

WHOSE PERMITS? THE TENACITY OF PERMISSIVE DEVELOPMENT CONTROL IN FLANDERS

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ABSTRACT

This paper explains how a permissive planning permit system is embedded in the Belgian/Flemish society and how this contributes to urban sprawl. We base our analysis on an institutionalist approach as developed in previous and current research and analyse the Flemish planning permit system since 1962 as one of different interacting planning systems, all (re)produced, maintained, transformed and struggled over by specific individual and collective actors and shaped by a range of institutional dynamics. The analysis shows how in the dynamics of the Flemish planning permit system, a general struggle between actors defending property based private initiative and actors arguing for collective action in space is especially apparant. In this struggle, property ownership expressed through a permissive planning permit system and confined enforcement of regulations shows to be predominant, especially in the 1960s, 1980s and 2000s. Changes in the 1990s, making the planning permit system more strict, have partly and momentary challenged the institutional frame which structures the predominant planning permit practice but left the logic of individual property largely untouched. Today, the Flemish planning permit system has again been reoriented towards the protection of private property, which hampers the capacity of government to implement a coherent spatial policy.

Keywords: spatial planning system, planning permit, development control, institutionalism, strategic-relational approach

INTRODUCTION

In the 1990s spatial planning in Flanders was quite broadly appreciated as an innovative policy domain by politicians, administrations, academics, practitioners, municipalities, and ngo's not only in the field of planning itself but also by the environmental movement, traffic planners, public policy scientists, urban designers etc. (Albrechts 1999, Albrechts 2001b, Van den Broeck 2008). Today however, the discourse is quite different. Spatial planning is claimed to lack public support, to have no strategic character and to hinder development (see e.g. Vlaams minister van financiën 2009). Complementary to previous work on the social production of Flemish planning [authors' own ref], in this paper we investigate these claims criticising strategic spatial planning by focussing on the role of the planning permit system as one of different interacting planning (sub)systems (planning permit system, structure planning, land use planning, regional development, project planning ...) in Flanders, all (re)produced, maintained, transformed and struggled over by specific individual and collective actors and shaped by a range of institutional dynamics. We thus explain why the permit system and its enforcement function the way they do today, how and why they evolved like this, and how this impacts possible future developments. We base this analysis on an institutionalist approach as developed in previous and current research [author's own refs] and briefly described in section 2. In section 3 we give an overview of the evolution of the planning permit system, as produced by different actors and organised in different more or less consistent episodes.

Section 4 re-interpretes this evolution and explains how the planning permit system is deeply embedded in a range of Flemish institutions and their dynamics. As is summarised in section 5, the analysis thus shows how in the complex dynamics of the Flemish planning permit system, a general struggle between actors defending property based private initiative and actors arguing for collective action in space is especially apparant. In this struggle, property ownership expressed through a permissive planning permit system and confined enforcement of regulations shows to be predominant, especially in the 1960s, 1980s and 2000s. Today, following the international shift towards ideological neo-liberalism stressing market oriented policies and individualism, the Flemish planning permit system has again been reoriented towards the protection of private property, which hampers the capacity of government to implement a coherent spatial policy and collective spatial projects.

A STRATEGIC-RELATIONAL INSTITUTIONALIST APPROACH

The planning permit system in Belgium/Flanders ¹ has been covered extensively by various authors (Bouckaert and Dewaele 2000, Hubeau et al. 2007, Hubeau and Vandevyvere 2010 and many more in the Flemish legal journal TROS). This literature is however descriptive and mainly focuses on planning law, legal aspects of delivering planning permits and technical overviews of formalised planning instruments. In our research, we look at the evolution of the social forces that have driven the history of Belgian/Flemish spatial planning. We look at the history of the planning permit system, its key actors and the institutional dynamics the system is embedded in, which are dialectically interrelated.

¹ In 1980 spatial planning became a full competence of the Belgian regions. This triggered a gradual development of proper Flemish regulations and practices. But until today some aspects of the previous Belgian system are active.

To do this, we mobilise a strategic-relational institutionalist (SRI) perspective regarding planning as embedded in an ‘institutional field’ of both actants and their practices, and of institutions, expressed and examined in terms of each other - institutions in terms of action and action in terms of institutions [authors’s own refs]. Institutions in this approach are more than (governmental) organisations. Institutions express routine behaviour and are more or less coherent sets of formal and informal routines, conventions, organisations, procedures, rules, sanctioning mechanisms etc which structure the strategies of the actors who (consciously or not) mobilise these institutions. Institutionalisation involves the ‘fixing’ (albeit temporarily) of certain ways of thinking and doing as accepted practices. Rather than focusing on institutions *in* planning, the SRI approach sees planning as an institutionalized practice, as ‘a set of practices itself subject to processes of institutionalization’ (Gualini 2001:51), guided not only by a technical rationality but by a multiplicity of social rationalities. A strategic-relational institutionalist perspective thus involves examining how - at any given time - particular institutions may privilege (but not determine) some actants, some actions, some strategies etc. over others in ‘structurally inscribed strategic selectivities’, and the ways - if any - in which actants take account of this differential privileging when choosing a course of action, ‘structurally oriented strategic calculation’ (Jessop 2001). The SRI perspective then focuses on the ways particular individual and collective actants succeed or fail to imbue their values and interests into institutional frames; how institutional frames embody compromises between different values and interests and concomitant power relations and who dominates these compromises; how these structurally inscribed values and interests and concomitant power structures in turn inform the behaviour of different planning actants and who benefits from this. Planning is thus deeply socio-political, not

