Which direction to take? On (in)direct obligations to climate proof buildings in dutch public and private law

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A. Introduction

The built environment contributes significantly to the emission of greenhouse gases and reducing these emissions is essential for the preservation of the environment. To accelerate the renovation of the built environment, the Dutch government has introduced various measures in both public and private law that directly or indirectly compel the owners of buildings to sustainably retrofit[1] those buildings. Public law measures either impose an obligation directly or provide authorities with the competence to impose an obligation to renovate, while private law measures impose these obligations indirectly by empowering private citizens to compel other private citizens to perform sustainable retrofitting.

Public law obligations to renovate can be found in the *Omgevingswet* [Environmental and Planning Act (EPA)], as well as the *Besluit bouwwerken leefomgeving* [Environment Buildings Decree (EBD)]. For instance, Article 3.87 EBD demands all owners of office buildings to refrain from use

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1 In this contribution we use the terms "sustainably retrofitting" and "climate-proofing buildings" synonymously. These terms are used to address all measures that can be taken to improve the environmental sustainability of a building, i.e. energy-saving measures, insulation etc.

of their building if it does not meet a certain minimum energy performance standard (MEPS). De facto this means that the owners of such buildings are forced to renovate, since they will not be allowed to use their property if they do not take measures to meet the MEPS. As we have specified, indirect private law measures can also be found in Dutch law. An example of this is Article 7:243 of the Dutch Civil Code (DCC), which grants tenants of residential buildings the right to force their landlord to perform certain kinds of sustainable retrofitting.

While these regulations aim to reduce emissions, they interfere with property rights by limiting the owner's freedom to manage their property as they see fit. Additionally, compliance with renovation obligations requires substantial investments which causes further interference, since it creates financial burdens for property owners. This raises important questions about how these obligations, and the public (environmental) interests they serve, relate to the protection of these property rights and whether the extent of this protection differs when the obligations are imposed by public law as opposed to private law.

In this paper, we will explore the relationship between the aforementioned two ways of implementing sustainability obligations and the protection of private property under article 1 of the First Protocol to the European Convention on Human Rights (A1P1) as well as the degree to which national legal norms protect the interests of those affected by these measures. Firstly, we will give some examples of public law obligations to climate proof buildings, as well as the safeguards that are in place to ensure protection of those who need it (B). Then, we will discuss a legislative proposal which proposes lowering the voting threshold in the association of owners of apartment buildings to a simple majority for all decisions relating sustainability. This will grant the majority to compel a minority to tolerate and contribute to the costs of the renovation works, and thus forms what we define as a private law obligation to climate proof buildings (C). In the final section (D), we will provide an analysis of the safeguards that are in place to protect vulnerable persons when public law obligations apply, as opposed to safeguards that are in place to protect vulnerable persons when private law obligations are utilized.

B. Public law obligations and safeguards

Dutch public law imposes sustainability obligations on the owners of buildings in two ways, either through a general obligation that specifies a minimum level of sustainability for specific categories of buildings, or by providing authorities with the competence to impose a renovation obligation in a specific case. Since these obligations can be found in public law, public law determines which public body has the competence to impose renovation obligations, as well as which safeguards guards apply to ensure that an imposed or enforced obligation is lawful.[2]

I. General obligations

An example of a general obligation to sustainably retrofit a building is the above-mentioned Article 3.87 EBD. This article requires owners of office buildings to have their office building meet a minimum energy performance standard (MEPS). According to this regulation, office buildings should have an Energy Performance Certificate of 'C.' All measures of which the investment can be recovered within ten years should be taken to reach this rating. If all measures of which the investment can be recovered within ten years lead to a lower standard than the 'C' certificate, that is also acceptable.[3] If the owner of an office building does not comply with the obligation, they risk closure of their building.[4] Article 3.84 of the same decree requires owners of non-residential buildings that use more than 50.000 kWh of electricity and 25.000 m^3 natural gas a year to take all energy-measures of which the investment can be recovered within five years. In short, owners of buildings that fall under either article 3.84 or article 3.87 are obliged to take energy saving measures of which the investment can be recovered within a certain timeframe. There is a list of recognized measures that can be taken to comply.[5] Implementing all applicable measures on

