

Legal Instruments in Spatial Planning to Ban Building in Flood Zones: From Water Test to Planological Protection via “Water Sensitive Open-air Areas”

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Abstract

In Flanders, the Government has recently established an innovative policy framework to preserve the water storage capacity in flood-prone areas. In this context, the concept of ‘Signal Areas’ (*signaalgebieden*) has been created. These areas are still undeveloped areas with a hard planning destination (residential and industrial areas) located in flood-prone areas. The framework outlines in what way one needs to deal with the flood risk in these areas. In order to implement this policy relating to signal areas in spatial planning, a recent draft decree has introduced water sensitive open-air areas where a relative ban on building applies. The aim is to achieve a prompt, effective implementation of the new water storage policy on the field based on a programmatic approach. In this contribution, the author will provide an insight into the legal design of the above-mentioned concepts and instruments, and how they can contribute to a stronger linkage between water management and spatial planning.

Keywords

water storage policy – flood-prone areas – the concept of Signal Areas – spatial planning – water sensitive open-air areas

1 Introduction

Flanders is a low-lying area, and is therefore more vulnerable to changes in sea level, river discharge and rainfall. Furthermore, the so-called ‘Flemish

Rhomb', situated between Brussels, Antwerp, Leuven and Ghent, along with London, Paris, the Dutch Randstad and the German Ruhr area, is one of the most densely populated areas in the world. As a result, there is a high degree of development, which is increasing exponentially. This puts the open space under extra pressure. All those paved areas at the expense of open space have consequences for the water system:¹ the surface runoff of water, the peak flows in the rivers and floods. These consequences are strengthened by the impact of climate change. And in relation to this account should also be taken of the relative sluggishness and irreversibility of spatial developments. In the light of the foregoing, the need for space for water in spatial planning emerges as a key focus area in a climate-proof spatial strategy. Therefore, integration of water management concerns into spatial planning is a crucial factor in a successful adaptation strategy.

Although Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive or WFD) or Directive 2007/60/EC on the assessment and management of flood risks imply no explicit provisions in relation to land-use planning, they strongly emphasize the need for closer ties between river basin management and land use planning. In many countries, spatial planning rules to prevent or mitigate flood risk are in place. Spatial planning instruments can largely be divided in two categories: one is to prohibit development in flood prone areas, another is to develop planning conditions that reduce the potential damage caused by flooding by flood-proofing buildings. Since the Flemish Decree on Integrated Water Policy of 18 July 2003 (FDIWP),² which implements the Water Framework Directive (Directive 2000/60/EC), and its sister directives, inter alia the Directive on Flood Risk Management (Directive 2007/60/EC), the link between water policy and spatial planning is also explicitly recognized and legal enshrined in Flanders.

The contribution will give insight into the legal structure of the above-mentioned concepts and instruments. First, the instrument of the Water Test will be considered. Next the concept of Signal Areas will be explained. At last the concept of water sensitive open-air areas will be discussed. The paper ends with a number of concluding remarks.

1 The notion "Water System" is defined broadly as: "A comprehensive an functional system of surface water, ground water, its soil and banks, including all organisms living in it and all physical, chemical and biological processes taking place in this environment, and its additional technical infrastructure" (Art. 3, §2, 16° Flemish Decree on Integral Water Policy (FDIWP)).

2 See for a short introduction to his Decree F. Maes (2005), 'Integrated water policy in Flanders. The implementation of the EC Framework Directive Water', in J.F. Neuray (ed.), *Directive 2000/60/EC of 23 October 2000 establishing a framework for community action in the field of water policy*, pp. 29–54.

2 The Water Test

Concept

The instrument granting the widest guarantees for the integration of water related issues in spatial planning and building licensing policy is the Water Test (Watertoets),³ which is anchored in Article 8 FDIWP. This water test is not only applicable to a large number of permits (*e.g.* building permits) but also to large number of plans and programmes (*e.g.* spatial planning). The ultimate purpose of this Water Test is avoiding harmful effects on the water system, if necessary by imposing permit conditions, or by refusing the permit or the plan.