just because of actants' attempts to manipulate planning and the political struggle over the choice of planning instruments, but in its very (strategically selective and institutional) nature.. Furthermore, the SRI approach is operationalised to conceptualize and analyse spatial planning systems and their dynamics of change [authors' own refs]. Specific planning instruments constitute the technical core of a spatial planning system, which is embedded in an institutional frame, interacting dialectically with a correspondent relevant social group organizing individual and collective actors. These interactions create different simultaneously active, sometimes complementary and often competing planning (sub)systems. Further insights are given to the concepts of relevant social group, technical core, institutional frame and the role of hegemonic configurations and related dynamics of changes. Planning systems should be evaluated and compared by analyzing their dynamics, and how socio-political content and meaning are structurally embedded within them.

Starting from this social-political interest we ask ourselves: who (re)produced the Belgian/Flemish planning permit system - technically and institutionally - and how, which instruments have been created and why, how have these been institutionally embedded, which institutional frame has emerged and how does this frame both embody and structure the interests, socio-politics and compromises of the actors involved, and who therefore benefits from the selectivities embodied in the planning permit system. In the next sections we thus analyse the Belgian/Flemish planning permit system since 1962 as one of different interacting planning systems, its production by different (groups of) individual and collective actors (focus in section 3), the key instruments (focus in section 3) of the system, and the most important institutions constituting the system's institutional frame and structuring the practices and strategies of the actors involved

(focus in section 4, but related to actors and key instruments). Since the institutional field of actors and institutions is essentially dynamic, a lot of attention is paid to the history, path dependency and path shaping, continuity and discontinuity in the (re)production of the planning permit system. The interaction between its actors, key instruments and institutional frame is therefore subdivided in different episodes. These episodes refer to the transformation and reconfiguration of the coalitions and antagonisms between the different actors and the transformations of the institutional frame that have played a role in the Belgian/Flemish planning permit system.

The article is based on one of three researches on Flemish planning instruments (structure planning, permit system, project planning) within the frame of the Flemish Policy Research Centre on Space and Housing 2007-2011. Each of these, more or less mobilised the SRI approach and concomitant methodological starting-points. The latter include double snowballing and dialectical connecting of actors and institutions through semi-structured interviews with key-informants, text-analysis, discussion of findings in a steering committee etc. A more detailed methodological account is given in [authors's own refs]. References to primary and secondary sources, including literature on Flemish planning, interviews, reports, legislation, press articles etc., are included in three concomitant research reports [authors's own refs], available on request.

EVOLUTION OF THE BELGIAN/FLEMISH PLANNING PERMIT SYSTEM

Towards a national planning permit system

The origins of delivering planning permits in Belgium/Flanders date back hundreds of years. Until the mid 1800s the use of space was mainly organised using techniques of private law, incorporated in the Civil Code and mainly organising neighbourliness. Around 1800 however local governments - triggered by the Napoleonic urge to enforce the French legal system - introduced the obligation to apply for an *approval* before conducting works on existing or new buildings adjacent to streets (Hubeau and Vandevyvere 2010, Tijss 1993). The rights and duties regarding building were also established in regulations and by-laws on safety and hygiene of buildings, rules on building height and appearance etc., some dating back centuries, others formalised in the Napoleonic government, still others enabled and/or regulated by the 1834 law on municipal organisation (Hubeau and Vandevyvere 2010).

Besides obligations for private individuals, governments developed statutory possibilities for planning their own activities, which also established frameworks for the evaluation of planning permit applications. Examples in the 19th and 20th century include regulations on the realisation of public works, building lines, expropriation etc. The 1858 and 1867 laws on expropriation, slum clearance and public works in deprived neighbourhoods for example, also created conditions for private building projects. The 1915 and 1919 reconstruction laws after world war I created obligations and frameworks for designing and decreeing local statutory land use plans which would establish building regulations for specific areas. The 1940 and 1946 laws on local land use plans did more or less the same thing (Janssens 1985). In the 1950s and 1960s Fordist projects of government (highways, harbours, social housing projects, large industrial areas etc.) were supported by land use plans, which (again) at the same time established regulations on private projects (Albrechts and Swyngedouw 1989).

However, upcoming governmental planning and interventions didn't change the importance of private initiative and its regulation. Especially after world war II, private spatial development initiative was stimulated by subsidies for private home ownership foreseen in the 1948 and 1949 housing laws, the small scale structure of the construction sector, fiscal policies supporting individual mortgages, the structure of the banking sector giving individual loans, electoral and ideological differences between conservative and progressive political parties etc. The planning permit system can thus be seen both as a system of control and as an expression of the importance attached to private spatial development initiative.

