Construction law as an example of interaction between law and governance

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Introduction

Construction law as we know it today is to a great extent developed in reaction on private initiative or the lack of necessary initiatives . When we regard governance as a model of social steering primarily as an alternative for or as a complement to legal rules enacted by government -i.e. public-authorities, the interaction between governance and law is inherent. Moreover construction law is as "functional "law both public and private law. The examples given are situated in both fields; public zoning law and building regulations and private construction law, especially (European) tender law and law concerning building contracts.

Public zoning law and building regulations; 3 examples

a. The development at the end of the 19th century/beginning of the 20th century.

The development of zoning law and building regulations has taken place in reaction on existing embryonic private governance rules and as instrument to complete private initiatives to regulate the miserable housing situation as a result of the migration of workers to the cities at the time of the industrial revolution.
In the 2nd half of 19th century private initiatives were taken to fill the gap of technical demands and hence the lack of quality of housing and construction as a whole. Some decades later the government acknowledges his responsibility by enacting the Housing Act 1901 and the Building Ordonnance. The content of the technical rules stems until today mainly from private organizations (for instance: NEN norms).

In the same period zoning regulation existed practically for reasons of public safety, that is military reasons only. On local level city expansion had been regulated as long ago as in the 16th and17th century, but the needs of the

huge migration towards the cities during the 19th century had not been met by proper zoning regulation. There were examples of zoning plans on the basis of private contracts, but enforcement of minimum demands of proper zoning failed. Therefore the Housing Act 1901introduces a building permit dependent on conformity with a zoning plan, but not until 1921;

b. The development of national zoning plans in the second half of the20th century

After the 2nd world war spatially relevant developments take more and more place on the national level. Decisions on important industrial zoning projects are based on contractual agreements, to be implemented later on in local zoning plans. Since public zoning plans on national level do not exist, the legal system of zoning plans does not really determine the direction of spatial development. Therefore the need is felt for (binding) zoning plans on the national level. Eventually a national zoning plan in the Spatial Planning act 1962 is introduced in 1985.The binding force was at first uncertain.

c. The introduction of binding landexploitation plans in the 1st decade of the 21st century

Cooperation with private patners in the development of zoning plans and realisation thereof was originally exclusively based on contracts. These contractual rules on land exploitation are nowadays regarded as insufficient since private landowners are not always willing to cooperate with the government.Therefore in 2008 the possibility of a municipal exploitation plan is introduced. When concluding a contract is likely or is proven to be impossible th municipal council enacts a binding exploitation plan. Failing to act in conformity with that plan results in the refusal of a building permit. (Landexploitation Act (as a part of the Spatial Planning Act 2008)

Private construction law; 2 examples

a. The caracteristics of the "construction market" (a desequilibrium between demand and offer) cause the search for methods to assure a relatively continuous flow of orders
In the period 1970-1990: private governance rules (called "Codes of Honour") regarding "regulation" of the market of building contracts were established ; As a breach of the rules of free competetion they were contested before the European Court of Justice and regarded as "governance against the law"; The Codes were formally abolished but the need to assure a continuous flow of orders still exists and hence the idea of a certain division of the market stays attractive:
→ European guidelines on tender; put limits on government contracts; implementation in national law is recent
→ in the private sphere; national rules on free competition forbid "governance against the law"

b. 1950-to date: Governance rules in the form of General Conditions play an important role in building contracts, both with architects and contractors. This so-called "autonomous construction law" brings about that the relatively recent regulation of building contracts the Civil Code is limited.