The Water Test is also a strong instrument: sometimes perceived as a crowbar on the basis on which water issues are imposed to other policy fields.⁴ Permits and plans can be shot off on the basis of a negative Water Test. In this context, the question has arisen whether the Water Test locks up Flanders. Indeed, a real fright exists among administrators and economic players that public and private infrastructure works and development projects will be obstructed. This apprehension is unfounded, as the Water Test has a step-by-step approach (*i.e.* a “three-stage rocket”).⁵ Refusal of a permit (third stage) is only possible when no alternatives can be thought of to prevent, reduce (first stage), repair or compensate (second stage) the harmful effect. After all the Water Test will only lead in a limited amount of cases to a building or exploitation prohibition. Indeed, the authority must ensure that the harmful effects are avoided or reduced as much as possible and when this is not possible, the effects are repaired or compensated; only when it is not feasible to avoid, reduce, repair or compensate such harmful effects, the authority has the duty to refuse the permit or the approval of the plan or program.

Harmful effect is defined⁶ as “any significant adverse effect on the environment resulting from a change in the conditions of water systems or parts of it,

3 See F. Maes, (2005) ‘Integrated water policy in Flanders. The implementation of the EC Framework Directive Water’, in J.F. Neuray (ed.), *Directive 2000/60/EC of 23 October 2000 establishing a framework for community action in the field of water policy*, pp. 37–38; See more extensively on the Water Test: P. De Smedt, (2008) *De watertoets getoetst. Juridische leidraad bij de toepassing van de watertoets*, pp. 3–157.; P. De Smedt, (2012) ‘De watertoets anno 2012: over oude gedachten en nieuwe vormen’, in L. Lavrysen (ed.), *Natuur, water en ondernemen. Kwelling of uitdaging?*, pp. 1–63.

4 See P. De Smedt, (2004) ‘De Watertoets: breekijzer van de watersector’, in F.C.M.A. Michiels & L. Lavrysen (eds.), *Milieurecht in de lage landen*, p. 17.

5 See in this sense also Constitutional Court, Judgment nr. 32/2005, 9 February 2005 (<http://www.const-court.be/>).

6 See Article 3, §3 17° FDIWP.

caused by human activity: such effects include effects on human health and the safety of houses and business premises outside flood areas, that are permitted or regarded to be permitted, effects on sustainable use of water for human consumption, on flora, fauna, soil, air, water, climate, landscape and the immovable heritage, as well as the interaction amongst one of more”, and is based on the definition in the 1992 Helsinki Convention on the protection and use of transboundary watercourses and international lakes.⁷ The scope and field of application of the Water Test is therefore actually broad.⁸ Also, water quantity and climate change concerns are included. Consequently, other aspects than strictly spatially relevant aspects are to be considered in the decision-making process of spatial planning. Thus, the Water Test offers a useful leg up to a stronger integration of climate change adaptation challenges.⁹ However it must be noted a strict causality rule applies. According to the jurisprudence of the Belgian Council of State, the Water Test is only suitable to prevent new harmful effects caused by a spatial plan or building project, not for the remediation of existing problems^{10,11}.

The Water Test is also a horizontal measure that can be applied everywhere irrespective of the location or the zoning of the concerned project or plan area. In other words, the Water Test is not subordinate to spatial planning or tied by spatial zones.

Procedural Aspects

The authority taking the spatial decisions must justify the decision in light of the Water Test and must contain a formally expressed justification, also called the water paragraph (waterparagraaf). The justification must be done in light of the objectives and principles of integrated water policy and takes

7 F. Maes, (2005) 'Integrated water policy in Flanders. The implementation of the EC Framework Directive Water', in J.F. Neuray (ed.), *Directive 2000/60/EC of 23 October 2000 establishing a framework for community action in the field of water policy*, p. 36.

8 See Council of State, Judgment nr. 197.469, 29 October 2009 (<http://www.raadvst-consestat.be>).

9 See also in this sense P. Jong, van P.J.J. Buuren, (2008) 'Een kleine (r)evolutie in het waterrecht: watertoets, versterkte watertoets, klimaattoets', *Tijdschrift voor bouwrecht*, pp. 901–908.

10 See among others, Council of State, Judgment nr. 173.482, 12 July 2007; Judgment nr. 166.439, 9 January 2007; Judgment nr. 197.469, 29 October 2009; Judgment nr. 207.830, 1 October 2010; Judgment nr. 214.033, 22 June 2011; Judgment nr. 215.969, 24 October 2011; Judgment, nr. 232.722, oktober 2015.