In 1962 the Belgian government voted the national law on spatial planning. The law centralised the existing local permit systems into one uniform procedure for applying for planning permits, introduced a system of allotment permits needed for parcelling out land into building lots, included a system of sanctioning offences of the planning law and decreed the making of hierarchically organised spatial plans on five levels of scale. The law thus integrated the interests of local authorities, urbanists, lawyers and central government, urbanists, political parties, land owners and the economic sector.

Use and misuse of the 1962 law on town planning

Although imposed in the 1962 law on town planning, none of the higher level spatial plans (national plan and regional plans ('streekplannen')), that could have given guidance to the development of the territory, were ever made. Equally compulsory were local plans, but local authorities only to a limited extent prepared spatial plans for their territories. Thus, since only very few plans were created, their quality was criticised and a

majority of concrete developments diverged from the plans, these plans hardly created a basis neither for public interventions nor for the evaluation of planning permits. Contrary to the spatial plans however, the allotment permit system inscribed in the law did have important spatial consequences. Land owners massively mobilised the permit system and the law to apply for allotment permits, resulting in unrestrained parcelling out of the Belgian/Flemish open space ². Together with subsidy mechanisms for private housing, the 1962 town planning law stimulated the rise and growth of the construction and development sector and the sector of surveyors-land developers both living on and sustaining the selling of land for subsidised houses. Contrary to neighbouring countries, the sector of developers was locally embedded and connected to local economies (Theunis 2008:381-385). In practice, the planning permit system in this episode thus served the interests of land owners (through allotment permits) and local authorities (through their interest in supporting local economies). The expectations of the other actors which helped establishing the 1962 law (urbanists and planners, lawyers, central government, economic sector), were hardly met.

Absorption of subregional land use plans in the planning permit system (1970s)

From the end of the 1960s, the fragmentation of space by granting allotment permits, the rise of land prices, the suburbanisation of housing and economic activities, led to pressure from a range of actors to develop a new framework for this fragmentation and to adjust the planning permit system. The advocates for such action were the agricultural sector, the national infrastructure planning authority, the authorities and planning professionals

² This was extensively criticized in the first issue of the Flemish Journal of Urbanism and Spatial Planning (STERO), by - among others - professors M. Anselin and R. Soetewey and civil servant L. Hendrickx, supported by minister of public works Jos De Saeger (Anselin et al. 1967). The misuse of the allotment permit has also been described by Peter Renard (1995). See also Braem (Braem and Strauven 2010) and interviews with urban planner and prof. Jef Van den Broeck in 2008.

involved in urban renewal concerned about urban decline, heritage planners and conservationists, the housing sector, and structure planners ³.

In answer to these critiques and following the obligation in the 1962 law to make regional plans, the Belgian minister of infrastructure in 1967-1968 commissioned the making of draft structure plans for the whole of the Belgian territory (scale 1/50.000), and from 1968 the making of preliminary draft subregional land use plans (1/25.000). The minister also expanded the Belgian administration for spatial planning DABRO. In the ten following years under the next Belgian ministers of spatial planning, draft and definitive subregional land use plans were enacted as statutory binding plans, covering the whole Belgian territory (Lagrou 1983, Saey 1988). During the process of their making however, the definitive land use plans received a different character than was meant in the 1962 law. Forced by the cabinet of the minister of spatial planning, they were designed as detailed plans, designating unambiguous and binding land uses to the whole territory, on a scale of 1/10.000 in order to use the plans as a basis for deciding on planning permit applications. De facto, the subregional land use plans became part and parcel of the planning permit system, rather than guidelines for a collective development of the territory (Saey 1988). In principle - and as long as the administration DABRO was strengthened - the plans increased governmental control over planning permit evaluation and restricted the fragmentation of the Belgian territory by land owners. At the same time however, they made the possible uses of every m² of land explicit and guaranteed the development of a major part of the territory. As a result, the integration of the subregional land use plans in the planning permit system, limited the impact of local authorities over

³ See among others interviews with civil servants Roger Liekens, Arnold De Smet, and Jos Lorent, planning practitioners Herman Baeyens, Jef van den Broeck, former ministers Wivina De Meester and Luc Dhoore and prof. Charles Vermeersch. See also (Anselin, Blanquart, Demeyere, Lauwereys, Mortelmans, Vanden Borre and Van Havre 1967, Baelus 1996, Knops et al. 1992)

spatial development and their capacity to plan collective decision making in space, and weakened their position compared to land owners.

Liberalisation of the planning permit system (1980s)

In the 1980s the framework regulating the evaluation of planning applications (1962 law, complementary laws and ministerial orders, subregional land use plans) was altered in ways that undermined the realisation of the subregional land use plans and expanded development opportunities of land owners. Following pressure of organisations of land owners, christian-democrat and liberal political parties, rural municipalities and the construction sector, christian-democrat (before 1985) and liberal (1985 - 1992) governments ⁴ created structural exceptions for expanding existing buildings and constructing new ones in areas not designated as development areas (see for instance Bouckaert and Dewaele 2000). The same happened for existing enterprises in open space. In practice, it turned out that building restrictions were often even ignored when delivering planning permits. Building without the necessary permits proved common practice and was often tolerated by local authorities and Flemish officers (see striking examples in Renard 1995). As in the 1970s, the realisation of invalid allotments continued.

