

SUSTAINABLE REAL ESTATE AND ETHICS

MORALS, PRINCIPLES AND RULES CONCERNING REAL ESTATE

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Paragraph 1 An introduction

This paper discusses sustainable real estate and the role of ethics within real estate. Both terms ‘sustainability’ and ‘ethics’ needs an explanation. With this discussion the tripartite system of ‘morals – principles - laws’ is described in order to have more grip on sustainable real estate and ethics.

Paragraph 2 Ethics, some cases

In the last decades, The Netherlands have seen a number of large scandals within the branch of real estate. A number of notorious cases should be mentioned. In this paper just three of the most notorious cases will be discussed in short, although, it must be noticed that they are just three of a large number of criminal cases concerning forgery, corruption et cetera within the Dutch branch of real estate. The most notorious case was the so called ‘Klimop case’ which was discussed in the book ‘The Real Estate Fraud’ (Boom & Marel, 2009). At the end of 2007, a fraud of unprecedented magnitude comes to light in the real estate world. Top companies such as Philips and Bouwfonds would have been robbed by their own directors. Two directors with their accomplices of the pension funds of Philips and Bouwfonds embezzled these funds for about € 200 to 250 billion. A sample process followed after the shocking facts where exposed. The main suspect Jan Vlijmen argued in the courtroom; *“I have been thinking about what I would say to you here today for three and a half years”,* and *“I have introduced the method within Bouwfonds. But no one has raised his eyebrows.”* Another suspect, Nico Vijsma, argued in court; *“I have always been on behalf of Bouwfonds with a shopping note, without knowing exactly what that letter meant. Look, project development is incredibly boring. It gets a bit up thanks to my contribution.”*

In the book ‘De Ontknoping’, in English ‘The Denouement’, (Boon and Marel, 2012), the motives of these neat businessmen, Vlijmen, Vijsma and top boss Hakstege, about power, the unprecedented love of money and the double standards in business is discussed. At the end, the court sentenced the main defendants for bribery, embezzlement, forgery, and members of a criminal organization. The prime suspect eventually got seven years in prison, his notary four years and other defendants between five and one and a half years (De grootste vastgoedfraudezaak, 2015). Another case is the fall off SNS Reaal (Boon, et al, 2013), SNS Reaal raises hundreds of millions of euros for a takeover event. In this case, SNS bought 50 percent of Bouwfonds, which at the end turned out to be a wasp nest of dubious real estate deals and fraud.

The third notorious case to be discussed, is the case ‘Rochdale’, where the director of the housing corporation ‘Rochdale’, mr. Möllenkamp, or his nickname ‘mr. Maserati’ acted with a megalomaniac and exaggerated luxurious behavior. The court suspected mr. Möllenkamp for perjury, corruption, misuse of credit cards of the Corporation, money laundering, tax fraud and forgery, he eventually got two and a half years imprisonment (Court of Amsterdam, 2015).

In the overall summary of his dissertation 'Material Immaterial', Veuger answered the question whether there are contradictions in the underlying social values of housing corporations that affect the way they are governed (Veuger, 2013). His conclusion is that directors at the highest level in dealing with values, ensure they drive on their own monitor, knowing the consequences and take their responsibility. The consequences might be that love of power, ignorance and other negative attitudes will lead to fraud, corruption and forgery. The panacea would be that society is the main responsible party for the objectives of public housing and that there exist a proper checks and balance system within housing corporations.

Paragraph 3 ideals, principles and rule

Each of us has his or her own ideals in live. Most of us have the ideal of a healthy and a peaceful live, although these individual ideals differ. As individuals have their ideals, so have governments there ideals which also differ from government to government.¹ This brings us to the following question; what drives us to a certain behaviour? What is the starting point of our behaviour?

In our opinion the starting point are our ideals and with these ideals, a certain behaviour arises. The concept of an ideal can be described as an imagination of something that one hopes to realise. As van der Burg describes "*ideals are values that are implicit or latent in the law, or the public and moral culture of a society or group that usually cannot be fully realized, and that partly transcend contingent, historical formulations, and implementations in terms of rules and principles and policies.*" (Van der Burg 1999 p. 176).

Ideals must be regarded as a moral point of departure, they are goals to strive for, used by individuals, divisions of communities as well as the global community. In this way, it can be concluded that the branch of real estate has its own moral starting point with its own ideals to be fulfilled by its own behaviour. Behaving ethically is at the heart of what it means to be a professional. It distinguishes professionals from others in the marketplace. This is what the Royal Institutions of Chartered Surveyors (RICS) promotes. The RICS sets up and maintains the highest professional qualifications and standards in the development and management of land, real estate, construction and infrastructure. RICS created a clear and streamlined set of professional and ethical standards to guide its members and ensures that this set of standards leads to confidence by all parties that deals with RICS members. The RICS developed five standards, RICS members must; demonstrate that they act with integrity, always provide a high standard of services, act in a way that promotes trust in the profession, treat others with respect and take responsibility for their measures and activities.

