision of the Flemish Region.

The province can suspend a municipal spatial executing plan, the Flemish Region can suspend or annul a spatial executing plan of the municipality or the province. The region only proceeds to annulment if it considers that the irregularity cannot be repaired, eliminated, or resolved by following the procedure provided for reinstatement of the plan after a suspension.

A decision on the final adoption of the lower spatial executing plan may be suspended or annulled only in the following cases.

1 because of certain conflicts with the spatial structure plans or spatial policy plans;

2 if the spatial executing plan conflicts with a higher spatial executing plan;

3 if the spatial executing plan conflicts with directly effective standards within other policy areas than spatial planning or with binding parts of a policy plan adopted by the Flemish Government;

4 for non-compliance with a substantial formal requirement.

A specific 'flexibility test' is not provided for in administrative supervision.

The administrative judge (the Council of State) can annul a SEP on grounds of any illegality.
Specifically with regard to flexibility, there is extensive case law on the test for the 'principle of legal certainty' and 'the principle of due care' (see Section II).

The public enquiry may also be subject to judicial review. There is an established and strict jurisprudence whereby spatial executing plans are annulled if the planning authority does not sufficiently address the objections from the public enquiry or the advice. An objection can be dealt with either by addressing the objection and adapting the draft spatial executing plan accordingly, or by rejecting the objection in a reasoned manner.

The control of the application of deviation rules in the permit process is double.

Most permit applications provide for an administrative appeal procedure. Permits granted by the municipality can be appealed against by the province and permits granted by the province can be appealed against by the Flemish Government. There is no administrative appeal against permits issued by the Flemish Government, only an appeal to the administrative judge. The administrative appeal is devolutive, which means that the reviewing body examines the application from scratch, and thus also the request for a derogation. The permit-granting authority must properly justify the application of the derogation rules.

Permits granted on appeal or in first instance by the Flemish Government can be appealed to the administrative judge (the Council for Permit Disputes). The administrative judge is authorised to check the correctness of the conditions of application of the derogation rules and the motivation of the permit-granting authority. The judicial review on deviation rules is often very strict. The court has ruled that derogation rules are exceptions, and that they must therefore be interpreted and applied strictly.

V. Key example for Flanders: the construction shift

A major problem in Flanders is the scattered development of buildings and the increasing intake of open space, mainly for housing.
As mentioned above, a combination of factors causes these problems.

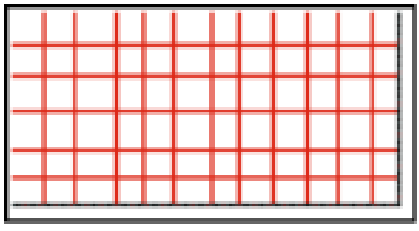
- At the time (1975-1980), the regional plans covered the entire territory of Belgium with zoning plans, which is unique in the world.
- At the time, a multiple of ‘hard uses’ (residential and industrial) was provided than the calculated needs (for residential two to three times the need).
- The destinations apply in perpetuity, as long as they are not replaced.

- In the case of zoning changes, the law provides for a compensation scheme that applies regardless of the age of the zoning plan to be changed and regardless of how long the landowner has owned the property.
- Belgium is the only country in the world where a zoning as 'residential extension area' exists (see below).

It is mainly the combination of all these factors that makes the regional plans a heavy legacy from the past that is difficult to undo. Since their approval in the period between 1976 and 1980, little fundamental change has been made to the 25 Flemish regional plans. The original regional plan is still the only regulatory plan for approximately 80 % of the Flemish territory. During the 1994-2019 period, the shifts between hard and soft uses amounted to only 5.600 hectares or 0.4 % of the total land-use budget, in favour of hard uses.

Due to the perpetual and area-wide nature, the planning burden is very high to revise all obsolete zoning. Because of the equally perpetual planning damage regulation, the planning authorities are afraid of the financial consequences for drawing up SEPs that convert a hard zoning into an open space zoning.