Also in the 1980s, the inspection and sanctioning systems as foreseen in the 1962 planning law, were undermined. In principle both building without planning permits and maintaining constructions without permits were by law liable to punishment. In practice however, judicial sentences to pull down constructions without permit or pay a penalty

⁴ In 1970 Belgian devolution took a start. In 1980 regional governments were created and competences of spatial planning were transferred from the Belgian to the regional governments of Flanders and Wallonia and in 1989 to the Brussels regional government.

were rarely executed. Moreover, the competence over the sanctioning system had been given to the same Flemish officers that allowed very tolerant permit evaluation policy (Hubeau 1997, Hubeau 1998, Roosemont 1998, Van Damme 2010).

The evolution of the planning permit system prevented local authorities and the (since 1980 regional) government from developing ways of collectively planning their own actions. The subregional land use plans obviously had fixed many governmental strategies by defining land uses for all sorts of activities, but due to their detailed character local authorities used the plans as a basis for their permit policy which took away the incentive to make local plans (except for solving very specific questions of land owners). Also, municipalities developed a practice of making local land use plans deviating from the subregional land use plans to enable specific private development initiatives. On the latter, a legal discussion originated that lasted for nearly ten years (Bouckaert and Dewaele 2000).

Tightening of the permit system and a new law on spatial planning in 1999

From 1993 onwards, planning permit evaluation was quite abruptly restricted through changes of the planning permit system. Initiated by the new Flemish minister of spatial planning and his cabinet and after pressure by academic and professional planners, the environmental movement, members of the press, the left wing of the christian-democratic socio-political family, ngo's etc., the Flemish government restricted the exceptions in the legislation for building in areas not designated as development areas. Likewise, the possibilities to make local plans deviating from the subregional land use plans, were restricted. This happened in a context of Belgian devolution (spatial planning became a

full competence of the Flemish region in 1980), reactions against the stagnation of spatial policy planning in the 1980s and against the shortcomings of the permit system and the subregional land use plans, the development of environmental policy in the 1980s, reactions against a number of scandals caused by the permissive permit system, and the development of spatial structure planning as part of the ecologicistic and emancipatory movement which originated end of the 1960s and led to the approval of a spatial structure plan for Flanders in 1997 (Van den Broeck et al. 2014).

The changes in the planning permit system led to strong reactions from land owner organisations, right wing christian democrat and liberal members of parliament and representatives of local authorities. The Flemish government was forced to recall some of the decisions and install some transition arrangements for the affected land owners. Also, the habit of ad hoc adapting subregional and local land use plans to the needs of individuals, was not altogether wiped out.

The restrictive changes in the planning permit system also show in its inspection and sanctioning part. The administration was expanded with new officers to specifically elaborate inspection activities. Follow-up systems were installed to control dossiers. After court verdicts, the financial penalties were now effectively collected from the convicted. Also, ideas originated on the administrative separation of planning permit evaluation and inspection. All this led in the first half of the 1990s to many spontaneous implementations of the court verdicts to undo building activities not having received planning permits. In the second half of the 1990s, the administration, in close contact with the Flemish minister of spatial planning, began preparing the implementation of such verdicts. A ministerial circular in 1997 stipulated that there would be no more tolerance for offences

against the building regulations, and that demolition of illegal construction would be the primary measure in sanctioning. In 1999 and 2000 finally, a very limited number of illegal and sentenced constructions like houses in nature development zones, were demolished by the authorities, causing a lot of public commotion.

Together with the tightening of the planning permit and sanctioning systems to put a halt to uncontrolled private development, the professional planning world experimented with new types of land use plans. As explained above, subregional and local land use plans had in the 1970s and 1980s been reduced to zoning plans that allowed planning permit evaluation but hardly enabled communicative and flexible strategic planning by government. On the local level, new types of local land use plans were developed with flexible regulations (Martens 2001, Vloebergh 1999). Similar experiments took place at the end of the 1990s with the subregional land use plans that were prepared after the approval of the spatial structure plan for Flanders. Such experiments however were quickly challenged by the legal world, which acknowledged the right of governmental discretion over planning permits but imposed a right of land owners to have a land use designated to their land and a right of realisation of this land use. Several experimental land use plans were thus judged unlawful by the Council of State. To overcome these legal restrictions, the Flemish government (1995 - 1999, in the same coalition as in 1991 - 1995) created a new legal framework in which the experimental land use plans were embedded as a new generation of flexible land use plans on three levels of government.

The new decree on spatial planning - approved by the Flemish government in 1999 - formalised most of the developments mentioned. In this decree, the restrictive planning permit culture of the 1990s was reflected. Planning permit evaluation and inspection were

assigned to separate Flemish administrations, in order to take inspection and sanctioning away from the more ‘accommodating’ officers evaluating planning permits. A new generation of land use plans giving more room for discretion by administrations, replaced the ones foreseen by the 1962 law and its later changes. The decree also formalised a system of governmental spatial planning, stimulating all governments to make spatial structure plans (see e.g. Albrechts 1999, Albrechts 2001a, Albrechts 2001b). Other changes included the higher degree of authority over permit evaluation by local authorities, stricter timing for the evaluation of permits and the possibility of appeal by third parties. The 1999 decree received a large political support, as can be concluded from the limited opposition during its preparations.