When ideals are considered on a level of policymaking, such as the RICS policy, the question arises how to convert these moral values into a legal system so that rules can be set up that might help to realise these ideals and to create a protective legal system with enforceable rules for real estate professionals. Dworkin argues that rules give a precise concrete formulation that may include obligations (Dworkin, 1996 p. 35). In order to convert moral values into enforceable rules, however, there must be something else. This 'something else' can be defined as 'principles', as a link between moral values and concrete binding rules. Principles are legal premises that do not necessarily exist in written form, but might provide a general orientation to which positive law should conform (De Sadeleer, 2005 p. 307).

Unlike binding rules in hard law, principles in general include less precise formulations. Principles are vaguer and less explicit than rules, they might be more open to different interpretations, however, they are a suitable instrument for policy-making as well as for law making (De Sadeleer, 2005 p.313). Verschuuren argues that principles themselves do not include enforceable legal duties, they give more insight into the morality of policies and legislative rules. He argues that there is a continuum from theoretical abstract principles on the one end, to very concrete and practical rules on the other hand.

¹ One can compare the socialist state of Cuba with its neighbour the USA.

(Verschuuren 2003 p. 25). Principles, should be considered as soft law, as non-binding expressions of commitment. Soft law can be embodied in written documents such as recommendations, declarations and guidelines by heads of States or ministers (De Sadeleer, 2005 p.312). Kiss explains this as follows: “*Soft law can mean formally non-binding expressions of commitment, whereas hard law instruments can be read in treaties and in operative, executive, statements of Conventions*” (Kiss, 2003 p. 69). Principles might evolve into the body of hard law, but this is not necessarily so the case. Where principles did not evolve in hard binding provisions, but might evolve into upcoming law we can speak about the so-called *lege ferenda*. It must be expressly indicated that not all principles are part of the body of *lege ferenda*. Principles within the body of *lege ferenda* can, as mentioned before, evolve into the body of binding law, the so-called body of *lex lata*. This process of evaluation however, is a continuum in which each principle evolves in its own way. An example of accepting principles as hard binding rules, as evolving from principles into hard law, is formulated in Article 38 (a to c) of the statute of the International Court of Justice, the ICJ.

Paragraph 4 sustainability as an ideal

Finding a balance between economics and social behaviour might be a challenge. Such a balance leads to economic developments hand in hand with protection of moral standards as part of sustainable behaviour. Nowadays it seems that the concept of sustainability, including sustainable behaviour, is often presented as a panacea for all kinds of problems of various origins. It might be considered that the concept of sustainability is often misused, or at least is misunderstood by organisations as well as by the public.

Therefore, it is necessary to have a clear understanding of the concept of sustainability and sustainable development and its relationship with ethics and legal systems. In 1987 the World Commission on Environment and Development (WCED), also named after its chair, the former Prime Minister of Norway, Gro Harlem Brundtland, stated in its report that “*the ‘environment’ is where we all live; and ‘development’ is what we all do in attempting to improve our lot within that abode. The two are inseparable.*” (WCED, 1978 p. xi) The WCED brought the concerns about human environment and sustainability to the attention of a wider public and defined the term ‘sustainable development’, which leads to the concept of sustainable development (Bugge and Voigt, 2008 p. vii). The Dutch ‘Centraal Bureau voor de Statistiek, (CBS)’ formulated sustainable development as follows;

“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It encompasses more than care for the environment. Development is sustainable if it also takes into account economic, human and social aspects: scarcity not only applies to natural resources; a highly educated and healthy population, well-functioning social networks, social trust, machines and infrastructure are also not in unlimited supply.” (CBS, What is sustainability).

In 2002, a United Nations Conference on Sustainable Development (UNCSD) was summoned in Johannesburg. In its Article 1, the declaration stated that “*[the parties] reaffirm our commitment to sustainable development.*” The UNCSD declaration included a political statement, signalling the moral values and intentions of the community of States. The parties at this conference referred to future generations. In its preamble the UNCED stated. In its preamble the UNCED stated

“[A]t the beginning of this summit, the children of the world spoke to us in a simple yet clear voice [saying] that the future belongs to them, and accordingly challenged all of us to ensure that through our actions they will inherit a world free of the indignity and indecency occasioned by poverty, environmental degradation and patterns of unsustainable development.”

Cordonier Segger stated it as follows: “*It outlines the path taken from UNCED to the WSSD (UNCSD) highlights present challenges, expresses a commitment to sustainable development.*” (Cordonier Segger, 2008 p. 107). It might be argued that Member States of the United Nations committed themselves to the ideal of sustainable development. This argumentation can be supported because the above mentioned declarations are signed by the Member States of the United Nations, therefore, by almost every State of the community of Nations.

Paragraph 5 ethics, principles and real estate; a conclusion

How about ethics, principles and rules within the branch of real estate? Following the above mentioned theory, the branch of real estate should indicate and describe its ideals, to be followed by its vision on sustainable behaviour, and then to be followed by describing already existing binding provisions within the branch of real estate. In this context, a next step should be undertaken by the organisations of real estate professionals. These organisations should come to a discussion whether principles within the body of *lege ferenda* within the branch of real estate must evolve into the body of *lex lata*, as hard law for real estate professionals, and if so, how these hard binding rules should be formulated. Because if we, as real estate professionals, will be seen by the community as serious sustainable working partners, we should take ourselves seriously, meaning that we must make clear, in a transparent way, what our ideals and principles are and in what way we stated these ideals and principles in hard binding rules for the community of real estate professionals.

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