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Karens, Jacco; Hoops, Björn

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Jacco Karens* and Björn Hoops

Obligations for Owners to Climate-Proof Buildings in the Netherlands

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1. Introduction

The Netherlands has committed to reducing its greenhouse gas emissions by at least 55 % by 2030 compared to 1990 levels,¹ in line with the European Union's climate target.² The goal is to be climate-neutral in 2050. The built environment is a major contributor to the country's harmful emissions. In 2021 only the heating of buildings, secured for decades through domestic natural gas, accounted for 15 % of all greenhouse gas emissions in the Netherlands.³ It is clear that the owners of buildings have to reduce the consumption of energy and that the energy needs to come increasingly from renewable sources, such as solar and wind power. Insulation, solar panels, and heat pumps have to be installed, and buildings have to be connected to district heating systems. With more than eight million homes, at least 60 % of which have an energy label of 'C' or worse, and more than 1.1 million other buildings in the Netherlands,⁴ this is a task of a daunting scale, within a very limited timeframe.

1 VVD, D66, CDA and ChristenUnie, 'Omzien naar elkaar, vooruitkijken naar de toekomst; Coalitieakkoord 2021-2025' (2021) 10ff <<https://open.overheid.nl/documenten/ronl-f3cb0d9c-878b-4608-9f6a-8a2f6e24a410/pdf>> accessed 1 May 2023. Furthermore, there is an amendment to the Dutch Climate Act that came into force in summer 2023: *Staatsblad* 2023, 271.

2 Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal' COM (2019) 640 final.

3 'Welke sectoren stoten broeikasgassen uit?' (CBS) <www.cbs.nl/nl-nl/dossier/dossier-broeikasgasen/welke-sectoren-stoten-broeikasgassen-uit> accessed 1 May 2023.

4 'Voorraad woningen en niet-woningen; mutaties, gebruiksfunctie, regio' (CBS) <<https://opendata.cbs.nl/statline/#/CBS/nl/dataset/81955NED/table?fromstatweb>> accessed 1 May 2023.

***Corresponding author: Jacco Karens**, Legal Consultant at AT Osborne. Jacco Karens obtained his PhD at the University of Groningen with a thesis on obligations to climate-proof under a municipal zoning plan in the Netherlands, E-Mail: j.j.karens@rug.nl

Björn Hoops, Professor of Private Law and Sustainability, Faculty of Law, University of Groningen, E-Mail: b.hoops@rug.nl

As subsidies and pollution taxes fail to accelerate the transition towards energy efficiency and renewable energy sources sufficiently, the role of the State's power to compel owners to climate-proof their buildings becomes increasingly important to reaching national and EU climate targets. In the Netherlands, the most prominent example of obligations to climate-proof buildings is the minimum energy performance standard for office buildings, which can lead to closures of insufficiently sustainable office buildings.⁵ Such obligations to climate-proof unilaterally imposed by the State infringe on the right to property protected under human-rights law such as Art. 1 of the First Protocol to the European Convention of Human Rights (A1P1) and under Dutch constitutional and administrative law. This contribution explores in the Dutch context the existing and future obligations to climate-proof, the enforcement of such obligations, how they restrict the right to property, and the boundaries set by the right to property, in particular the extent to which the State may impose such obligations without compensation.

This contribution is structured as follows. It first sets out the institutional and legal context of obligations to climate-proof buildings in the Netherlands (Section 2.). Then, this contribution describes and analyses existing obligations to climate-proof and plans to introduce such obligations in the near future (3.). It goes on to assess the permissibility of such obligations, with or without the payment of compensation, under the protection of property in A1P1 and Dutch constitutional and administrative law (4.). Subsequently, it examines the scope and means for enforcing such obligations (5.). Section 6 concludes this contribution.

2. The Institutional and Legal Framework for Obligations to Climate-Proof Buildings

The goal of obligations for owners to climate-proof buildings is to reduce energy consumption and to promote the use of renewable energy sources. At policy level, the Climate Agreement (*Klimaatakkoord*) between the Dutch government and relevant stakeholders is the guiding document for the decarbonization of the Netherlands.⁶ This document contains specific carbon reduction goals for buildings and their energy supply. To implement it municipalities must adopt non-binding plans for the decarbonization of existing buildings (*Transitievisie warmte*), laying down a

⁵ Art. 5.11 Building Decree (*Bouwbesluit*).

⁶ 'Climate Agreement' (Dutch Government, 2019) <www.klimaatakkoord.nl/documenten/publicaties/2019/06/28/national-climate-agreement-the-netherlands> accessed 1 May 2023.

long-term strategy at municipal level to substitute the current fossil heating systems with renewable ones. These policies can also include measures like insulation, heat pumps, and connections to district heating systems. The Climate Agreement contains specific agreements between the central government and stakeholders on the introduction of legal instruments to compel owners to take these measures, which is discussed in more detail in sub-section 3.3.

Public bodies impose obligations for owners to climate-proof buildings unilaterally. Their legal framework thus belongs to the realm of public law, in particular general constitutional and administrative-law principles and specific administrative law that applies to buildings, such as building and planning law. Together, administrative and constitutional law define whether the public body has the competence to impose obligations and under which constitutional and administrative-law guarantees such obligations are regarded as lawful. The obligations and guarantees differ depending on the function of the building (residential, non-residential), the actual use of the building (rental, non-rental), the content of the obligation (for instance, insulation or solar panels), the history of the intervention (permit application by owner or initiative by public body), and the question whether an authority imposes an obligation on individual owners or relies on uniform standards. All these factors are relevant to the review of both the legality and proportionality of obligations to climate-proof buildings.

As this contribution is generally based on the law effective in 2023, note that the Netherlands is replacing several existing laws on spatial planning, the environment and nature with a single Physical Environment Act (*Omgevingswet*). The Act entered into force on 1 January 2024. It has also repealed some building regulations, with the Decree Buildings Environment (*Besluit bouwwerken leefomgeving*; Bbl) replacing the Building Decree (*Bouwbesluit*). This governmental decree under the Physical Environment Act, which has roughly the same design as the Building Decree, offers more flexibility for local authorities, also with regard to the regulation of the energy efficiency or environmental impact of building materials of newly built buildings. This article deals with the regulations under the Bbl and the Building Decree.

The statutory basis for energy-efficiency requirements for buildings are laid down in the Housing Act (*Woningwet*) and, since 1 January 2024, the Physical Environment Act. The Dutch Housing Act provides a general duty of care for owners to guarantee that a building causes no harm to the environment or public health (Art. 1a) and gives a legal basis for building regulations on both newly built and existing buildings (Art. 2). Based on these general clauses, the Dutch government has adopted building regulations in the Building Decree. The Building Decree provides for specific sets of requirements for each of three different types of actions: the construction, renovation, and maintenance of a building. Once the construction

of a new building is finished, the obligation to maintain existing buildings applies.⁷ However, the requirements applicable at the moment of construction, specifying the maintenance obligation, remain applicable during the life cycle of the building to prevent decay of building quality. Every minor or major adjustment to the building constitutes a renovation. Only cases of extensive renovations – defined as a change to more than 25% of the surface of the building shell – give rise to, as set out in section 3 below, specific requirements pertaining to energy efficiency and the use of renewable energy.⁸ Beyond the Building Decree, municipal building regulations can only relate to urban planning, buildings on contaminated land and requirements regarding the external appearance of buildings. They are thus of little importance to climate-proofing buildings.

The technical standards required under the Building Decree for *new* buildings are based on a one-size-fits-all model and impose a uniform level of quality for the energy performance of new buildings in the Netherlands. The Building Decree uses standards, for instance the energy efficiency standard used for new-built buildings, called the ‘nearly zero-energy buildings’ norm. These uniform standards, in the form of standardization norms (NEN), guarantee a technology-neutral approach. This means that they do not prescribe specific means but primarily secure the goal of energy efficiency, mostly through an energy performance standard in the Building Decree or the Bbl.⁹ These uniform standards differ from tailor-made obligations in that they do not precisely enforce certain measures or techniques to make the building more energy efficient, but they prescribe a certain level of quality, which can be reached by combining several measures. The exact applicable level of energy efficiency depends on the function of a building. For instance, energy efficiency requirements for residential buildings are stricter than those applicable to buildings with an educational function.¹⁰ Structures not meant to accommodate persons, such as barns and parking lots, are not subject to specific requirements in terms of energy efficiency.¹¹ One building can combine different functions, and thus different energy efficiency requirements can apply to one building.

As for existing buildings, the initiative for possible changes to insulation and installations for renewable energy generally lies with the owner. As pointed out, owners have the right to stick to the quality level that was applicable at the moment

⁷ *Besluit bouwwerken leefomgeving* (Bbl), *Staatsblad* 2018, 291, 236.