11 In this context it should be noted that the spatial Ordinance of 1 October 2004, as recently changed, gives partly an answer to this concern, as existing paving constructions are taken into account.

into account the provisions of the water management plans (Art. 8, §2 FDIWP). Thus by using the Water Test, each permit or plan or programme must be viewed in light of the objectives and principles of integrated water management (e.g. the precautionary principle, the principle of solidarity), and the relevant water management plans. For activities that require an Environment Impact Assessment (EIA) or Strategic Environment Assessment (SEA), the Water Test must be a part of the Environment Impact Statement (EIS). To assist the authorities with this Water Test, a water advice could, and in many cases (e.g. in cases where projects are located in flood-prone areas) should be asked from the competent authorities. This water advice cannot be easily derogated.

Bottlenecks in the Water Test-Mechanism

Although the Water Test was, among other things, introduced to prevent (more) development in flood prone areas, the use of this instrument has not prevented many undeveloped plots in flood prone areas from being developed for housing or other hard destinations. The reasons for this are many and varied:¹² the fear of compensation claims, the lack of knowledge about the vulnerabilities of the water system among the authorities and the civil servants and the lack of political courage to take stringent but necessary measures. This leads to legal uncertainty and an insufficient protection of the necessary space for water.

3 The Concept of the Signal Areas and Sharpened Water Test¹³

The Concept of Signal Areas

Because of the above-mentioned bottlenecks in the water test-mechanism, and more specifically as a result of the big floods of November 2010 and January 2011, the Flemish Government established an innovative policy framework to preserve the water storage capacity in, among others, flood prone areas. In this context, the concept of 'Signal Areas' (Signaalgebieden) has been created.¹⁴ These areas are still undeveloped areas with a hard zoning type or

12 See also P. De Smedt, (2012) *De watertoets anno 2012: over oude gedachten en nieuwe vormen*, in L. Lavrysen (ed.), *Natuur, water en ondernemen. Kweeling of uitdaging?*, pp. 60–62.

13 See also P. De Smedt, (2014) Towards a New Policy for Climate Adaptive Water Management in Flanders: The Concept of Signal Areas, *Utrecht Law Review*, 10 (2), pp. 107–125, <http://doi.org/10.18352/ulr.272>.

14 For the sake of completeness, it has to be noted that also outside the Signal Areas account should be taken of the preservation of 'space for water' and the accompanying measures to limit the negative impact of floods when issuing building authorizations and drawing

zoning code (e.g. residential and industrial zoning) located in flood prone areas. The above-mentioned policy framework, which has been anchored in a circular,¹⁵ outlines in what way one needs to deal with the flood risk in these areas. The circular aims to provide a uniform assessment framework to prevent local authorities apply the Water Test in a very different manner. The circular provides for a conservation policy where a planological re-destination may be required. For this reason, a temporary construction ban is set in the most critical Signal Areas, pending the drafting of a new spatial plan.

These Signal Areas were subsequently further assessed on the basis of the flood hazard maps drawn up in implementation of the Flood Directive (2007/60/EC).¹⁶ For Signal Areas where the chance of floods is not yet known, the above-mentioned assessment is still based on the 'Water Test maps of flood prone areas'.¹⁷ Uncertainties are also taken into account when estimating the flood chance, such as climate change scenarios, on the basis of the precautionary principle.¹⁸

up spatial development plans. Moreover, the below-mentioned circulars LNE 2013/1 (now LNE 2015/1) stipulate that also in flood-prone areas with a 'soft' zoning code (valley areas, area for nature or agriculture) a preservative policy should be implemented. It should be avoided that these areas will be rezoned to a 'hard' zoning code, because in that case new Signal Areas will be created.