Renewed liberalisation of the permit system in the 2000s

In 1999, concomitant to international liberalisation tendencies, the liberal party won the Flemish elections and formed a new political coalition of the liberal, socialist, green and Flemish nationalist parties. The christen-democrats who had been in power for nearly a century were banned to the opposition. Under the now liberal Flemish minister of spatial planning, the Flemish government, started to systematically and fundamentally change the planning permit, inspection/sanctioning and planning systems embedded in the 1999 planning decree. This followed debates over spatial planning in 1999, in the same period in which the new spatial planning decree was approved. At that time, government actually and without precedent executed a number of court sentences to demolish illegal constructions. Defenders of more rights to build in open space areas not designated as housing areas, created a discourse in which the demolitions after court convictions became mixed up with the issue of the existing houses in open space, and their

possibilities to be renovated, enlarged and rebuilt after demolition. In this fuzzy discussion, public opinion turned against the strict permit policy for out-of-zone constructions, wrongly based on the images in the press of the demolishing of illegal and convicted houses.

Concerning the planning permit system, the new coalition created generic regulations giving more and more rights to all owners of out-of-zone constructions, regardless of the situation in site. Over the following years, these building rights became a right given by decree, not to be overruled by any spatial plan. Similar adjustments were made for out-of-zone enterprises in open space. Moreover, at the very end of the 1990s, even a new way of creating new out-of-zone constructions in open space - abolished in the 1990s - was reintroduced. In the inspection and sanctioning system, even more drastic changes took place from a strict policy against spatial 'crimes' to a protection of the illegal constructor. The new coalition thus took away the inspection of local permit policies from the regional planning inspection officer, and again placed it with the regional planning permit officer. Strong opposition over dossiers of convicted illegal constructions by liberal and right-wing Christian-democrat members of parliament also practicing as lawyers supporting liberal spatial policies, can explain this. Thus, illegal constructions could more easily be regularised. The possible legal consequences for illegal building acts were then reduced radically. Obviously the green and socialist parties in the 1999 coalition did not like this adjustment. However, they settled for a protection of the nature development zones from ever lasting illegal constructions. But moreover, government decided that all demands for repair should be accompanied by a positive advice of a newly created administrative Council. Since this Council hardly formulated positive advices, very few dossiers even made it to court in the 2000s. Even verdicts were not carried out. Yet

another change, was the adjustment of the definition of illegal building acts. Before the decrees of the 2000s, any unpermitted building act since 1962 had to be seen as illegal, building acts before that date as permitted and legal. In this decennium, the date before which any building activity should be accepted as legal, was postponed. And finally, in the same period, the Council of State further tackled the idea of more collective, communicative and strategic planning-based interventions in space. Thus, no regulations were allowed that submitted the use of land to extra evaluations between land use plan approval and permit evaluation.

The very liberal interventions in the planning permit system, the halt on serious inspection and sanctioning and radical changes away from planned intervention in space, indicate a complete new coalition of dominant actors in the 2000s, which cannot simply be explained by the substitution in government of the Christian-democrat party by the Liberal one. The discussions preceding the 1999 decree, show that the Christian-democrats were not too happy with the strict sanctioning policy against private house owners who didn't take the permit obligation too seriously. Freed from the former coalition, the (right wing in the) Christian-democrats challenged the right wing in government to redeem what they never really supported. The network (and overlaps) of accused owners of out-of-zone constructions, their lawyers, the new administrative Courts and Councils and right wing members of the Flemish parliament, enabled by extremely technical discussions over decree changes that lay people could not understand, thus broke up the broad coalition of the 1990s. Until mid 2014 the distribution of power has remained more or less the same. The effects of new decrees on the combination of the environmental permit and the planning permit, on shortened procedures for complex projects and on more flexible land development, voted in the first

half of 2014, and of the Flemish nationalist party's victory in the 2014 regional and national elections, remain to be seen. Current tendencies seem to reproduce the choices affecting Flemish spatial planning made during the last 15 years.

INSTITUTIONAL BACKGROUNDS AND INTERPRETATIONS

In the actors and instruments of the planning permit system as analysed in the previous section, a whole range of institutions/logics are active. In the last fifty years (and more), the different groups of actors have imbued these logics in the instruments and their institutional frames, and at the same time have been recursively structured by them. In this section - and summarized in figures 1 and 2 - we thus analyse the institutions/logics structuring the instruments and actors of the planning permit system: administrative logics, the right of ownership and especially its embeddedness in housing policies, the Keynesian socio-economic project, the fragmented spatial structure of Flanders, the subregional plans as individualisation of development rights, the logic of legal certainty, the organisation of government, and the land and real estate market. In general these logics show tensions between individual property right versus collective action on the one hand, and legal certainty versus openness for change on the other. The specific forms of these tensions in specific episodes, determine the planning permit system's selectivities in these episodes. It appears that through the different compromises embedded in the planning permit system, the property logic is predominant today.