⁸ This forms part of the implementation of Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the Energy Performance of Buildings [2010] OJ L153/13 and came into force in 2022.

⁹ Art. 5.11 Building Decree and Art. 4.148 Bbl.

¹⁰ Table A4.148A, which is included in the Bbl.

¹¹ Art. 5.5 Building Decree.

the building permit was obtained (*rechtens verkregen niveau*). There are no rules setting energy-efficiency standards as a minimum level for all buildings.¹² The energy performance certificate, based on EU Directives and mandatory for most buildings when they are leased or sold,¹³ does not oblige owners to climate-proof existing buildings. It only enhances transparency and encourages owners to take measures voluntarily whenever the property is sold or rented out. The requirements for new buildings under the Building Decree partially apply to existing buildings in cases of extensive renovations. In this sense, the Building Decree imposes conditional obligations on owners of existing buildings. Municipalities will review a plan to build, rebuild or renovate in light of the Building Decree when owners apply for an all-in-one environmental permit for the construction works.¹⁴

Outside the scope of extensive renovations, as exceptions to the rule, building regulations or administrative decisions may impose obligations to climate-proof existing buildings. For instance, offices must comply with a minimum energy performance standard since 1 January 2023.¹⁵ If this energy performance standard is not met, the use of the building for offices will be prohibited and municipalities can enforce this obligation and *ad ultimo* close the building. Section 3 discusses this and other specific obligations to climate-proof buildings.

Subsidies for climate-proofing existing buildings are very important. Policy-makers see them as an incentive to climate-proof buildings voluntarily and prefer them over command-and-control regulation because they are less controversial.¹⁶ Also, as Section 4 demonstrates below, subsidies may be required to ensure the lawfulness of obligations to climate-proof because owners may otherwise have to carry an excessive burden. Owners can apply to several subsidy schemes. Most notable are the *Investeringssubsidie Duurzame Energie* (ISDE), which can cover expenses incurred to expand the use of renewable energy in buildings, and the *Subsidie Energiebesparing Eigen Huis* (SEEH), which is a specific subsidy scheme for apartment owners' associations. Also, regional or local subsidies are available for owners to

12 cf Nico PM Scholten and A Richard Neerhof, 'Op weg naar uniformering van bouwtechnische energieprestaties en een integrale benadering?' (2019) 152 TBR 928; A Richard Neerhof, *Standaardisering en normalisatie* (IBR 2015) para 7.2.1.1.

13 Directive 2010/31/EU (n 8); Art. 2.1 Decree on Energy Performance of Buildings (*Besluit energieprestatie gebouwen*; Beg).

14 Art. 2.10(1) lit. a Law general provisions environmental law (*Wet algemene bepalingen omgevingsrecht*; Wabo).

15 Art. 5.20(6) Bbl and Art. 5.11 Building Decree.

16 Ministerie van Volkshuisvesting en Ruimtelijke Ordening, 'Programma Versnelling Verduurzaming Gebouwde Omgeving' (2022) 5 <<https://open.overheid.nl/documenten/ronl-789924103b28f6a32678bdd3fc81e5d35b2a320a/pdf>> accessed 6 June 2023.

cover (part of) the expenses for making their property climate-proof.¹⁷ In the future, several large funds will be available to give loans to owners who cannot afford to cover the expenses, such as the National Heat Fund (*Nationaal Warmtefonds*) and the National Insulation Programme. These loans can be paid off through lower energy bills after the adjustments. This shows that both subsidies and support for owners to obtain funding play a role.

Other possible incentives to climate-proof are lower taxes on insulation material and electricity use and higher taxation of natural gas use. Both are part of the policy programme of the Dutch government.¹⁸ Moreover, rising costs of natural gas have indirect effects on the cost-efficiency of measures such as insulation.¹⁹

3. Obligations to Climate-Proof Existing Buildings

This section discusses existing and foreseeable obligations for owners to climate-proof existing buildings. While some legal bases mandate obligations to reduce energy consumption or the decarbonization of energy sources generally (sub-section 3.1.), others empower authorities, albeit under limited circumstances, to require specific measures, such as insulation (3.2.) and sustainable heating systems (3.3.).

3.1 General Climate-Proofing

Section 2 has already referred to the obligation for office buildings to meet a certain energy performance standard, which relates to the energy use of the building. The required energy performance certificate is a label ‘C’ or, to the extent that the investment cannot be recovered within ten years, a lower label for which the investment can be recovered within ten years.²⁰ This obligation does not require specific

¹⁷ An example would be the local municipal subsidy scheme of Amsterdam (*Subsidieregeling duurzame Amsterdamse gebouwen*), which subsidizes specific costs resulting from decarbonizing real estate in specific neighbourhoods.

¹⁸ ‘Climate Agreement’ (n 6) 23 and Ministerie van Volkshuisvesting en Ruimtelijke Ordening (n 16) 5.

¹⁹ Peter Mulder, Francesco Dalla Longa and Koen Straver, ‘De feiten over energiearmoede in Nederland’ (TNO, 2021) <<https://publications.tno.nl/publication/34638646/p5uUXw/TNO-2021-M11697.pdf>> accessed 6 June 2023, and, more recently, Esther Mot and others, ‘Inkomenseffecten van woningisolatie naar de isolatiestandaard 2023’ (TNO and CBS 2023) <www.cpb.nl/sites/default/files/omnidownload/CPB-TNO-Publicatie-Inkomenseffecten-van-woningisolatie-naar-de-isolatiestandaard.pdf> accessed 6 June 2023.

²⁰ Art. 3.87 Bbl and Art. 5.11 Building Decree.

measures but leaves it to the owners of office buildings to choose the means to climate-proof their buildings. If owners fail to meet the energy performance standard, they will risk the closure of their building. The Dutch government has announced that similar obligations will be introduced regarding rental residential properties by 2032 and that the existing obligation for office buildings will have to meet more ambitious energy performance standards by 2030.²¹ The implementation of these new obligations depends on the future regulations in the Energy Performance of Buildings Directive. At EU-level, minimum energy performance standards were supposed to be set for both non-residential buildings (from 1 January 2027, at least energy performance class E; and, from 1 January 2030, at least energy performance class D) and residential buildings (from 1 January 2030, at least energy performance class E; and, from 1 January 2033, at least energy performance class D).²² As the comparative analysis in this special issue observes, however, the current proposal foresees no more mandatory standards for residential buildings.

Article 2.15 of the Activities Decree Environmental Management (*Activiteitensluit milieubeheer*) requires so-called establishments (*inrichtingen*) to implement all energy-saving measures whose costs can be recovered in no more than five years. These establishments refer to any facility having certain distinct effects on the environment and particularly include commercial property, such as hotels, shopping malls and offices. The mandatory energy-saving measures are based on packages of recognized measures.²³ These are *de facto* standards based on different categories, such as offices or shopping malls, and that guarantee that each building with a specific function fulfils the obligation under Art. 2.15 Activities Decree. This general obligation is different from the requirement of an energy performance certificate. While the certificate exclusively relates to the energy use of the building itself, Art. 2.15 Activities Decree pertains to the energy use for specific activities carried out within the building.

The Physical Environment Act reflects a slight and gradual switch from voluntary to obligatory upgrades to existing buildings to reduce greenhouse gas emissions. Under the Physical Environment Act, local authorities are able to introduce general or tailor-made standards to reduce emissions through the environmental

²¹ Ministerie van Volkshuisvesting en Ruimtelijke Ordening (n 16) 35.

²² Committee on Industry, Research and Energy, 'Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council on the energy performance of buildings' COM (2021) 0802 – C9-0469/2021–2021/0426 (COD).

²³ Art. 2.15 Activities Decree and Appendix 10 to the Activities Regulation (*Regeling Activiteiten milieubeheer*).

plan (*omgevingsplan*, which is a type of zoning plan).²⁴ The exact boundaries of this power are as of yet uncertain.

A future amendment to the Decree Buildings Environment aims to empower local authorities to oblige owners of buildings with non-residential functions, such as parking lots and industrial plants, to install solar panels.²⁵ The obligation to install solar panels will be based on a weighing of the scarcity of areas for local renewable energy generation against the interest of the owner, including the safety and the technical suitability of the building. This means that the obligation to install solar panels on roofs that are not suitable for these panels, would be regarded as disproportionate.²⁶ Another specific power that will be introduced concerns local regulations in the environmental plan to replace fossil fuel heating systems with renewable district heating systems within a reasonable period.