- 15 Circular LNE 2013/1, *Belgian Official Journal*, 4 October 2013, replaced by Circular LNE 2015/1, *Belgian Official Journal*, 27 February 2015.
- 16 The geoportal 'Signal Areas' (<http://signaalgebieden.be>) shows the actual information about the different flooding probabilities (small, medium, large) of the different Signal Areas.
- 17 The Water Test map, to be consulted at <http://geo-vlaanderen.agiv.be/geo-vlaanderen/watertoets2012/>, (last visit 17 February 2014) can be regarded as a flood hazard map '*avant la lettre*.' The map distinguishes between actual flood prone areas and potential flood prone areas. Actual flood prone areas are areas that have experienced recent flooding or areas with a significant chance of flooding. Potential flood prone areas are areas where floods are only possible during extreme weather circumstances or on the failure of flood defences such as dike breaches. The Water Test map was fully updated in 2012.
- 18 The precautionary principle is defined in Article 6,4° FDIWP. According to Article 6,4° the FDIWP the precautionary principle means that action to avoid harmful effects should not be postponed on the ground that scientific research has not fully proved a causal link between the act or the omission and the effects thereof. By making this link to the concept of harmful effects, which is defined in Article 3, § 2, 17° DIWP, the precautionary principle is given a wide scope of application: in addition to preventing floods, among other things, the climate, and the interdependence of these elements is also included. At first sight the legislator has thus adopted a 'hard' precautionary approach; however on further reflection this should be nuanced and alongside the intended precaution account should also be taken of other stakes, such as economic or social stakes. This emerges from

Next Steps-Trajectory

On the basis of this (high water) assessment a so-called 'next steps-trajectory' (vervolgtraject) for each Signal Area is being determined by the Flemish Government.

The next steps-trajectory determines the spatial development perspective in the concerned Signal Areas, and defines which actions have to be taken and which instruments and which instruments could/should be used for this purpose, ranging from imposing specific restrictions on use or exploitation to rezoning the area.

The next steps-trajectory in the Signal Areas depends on the question of whether the current, as yet undeveloped spatial development plan is compatible with the water storage capacity in the concerned Signal Areas or, in other words, a flood risk will occur if one develops the area in accordance with the existing planning zone. Depending on the question what impact spatial development has on the water storage capacity, the following hypotheses are defined:

- (a) If the spatial development in line with the spatial development plan is *compatible* with the water storage capacity (i.e. no flood risk), the standard instruments will suffice, more specifically, the regular Water Test, where appropriate coupled with adaptive construction measures.
- (b) If the spatial development of the area in line with the spatial development plan is *not compatible* with the water storage capacity, a new spatial development perspective will be established. In this hypothesis, the following sub-hypotheses occur, dependent on probability of flooding:
 - If the current spatial development plans for the Signal Area are incompatible with the water storage capacity but there is a *small probability of flooding*, the zoning codes of the plans may remain in place. In view of the safeguarding of the water storage capacity additional measures will however be taken;
 - If the current spatial development plans are incompatible with the water storage capacity and there is also a *high probability of flooding*, the area needs to be rezoned;
 - If the current spatial development plans are incompatible with the water storage capacity and there is a *medium probability of flooding*, both rezoning and maintaining the zoning code with additional measures may be considered, depending on the specific circumstances.

Article 7 DIWP, which states that when applying the objectives and principles of integrated water policy, with a view to the multifunctional use of the water system, account should also be taken of economic and social water usage.

Protective Policy: The Sharpened Water Test

To prevent the foreclosure of the development perspective set out in the 'next steps-trajectory', a protective policy is deployed in the Signal Areas. After all the spatial planning process, that must be passed through in order to anchor the spatial development perspective of the trajectory, is relatively slow.

This preservative policy will also be used in Signal Areas where the 'next steps-trajectory' has not yet been approved by the Flemish Government. Therefore, the preservative policy has a broad application field: all flood prone areas with "hard" spatial zoning codes are targeted. The preservative policy can involve the realisation of the current development plans being brought to a standstill if rezoning is required to limit the risks of flooding. In other words: a building freeze applies. In cases where the risk of flooding does not call for such a building freeze, the laying down of conditions for adaptive construction or other preconditions governing the use of the area will suffice.

The preservative policy is given shape by the Water Test.¹⁹ To this end circular LNE/2013/1 (now LNE 2015/2), containing guidelines for planning authorities and for licensing authorities as well as public advisers in the context of the Water Test. The application of the guidelines gives rise to a more stringent Water Test. Through this *sharpened Water Test* the Flemish Government aims to prevent the foreclosure of the 'next steps-trajectory'. In this context, the intended spatial development that is the object of the plan or project should be assessed based on the spatial development perspective that was established in the 'next steps-trajectory'. The guidelines in the cited circulars are intended to realise a so-called standstill (building freeze) in the areas where, conform to the 'next steps-trajectory', a rezoning is necessary.