2 Jacco Karens/Björn Hoops, 'Obligations for Owners to Climate-Proof Buildings in the Netherlands' (2024), 13(1) ELPJ, p. 161, 163.
3 Article 3.87(5) EBD.
4 Karens/Hoops (2024), p. 162.
5 Rijksdienst voor Ondernemend Nederland, 'Erkende maatregelenlijst (EML) [List of recognized measures]' (2023), https://www.rvo.nl/sites/default/files/2023-11/erkende-maatregelenlijst-eml-2023-v-1-3.pdf (last accessed: 21 July 2025).

the list ensures fulfilment of the obligation.[6] If an owner would rather take alternative measures not included in the list, the *Omgevingsregeling* [Environmental and Spatial Planning Regulation] provides a method to calculate the time needed to recover an investment.[7]

If authorities enforce these general energy-saving measures by, for instance, ordering the closure of the building or imposing a fine, the owner can file a notice of objection if he feels this is disproportionate or an infringement of A1P1.[8] The enforcing authorities (most often the municipality) are then required to re-assess this decision, and motivate whether it was or was not proportionate. If they decide the closure was proportionate, the owner of the building can lodge an appeal with the Administrative Court. Then, an independent judge will rule whether the closure was in line with legal principles such as proportionality as well as the right to peaceful enjoyment of possessions.

II. Situation specific obligations

As specified above, public law provides general obligations to climate proof buildings but also grants authorities competences to impose obligations in specific situations. For instance, article 3.7 provides the municipal executive with the competence to lay down *maatwerkvoorschriften* [situation-specific regulations] regarding the technical condition of a building.[9] Through such a regulation, the owner may be required to improve the condition of the building. However, the required level of improvement should not exceed the standard that the EBD prescribes for new construction.[10] This provision can be used to obligate owners to climate proof buildings, by for instance requiring the owner to install double-glazed windows or take measures

6 Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Besluit van 10 juli 2023 tot wijziging van het Besluit bouwwerken leefomgeving in verband met de actualisatie van de energiebesparingsplicht voor utiliteitsgebouwen en enkele andere wijzigingen, 10 July 2023, Stb. 2023, 272, p. 6.

7 Appendix XV to the *Omgevingsregeling* [Environmental and Spatial Planning Regulation].

8 Article 7:1 & 8:1 Dutch Administrative Code (DAC).

9 Arjan Bregman, 'De mogelijkheden van gemeentelijke sturing op duurzaamheid en klimaatadaptatie op grond van de Omgevingswet [The possibilities of municipal steering for sustainability and climate adaptation in the Environmental and Planning Act]' (2024), 97 *TBR,* p. 723.

10 Karens/Hoops (2024), p. 169.

regarding the insulation of the building.[11] If this competence is used, the owner of the building that should be renovated can file a notice of objection.[12] Similarly to the notice of objection discussed earlier, the municipal executive will then reassess their decision, and motivate whether it was or was not proportionate, with the possibility for the owner to lodge an appeal with the Administrative Court.[13]

A legislative proposal, the *Wet gemeentelijke instrumenten warmtetransitie* [Act on Municipal Instruments for the Heat transition] will grant the municipal executive the power to designate certain areas in which the buildings will have to convert from the use of natural gas to the use of alternative sustainable resources, starting January 2026.[14] The municipal executive will be able to lay down these designations in the so-called *omgevingsplan* [environmental plan]. To ensure foreseeability, the environmental plan must indicate the point in time from which the use of natural gas is prohibited.[15] Since it takes time to (prepare to) convert to a sustainable alternative, a reasonable timeframe must be provided between the designation and the actual transition from natural gas to an alternative.[16] A timeframe of eight years can be regarded as a guideline, but a shorter or longer timeframe is also possible. Regardless of the length, the municipal executive is always obliged to motivate and justify the length of the transition period.[17] When the municipal executive lays down a designation in the environmental plan, the owners of buildings in this area can appeal directly before the *Afdeling Bestuursrechtspraak van de Raad van State* [Administrative Jurisdiction Division of the Council of State], which is the highest administrative law court of the Netherlands.[18] The judge will then decide whether the designation was in line with legal principles such as proportionality.

11 Karens/Hoops (2024), p. 162.
12 Article 6:4 DAC.
13 Article 7:1 & 8:1 DAC.
14 *Kamerstukken II* 2022/23, 36387, nr. 3, p. 30.
15 Ibid p. 17.
16 Ibid p. 17.
17 Ibid p. 17.
18 Appendix 2 article 2 to the DAC.