More generally, Art. 4.18 of the Physical Environment Act empowers municipalities to designate in the environmental plan modernization zones in which buildings have to be refurbished or replaced. It remains to be seen how far-reaching this power will be with regard to climate-proofing buildings, since it derives from previous legislation concerning the modernization of neighbourhoods, which only served as a precondition for expropriation whenever an owner was not willing to modernize a building themselves.²⁷ In any case, whenever local governments choose to include obligations to climate-proof in the environmental plan, they need to observe the requirements of legality and proportionality. These requirements entail that an intrusive obligation for owners to, for instance, install solar panels or heat pumps and to phase-out fossil fuels within the energy supply, will need a proper and precise legal basis and should be proportionate with regard to the owner's interests.²⁸ Especially the former requirement is a bone of contention because rather broad statutory provisions may not be proper legal bases for obligations on owners.²⁹

24 Kars J de Graaf and Hanna D Tolsma, 'Over gebiedsbepalingen en emissie- en immissienormen in het omgevingsplan' in Natasja Teesing (ed), *Milieubescherming in het omgevingsplan* (Boom 2016) 61.

25 Draft-Art. 3.86a Bbl. Jacco J Karens and HCWM Moesker, 'Omgevingsrechtelijk instrumentarium voor duurzaam gebruik van daken' (2021) 128 TBR. However, this amendment has not been included in the regulatory process yet. The government has announced that a similar amendment will be designed based on policy developments at EU level: *Kamerstukken II 2022/23*, 32813, nr. 1107, 34.

26 Karens and Moesker (n 25) para 5.5.

27 *Kamerstukken II 2013/14*, 33962, nr. 3, 477.

28 Frank AG Groothuijse and others, 'Omgevingsplan: overgangsrecht, gebiedsbepalingen en het verschuiven van onderzoeksplichten' (2016) 111 TBR para 4.2.2; De Graaf and Tolsma (n 24) 64.

29 Frank AG Groothuijse and others, 'Gebodsbepalingen in het omgevingsplan' (Research in commission of the Ministry of Infrastructure and Water Management, 2015) para 3.1.1 <<https://dspace.library.uu.nl/handle/1874/329019>> accessed 7 June 2023.

3.2 Insulation

National, regional, and municipal authorities have no general power to compel owners to improve the insulation of their buildings. This also applies to the power of authorities to include conditions regarding insulation in a permit for the renovation of an existing building. This follows from the principle of legality, which also entails that public bodies cannot deny a permit on grounds that are not enlisted in the law.³⁰

There is only one discretionary power to impose obligations on individual owners to improve the insulation of their buildings. Article 13 of the Housing Act empowers the municipal executive to require quality improvements to existing buildings. The required quality level can be higher than the level prescribed at the moment of construction, but never higher than the quality level of newly built buildings under the Building Decree. This power was introduced to order owners of badly maintained buildings to take measures to improve the quality of the building.³¹ Theoretically, this provision is important to decarbonization. As the Building Decree contains specific provisions on energy efficiency but not on solar panels or heating systems, local authorities may impose higher energy-efficiency standards through insulation and double-glazed windows, but no obligations pertaining to solar panels or heating systems.

However, in practice, municipalities do not often invoke Art. 13 of the Housing Act.³² Several reasons may explain this reluctance of local authorities. One reason is that the power may only be used if the improvement is ‘necessary’. This is not the same requirement as the necessity test under the principle of proportionality, discussed in Section 4. While proportionality requires a test of whether the measure goes beyond what is needed to achieve the aim, Art. 13 of the Housing Act addresses the aim itself in requiring the authority to motivate why adjustments are needed to the specific building or group of buildings in the specific context.³³ The obligation will be necessary when, for instance, there is a change to the use of the building. Think of residential buildings being turned into a hotel. Adjustments will then be necessary to reach reduction targets for existing buildings. As the national building

³⁰ Petrus JJ van Buuren (ed), *Hoofdlijnen ruimtelijk bestuursrecht* (10th edn, Kluwer 2017) 5.

³¹ Els-Marie Peeters, *Deregulering in de volkshuisvesting. De herziene Woningwet en de Huisvestingswet* (Tjeenk Willink 1992) 91–100.

³² Björn Hoops, ‘Verduurzamingsverplichtingen zonder compensatie. Het krimpende gewicht van de autonomie van de eigenaar’ (2020) 66 TBR 445; and Björn Hoops and others, ‘Het afdwingen van de verduurzaming van gebouwen op gemeentelijk niveau: art. 7a en 13 Woningwet onder de empirische loep’ (2020) 54 Gemeentestem 280.

³³ *Kamerstukken II* 2003/04, 29392, para 3.

regulations such as the Building Decree are generally deemed to reflect a sufficient quality level, a general policy statement by the public authority on reducing greenhouse gas emissions is not sufficient to require higher energy-efficiency levels.³⁴ The public body can adopt policy rules on the exercise of the power, in which it determines under which circumstances the competence can be used. This can be helpful to prove the necessity of the improvements. Still, this requirement of necessity generally prevents authorities from a widespread use of the power.

3.3 Sustainable Heating Systems

Currently, there is no legal basis for obligations to change the heating system of existing buildings outside the context of renovations or specific experiments sanctioned by statute. However, the policies of both national and local government, such as the *Transitievisie warmte*, aim at the reduction of fossil fuels such as natural gas as heating fuel for buildings.

In the context of renovations involving the replacement of heating systems, new legislation was recently adopted at national level to oblige owners to use, as set out in more detail below, a specific amount of renewable energy.³⁵ This amount will not be higher than the energy consumption of the building itself because the owner cannot be obliged to become an energy supplier for the local community.³⁶ Since February 2022, this specific obligation has applied whenever renovation involves at least 25% of the building surface and the replacement of the existing heating system. The owner is free to choose how to fulfil the obligation, for instance, by choosing solar boilers, solar panels with heat pumps, or a connection to a district heating system. The available options will also depend on the exact amount of renewable energy that should be used within the building. There is no power for local authorities to limit this freedom of owners. Also, this obligation does not apply if for technical or financial reasons, the owner of the renovated building cannot meet the minimum renewable energy standard. A financial reason would be that the costs of realizing more renewable energy capacity cannot be recovered within ten years. In

³⁴ Rb. Amsterdam 18 januari 2012, ECLI:NL:RBAMS:2012:BX3481.

³⁵ This obligation is a direct implementation of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L328/82 (*Kamerstukken II 2020/21, 32757, 179*).

³⁶ The draft text of this amendment and the legislature's motivation can be found here: 'Besluit tot wijziging van het Besluit bouwwerken leefomgeving in verband met het duurzaam gebruik van daken' (*Internetconsultatie*, 2021) <www.internetconsultatie.nl/bbl_duurzaam_gebruik_daken> accessed 1 May 2023.

that case, the owner is only obliged to realize as much renewable energy capacity as can be earned back within that period.³⁷ There will be a technical reason if the location of the building is not suitable for the generation of renewable energy, for instance, when the roof is unfit for solar panels and district heating is not available in the vicinity of the building. Exceptions apply to architecturally significant or monumental buildings to the extent to which fulfilment of the obligation would result in unwanted changes to the aesthetical and monumental values.³⁸

In 2021 the government proposed plans to adopt legislation that empowers local authorities to end natural gas use of existing buildings and for commercial purposes, such as in shops and small factories, against the will of the owner and also outside the context of a voluntary renovation.³⁹ Under the government's plan, the local authority could cut off buildings of the natural gas supply whenever alternatives such as district heating systems will be realized in the neighbourhood in the nearby future. Being cut off the public gas grid implies an obligation to connect to another heating source.

The plans contain specific observations on the legitimacy and proportionality of such an obligation and how this obligation relates to, for instance, tenancy law. An important substantive requirement concerning the phase-out of natural gas in buildings would be the guarantee that the owner will have an alternative renewable heating system at their disposal within a certain period of time. This can be the realization of district heating or any alternative with equal performance in terms of energy efficiency the owner chooses, such as heat pumps. The viability of the alternative to natural gas use would be predominantly judged by the costs of such a heating system and any additional costs for exchanging heating systems and/or adjustments to the building itself. This means that municipalities would only phase-out fossil fuels whenever affordable options are realistically available for owners, and that there would be a reasonable period of time between the change of the municipal environmental plan and the actual phase-out. In most situations any climate-proofing of buildings would be subsidized by local or national subsidy schemes. Whenever additional costs qualified as damage, under specific restrictions, the owners would be eligible for compensation under Art. 15.1 of the Physical Environment Act.

³⁷ Art. 5.6(6) Building Decree.

³⁸ *Kamerstukken II 2020/21, 32757, nr. 179.*

³⁹ Jacco J Karens, 'Van beleid naar verplichtingen: De Wet gemeentelijke instrumenten warmtetransitie' (2022) 22 TBR. The draft text of this new Act can be accessed via: 'Wetsvoorstel voor warmtetransitie in gebouwde omgeving in consultatie' (*Rijksoverheid*, 15 December 2021) <www.rijksoverheid.nl/actueel/nieuws/2021/12/15/wetsvoorstel-voor-warmtetransitie-in-gebouwde-omgeving-in-consultatie> accessed 1 May 2023.