3 Water Sensitive Open-air Areas

The Achilles' heel of this new policy framework concerns the legal status and therefore the enforceability of the circular. The circular has no regulatory power. Therefore, the imposition of a temporary construction ban in licensing is considered a problematic legal point. Besides, the concept of Signal Areas (with the sharpened water test) is subject to legal limitations as well: this concept has not yet been embedded in spatial planning, either. Consequently, if sufficient space for water is to be created within a reasonable time span, additional instruments are needed with which (more) space for water can be proactively and strategically sought. At last, the Water Test has also a big

19 Where the Water Test is not in the picture because there is no authorization request at hand, usage restrictions can also be imposed to protect the water system.

conceptual disadvantage: it is essentially a passive tool. As long as no spatial development plan is drawn up or building permit is applied for, everything remains the same.

Therefore, it was considered necessary to anchor the signal areas in a legislative planning process.²⁰ This resulted in the creation of a new destination area, in particular “water sensitive open-air areas” (“watergevoelig openruimtegebied”). This process is the tail end of the integration of the high-water policy in spatial planning. This process has also a pronounced programmatic approach.

That's why the Flemish legislator recently took a legislative initiative to embed conservatory policies in signal areas for which the Flemish Government approved a next steps-trajectory into spatial planning legislation.²¹ The purpose of this initiative is to designate the formerly designated signal areas as water sensitive open-air areas with a view to preserving the water storage capacity, at the same indicating which (restricted) actions are still permitted.

Designation of Water Sensitive Open-air Areas and Legal Consequences

The draft Decree authorises the Flemish Government to designate areas as water sensitive open-air areas (new art. 5.6.8. Flemish Codex Spatial Planning, FCSP). The water storage capacity of the area, the probability of flooding and the decisions of the Flemish Government as to the next steps-trajectory in Signal Areas are taken into account for the designation. Prior to the designation, a public investigation is organised and advice is requested from the water managers, among others. It is not entirely clear whether the designation as water sensitive open-air area cancels the original destination (e.g. housing, industry, recreation) as determined in the development plans. This is not determined in the draft decree. As a development can only be changed by a new plan,²² it must be assumed that the existing destination will not change, even if the area is designated as a water sensitive open-air area. The designation as a water sensitive open-air area should therefore be regarded as a specific form of easement in the public interest that restricts the possibilities of the existing destination. For the sake of legal certainty, it would have been better for the legislator to stipulate that the designation as a water sensitive open-air area automatically cancels the existing destination.

The legislator opted for a multifunctional use of these areas, provided that this use is compatible with the flooding regime. This is in line with the

20 Explanatory Memorandum, *Parl. St. VI. Parl.* (2016–17), nr. 1149/1, p. 13.

21 Draft decree including changes to various provisions relating to spatial planning and the environment, *Parl. St. VI. Parl.* (2016–2017), no. 1149/1.

22 See Art. 2.2.2, §2 FCSP.

objectives of the integral water policy, as embedded in article 4 of the FDIWP.²³ In the water sensitive open-air areas, nature conservation, forestry, landscape protection, agriculture and recreation are therefore equivalent. In principle, a ban on building applies in these areas. In order to enable the implementation of the permitted functions, the construction of small-scale infrastructure remains possible. In subsequent spatial development plans, the permitted actions could be further restricted if deemed necessary for the preservation of the water storage capacity of the area. However, the ban on building is of a relative nature, as the FCSP allows numerous exceptions to urban development regulations, for instance for acts of public interest (e.g. the construction of public roads) or for works on houses not permitted by zoning regulations, which the legislator declares to also be applicable to areas designated as water sensitive open-air areas.²⁴

However, the designation of an area as a water sensitive open-air area does not affect building permits that were granted on a permanent basis. This means that in principle, acquired rights are not impacted, which is in line with the principle of legal certainty and the principle of non-retroactivity of laws.²⁵ Nevertheless, there is one exception to this rule: any unbuilt parts of valid allotments situated within the water sensitive open-air area are automatically excluded.