III. Protection of property rights

As illustrated above, when a general obligation to climate proof is enforced or the competence to lay down an obligation is used, the owner of the building it applies to can ask a court for a ruling on the lawfulness and proportionality of the obligation or enforcement. The court can then decide whether the obligation or enforcement is in line with the right to peaceful enjoyment of possessions, as laid down in article 1 protocol 1 of the European Convention on Human Rights (A1P1) and in line with Dutch law principles such as proportionality.

Climate proofing obligations can be classed as a 'control of use' of property rights in the sense of A1P1.[19] That means that it is an interference in the right of peaceful protection of possessions and should thus be justified in order to be lawful and not deemed in breach of A1P1. A1P1 requires any interference to be lawful, serve a legitimate public interest and strike a fair balance between the general interest and the protection of the individual's fundamental rights.[20] When an owner of a building subject to an obligation to climate proof appeals before a court, the court should thus determine whether the enforcement or imposing of the obligation is lawful. This means that the applicable laws and rules should be sufficiently clear, precise, and foreseeable in their applicability.[21] Moreover these laws should provide some sort of protection against arbitrariness. As briefly mentioned, the court should also answer the question of whether the interference serves a legitimate public interest. This should however, not be much of a problem, since the European Court of Human Rights recognizes protection of the environment to be a legitimate public interest.[22] Lastly, when exploring whether a fair balance was struck, the court has to assess whether the owner has to carry a disproportionate and excessive burden.[23] To discern this, the court should examine all interests in issue.

19 An example of an obligation imposed on a landowner, which the Commission considered 'control of use' can be found in ECtHR, 18 January 1989 – 12570/86 – Denev v Sweden.

20 e.g. ECtHR, 5 January 2000 – 33202/96, para. 108–114 – Beyeler v Italy.

21 e.g. ECtHR, 25 October 2012 – 71243/01, para. 96 Vistins and Perepjolkins v. Latvia and ECtHR, 23 January 2014 – 19336/04, para. 167 – East/West Alliance Limited v. Ukraine.

22 ECtHR, 27 November 2007 – 21861/03, para. 79–80 – Hamer v. Belgium.

23 e.g. ECtHR, 5 January 2000 – 33202/96, para. 114 – Beyeler v Italy; ECtHR, 23 September 1982- 7151/75, para. 73 – Sporrong and Lonnroth v Sweden.

While there is no complete list of aspects the court has to consider when conducting a fair balance test, there are some aspects that seem to be relevant in most cases. For instance, the owner of an affected building should be able to put their case to the enforcing or obligating authorities, being able to effectively challenge the measures taken. Furthermore, when less intrusive measures could be used to achieve the same goal, those measures should be taken. And of course, the enforcing or obligating authorities should assess the personal circumstances of each case. If these have not been taken into account, it could result in a violation of A1P1.[24]

As specified, these obligations are not just subject to A1P1, but also to the principle of proportionality, which can be found in the Dutch Administrative Code.[25] When assessing a case regarding a public law obligation to climate proof, a judge should also take these principles into account. This means that the use of the competence to impose or enforce an obligation to climate proof should be suitable, necessary and proportionate in the narrow sense.[26] The application of this principle overlaps to an extent with A1P1, since it requires the court to assess whether a measure that is taken was suitable and necessary.[27] Thus, whether it is suitable to reach a certain goal in the public interest, as well as whether there are less intrusive means available to reach the same goal. As well as requiring a balancing of interests.

When the court deems (the enforcement of) an obligation in line with A1P1 as well as the principle of proportionality, the owner can still ask for compensation for loss resulting from administrative acts.[28] Whether this compensation is awarded, depends on the situation. The general rule is that there is no compensation for lawful administrative acts, but those affected disproportionately in relation to others, can under some circumstances be awarded compensation.[29]

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24 E.g. ECtHR, 5 May 1995 – 18465/91, para. 46 – Air Canada v the United Kingdom; ECtHR, 21 February 1986 – 8793/79, para. 51 – James and others v the United Kingdom.

25 Article 3:4(2) DAC.

26 ABRvS, 2 February 2022 – ECLI:NL:RVS:2022:285, para. 7.4 – 7.8 – Harderwijk.

27 Tom Barkhuysen/Michiel van Emmerik, 'De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse bestuursrecht [Protection of private property under Article 1 of the First Protocol to the European Convention on Human Rights and Dutch administrative law]' (2003), JBPlus, p. 2, 13.