Figure 1 about here

Planning permits and their administrative logics

Applying for and delivering permits for ‘the building, demolishing, renovation or rebuilding of buildings or fixed constructions’, is evidently the heart of the planning permit system. As analysed above, the planning permit has a long history, dating back to the introduction of the Napoleonic legal system, geared at controlling the (subjected) territory. Since then the obligation to apply for a planning permit has been expanded and refined. As a result, an administrative logic of control is embedded in the planning permit system. The task of administratively controlling large numbers of planning permit applications, forces governments - pushed by property owners and lawyers - to create and organise administrations, rationalise internal procedures, standardise evaluations (‘tick-boxing’), monitor the efficiency of permit delivery etc. This explains the continuous clarification and refinement of the conditions and procedures for applying for planning permits, which has been going on since the existence of the 1962 spatial planning law.

The right of ownership

More importantly however, the previous section showed how property owners have had a strong impact on the planning permit system through their associations, the construction and development sector, parts of political parties and the legal profession. Going back at least to the insertion of the right of ownership in the constitution and the civil code, the right of ownership has been imbued in a whole series of institutions in diverse parts of society.

Especially housing policies have responded to the right of private property ownership, which resulted in Flanders in family ownership of dwellings of almost 80%. Already since 1865 but especially after 1945, the Belgian government created legal and financial structures in its housing policies to stimulate individual building of homes all over the country (De Decker 2011, De Decker 2004, Goossens 2012, Ryckewaert and Theunis 2006:150-154, Smets 1982, Theunis 2008). The 1948 law 'De Taeye' stimulated individual building initiatives by creating subsidies and cheap loans for a very large group. The 1949 law 'Brunfaut' subsidised infrastructure and urbanisation works in new collective housing projects and thus stimulated the construction of small scale group housing, again with an important role for private initiative and capital. The mechanisms of both laws fitted the small-scale structure of the Belgian construction sector and also stimulated small local financial enterprises investing in building allotments and housing estates and applying for public subsidies of both laws (Ryckewaert and Theunis 2006). The right of individual ownership is also politically embedded. Housing policies developed in the 1940s and 1950s in a compromise between the christian-democratic party (CVP) and the Belgian socialist party (BSP). According to their constituency, the CVP (middle income voters) defended individual private initiative, and the BSP (lower income voters) argued for a stronger public role. Although both parties created compromises, especially the CVP logic impacted strongly on the Belgian housing production (Ryckewaert and Theunis 2006).

Given the importance of the planning permit for individual property-related initiatives, it is evident that (associations of) property owners, the construction and development sector, parts of political parties, parts of the legal profession, etc. continuously - but especially in the 1960s, 1980s and 2000s - and successfully have interfered in the

planning permit system. This group firstly tried to secure building rights by inserting the right to apply for allotment permits in the 1962 planning law and massively applying for these permits in the decades after that. Also, the territory-covering subregional land use plans that were approved in the 1970s, were influenced in order to maximise building land, and extensive lobbying and media strategies to argue for the use of land reserves for housing were developed. Secondly, these actors tried to separate the planning permit from the conditions that diverse regulations and (land use) plans impose. Thirdly, the right of ownership explains why property owners oppose restrictions and value capturing regulations. Finally, the ownership logic has tried to minimise control and enforcement of planning permit restrictions, e.g. by not executing convictions in the 1980s or undermining the authority of the administration for inspection in the 2000s.

Legacy of the Keynesian socio-economic project

A third institutional explanation of actual practices in the planning permit system is rooted in the Belgian Keynesian/fordist socio-economic project, producing, among others, economic policies stimulating mass production and consumption, policies of distributing development evenly over the territory, the welfare regime, socio-political families, and the centralised nation state (for a brief account of planning in the transformation of the Belgian/Flemish welfare state, see Van den Broeck 2008). The fordist socio-economic project was connected to the planning permit system through the 1962 planning law centralising former local permit systems, the principle that subregional land use plans were to be made, spatial projects as harbours, highways, canals, green belts around cities etc., and especially the subregional land use plans themselves as frameworks for the approval or refusal of planning applications. Indeed, the subregional

land use plans imbued the Keynesian/fordist dynamic of the 1950s, 1960s and 1970s in the planning permit system. Saey (1988) and Albrechts and Swyngedouw (1989) showed how the subregional land use plans '*institutionalised the fordist spatial distribution of both labour and consumption*' expressed in housing, economic, transport and infrastructure etc. policies, and '*were the physical-spatial and societal expression of the social and economic segmentation*'. Furthermore, Fordist regional development policies were ideologically supported by a discourse of emancipating the country as a whole. Politically the socio-economic structure predominantly shows in the CVP rural constituency and ideology of even regional development and prevention of concentration of people in the cities, the latter being socialist (BSP) bastions. Since today the land uses designated in the 1970s to the Belgian/Flemish territory are still for a large part prevalent the fordist logic of spreading development over the territory still to a large extent affects the planning permit system.