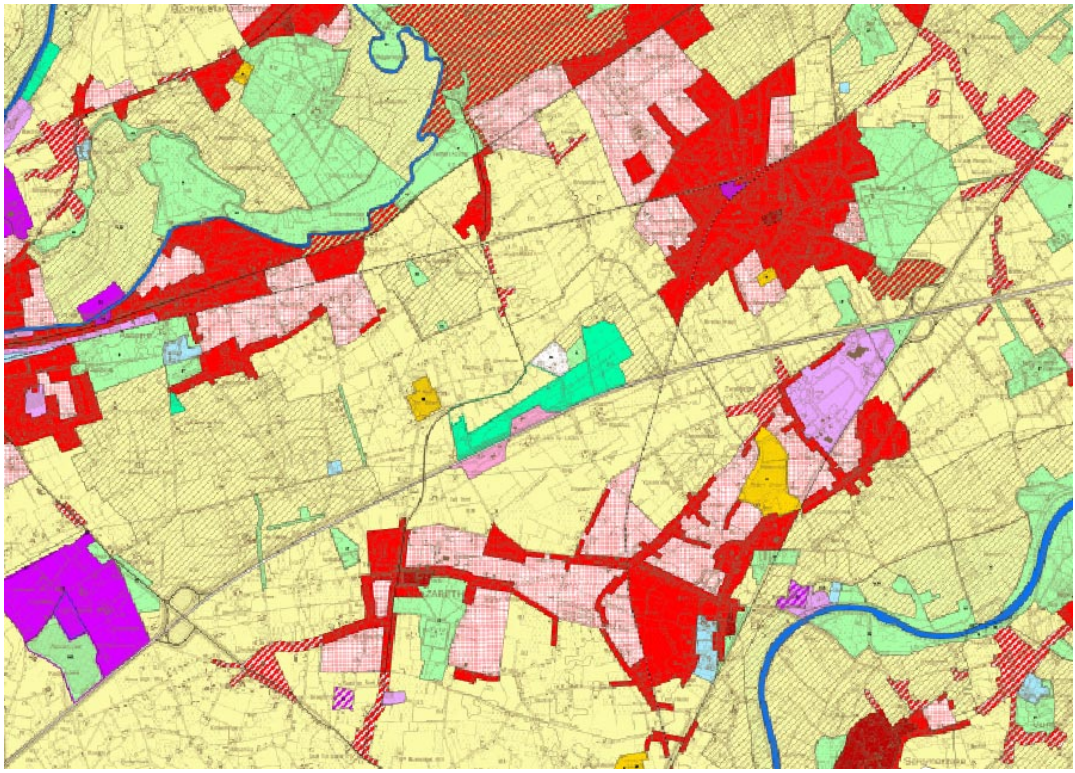
One of the big problems is the 'residential expansion areas'. This is a very ambiguous destination, which the government does not know how to deal with.



"The residential extension areas are reserved for group housing construction only as long as the competent authority has not decided on the planning of the area, and as long as, according to the case, either that authority has not taken a decision to fix the expenditure for the facilities, or no commitment with guarantees has been made by the promoter regarding these facilities".

In short, in residential expansion areas, permits can only be granted for group housing construction as long as the government has not decided on the 'planning' of the area. The real residential areas were located against the town and village centres, and the residential expansion areas were located more peripherally. To the great frustration of the spatial planners and the central government, it turned out that shortly after the introduction of the regional plans, the residential expansion areas were built on en masse. One of the reasons for this was that these lands were cheaper, given their peripheral location.

Dispersed and peripheral residential expansion areas:



Since the 1990s, the Flemish government has sought to limit development opportunities through pseudo-legislation (circulars). But a circular cannot change the content of a zoning plan, which has led to great legal uncertainty.

As a result of these circulars, case law has become increasingly strict. With regard to the legal condition of the "planning" of a residential expansion area, the case law ruled, for example, that an existing actual building does not count as ‘planning’ in the legal sense. According to case law, ‘planning’ is only possible by means of a global planning of the entire residential expansion area via a zoning plan or by means of a total subdivision of the entire area. This is hardly possible in practice, because most residential expansion areas were already partly built on when the regional plans were drawn up, and because, after the regional plans were drawn up, allotment and building permits were granted en masse in the residential expansion areas.

Actual built-up areas, almost completely or only very partially:

These circulars and the ever stricter case law create great legal uncertainty for the owners. Legally, the residential expansion areas are building land, but because of the attitude of the higher authorities and the case law, the owner is dependent on the - often political and subjective - attitude of the municipal authorities in order to know whether or not he has a chance of obtaining a permit.