28 Article 4:126 DAC & section 15.1 ESA.

29 Michiel Tjepkema, Nadeelcompensatie op basis van het égalitébeginsel: een onderzoek naar nationaal, Frans en Europees Recht [Compensation for loss based on the

It is clear that there are several safeguards and procedures available for those affected by (the enforcement of) obligations to climate proof buildings. While these obligations do require owners' investments and willingness to renovate, and thus form an interference with their property rights, they are subject to judicial review.

C. Private law obligations and (the lack of) safeguards

Public law is not the only avenue through which the Dutch legislator tries to stimulate the sustainable upgrading of buildings. Two private law measures have been implemented, or are going to be implemented, that enable private citizens to force each other to sustainably retrofit their buildings. Both measures are aimed at situations where multiple people have an interest in the same immovable property, specifically within rental law and condominium law.

I. Sustainable retrofitting in Dutch rental law

The first is a rental law measure, implemented in article 7:243 of the Dutch Civil Code (hereafter: DCC). This measure grants tenants of residential property the power to request a judge to issue an order compelling their landlord, who owns the property in question, to improve the thermal isolation of the external walls, the floor that separates the building from the ground or replace the central heating installation with a more sustainable alternative.

If a tenant wants a judge to grant their request, they must be prepared to pay an increased rental fee. This increase must be reasonably proportionate to the costs the landlord has to make to implement the requested measures. An increased rental fee is proportionate when it allows the landlord to recover the costs of the investment within a reasonable timeframe.[30] Additionally, judges are granted a significant amount of discretion in determin-

principle of equality: an investigation into national Dutch, French, and European Law] (2010), p. 2 et seqq.

30 Justine van Lochem/Elmer van der Kamp, in Bart Krans/Carel Stolker/Lodewijk Valk (eds.), Tekst & Commentaar Burgerlijk Wetboek [Text and Commentary Dutch Civil Code], art. 7:243 DCC.

ing whether or not to compel the landlord to apply the requested measures. They can take all relevant interests and arguments into account as a part of their assessment, such as the current state of the building and the practical and financial obstacles to implementing the measures.[31]

This measure strikes a balance between the interests of the tenant and the interests of their landlord. There is a fundamental tension in the relationship between two parties when it comes to the sustainable retrofitting of the rented residential property. The tenant is most benefited by the retrofitting, as they will see a decrease in energy consumption as a result thereof. The landlord is, in principle, the one who decides whether or not to retrofit the building, and the one who has to pay for those costs, while not directly benefiting from the retrofitting.

Article 7:243 DCC resolves this tension by giving the tenant limited room to make decisions regarding the retrofitting of the rental property that would normally belong to the owner. The interests of the landlord are protected in two ways: firstly through the requirement of a proportionate rental fee increase, sufficient to cover the investment the landlord is required to make, and secondly through judicial oversight, through which a judge will examine whether the interests of the landlord are sufficiently protected.

This combination of factors results in a measure that promotes the sustainable retrofitting of buildings in a legal dynamic that would otherwise prevent such retrofitting, while sufficiently protecting the interests of the landlord.

II. Condominium law and indirect sustainability obligations

A defining characteristic of condominium law is that multiple owners have an equal right to (parts of) a condominium building and have to govern it together. Under Dutch law, the whole of the building is jointly owned by the condominium owners, with each owner having a fractional share in the property right of the building, and attached to that fractional share the right to exclusively use a part of that building, hereafter referred to as the condominium units.[32]

31 Marcel van Wezel, in Jan Heikens et al. (eds.), Groene Serie Huurrecht [Green Series Rental Law], art. 7:243, para. 2.1.

32 Article 5:106 para. 4 DCC.

Dividing a building into condominium rights requires the founding of a special kind of legal person, called the Association of Owners (hereafter: AoO). Article 5:125 par. 2 DCC states that all condominium owners automatically become members of the AoO, and that only condominium owners can be members.

The AoO is tasked with the maintenance and management of the jointly owned building, with the exception of the condominium units.[33] The condominium owners must take decisions relating to the maintenance and management in the general assembly of the AoO. This decision making process is democratic by nature: each owner has a certain amount of votes as described in the notarial deed of division, and decisions can in principle be taken with a simple majority, with the possibility to choose a greater minimum amount of votes for specific decisions in the deed of division.[34] In practice, impactful decisions typically require a 3/4ths or 2/3rds majority vote.