District heating can be both a sustainable and efficient form of heating. Municipalities are recognized as having a key role in the development of district heating systems.⁴⁰ However, until now they could only enforce a mandatory connection to such a system with respect to newly built buildings.⁴¹ The obligation to connect existing buildings to a district heating system may be introduced through the new Heating Act (*Wet collectieve warmtevoorziening*), which is currently drafted by the legislature and will presumably come into force in the years to come.⁴² The goal of this obligation would be to increase the use of renewable heating supply in the existing building stock. Whenever a local authority would choose district heating as a potential instrument to increase renewable heating in urban areas and a district heating system would be viable within a specific area, owners could be obliged by the environmental plan to connect to a district heating system. The environmental plan would have to include a viable plan made by the heating company with information on the affordability for owners. The exact requirements for this obligation are as of yet unclear, such as whether the owner's costs need to be compensated or the connection needs to be subsidized by the public authority. The obligation would not be absolute, since the owner would still be able to choose for an equivalent alternative, such as heat pumps.

The proposed new Heating Act connects to the draft legislation giving municipalities the power to phase-out natural gas in buildings through the environmental plan. This cut-off can be seen as a material condition for the obligation to connect to the district heating system because existing buildings are predominantly heated by natural gas for which installations and contracts with energy suppliers are still in place.

4. The Constitutional and Human-Rights Protection of Property Against Obligations to Climate-Proof Buildings

Owners can lodge an appeal against obligations based on administrative decisions before the administrative courts and, eventually, the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*). They can choose to invoke the invalidity of unlawful obligations or claim compensation.⁴³ Whenever obligations arise

⁴⁰ *Kamerstukken II* 2002/03, 29048, nr. 3, 4; 'Climate Agreement' (n 6) 25ff.

⁴¹ Art. 6.10 Building Decree and Art. 1 Heating Act.

⁴² A draft version of the Heating Act is available via 'Wet collectieve warmtevoorziening' (*Internetconsultatie*, 2020) <www.internetconsultatie.nl/warmtewet2> accessed 6 June 2023.

⁴³ ABRvS 8 november 2006, ECLI:NL:RVS:2006:AZ1762, AB 2007/252.

from general rules, such as building regulations, owners cannot challenge these obligations before the administrative courts.⁴⁴ Indirect scrutiny of general rules by administrative courts is possible when owners appeal against administrative decisions based on these general rules. Moreover, owners can claim compensation before the ordinary courts if the general rules are unlawful, based upon the basic norm of Dutch tort law, Art. 6:162 of the Civil Code (*Burgerlijk wetboek*). Both the administrative and ordinary courts will test whether the general rules are incompatible with constitutional law, human-rights law, or fundamental principles. This section sets out the protection of owners from obligations to climate-proof flowing from these sources of law. This section first introduces the protection of property under Dutch law (4.1.). Then, it focuses on the principle of proportionality in general (4.2.) and the role of financial aspects within that principle in particular (4.3.).

4.1 Property Protection under Dutch Law

Obligations for owners to climate-proof buildings need to comply with constitutional principles, such as the rule of law. The rule of law entails that the obligations must be based on a legal basis and exercised in accordance with the principles of proper administration (*beginselen van behoorlijk bestuur*), such as proportionality, legality, and the principle of due care.⁴⁵ These principles are supposed to prevent public bodies from imposing obligations in an arbitrary manner. They apply to both individual obligations imposed by administrative decisions and uniform building standards imposed by general rules.

Property enjoys human-rights protection under A1P1. Obligations to climate-proof existing buildings constitute in almost all cases a control of use of possessions in terms of A1P1, but not a deprivation, because the same person remains the owner and the building can still be used for the same purpose after realizing the mandatory adjustments to the building.⁴⁶ A1P1 sets out the legal requirements for such infringements. The Dutch Constitution (*Grondwet*; Gw) contains a comparable clause in Art. 14 Gw. However, in legal practice, this clause has little importance because the Dutch judiciary is not allowed to review the constitutionality of Acts of Parliament and treaties (Art. 120 Gw).⁴⁷ Legal doctrine on Art. 14 Gw is therefore

⁴⁴ Art. 8:3 of the General Administrative Law Act (*Algemene wet bestuursrecht*; Awb).

⁴⁵ Art. 3:1 Awb; Groothuijse and others (n 29) 7.

⁴⁶ *Sporrong and Lönnroth v Sweden* (1982) Series A no 52.

⁴⁷ Tom Barkhuysen and Michiel L van Emmerik, 'De eigendomsbescherming van art. 1 Eerste protocol en het Nederlandse bestuursrecht' (2003) JBPlus 2, 12.

underdeveloped, and the protection from infringements of fundamental rights usually relies on the ECHR. Articles 93 and 94 Gw declare the supremacy of international law over national law whenever there is a conflict between them, underlining the importance of human-rights protection under the ECHR in national law.⁴⁸ This also means that the criteria applicable to the control of use under national law are the same as the criteria used by the European Court of Human Rights (ECtHR): (1) lawfulness, (2) a legitimate aim, and (3) a fair balance between the public interest in the control of use and the interests of the owner.⁴⁹

The criteria under A1P1 overlap with the principle of proportionality. Art. 3:4 of the General Administrative Law Act (*Algemene wet bestuursrecht; Awb*) contains a specific proportionality clause. The EU-law principle of proportionality (Art. 5 EU Treaty) is applicable in national contexts whenever EU law is involved, but recent judgments of the Council of State give reason to adapt even the interpretation of the national proportionality clauses to the three major elements of the European principle of proportionality: suitability, necessity, and proportionality of the adverse impact in the specific situation (*stricto sensu*).⁵⁰ As a result, several requirements for the control of use of ownership (lawfulness, legitimate aim, and fair balance) are part of the review of proportionality and are taken into account whenever the more general requirements of proportionality, particularly suitability, necessity and proportionality *stricto sensu*, are reviewed. This sub-section discusses both applications of proportionality (based on A1P1 and Art. 3:4 Awb).

Both the public body taking an administrative decision or adopting a regulation and the courts must examine the proportionality of any obligation on owners in force under Dutch law. The intensity of the court's review will vary. The lightest form is limited in that the court scrutinizes the impact of the measure on the interests involved and only assesses whether the public body has taken the decision on reasonable grounds. This means that the public body has some discretion to decide on the obligation.⁵¹ As the impact of the measure becomes more severe, for instance

⁴⁸ This also means that human-rights guarantees under the ECHR have direct effect within the Dutch legal system and authorities directly need to act in accordance with international law.

⁴⁹ Dirk GJ Sanderink, *Het EHRM en het materiele omgevingsrecht* (Kluwer 2015) 321.

⁵⁰ ABRvS 7 juli 2021, ECLI:NL:RVS:2021:1468, para 8.1; ABRvS 2 februari 2022, ECLI:NL:RVS:2022:285; ABRvS 22 december 2017, ECLI:NL:RVS:2017:3557. See Niels Jak and Pim J Huisman, 'Verschillende gezichten van bestuursrechtelijk maatwerk: interactie tussen wetgever, bestuur en bestuursrechter' (2021) 45 *Gemeentestem* 244.

⁵¹ Insights could also be gained from comparing case law on obligations flowing from the designation of buildings as monuments by public bodies. The owner may be obliged to take measures to maintain the monument and partially to pay for these measures themselves, not *per se* resulting in a disproportionate measure (ABRvS 4 december 2019, ECLI:NL:RVS:2019:4062).

when fundamental rights are infringed, the review will become more thorough and the bar to motivate the measure is set higher.⁵²

4.2 Proportionality of Obligations to Climate-Proof Buildings

Suitability and Necessity

The proportionality of an obligation is specifically reviewed with regard to the suitability and necessity of the obligation.⁵³ Any obligation that is not suitable because the obligation cannot promote its aim, is regarded as disproportionate. A particular example that may create problems in practice would be the mandatory connection to renewable district heating for owners who have already put in place a renewable and durable heating system such as a heat pump that was only installed not more than a few years ago. An additional connection to the heat network may render the network economically viable because it would lower the overhead costs per user. Thereby, the obligation to connect the building to the heat network would enable a substantial overall reduction of GHG emissions from the heating sector. However, it is submitted that this obligation would still fall foul of the requirement of suitability because it would not reduce the emissions of the owner's building and cause additional GHG emissions from connecting the building to the heat network. The goal to distribute burdens in the public interests equitably, of course, informs this narrower view on suitability. In this case, the single owner should therefore not be burdened with a task that can be fulfilled by many other owners or the taxpayer, who could subsidize the heat network.