The designation as water sensitive open-air area undeniably meets the definition of “plan or programme” contained in Directive 2001/42/EC. As the designation as water sensitive open-air area may be the framework for the granting of permits for the projects listed in annexes I and II of Directive 2011/92/EU (previously Directive 85/337/EEC)²⁶ or may impact Natura 2000 areas, it should be assumed that the plans for the designation of these areas are in principle subject to an environmental assessment. In this context, it should be noted that the European Court of Justice has ruled in Case C-290/15 that Articles 2(a) and 3(2)(a) of Directive 2001/42/EC must be interpreted as meaning that a regulation order, such as the designation of a water sensitive open-air area, comes within the notion of ‘plan and programme’.

23 Article 4 states: *Integrated water policy is the policy aimed at coordinated and integrated development, management and restoration of water systems with a view to achieving the preconditions required for the maintenance of this water system as such and for the purpose of multifunctional use of it, which takes into account the needs of present and future generations.*

24 See Art. 5.6.8, §3, *in fine*.

25 Art. 2 Code Civil.

26 E.g. initial afforestation and deforestation for the purposes of conversion to another type of land use, inland-waterway constructions.

Damage Compensation?

After all, the application of the Water Test and the designation as water sensitive open-air areas can put great restrictions on the use of the land. This will obviously affect the value of the land and may give rise to loss of income. This produces objections not only from a legal perspective. The social support base for the water and adaptation policy may also be affected, which in turn might make administrators hesitant about taking far reaching but necessary measures. This gives rise to the question of compensating the disadvantage or damage incurred.

For the restrictions spatial development planning imposes on land-use, different compensation schemes are in force: the plan damage compensation (*planschadevergoeding*),²⁷ the capital loss compensation (*kapitaalschadecompensatie*) and user's compensation (*gebruikerscompensatie*). Unlike the plan damage compensation, which has a general scope of application, the capital loss compensation and user's compensation are intended to protect the agricultural interests.²⁸ All the compensation schemes have in common that the damage is not reimbursed in full, but that part must be borne by the owner or user. This expresses the fact that damage that is part of the normal social or business risk is not eligible for compensation. Moreover, the awarding of this compensation is subject to strict time limits. There is also a cumulative prohibition between these and other compensation schemes.

By analogy with the arrangement relating to plan damage of a land designated as a water sensitive open-air area, the legislator proposes a compensation arrangement for owners, the conditions and scope of which are equal to those applicable to plan damage compensation. One of the conditions to obtain an compensation is that the parcel of land qualifies for building from a structural point of view. It is remarkable that in the Explanatory Memorandum, the legislator states that a large number of parcels of land situated in a water sensitive open-air area do not qualify for compensation because they mainly concern water-logged soil. Apparently, the legislator does not take into account the evolution of building techniques and adaptive building (e.g. pile houses). The legislator stipulates, again by analogy with the arrangements

27 Art. 2.6.1.–2.6.2. 2.3.1, §2 FCSP. Plan damage is the damage that the owner of buildable plot incurs if his land is rendered unbuildable or not eligible for allotment due to a planning revision. Noteworthy is that the legislator provides for a rather surprising payment modality for this plan damage compensation: the government can comply with the obligation to pay by returning the original development plan to the parcel of land.

28 See about this H. Schoukens, K. De Roo, P. De Smedt, (2011) *Handboek natuurbeschermingsrecht*, pp. 623–624.

applicable to plan damage compensation, that the Flemish Government can decide to cancel the designation as water sensitive open-air area as a whole or in part for land for which a compensation is requested. In that decision, the Flemish Government can also impose conditions, e.g. with regard to flood-proof building.²⁹ This appears to be rather counterproductive. In such cases the area would again be deprived of its protection status that was deemed necessary in order to preserve its water storage capacity. In order not to overly impact that objective, it is therefore important for the Flemish Government to exercise caution when using the power to take these decisions, and to make area adjustments in exceptional cases only.