In practice, only permits for group housing construction are possible. The paradox is that, by being strict on the possibility of getting a permit for the ‘planning’ of a residential expansion area, owners are ‘forced’ to ask building permits for group housing construction, which leads to an even quicker intake of open space.

Because of the heavy planning procedure, it is almost impossible to solve the problem of residential expansion areas by drawing up spatial executing plans. It is impossible to oblige the 300 Flemish municipalities to start procedures to abolish residential expansion areas, and for the Flemish Region the workload would be far too great to do this across the entire territory (e.g. handling objections from public enquiries).

On 22 February 2022, after years of political debate, the Flemish government approved a Concept Note 'Construction/Building Shift', which announced a legislative initiative to tackle the issue of residential expansion areas.

The proposed decree on residential expansion areas essentially provides that residential expansion areas will be declared unbuildable until 2030. During this period, the municipalities can either reallocate the areas (in which case the municipality may have to pay compensation for building loss), or offer the opportunity to develop the areas as a 'residential area' through a municipal 'release decree'. The release decree motivates how it is in line with the municipal spatial structure plan or the municipal policy plan, and it clarifies how it leads to a socially desirable and qualitative use of space and to a qualitative increase in the spatial yield in places where this is justified. The proposed decree provides a specific procedure for the approval of a release decision. A release decision obliges the municipality to draw up an SEP within one year.

In practice it will almost be impossible to decide for a 'release decree' because the spatial structure plans contain quota for housing, and there is almost no municipality of the outside area that has a positive quotum.

For lands where no municipal council decision to release a residential expansion area has been taken by 1 January 2030, and which have not been reallocated through an implementing zoning plan either, the Flemish Government shall adopt an implementing zoning plan no later than 31 December 2043. In this case, the Flemish Government will have to pay planning damages if building possibilities are restricted.

In all this, it can be noted that scrapping the residential expansion areas will not solve the progressive degradation of open space. Research

shows that of the 31.067 ha of undeveloped residential areas, only 30 % are in residential expansion areas and 70 % in 'normal' residential areas. Thus, deleting the residential expansion areas solves only a small part of the problem. Reallocating the other residential areas to open space will have to be done through spatial executing plans, but the chances of this happening on a massive scale are very small in view of the large planning burden and the financial consequences for the municipalities.

In addition, linked to the scheme for residential expansion areas, there will be a new planning compensation scheme that will be even more financially disadvantageous for the planning authorities that want to convert a residential zoning to an open space zoning. The new compensation scheme provides for an integral planning damage compensation based on estimated market value. This will make the compensation for planning damage even more expensive than the current compensation scheme, which will further increase the lack of flexibility to change plans.

The example is particularly illustrative for the Flemish planning context because it shows how problematic the past is and how difficult it is to correct spatial plans.

The example is not only illustrative for the past, but also for the present and for the future. In 1999, the legislator wanted to replace the old planning figures (regional plan/municipal SPD) with a new type of plan (spatial executing plans), but practice has shown in the meantime that relatively few spatial executing plans have been drawn up, while almost 25 years later 80 % of the territory is still governed by the old regional plans. Moreover, the new plans make the same mistakes as the old ones: they apply without a time limit, their uses are often monofunctional, the development regulations are often very detailed, etc. The new plans therefore again lack flexibility.

Only the new residential areas designated by the higher authorities when defining the urban areas, provide a zoning regulation that allows multiple functions, just like the old regional plans for residential areas. The municipal spatial executing plans are as detailed as the maligned old special plans. The reason for this is the mistrust of higher authority officials towards the municipalities, which forces the municipalities to draw up detailed spatial executing plans.

Due to the heavy procedural burden and possible financial consequences, the old plans remain valid for a very long time and become outdated, blocking new developments, such as multifunctional urban development projects with a high spatial return.

All this, in turn, leads the legislator to constantly provide new derogation options. These are often challenged before the Constitutional Court. Often, the Constitutional Court rules that the derogation scheme must be annulled due to the amendment by law of a zoning plan without a public enquiry and/or a violation of the standstill principle.