Fragmented spatial structure of Flanders

The Keynesian/fordist distribution of development and its later neo-liberal restructuring adds to the historically fragmented spatial structure of Flanders. The latter can be explained by the omnipresent solid ground, the early development of manuring techniques and intensive agriculture, the historical subdivision of agricultural land into small parcels, and the development of a dense local network of roads based on the agricultural structure (De Meulder et al. 1999). The fordist distribution of housing, infrastructure and economic activities, the concomitant production of suburbanisation (De Brabander et al. 1992, Kesteloot 1990, Kesteloot 1993), the promotion of ribbon development through allotments and the possibility to legally fill in gaps in ribbons (see

section 3), add to that. These factors partly explain the omnipresence of scattered housing, ribbon development and constructions in areas designated in land use plans as non-construction areas, and especially the continuous struggle over development rights and permits for the latter. It also explains the tensions between the planning permit system and the making of plans.

Subregional plans as individualisation of development rights

The aforementioned subregional land use plans embedding the Keynesian/fordist project in the planning permit system, also in their own right structure the practices of actors of the planning permit system. Firstly, by designating a land use to every part of the Belgian/Flemish territory, the indeterminacy of the regulations for housing, industrial and agricultural areas (together 75% of the territory) and the large number of housing and industrial areas, the government once and for all gave away the rights over the development of land. In practice, government can only postpone or reverse building rights by buying or expropriating the land. Moreover, once development rights have been executed and land is being built on, the building permit more or less guarantees an eternal development right (Sebreghts 1999). Evidently, this explains the continuous political pressure by owners of constructions in areas designated as non-construction areas to expand their development rights. But secondly, the subregional land use plans also to a certain extent limit development rights, thus - depending on specific regulations - giving room for more collective logics in the planning permit system, the supply of development oriented land uses, the protection of open spaces etc. The changing condition of these factors during the last fifty years have already been discussed in section 3.

The legal profession and debates on the logic of ‘legal certainty’

In section 3 we have seen how the legal profession is an important player in the dynamics of the Belgian/Flemish planning permit system. The logic thereof has been coined as ‘legal certainty’. However, within this logic different actors have struggled over the meaning and form of the concept and the way it shapes the legal world and the planning permit system. In the 1980s and 2000s legal certainty was (and still is) predominantly seen as a rather static and conservative principle (Popelier 1999). As such, the law must be so obvious that the application of the general rule to particular cases is possible by pure deduction. The rights thus given to legal subjects, are ‘obtained’, absolute and can no longer be undermined by government. In fact, ‘legal certainty’ more or less equals ‘the right of ownership’. Actors embedded in this logic are associations of property owners, the construction and development sector, the legal profession defending the rights of property owners and conservative parts of political parties. The dominant position in the 1990s temporary advocated that legal certainty ‘has nothing to do with rights of ownership’ (Defoort 2007, Popelier 1999, Sebreghts 1999). ‘Legal certainty’ in legal matters was not to be seen as equal to ‘rigidity’. Since law is produced in an uncertain, evolving society, absolute legal certainty doesn’t exist. Laws and statutory plans shouldn’t automatically imply a right to execute what is decreed, but must be balanced against the appropriateness of the proposed developments. In spatial planning this would mean that a designated land use doesn’t automatically give the right to obtain a permit for the maximum rights associated with this land use. Still, government must provide maximum clearness based on reasonableness, on a number of elements. Discretion for example on local spatial qualities is possible to the extent that the law provides clear principles and conditions within which governments and administrations can act. This

dynamic concept of legal certainty was supported by a part of the legal profession, some academics and educators, professional planners, planning administrations etc. The struggle over these two concepts of legal certainty explains why the Belgian subregional land use plans were gradually incorporated in the planning permit system (predominance of the absolute concept of legal certainty), why some planners and lawyers - with partial success - tried to introduce flexible land use plans and independent enforcement in the 1990s, and why owners and other lawyers opposed this and reintroduced permissive planning permit evaluation and enforcement in the 2000s.

Re-organisations of government

The kind of planning permit evaluation, enforcement, procedures of appeal and land use plans are also structured by the way government is organised. We see as important factors the position of the Belgian/Flemish administrations involved in the planning permit system (leading in the 1970s and 1990s, limited in the 1980s and after 2003), the contrast between a short term logic of ministers and cabinets and a long term logic of administrations, the division of labour in permit delivery between different governmental tiers, the power relations, tensions and compromises between different governmental tiers (Instituut voor de overheid et al. 2012), and the ecological, social and/or economic themes that are predominant in permit delivery. This also relates to the ongoing processes of re-scaling in Belgium and the concomitant re-distribution of power over municipal, provincial, regional and national tiers of government. Thus, centralisation of the planning permit system in the 1962 spatial planning law is related to the building of the Belgian nation state until the 1960s; the temporary stricter and more collective approach in the 1990s is indebted to the Belgian devolution since the 1970s and especially after 1980 and

the important role of planning in the building of a Flemish identity; the rising autonomy of local authorities in evaluating planning applications in the 1990s but especially after 2000 is partly due to the neo-liberal restructuring of the state; the continuous restructuring of the Flemish administration since 2003 and the weakening of the planning administration and the inspection department, play a role in the restored permissivity in the permit system since 1999.