The compensation is only granted to owners of land designated as water sensitive open-air areas. No capital loss compensation and no user's compensation are provided for. Thus the loss of income that is incurred resulting from the designation as water sensitive open-air area is not compensated in the current legislation. This in itself is not unlawful. In accordance with the case law of the Constitutional Court,³⁰ the Court of cassation³¹ and the Council of State³² the government is authorized to impose restrictions on exercising property rights in order to realise objectives of public interest such as good water management. Neither Article 1, First Protocol ECHR, nor Article 16 of the Belgian Constitution, which provide constitutional protection to the property rights, require the payment of compensation for legal measures imposing restrictions on use. This is also in accordance with Article 544 of the Belgian Civil Code, which allows the government to impose measures that restrict the use of the property in the public interest. This is however mitigated by the principle of *equality before public burdens*. This principle means that the government cannot impose on a citizen or group of citizens burdens that exceed the burdens that are considered in society as a normal risk without paying compensation.³³ When a construction or operation ban or a major restriction on use is imposed on a specific citizen or a specific group of citizens, which is not limited by time, it is not evident to decide that this principle is not violated. Especially not if these measures are imposed to limit the risk of flooding in the wider surroundings of the parcel of land concerned. In these cases the

29 Explanatory Memorandum, ParL. St. VI. Parl. (2016–2017), 1149/1, 75.

30 E.g. Constitutional Court, Judgement nr. 32/2005, 9 February 2005 (<http://www.const-court.be/>).

31 E.g. Court of Cassation, 16 March 1990, *Arresten van het Hof van Cassatie*. 1989–90, p. 922.

32 E.g. Council of State, Judgement nr. 21.269, 16 June 1981 (<http://www.raadvst-consetat.be>).

33 See also W. van Doorn-Hoekveld, (2017) Equal distribution of burdens in flood risk management: The application of the 'égalité principle' in the compensation regimes of the Netherlands, Flanders and France, *Review of European Administrative Law*, pp. 81–110.

restrictions may be considered to exceed the usual social risk or the usual operating risk. The availability of some kind of compensation scheme would then seem to be required to avoid a violation of Article 1, First Protocol ECHR.³⁴ This need seems especially pressing now that the Belgian Constitutional Court has confirmed the applicability of the principle of equality before public burdens on the imposition of an easement in the public interest.³⁵ Numerous measures imposed in the application of spatial planning law and environmental law can be considered to be easements in the public interest. However, the reference to the normal social or normal operating risk might offer significant margin to impose ownership restrictions in the public interest without paying compensation. Van Hoorick assumes that the location of the property is very relevant for assessing these risks, such as whether the land is located in a flood prone area,³⁶ because in such areas the owner can reasonably expect such restrictions to be imposed. In cases where the principle of equality relating to public burdens cannot be applied as the basis of liability, the damaged party should invoke common law tort due to *government liability*.³⁷ Contrary to what applies in a system of compensation for legitimate government action, in liability law a fault on the part of the government has to be proven. This is no easy task, in view of the large discretionary power of the authorities in applying the Water Test. The Belgian Court of cassation recently ruled that the decision of the appeal judges, who judged that the refusal of the authorization in accordance with Article 8 of the Decree of 18 July 2003 on integral water policy, on grounds that the risk of flooding could not be reduced sufficiently even on the imposition of conditions, because the area is subject to a real risk of flooding, while the application for the allotment does not provide sufficient guarantees regarding the external water security of the area, is justified by law.³⁸ According

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- 34 See also P. De Smedt, (2014), Towards a New Policy for Climate Adaptive Water Management in Flanders: The Concept of Signal Areas, *Utrecht Law Review*, 10 (2), pp. 118–119; H.F.M. van Rijswijk, (2004) ‘De watertoets in Vlaanderen en Nederland: een geschikt instrument voor externe integratie?’, in F.C.M.A. Michiels & L. Lavrysen (eds.), *Milieurecht in de lage landen*, p. 211;
- 35 E.g. Constitutional Court, Judgement nr. 55/2012, 19 April 2012; Judgement nr. 132/2015, 1 October 2015; Judgement nr. 57/2016, 28 April 2016.
- 36 G. Van Hoorick, (2012) ‘Over het bouwverbod en de schadevergoedingsregeling in het kader van het Duinendecreet, en het beginsel van de gelijkheid voor de openbare lasten (noot onder GwH 19 April 2012, no. 55/2012)’, *Milieu en Recht*, p. 253.
- 37 P. De Smedt, (2004) ‘Watertoets getoetst. Een revolutionair instrument van het decreet van 18 juli 2003 betreffende het integraal waterbeleid’, *Nieuw juridisch weekblad*, pp. 911–912.
- 38 Court of Cassation, Judgement nr. C.12.0333.N, 8 March 2013, *Tijdschrift voor milieurecht* 2013, pp. 251–252.