As the principle of proportionality addresses the relation between the aim, the means to achieve this aim, and their impact, the necessity of the obligation and possible alternatives with less drastic consequences are an important factor to be taken into consideration.⁵⁴ Necessity means that the obligation cannot reach further

⁵² ABRvS 18 november 2015, ECLI:NL:RVS:2015:3578; ABRvS 2 februari 2022, ECLI:NL:RVS:2022:285.

⁵³ A recent conclusion by the Advocate General to the Council of State has extensively researched the review of proportionality by national judges and also sheds light on the relation between national and EU law in this respect. See ABRvS 7 juli 2021, ECLI:NL:RVS:2021:1468; and ABRvS 2 februari 2022, ECLI:NL:RVS:2022:285. cf Sanderink (n 49) para 9.5.

⁵⁴ Janneke H Gerards, 'Het evenredigheidsbeginsel van art. 3:4 Awb en het Europese recht' in Tom Barkhuysen and Willemien Den Ouden (eds), *Europees recht effectueren. Algemeen bestuursrecht als instrument voor de effectieve uitvoering van EG-recht* (Kluwer 2007) 81.

than necessary to realize the aim,⁵⁵ and that public bodies and courts will have to scrutinize whether there are less invasive alternatives.

Alternatives need to be taken into account insofar as they can reach the aim equally effectively in a less far-reaching way.⁵⁶ Obligations will usually be necessary when milder policy instruments, such as subsidies or taxes, do not have the desired outcome, that is, the energy efficiency of buildings is not improved or not improved as fast. In this respect, specific characteristics of command-and-control measures play a role. For instance, when a significant number of homeowners refuse to be connected to district heating, the business case of district heating will fail. As a result, greenhouse gas emissions will increase. Incentives to connect could be seen as alternatives. However, the key advantage of obligations to connect their buildings to the district heating system is that they will contribute much more to the goal of reducing greenhouse gas emissions, since every owner must comply or establish that their heating system is already sufficiently sustainable. Voluntary instruments such as subsidies lack the ability to reach the goal as thoroughly as the obligation to climate-proof buildings and are thus not equally effective.

Whether there are alternatives that are equally effective, but less invasive, will depend on the specifics of the obligation, the interests involved, and the circumstances taken into account by the public body. For example, if the obligation to install a heat pump leads to the same reduction of GHG emissions as a connection to the district heating system, but district heating is only half as expensive as the heat pump, the obligation to install a heat pump will be suitable to bring about a reduction in GHG emissions, but not necessary because an owner generally has the right to use that alternative, based on the principle of equivalence.⁵⁷ However, it is up to the owner to prove that the alternative is equivalent.

Inversely, if the owner plans to install a heat pump voluntarily, a unilateral obligation for the owner to connect the building to district heating will also be suitable because the heat pump has not been installed yet. However, the obligation will not be necessary if we only consider the situation of the addressee of the obligation and the heat pump roughly reduces GHG emissions by the same amount as the connection to district heating. This narrow approach to necessity can be justified by the reasons given for rejecting obligations to connect to district heating where a modern heat pump is already in place.

That said, if there is no modern heat pump in place, the obligation will not require the replacement of a functioning sustainable heating system, which may

55 Adrienne JC de Moor-van Vugt, *Maten en gewichten, Het evenredigheidsbeginsel in Europees perspectief* (W.E.J. Tjeenk Willink 1995) 211.

56 Gerards (n 54) 83ff.

57 Art. 1.3 Building Decree. See also ABRvS 27 november 2013, ECLI:NL:RVS:2013:2150, AB 2014/28.

justify loosening this approach. Any additional connection to the heat network renders the network more economically viable because it would lower the overhead costs per user. This would also benefit owners or tenants who do not have the financial means to invest in heat pumps. The obligation to connect the building to the heat network would thus enable an additional reduction of GHG emissions at regional or national level. Compared to the heat pump, the connection to district heating could thus be considered more effective in reducing GHG emissions, and obligations to connect to the heat network would, from that perspective, be necessary. This approach to necessity would entail that the owner's private interest is subject to the public interest of connecting more buildings to district heating. What makes this approach more likely to be adopted in practice, is that most courts deal with necessity in the context of the broader proportionality test. Within the test of proportionality *strictu sensu*, the public interest in an economically viable heat network and an additional reduction of GHG emissions could be prioritized over the owner's interest. However, to the extent that the heat pump is less expensive for the owner than the connection to the heat network, the owner is likely to be entitled to financial compensation because the owner is burdened with a task that can be fulfilled by many other owners or the taxpayer.

Uniform standards for existing buildings, such as the obligation to reach a certain energy performance standard, generally pass the necessity test more easily than obligations that prescribe the use of specific means. Standards are less invasive because they do not prescribe specific measures and leave freedom of choice to owners to upgrade their buildings to a certain quality level. This also means that uniform standards are a less far-reaching alternative to obligations to take certain measures.⁵⁸ From a proportionality perspective, it is recommended leaving the exact fulfilment of the norm to the owner.⁵⁹

Proportionality stricto sensu in general

The proportionality *stricto sensu* or the fair balance of an obligation is case-specific, requiring a review of the impact of the measure in relation to its aim within a specific context. The review of an obligation to climate-proof buildings must take into account the situation of both the property, including its physical characteristics and suitability for climate-proofing, and the owner, such as their financial situation.

⁵⁸ Hoops (n 32). See ABRvS 27 november 2013, ECLI:NL:RVS:2013:2150, AB 2014/28.

⁵⁹ ABRvS 18 januari 2017, ECLI:NL:RVS:2017:92.

Most obligations to climate-proof buildings are directed at the owner of the building, requiring the owner to adjust the building in line with the obligation, for example through insulation. The financial impact of the obligation is the most important aspect in the review of proportionality *stricto sensu*. In Dutch doctrine it receives far more weight than the infringement on the autonomy of the owner to determine the use of their property.⁶⁰ The financial aspects are discussed in subsection 4.3. below. The duration and intensity of construction works can also be a key factor in the review of proportionality *stricto sensu*, particularly when the obligation infringes the right to privacy and family life under Art. 8 ECHR. This will be particularly the case if the owner or a tenant cannot live in the building anymore due to the construction works, which also entails relocation costs.⁶¹ Article 8 ECHR and other housing-related rights entail a distinction between residential and non-residential buildings, with stronger protection for the owner of residential buildings.⁶² Regulations in the Netherlands reflect this distinction in that obligations to climate-proof are generally more ambitious when they apply to government and commercial buildings.

Important insights on other relevant factors can be gained from debates on obligations requiring other types of adjustments to buildings. The Netherlands has had a debate about a ban and replacement of roofs containing asbestos. The Dutch Senate (*Eerste Kamer*) rejected a draft proposal in 2019 because the obligation to replace such roofs would have a disproportionate impact on private owners, despite available subsidies.⁶³ The reason was an imbalance between the interest in public health and the costs owners would have to make, a relatively short transition period between the proposal and the obligation, since the ban was envisaged to be enforced in 2024, and the lack of financial and organizational capacity of private owners and the market both to detect asbestos and to remove asbestos-holding roof material. Access to funding and the capacity of the market to absorb demand within the given timeframe will thus be relevant to the proportionality *stricto sensu* of the obligation to climate-proof buildings.

⁶⁰ Hoops (n 32) para 4.1.

⁶¹ This is true for both owners who actually live on their property and owners who rent their property to tenants. Art. 7:207 of the Dutch Civil Code (*Burgerlijk wetboek*; BW) provides a legal basis for tenants to claim compensation for relocation and substitute homes or business premises. There is no case law available about how these costs relate to the proportionality of an obligation to the owner who is also landlord, but the costs will be taken into account.

⁶² *Noack and Others v Germany* App no 46346/99 (ECtHR, 25 May 2000). The Dutch government adopts this position in its recent policy programme for decarbonizing the built environment: Ministerie van Volkshuisvesting en Ruimtelijke Ordening (n 16) 37

⁶³ *Handelingen II* 2018/2019, 28 May 2019, nr. 33.

This suggests that a transition period can at least partially restore the proportionality *stricto sensu* of the obligation.⁶⁴ A transition period can contribute to a fair balance because owners can anticipate the obligation to adjust their building and the obligation will be foreseeable to the public, in particular future owners.⁶⁵ Transition periods can have a general or specific character, which means that they either apply to all or only to specific groups of owners based on particular circumstances.