And if a (positive) derogation regulation is not challenged or upheld, it goes wrong in its application. For example, the statutory derogation scheme introduced to derogate from a 15-year-old SPD to increase spatial efficiency, contains overly strict conditions and runs aground on judicial interpretations that go against the intentions of the law.

Résumé

I. Flexibilité dans la détermination de l'aménagement du territoire

Les plans de zonage n'ont été introduits en Belgique que par la loi d'urbanisme du 29 mars 1962. Cette loi exigeait que l'ensemble du territoire belge (y compris la Flandre) reçoive une destination. Une multitude de destinations « dures » ont été fournies par rapport au besoin calculé, par exemple, de vivre et d'industries. En 1999, un nouveau type de plan de zonage a été introduit dans le but de remplacer les plans précédents. Les nouveaux plans peuvent être élaborés par la Région flamande, les provinces et les communes. Les anciens plans étaient considérés comme trop rigides et l'intention était que les nouveaux plans fassent preuve de plus de flexibilité.

Ces nouveaux plans de zonage doivent répondre à un certain nombre de conditions. Ils doivent être conformes aux plans de politique spatiale, qui établissent une vision à long terme des développements spatiaux. Un plan de zonage doit être conforme aux objectifs de durabilité et de

qualité spatiale. Une limitation importante de la possibilité de modifier un plan de zonage est la traduction des résultats de l'évaluation de l'impact sur l'environnement dans le plan.

Un seuil important pour changer de destination donne droit à une indemnisation si un changement de zonage a pour effet de supprimer ou de réduire la possibilité d'obtenir un permis.

La législation ne prévoit pas de possibilité formelle pour les parties prenantes ou les tiers de prendre l'initiative d'élaborer ou de réviser un plan de zonage.
La procédure d'élaboration ou de modification d'un plan de zonage est complexe et prend beaucoup de temps. De manière réaliste, il faut environ deux à trois ans (ou plus) entre la décision d'élaborer un plan et son adoption finale.
En 2018, une procédure de modification simplifiée a été introduite en vue d'accroître l'efficacité spatiale. Cette procédure comporte moins d'étapes et peut en principe être achevée en six mois. Les conditions de fond de la procédure simplifiée sont très nombreuses et complexes, ce qui signifie que la procédure n'est pratiquement jamais appliquée.
On peut conclure que la possibilité de modifier les plans de zonage en Flandre n'est pas flexible en raison d'une combinaison de facteurs : un changement doit répondre à la vision des plans de politique spatiale, seul le gouvernement peut prendre une initiative, la procédure est complexe et prend beaucoup de temps, et le gouvernement risque de devoir payer des dommages s'il réduit les possibilités d'obtenir un permis.

II. Plans flexibles

Le Codex flamand d'aménagement du territoire dispose qu'un plan de zonage peut imposer des restrictions de propriété et prévoit la possibilité de moduler les règlements d'urbanisme de plusieurs manières.
Les règlements d'urbanisme peuvent être tels qu'ils permettent une utilisation temporaire de l'espace, entrent en vigueur au fil du temps, que le contenu change à un certain moment ou qu'une partie d'un règlement entre en vigueur si la condition incluse est remplie. Cette

disposition permet de prévoir une destination progressive. La jurisprudence accorde beaucoup à l'autorité chargée de la planification, ce qui en pratique conduit aux plans rigides qui font obstacle à la flexibilité.

Les règlements d'urbanisme peuvent prescrire les modalités qui doivent être respectées dans la conception de la zone. Toutefois, un plan de zonage spatial doit être réalisable en soi et ne peut prescrire un instrument de planification supplémentaire ou une étape procédurale supplémentaire.

Les règlements d'urbanisme peuvent prévoir que la mise en œuvre du plan d'aménagement du territoire dépend de l'adoption ou de la mise en œuvre de certains instruments, y compris une ordonnance ou une convention d'urbanisme.

III. Mesures dérogatoires

Le Codex flamand d'aménagement du territoire comporte un nombre impressionnant de règles dérogatoires. Les raisons en sont doubles : d'une part, le fait que l'ensemble du territoire est couvert par des plans de zonage et, d'autre part, le caractère rigide des plans. Les règles sont parfois très complexes et précises. Si quelqu'un veut invoquer un régime de dérogation pour une demande de permis, il doit le justifier et la demande fera l'objet d'une enquête publique. Bon nombre des règles dérogatoires ne sont pas autorisées dans les « zones spatialement sensibles » telles que la réserve naturelle, la zone d'habitat, la zone forestière, etc.