to the Court the judge has to respect the discretionary judgement margin of the government. Obviously, the Flemish Government can still be held liable if it appears that the designation of a parcel of land as a water sensitive open-air area is based on an inadequate assessment of the water sensitivity of the parcel or on an unjustified designation of this area.

Enforcement

In order to be able to enforce the new regulations relating to water sensitive open-air areas, the enforcement tools used within the context of spatial planning also become applicable to the areas designated as water sensitive open-air areas.

As a result, any person performing, continuing or preserving acts not permitted by the decree will be prosecuted. This also applies to any person who fails to comply with the conditions imposed by the Flemish Government when cancelling the designation. An owner who permits such acts or tolerates a violation will also be prosecuted. In addition, an urban restoration claim can be filed against these persons, imposing the cessation of the use of the land in a manner conflicting with the applicable regulations or its restoration to its original condition.

4 Concluding Remarks

The Flemish Decree on Integrated Water Policy provides strong tools to integrate water issues in the field of spatial planning, especially the Water Test. However, this instrument has some conceptual limitations which restrict their deployability for the implementation of the water storage policy in practice. Either they are too passive, or too slow deployable.

In the aftermath of the big floods of November 2010 and January 2011, the Flemish Government gave shape to a new innovative water storage policy. The aim is to achieve a prompt, effective implementation of the new water storage policy on the field based on a programmatic approach. This policy is linked to the most critical areas, i.e. the areas in which, in line with the spatial zoning codes, one can build or operate but where the risk of flooding is realistic (called Signal Areas). In these areas the construction or exploitation capability will be abolished by changing the current zoning codes, or will be regulated through use restrictions or building regulations (i.e. adaptive building). This occurs according to a 'next step-trajectory' adopted by the Flemish Government, containing a new spatial planning perspective. The new perspective has often to be enshrined into spatial planning policy through the process of spatial development planning. Experience has shown, however, that between the

adoption of a spatial development plan and its realisation, a large time gap arises. Pending the required plan revision, appropriate preservative measures must be taken to prevent the foreclosure of the new development perspective set out in the 'next steps-trajectory'. This implies the imposition of a ban on building. This new system has, however, certain weaknesses, having to do with the legal validity of it. The authorities adopting the spatial development plans are after all not bound by the 'next steps-trajectory' adopted in the field of water policy. It can therefore not be ruled out that in the end the targeted water retention policy will not be incorporated or integrated in the spatial development plan. A similar concern may be formulated regarding to the preservative policy, as the guidelines for the application of the sharpened Water Test are also not binding.

Next to that, the question of damage compensation arises. Indeed, the loss that is incurred resulting from a negative Water Test is not compensated in the current legislation. The lack of a compensation is difficult to defend in light of the doctrine of equality before public burdens, especially when a construction ban or a major restriction on use resulting from the Water Test is imposed to limit the risk of flooding in the wider surroundings of the parcel of the project owner involved. The lack of compensation in these cases undermines the social support for the water management.

In a recent legislative initiative, the Flemish legislator introduced the concept of water sensitive open-air areas. This concept is an attempt by the legislator to embed the policy relating to Signal Areas in spatial planning in a more legally secure and enforceable manner. It concerns a specific public easement that considerably restricts the implementation of the planning destination as important restrictions are imposed on building or exploitation projects in those areas. Enforcement tools include penalisation and public restoration claims. A compensation is linked to the designation of an area as a water sensitive open-air area, but only owners qualify for this compensation. No specific arrangement is provided for users suffering a loss of income as a result of the designation as a water sensitive open-air area; they can resort to compensation arrangements of common law, such as liability law.

By introducing the concept of water sensitive open-air areas, the legislator has taken another step towards a stronger integration of water policy in spatial planning. This is a major step as practice has shown that the implementation of water policies, in particular water storage policies, in spatial planning has been a rather slow process.