Exceptions are another option to alleviate the overall impact of the obligation and an important factor in reviewing the proportionality of an obligation. Most existing regulations containing obligations on owners provide for exceptions, such as when adjustments are not cost-effective for economic or technical reasons, possibly related to the type of building. Exceptions can either have a general effect or depend on the specific application by the competent authority.⁶⁶

Hardship clauses should be adopted to cater for unforeseeable circumstances.⁶⁷ Hardship clauses usually provide for exceptions to a norm, such as an obligation, in very specific situations in which the obligation will lead to an individual and excessive burden. They are meant to prevent disproportionate effects of a norm in a specific situation not envisaged by the regulation.⁶⁸ However, particularly in municipal planning law, they are not very common.⁶⁹ Whenever hardship clauses are applied to climate-proofing buildings, possible grounds to rely on the hardship clause would include the situation of the owner, such as their health or age, or the situation of the building, such as the prospect of demolition in the nearby future.

64 *Depalle v France* App no 34044/02 (ECtHR, 29 March 2010); Sanderink (n 49) para 9.5.

65 An example is Art. 4 of the Act banning the production of coal-based electricity (*Wet verbod op kolen bij elektriciteitsproductie*), which states that the Minister can compensate electricity power plants whenever their closing down by 2024 would be disproportionate. In most cases, however, the legislator expects that the transition period for power stations to switch to alternative operations is sufficient and that therefore no compensation will be due. No compensation was due in a case before the District Court of The Hague about this Act because the transition period should secure a balance between the reduction of carbon emissions within a specific period and the opportunity for owners to mitigate damage during that period. Martha M Roggenkamp, Kars J de Graaf and Lolke S Braaksma, 'Afscheid van kolen(centrales): waar een wil is, is een wet?' (2019) 6 *Ars Aequi* 449, 456.

66 These can be general exceptions, such as Art. 3.87 Bbl, or exceptions that come as hardship clauses. Currently, only Art. 5.6 Building Decree contains some sort of hardship clause for individual cases.

67 For instance, the Instructions to Legislators (*Aanwijzingen voor de Regelgeving*) specifically refer to hardship clauses that should be introduced when possible disproportionate outcomes cannot be foreseen (*Aanwijzing* 5.25).

68 Art. 4:84 Awb contains a hardship clause concerning the application of policy rules, and Art. 5:46 Awb contains one concerning administrative fines.

69 Frederik S Bakker, *Billijkheidsuitzonderingen. Het wegens bijzondere omstandigheden buiten toepassing laten van wettelijke voorschriften in individuele gevallen* (Kluwer 2018) para 6.3.3.

4.3 The Financial Impact of the Obligation and Compensation for Owners

The financial impact of an obligation on owners is crucial to the proportionality *stricto sensu* of the obligation. Loans and subsidies can alleviate the financial burden imposed upon the owner and restore proportionality.⁷⁰ Compensation can never be claimed to the extent to which subsidies or similar state measures are certain to cover the damage.⁷¹ Should these financial means not be sufficient to ensure proportionality *stricto sensu*, compensation awarded by authorities or judges is vital to restoring proportionality. Although not mandatory for state action that falls short of expropriation,⁷² compensation can be granted under both the ECHR and national law. The ECHR protects all possessions and thus also landownership. That means that a change in the value of the property and a change in the capital of owners to finance obligatory adjustments are protected under A1P1.⁷³ A1P1 limits compensation to the control of use or deprivation of possessions, while Dutch administrative law applies to all damages caused by regulations and administrative decisions. As a result, the Dutch General Administrative Law Act and the criteria for compensation based on this Act are applied first. The criteria for compensation under A1P1 will only play a supplementary role whenever compensation is not granted under the General Administrative Law Act.⁷⁴

This sub-section first deals with the cost-effectiveness of required adjustments and the emerging rule that no compensation is due for cost-effective adjustments (4.3.1). Subsequently, this sub-section addresses compensation for investments that cannot be earned back (4.3.2). Finally, this sub-section briefly discusses the particular situation of landlords (4.3.3).

70 Dutch literature qualifies compensation, loans, and subsidies as benefits based on public law: Willmien den Ouden and Michiel KG Tjepkema, 'Voor hetzelfde geld, Over de kwalificatie van publiek-rechtelijke financiële verstrekkingen en hun wettelijk kader' (2006) 4 NTB 101, 103–116.

71 ABRvS 3 september 2003, AB 2004/51, which is case law on the damage caused by the replacement of an industrial unit but already covered by a local fund.

72 *Pine Valley Developments Ltd. v Ireland* App no 12742/87 (ECtHR, 29 November 1991). ABRvS 12 juni 2013, ECLI:NL:RVS:2013:CA2858, para 6.2.

73 *Ayengil and Others v Turkey* App no 33294/03 (ECtHR, 6 December 2011), paras 45–48. See more on the definition of property under the ECHR: Jacques AMA Sluysmans and Ruben de Graaff, 'Ontwikkelingen in het eigendomsbegrip onder artikel 1 Eerste Protocol' (2014) 20 NTM/NJCM-bull.

74 Sanderink (n 49) 416.

4.3.1 No Compensation for Cost-Effective Adjustments

First of all, we need to take a closer look at the character and scope of expenses owners need to make to adjust their building in line with an obligation to climate-proof, and inquire whether the owners actually suffer pecuniary damage. The measure itself as well as the activities in, and characteristics of, the building determine the cost-effectiveness of the measure. The value of the property will, at least temporarily, increase as the building will become more energy-efficient and savings on energy costs will be realized.⁷⁵ Regarding this increase, a distinction needs to be made between measures that have a long-lasting potential for energy cost savings, such as insulation, and measures that have short-term potential, such as solar panels, which have a lifetime of roughly 25 years. On top of that, many adjustments will increase the comfort of living or working in the building. On the other hand, the owner needs to invest in materials and labour to adjust the building. From a policy perspective, the national government states that adjustments to buildings should not be cost-increasing for owners compared to the current situation, and irrecoverable losses should at all cost be avoided.⁷⁶ We thus need to distinguish between expenses that can be recovered through lower energy bills (and, indirectly, value increases of the property), and expenses that exceed the maximum amount of savings on the energy bill and thus cannot be earned back, the so-called inevitable losses.⁷⁷ Measures such as insulation or the installation of solar panels will generally be cost-effective. However, due account needs to be taken of damage to the property caused by the phase-out of the current energy supply, probably based on fossil fuels. Other obligations, such as adjustments to the heating system, will only be cost-effective under specific circumstances, such as higher taxes on natural gas consumption in the future. In both cases, subsidies and sustainable loans could help to finance the investment and avoid inevitable losses.⁷⁸

The cost-efficiency of adjustments is a key factor in ensuring the proportionality of energy-efficiency obligations in the specific situation.⁷⁹ Generally, cost-efficient measures will be regarded as proportionate and will not attract compensation,

⁷⁵ Recent Dutch research indicates a value increase of about 4% compared to comparable buildings: Alexander Oei, Maurice Thijsen and Harry van Til, 'Inzicht in aanvullende beleidspakketten voor de verduurzaming van de gebouwde omgeving' (Policy study, Ecorys 2021) <www.klimaataakkoord.nl/documenten/publicaties/2021/07/06/ecorys-inzicht-in-aanvullende-beleidspakketten-voor-de-verduurzaming-van-de-gebouwde-omgeving> accessed 6 June 2023.

⁷⁶ 'Climate Agreement' (n 9) 15.

⁷⁷ Rijksoverheid, 'Lange Termijn Renovatiestrategie' (2020) 60 <<https://open.overheid.nl/documenten/ronl-14c0cb4c-9f4e-4e63-a3d8-70285062f52d/pdf>> accessed 6 June 2023.

⁷⁸ Oei, Thijsen and Van Til (n 75).

⁷⁹ As an example, the principle of cost-effectiveness is laid down in Art. 1.1 Beg.

setting a benchmark for future obligations to climate-proof buildings.⁸⁰ This is also an expression of the rule that the damage inflicted by state action must be set off against the benefits enjoyed by the owner.⁸¹ The minimum energy performance standards for office buildings, effective since 1 January 2023, are a case in point. Neither the Building Decree nor its legislative basis gives specific consideration to the proportionality of costs that need to be made by owners, estimated around 300,000 euros for adjustments to an average office building.⁸² There is no specific clause on compensation. The government simply assumed that a return could be made on the investment and a transition period from 2018 to 2023 was supposed to give owners ample time to adjust their buildings. The value increases after the adjustments would make compensation unnecessary.⁸³ However, the government has created a safety net to ensure the measure's proportionality. Where the expenses cannot be recovered within ten years, the owners will only have to make the adjustments that can be earned back within ten years.

With regard to the financial aspects of proportionality, the moment of assessment of the economic feasibility is a key factor. Before a specific obligation can be enforced, it should be clear that this obligation will generally not lead to investments that cannot be earned back. Such assessment requires an ex-ante inquiry into predictions of, amongst others, energy prices and interest rates. The disadvantage of such an approach is that these predictions probably will not materialize. Hence, damage can still occur when an initial investment turns out to be financially detrimental. A complicating factor is that under Dutch administrative law, claims to compensation are subject to a limitation period. This means that any damage caused by unfulfilled predictions would have to materialize within five years of the administrative decision, which is the moment of reference for damages.