IV. Contrôle administratif et contrôle juridictionnel de la flexibilité

La liste des questions sur le contrôle des « plans flexibles » n'est pas vraiment pertinente dans le contexte flamand. Il n'existe qu'un seul type de plan de zonage. Il n'y a pas de distinction formelle entre un régime souple et un régime non flexible. La procédure est toujours la même.

Tout plan de zonage d'une administration communale ou provinciale est toujours soumis à la supervision administrative des autorités supérieures de planification. Une décision d'adopter définitivement le plan d'aménagement du territoire inférieur ne peut être suspendue ou annulée qu'en cas de conflit avec un plan de politique spatiale ou avec un plan de zonage supérieur ou en raison du non-respect d'une exigence formelle substantielle. Un « test de flexibilité » spécifique n'est pas prévu dans le cadre de la surveillance administrative.

Le tribunal administratif (le Conseil d'État) peut annuler un plan de zonage pour cause d'illégalité. En ce qui concerne plus particulièrement la flexibilité, il existe une jurisprudence abondante sur le critère au regard des principes de sécurité juridique et de diligence.

Le contrôle de l'application des règles dérogatoires dans l'octroi des autorisations est double. La plupart des demandes de permis prévoient une procédure de recours administratif. Il existe un droit de recours contre les autorisations accordées en appel devant le tribunal administratif (le Conseil pour le contentieux des autorisations). Le tribunal administratif a le pouvoir de vérifier les conditions d'application des règles dérogatoires et les raisons de l'autorité de délivrance des licences. La jurisprudence concernant les règles dérogatoires est souvent très stricte.

V. Exemple typique pour la Flandre : la non-flexibilité pour modifier les plans existants

Un problème majeur en Flandre est la dispersion des bâtiments et la détérioration croissante des espaces ouverts, principalement pour le logement. Les anciens plans de zonage, qui couvrent l'ensemble du territoire, ont fourni une abondance de destinations « dures ». Les plans de zonage originaux des années 1973-1980 s'appliquent toujours à environ 80 % du territoire flamand. En raison du caractère perpétuel et à l'échelle de la région, le fardeau de la planification est très lourd pour réviser toutes les destinations obsolètes. En raison du règlement des dommages tout aussi perpétuel, les autorités de planification craignent les conséquences financières de l'établissement des plans de zonage qui convertissent une destination dure en une destination d'espace ouvert.

L'un des gros problèmes concerne les « zones d'expansion résidentielle ». En bref, dans les zones d'expansion résidentielle, les permis ne peuvent être accordés pour le logement collectif tant que le gouvernement n'a pas décidé de la « planification » de la zone. Les zones résidentielles réelles étaient situées contre les centres de la ville et des villages, et les zones d'expansion résidentielle étaient situées plus périphériquement. À la grande frustration des planificateurs spatiaux et du gouvernement central, il s'est avéré que peu de temps après l'introduction des plans régionaux, les zones d'expansion résidentielle ont été construites en masse. La raison en était, entre autres, que ces terres étaient moins chères, compte tenu de leur situation périphérique.

Depuis les années 1990, le gouvernement flamand a voulu restreindre les possibilités de développement par le biais de pseudo-législations (circulaires). Mais une circulaire ne peut pas modifier le contenu d'un plan de zonage, ce qui a conduit à une grande insécurité juridique. Ces circulaires ont toutefois conduit à ce que la jurisprudence sur les possibilités de développement des zones d'expansion résidentielle soit devenue de plus en plus stricte.

Ces circulaires et la jurisprudence de plus en plus stricte entraînent une grande insécurité juridique chez les propriétaires. Légalement, les zones d'expansion résidentielle sont des terrains constructibles, mais en raison de l'attitude des autorités supérieures et du pouvoir judiciaire, le propriétaire dépend de l'attitude – souvent politique et subjective – du gouvernement municipal, pour savoir s'il a ou non une chance d'obtenir un permis.

En raison de la lourdeur de la procédure de planification, il est presque impossible de résoudre le problème des zones d'expansion résidentielle en élaborant des plans de zonage.