Land and real estate market

Finally, mobilising the planning permit system also mobilises the logics of the Belgian/Flemish land and real estate market. The relationship between both was to a large extent determined in the 1950s, 1960s and 1970s. In the 1950s - 1960s, the Belgian property market experienced a strong transformation, due to the increased wealth fostering investments in real estate, the fordist distribution of development, better access to the territory, the rise of a real estate and development sector, changes in the financial sector, subsidy systems of government etc. (see above and Lagrou 1983). Reacting to changes in the property market and to the wave of (speculative) allotment permits in that period (see section 3), the left wing part of the christian democratic family argued for a strict control of land prices, priority for social housing corporations, benefits for the less well-off in the housing market, capturing of surplus values of land and the coupling of a non-capitalist land policy to the subregional land use plans (Lagrou 1983). In 1972 - 1973 however, actors involved in the property market strongly and successfully opposed these ideas. After that, ideas on land policies never gained any support again. Indeed, by designating land uses in the subregional land use plans to the whole Belgian territory, creating an excess of building land and giving the right to apply for planning permits in

different types of building areas, government gave away development rights without being compensated for it and once and for all interfered in the property market.. From then on, designated land uses determined land values, making the planning permit system part of land pricing. By imbueing this logic in the permit system, the advocates of individual ownership exposed the permit system and those mobilising it to a whole range of property trends, thus making it rather impossible to refuse planning applications in areas designated as building land.

CONCLUSIONS

In this paper we have analysed the Belgian/Flemish planning permit system as (re)produced and transformed by different individual and collective actors (section 3) and shaped by a range of institutional dynamics (section 4). This complements a previous more general analysis of Flemish spatial planning instruments since 1962 as organised in different (sub)systems (Van den Broeck, Moulaert, Kuhk, Lievois and Schreurs 2014) and embedded in the rise and transformation of the welfare state. We based this analysis on a strategic-relational institutionalist approach as developed in previous and current research (section 2). This approach argues for a dynamic analysis, showing how changes in actors in relevant social groups and their positions and practices, dialectically related to institutional changes mediating macro-structural changes are drivers of changes in the planning system. Moreover, it enables a deeper understanding and evaluation of the socio-political content and meaning of a planning system and who is privileged or put into disadvantage by the interests and values inscribed in planning systems, their key instruments and institutional frames.

Figure 2 about here

Analysing the Belgian/Flemish planning permit system in this way, showed how the planning permit as we know it today has its origins in formalised municipal planning permit regulations around 1800 which were centralised in the 1962 planning law in the context of a developing keynesian welfare state. The latter integrated the stakes of municipalities, urbanists, lawyers and central government, urbanists/planners, political parties, property owners and economic sector. In the 1960s especially land owners mobilised the planning law to apply for allotment permits and secure their property rights. This triggered reactions in the 1960s and 1970s by the agricultural sector, infrastructural planners, urban renewal activists and the housing sector itself, leading to the making of draft subregional land use plans initially aimed at stopping fragmentation of open space but which soon evolved to detailed and legally binding plans designating a land use to the whole Belgian territory. De facto these plans became part of the planning permit system but also made explicit the (vast) opportunities for development. Especially in the 1980s land owners, right wing christian-democrat and liberal parties, rural municipalities and the construction and development sector, influenced the permit system and the subregional land use plans in order to limit control over planning permits and to expand opportunities for land development. In the 1990s the left part of the christian democratic movement, the socialist party, the ecological movement, urbanists, planners, community developers, academics, ngo's etc. succeeded in making the planning permit system less permissive and more discretionary. This reaction is rooted in the protest of the 1960s against consumerism, party based decision making and compartmentalisation along socio-political lines and was supported by Belgian devolution and a rising autonomy of the Flemish region. However in the 2000s the worldwide neo-liberal shift

empowered rightish political parties, lawyers, and property owners to reverse the changes from the 1990s and to increase development opportunities for property owners and developers.

In the complex dynamics of the planning permit system, one general struggle between actors representing land ownership and actors arguing for collective action in space became especially apparent. In this struggle, land ownership expressed through a permissive planning permit system has shown to be predominant. This is due to the embeddedness of property rights in several Belgian/Flemish institutions, as analysed in section 4: administrative logics, the right of ownership, the legacy of the Keynesian socio-economic project, Flemish historical spatial structure, the proper logic of the sub-regional land use plans, configurations and ideologies of political parties, the logic of legal certainty, governmental organisation, the logics of the land and property market(s). The changes of the planning permit system in the 1990s, have changed only a small part of the institutional frame which structures the predominant planning permit practice and left the logic of individual land ownership largely untouched.

The strategic-relational institutionalist analysis of the planning permit system opens up pathways for future research and action. Restoring communicative and flexible ways of strategic planning in Flanders (and Europe), requires a complex and situated set of institutional changes in the planning permit system, the right of ownership, housing policies, the structure of the construction sector, land and real estate markets, land policies, land use legislation, government organisation, neo-liberal discourses etc. On the one hand we thus need a further understanding of how these institutions are embedded in the planning system and the way they are (re)produced by different actors. On the other,

innovative planning practices, creating new instruments able to change existing institutional frames oriented towards land fragmentation and urban sprawl, should be stimulated. Both research and action need to take into account the dynamic (re)production of planning systems and their socio-political meaning in the dialectical interaction of actors and institutions.

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Notes

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