In the proportionality analysis, the type and use of the building not only, as pointed out in sub-section 4.2. above, implicates different fundamental rights. Obligations to climate-proof residential buildings will render Art. 8 ECHR applicable, while this provision is unlikely to feature in cases involving commercial buildings. The type and use of the building also has an impact on the cost-efficiency of the measure. Commercial buildings have a relatively high energy demand, rendering investments in energy efficiency generally cost-effective. By contrast, energy performance standards are not mandatory for buildings with a small energy demand,

⁸⁰ Hoops (n 32) para 6.2.

⁸¹ ABRvS 13 augustus 2014, ECLI:NL:RVS:2014:3022, para 6.1; ABRvS 19 juli 2017, ECLI:NL:RVS:2017:1968, para 4.2.

⁸² *Besluit van 17 oktober 2018, houdende wijziging van het Bouwbesluit 2012 betreffende de labelverplichting voor kantoorgebouwen*, Staatsblad 2018, 380.

⁸³ *ibid.*

such as pigsties and other buildings with agricultural functions.⁸⁴ This suggests that obligations to make adjustments to these buildings will be seen as disproportionate because they have little effect on the total energy demand of the built environment and disproportionate costs would have to be incurred by the owner to reduce very few greenhouse gas emissions. Obligations to climate-proof monuments are also perceived as disproportionate because adjustments are generally so expensive that they cannot be earned back and, moreover, they can harm the monumental value of the building.

4.3.2 Compensation for Inevitable Losses

It is possible that there is no reasonable expectation that the value increase of the property and the reduction in energy expenses will equalize the investment. Proportionality under A1P1 and Dutch law requires a fair balance, but not full compensation of the extent to which adjustments are not cost-effective. Inevitable losses can under certain circumstances still reflect a fair balance between the reduction in greenhouse gas emissions and the owner's interest.⁸⁵

With respect to the compensation of inevitable losses, a distinction must be made between obligations to climate-proof based on administrative decisions and those flowing from building regulations. The general principle of equality before charges levied by the State (*égalité-beginsel, gelijkheid voor de openbare lasten*) will determine whether compensation is due for administrative decisions causing inevitable losses. This principle entails that state action may cause damage in the public interest, and that this damage will only be compensated whenever citizens suffer 'individual and excessive burdens' when compared to others.⁸⁶

A rule of thumb arising from this principle and relating to the excessiveness of the burden is that compensation is only required if the damage significantly goes beyond what is regarded as a normal societal risk.⁸⁷ In a modern society, owning property is not without risks, such as changing government regulations. Only damage beyond normal risks will be compensated. Sometimes, the loss of a part of the total value of the property is regarded as a normal risk of damage when obligations

⁸⁴ See, for instance, Table 3.83 or 4.148A of the Bbl.

⁸⁵ ABRvS 28 september 2016, ECLI:NL:RVS:2016:2582, para 5.22

⁸⁶ Michiel KG Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel* (Kluwer 2010) 355. This principle is the only and exclusive basis for compensation under Paragraph 4.5 of the General Administrative Law Act.

⁸⁷ Tjepkema (n 86) 409.

directly apply to an owner. There is no fixed percentage though.⁸⁸ This could mean that part of the investment that is not cost-effective could be a manifestation of a normal risk. The normal risk may differ, depending on financial capacity of the owners. An owner's financial damage should be compared to the one suffered by owners in their own reference group. This would mean that residential owners and commercial owners cannot be compared to each other. The uncompensated part of the actual damage due to the normal risk or, as discussed hereafter, a lack of foreseeability, could differ between these groups.⁸⁹

Foreseeability of government regulation rules out claims to compensation. When the owner sells their property during the transition period in which the adjustments can be made, foreseeability will prevent the succeeding owner from claiming compensation, since the successor-in-title has accepted the future obligation in buying the property.⁹⁰

Another criterion pertains to the 'individual burden' and inquires whether the damage is specifically imposed upon one owner or a smaller group of owners. This review includes a comparison with other owners, with the same type of property and/or within the same geographic area.⁹¹ At least in theory, this criterion could bar a claim to compensation where an authority has imposed obligations to climate-proof on broad categories of owners in an area.

Unlike administrative decisions, building regulations apply to broad and abstract categories of citizens. Obligations to climate-proof on this basis generally do not attract compensation based on the principle of equality before charges levied by the State. This does not mean that the government can disregard claims to compensation. The current obligations under the Building Decree to upgrade office buildings do not contain specific clauses on compensation but are limited to cost-effective measures and will thus never require compensation. While the *égalité* principle would suggest that obligations to climate-proof that apply to all buildings or broad categories of buildings, such as the minimum energy performance standards for office buildings, are never compensated, in practice regulations often award compensation to broad categories of people affected by the regulation who cannot be said to be small groups. More generally, a special power for the Minister to grant compensation will usually feature in any regulation because an obligation may

⁸⁸ ABRvS 28 september 2016, ECLI:NL:RVS:2016:2582; ABRvS 19 september 2018, ECLI:NL:RVS:2018:3026.

⁸⁹ Tjepkema (n 86) 406.

⁹⁰ Jonathan HM Huijts, *Nadeelcompensatie en tegemoetkoming in planschade: Titel 4.5 Awb en afdeling 15.1 Omgevingswet: tussen eenheid en verscheidenheid* (IBR 2019) para 8.2.1.

⁹¹ Tjepkema (n 86) 355.

otherwise violate A1P1.⁹² A1P1 will require compensation whenever the measure causes excessive damage to owners, for instance if they have to make expenses that cannot be earned back and these costs exceed the normal societal risk.⁹³ Also, even though owners cannot challenge a uniform building standard before the administrative courts, the owner could request that the ordinary courts declare the obligation an unlawful act and award compensation in cases of individual and excessive burdens.

4.3.3 Obligations for Landlords to Climate-Proof

When landlords climate-proof their buildings, the tenants will benefit from lower energy bills and, under certain circumstances, the landlord from a value increase. The landlord will seek to pass the expenses on to the tenants by raising the rent, conflicting with the tenant's interests. The construction works can also affect the interests of tenants. The situation that a building is rented out is in and of itself not relevant to the proportionality of an obligation on the owner. However, the interests of the tenants will feature in the proportionality analysis in the form of their financial interest and their interest in having the building at their disposal.⁹⁴

The tenancy agreement can create problems for the proportionality of the obligation to climate-proof in two situations.⁹⁵ First, Dutch tenancy law would allow for an increase of the rent that goes beyond what the tenant saves on their energy bills. Then, the obligation to climate-proof would impose financial losses on the tenant, triggering a claim to compensation. Second, Dutch tenancy law would not al-

92 Examples are the Act banning the production of electricity from coal (*Wet van 7 juli 2021 houdende wijziging van de Wet verbod op kolen bij elektriciteitsproductie in verband met beperking van de CO₂-emissie*, *Staatsblad* 2021, 640) and the Act banning fur farming (*Wet van 16 december 2020 tot wijziging van de Wet verbod pelsdierhouderij in verband met een vervroegde beëindiging van de pelsdierhouderij*, *Staatsblad* 2020, 555).

93 Dirk GJ Sanderink and Joyce J Scheltens-Fokke, 'Gebodsbepalingen en overgangsrecht in het omgevingsplan' in Saskia Hillegers (ed), *Vertrouwen in de Omgevingswet* (Kluwer 2021) 296. An example can be found in the legislative process on the Act to ban fur farming in the Netherlands. This Act would have compelled fur farmers to end their activities within ten years of the Act being adopted, and may have led to lost investments (*Kamerstukken II* 2012/13, 33076, lit. H).

94 ABRvS 18 november 2019, ECLI:NL:RVS:2019:3808, which gives the example of a enforcement decision that obliged the landlord to terminate the rental agreement of a business unit inhabited by tenants. Their interests were directly influenced by the decision, also because it conflicted with their fundamental right to life.

95 Yassine Hasnaoui and Björn Hoops, 'Verplichtingen om huurwoningen te verduurzamen: klem tussen privaat- en publiekrecht?' (2021) 166 *WR tijdschrift voor huurrecht* 841.

low for an increase that makes the adjustments cost-effective. In that case, the landlord would have a claim to compensation.