C'est pourquoi il y aura un décret qui rendra les zones d'expansion résidentielle fondamentalement inconstructibles jusqu'en 2030. Il existe une procédure d'exception limitée permettant aux municipalités de « libérer » une zone d'expansion résidentielle. Pour les terrains pour lesquels aucune décision du conseil communal de libérer une zone d'expansion résidentielle n'a été prise au 1er janvier 2030 et qui n'ont pas non plus été réaffectés par un plan, le gouvernement flamand

adoptera définitivement un plan de zonage au plus tard le 31 décembre 2043. Dans ce cas, le gouvernement flamand devra payer pour les dommages de planification si les possibilités de construction sont limitées.

L'élimination des zones d'expansion résidentielle ne résoudra pas la détérioration progressive des espaces ouverts. Sur les 31 067 ha de zones résidentielles non aménagées, seulement 30 % se trouvent dans des zones d'expansion résidentielle et 70 % dans des zones résidentielles « normales ». La suppression des zones d'expansion résidentielle ne résout donc qu'une petite partie du problème.
La réaffectation des autres zones résidentielles en espace ouvert devra se faire par le biais de plans de zonage, mais la probabilité que cela se produise en masse est très faible. En lien avec le plan pour les zones d'expansion résidentielle, il y aura une nouvelle réglementation qui prévoit une compensation complète pour le réaménagement sur la base de la valeur marchande estimée de la perte de valeur. La rémunération du régime deviendra donc encore plus coûteuse que le régime de rémunération actuel, ce qui renforcera le manque de flexibilité pour changer de régime.

L'exemple illustre particulièrement le contexte urbanistique flamand car il montre à quel point le passé est problématique et combien il est difficile de corriger les plans d'espace.

Non seulement 80 % du territoire est encore couvert par les anciens plans rigides malgré l'introduction du nouveau type de plans de zonage en 1999, mais les nouveaux plans commettent les mêmes erreurs que les précédents : ils s'appliquent sans limite de temps, les destinations sont souvent monofonctionnelles, les règles d'implantation sont souvent très détaillées, etc. Les nouveaux plans donc, encore une fois, manquent de flexibilité.

Tout cela, à son tour, conduit le législateur à offrir constamment de nouvelles possibilités de dérogation. Celles-ci sont souvent contestées devant la Cour constitutionnelle. La Cour constitutionnelle décide souvent que le règlement de dérogation doit être annulé en raison de la modification par la loi d'un plan d'occupation des sols sans que cela

ne s'accompagne d'une enquête publique et/ou d'une violation du principe de statu quo.

La flexibilité en droit de l'urbanisme

Flexibility in urban planning law

Le thème choisi pour le treizième colloque biennal de l'Association internationale de droit de l'urbanisme (AIDRU), qui s'est tenu les 16 et 17 septembre 2022 à Bergame et Brescia, est classique, ce qui ne le rend pas facile pour autant : la flexibilité en droit de l'urbanisme. Il a été traité dans la perspective comparatiste qui est la marque de fabrique des colloques de l'AIDRU.

L'ouvrage s'ouvre sur une première approche de la flexibilité du droit de l'urbanisme avec des rapports de synthèse sur la flexibilité de la planification spatiale et les plans souples. Il se poursuit avec une deuxième approche sur la flexibilité en droit de l'urbanisme, où sont examinés les mécanismes dérogatoires et le contrôle de la flexibilité. Un dernier rapport de synthèse tire les leçons des exemples nationaux. Des conclusions générales mettent l'ensemble en perspective. À la suite de cette partie générale, figurent les différents rapports nationaux.

The theme of the thirteenth biennial conference of the International Association of Land Use Planning Law (AIDRU), held on September 16th and 17th, 2022 in Bergamo and Brescia, is a classic one, which doesn't make it any easier: Flexibility in urban planning law. This theme was approached from a comparative perspective, which is the trademark of AIDRU conferences.

The book opens with an initial approach to the flexibility of urban planning law, featuring synthesis reports on spatial planning flexibility and flexible planning schemes. It continues with a second approach to flexibility in urban planning law, examining derogations and flexibility review. A last synthesis report draws the lessons from the national examples. General conclusions tie it all together. The national reports follow this general section.

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