Under Dutch tenancy law, the landlord has the option to make a reasonable proposal to raise the rent or service costs or to agree on a special reimbursement due to improved energy efficiency.⁹⁶ The proposal will only be reasonable if the overall expenses by the tenant do not increase.⁹⁷ In this way, Dutch tenancy law effectively prevents the first situation from arising. If the tenant does not accept the reasonable proposal, the landlord of a residential building can generally request the Rental Housing Committee (*huurcommissie*) to assess the reasonableness of the increase of the rent.⁹⁸ An increase of the rent will thus generally be possible and, to the extent that the adjustments are cost-effective, prevent the second situation from arising in a residential context. In cases of non-residential buildings, however, there is no statutory mechanism for a rent increase.⁹⁹ If the tenancy agreement also lacks such a mechanism and the agreement does not expire soon, the proportionality of the obligation to climate-proof will be in serious danger.

5. Enforcement

The power to actually enforce the obligations is the capstone of climate-proofing buildings. Different administrative bodies are involved in the enforcement of existing obligations, either at national level (*Inspectie voor de Leefomgeving en Transport*) or at municipal or regional level (*Omgevingsdiensten / Bouw- en Woningtoezicht*).

Usually, the legislative process pays specific attention to the enforcement by the competent public body, based on a broader discussion about the effectiveness and administrative costs of the legislation. This entails that legislation needs to be drafted in such a way as to avoid discussion between the enforcing administrative body and the owner about whether an obligation is fulfilled. An example of bad practice would be Art. 2.15 Activities Decree, which obliges owners to implement all

⁹⁶ The landlord will need the reimbursement to get compensated for their expenses, but the actual feasibility of the measures and the compensation for larger energy efficiency need to be proven. This is because tenants (with low incomes) should be protected against the possibility that the renovation will not have the desired result in terms of energy efficiency, and the reimbursement being too high (Rb. Amsterdam 4 april 2019, ECLI:NL:RBAMS:2019:2543).

⁹⁷ Rb. Amsterdam 4 april 2019, ECLI:NL:RBAMS:2019:2543, para 11.

⁹⁸ Art. 7:255 and Art. 7:255a BW.

⁹⁹ Aemile GA van Rappard, Jetske M Huber and Raf Vermolen, 'Label C-verplichting kantoorruimte, goed begonnen is half gewonnen?' (2020) 62 WR tijdschrift voor huurrecht.

energy-saving measures that can be earned back within five years. In practice, this has fuelled discussions between the administrative body (*Omgevingsdiensten*) and owners of industrial sites about which measures to take and whether they have a payback period of five years or less.¹⁰⁰

Any power to compel owners to adjust their property also entails the power to enforce such an obligation. Dutch administrative law contains a duty for public bodies to enforce administrative law, and only under exceptional circumstances, such as minor violations or situations which are soon to be legalized, can enforcement be omitted.¹⁰¹ The general obligation to enforce does not rule out that administrative bodies have their own policy whereby enforcement of specific violations of the law can be prioritized, or less so.¹⁰² In practice, the capacity to respond to violations is limited due to a lack of staff, which is the reason for enforcement policies.

Based on their policy, administrative bodies can postpone enforcement in order to give norm addressees more time to comply with the regulations, which does not rule out enforcement at a later stage.¹⁰³ Such a final notice is also not a precondition for enforcement itself, which can be done without prior notice. Whenever it is foreseeable that many owners cannot comply with the regulation within the given period of time, administrative bodies can choose to give enforcement a low priority during a set period of time, in order to give more time to meet the obligation. This can, for instance, be the case when climate-proofing adjustments cannot be carried out in time because there is a lack of certified materials or installers. It is expected that this will be the case with owners of office buildings that need to be renovated due to the obligation to have a minimum energy performance certificate by 2023.¹⁰⁴ However, 12 million euros have been made available for the enforcement of this obligation, which indicates that enforcement of energy standards will receive more priority in the nearby future, especially when buildings with commercial uses are involved.

In the enforcement policies, the administrative body typically takes into account the interests of third parties, the gravity of the violation, and values that need

100 ABRvS 23 mei 2018, ECLI:NL:RVS:2018:1688.

101 This principle is based on case law. See, for instance, ABRvS 30 juni 2004, ECLI:NL:RVS:2004:AP4683.

102 ABRvS 7 augustus 2011, ECLI:NL:RVS:2013:663.

103 ABRvS 30 maart 2016, ECLI:NL:RVS:2016:849.

104 Mid-2022, less than 50 % of the total amount of offices complied with the obligation, Rijksdienst voor Ondernemend Nederland, 'Monitor Verduurzaming Gebouwde Omgeving' (2022) <www.rvo.nl/sites/default/files/2022-12/Monitor-Verduurzaming-Gebouwde-Omgeving-2022.pdf> accessed 5 June 2023.

to be protected by the specific regulation.¹⁰⁵ Regarding the enforcement of obligations to climate-proof buildings, compared to, for instance, noise pollution standards, third-party interests and requests for enforcement play a minor role. This means that enforcement will largely depend on the willingness of the administrative body to enforce specific energy standards, which will be the outcome of a weighing of interests in which the public interest in enforcing rules on energy efficiency and greenhouse gas emissions will play a key role.

Enforcement can be executed through different sanctions, including both administrative punitive sanctions and remedial sanctions. Administrative sanctions such as fines are very common in administrative law. Recently, fines for not presenting an energy performance certificate in real estate transactions were increased to 435 euros for residential owners and 870 euros for commercial owners.¹⁰⁶ Remedial sanctions are intended to restore the status prior to an illegal action (e.g., when a building is built without a permit). They are less suitable to enforce obligations to climate-proof buildings because the violation will usually not be an illegal action but no action at all. Both permanent stop orders (cease and desist – *last onder dwangsom*) and administrative coercion (*bestuursdwang*) are available sanctions. In the first case, the non-compliance has an ongoing character and is remedied with a fine, while in the second case, the non-compliance is halted immediately (for instance, through the demolition of an illegal building). A cease and desist will be the most common instrument in enforcing energy standards, in which case the owner has to improve their property to avoid the fine.¹⁰⁷ However, it needs to be feasible for the owner to stop the sanctions, which means that technical and financial feasibility and, therefore, proportionality will play a role in enforcement procedures as well. Administrative coercion is unlikely to be employed. The administrative body would have to make improvements to the building themselves and then to recover the costs from the owner. Not only would the administrative body be ill-equipped to organize such adjustments at a large scale, this type of sanction would also raise new questions such as whether these projects would be subject to procurement law.

105 MGJ Maas-Cooymans, A Danopolous and J Barense, 'Handhaving door en voor gemeenten. Een juridische handleiding voor de gemeentelijke praktijk, Vereniging van Nederlandse Gemeenten' (VNG 2019) 52–53.

106 'Hogere boetebedragen bij ontbreken energielabel woning' (*Ilent*, 5 November 2021) <www.ilent.nl/onderwerpen/energielabel/energielabel-gebouwen/energielabel-woningen> accessed 6 June 2023.

107 ABRvS 17 oktober 2018, ECLI:NL:RVS:2018:3347.

6. Concluding Observations

Dutch law generally permits obligations to climate-proof buildings without compensation, as well as their enforcement. The most prominent examples so far concern non-residential buildings. Existing office buildings need to comply with a minimum energy performance standard, and businesses have to take all energy-saving measures that can be earned back within five years. Obligations to climate-proof houses play a considerably smaller role. Municipalities seldom make use of their already limited power to compel owners to insulate their residential buildings. This review indicates that the State is substantially more hesitant to tackle unsustainable residential buildings, confirming a better political and legal protection of residential buildings. Also, this review shows that Dutch law mostly leaves it to the owners to decide on the means to make their buildings more sustainable.

In the near future, obligations to climate-proof are poised to keep their focus on non-residential buildings and technological neutrality. However, energy performance standards for existing rental housing and expanded powers for municipalities to impose obligations on owners of residential buildings will increasingly expose residential buildings to such obligations. Also, the possible future power for municipalities to order solar panels to be placed on unused roofs of non-residential buildings or the connection of buildings to a district heating system departs from the freedom of owners to decide on the means to make their buildings more sustainable.

Under A1P1 and Dutch constitutional and administrative law, the proportionality of the obligation to climate-proof is essential to its permissibility. So far, Dutch doctrine has not developed separate rules for obligations that require law-abiding citizens to actively make their buildings more sustainable. It applies the general rules that have been developed for obligations on owners not to do or to tolerate activities of others on their property. It generally depends upon the cost-effectiveness of the measures whether or not obligations to climate-proof buildings are lawful without compensation. In cases of investments that cannot be earned back, the State should provide a subsidy scheme to ensure the obligation's proportionality. Also, building regulations or administrative decisions need to provide for a sufficient transition period to allow owners to climate-proof their buildings. Owners can challenge or, at least, claim compensation for obligations to climate-proof that entail inevitable losses or do not allow for enough time for their implementation.