A crucial detail is that decisions, once taken, bind all condominium owners, including those who voted against the decision. They will have to pay their share of the costs involved in executing the decision, even if they do not benefit directly from the decision.[35]

The Dutch Minister of Housing and Spatial Planning (hereinafter: the Minister) has proposed an amendment to the current system of condominium law. This amendment would lower the required number of votes from 3/4ths or 2/3rds of the total votes to a simple majority, to promote the sustainable retrofitting of condominium buildings.[36]

The logical consequence of this amendment would indeed be that it becomes easier to take decisions relating to sustainability. At the same time, this would also mean that a smaller majority of owners can take decisions that bind a larger minority of owners than is currently possible, which can lead to undesirable consequences.

To provide a brief example which illustrates this: Imagine a condominium complex with five owners, of which two owners have trouble making

33 Article 5:126 para. 1 DCC.
34 Article 5:127 para. 1 DCC.
35 Article 5:113 DCC.
36 Ministry of Interior and Kingdom Affairs of the Netherlands, Versnellingsagenda verduurzaming
gebouwen in beheer van Verenigingen van Eigenaars (VvE's) [Acceleration agenda or the sustainable retrofitting of buildings maintained by an Association of Owners] 15 June 2023, p. 2 et seqq.

ends meet. They actively reduce their energy consumption to lower their costs, for example by not heating their houses but wearing warmer clothes instead. The other three owners have sufficient money and are not concerned about their energy consumption.

In this case, sustainably retrofitting the condominium building might be appealing to the three owners. It would lower their energy consumption, reducing their monthly costs as well, without having to sacrifice their quality of life, and they have the means to pay for it. For the two owners with less money, such a proposal is less attractive. Their monthly savings would be minimal as they already use very little energy, and they do not have the means to pay their share for the required works. In other words: the majority of owners would benefit from the decision, while the minority would be harmed.

If the required number of votes is two-thirds of the total amount of votes, the majority of three could not take the decision without the approval of one of the two minority owners. If the required number of votes is lowered to a simple majority however, three votes would be sufficient, and the majority could force the minority to tolerate and pay for the retrofitting of their shared building.

The process of democratic decision making could lead to unjust outcomes that harm the justified interests of the minority that voted against the decision. In order to protect the justified minority interests, Dutch condominium law contains several safeguards. Firstly, as is the case for most areas of Dutch private law, the relationship between the condominium owners is governed by the standards of reasonableness and fairness.[37] Even though the democratic decision-making process itself contains no inherent limitations to the scope and impact of the decisions taken by the AoO, owners are in general required to behave *ex aequo et bono* in relation to each other, including in the ways they use their votes.[38]

Article 5:130 DCC opens the possibility for an owner to request the avoidance of a decision of the AoO by a Cantonal judge, within one month after the day on which the owner became aware of the decision. The grounds for avoidance are those listed in article 2:15 DCC, a provision applicable to all legal persons. There are three distinct grounds for avoidance: if the decision was taken in conflict with procedural rules originating from

37 Harriët Schelhaas, Redelijkheid en billijkheid [Reasonableness and fairness] (2017), para. 1.

38 HR 30 October 1998 – ECLI:NL:HR:1998:ZC2759, para. 3.8.

the law or the articles of incorporation of the legal person, if the decision conflicts with the standards of reasonableness and fairness or if the decision was taken in conflict with internal regulations of the legal person.

The standards of reasonableness and fairness can also entail that refusing to take a decision is unreasonable. For that reason, article 5:121 DCC allows a condominium owner to request authorisation from the Cantonal court to perform certain acts that affect the common parts of the condominium building, in cases where such acts require the approval or cooperation of the AoO or other condominium owners. The court will grant authorization if, after weighing the interests involved in the decision, it comes to the conclusion that there are no reasonable grounds on which the other parties refuse their approval or cooperation.[39]

Articles 5:130 and 5:121 DCC taken together make it possible to invoke judicial protection both in cases where an unreasonable decision is taken and where a reasonable decision is taken on unreasonable grounds. In both cases the potentially unfair results of the democratic decision-making process are tempered by the possibility of judicial review.

The proposal of the Minister to lower the required number of votes for measures related to sustainability can therefore be seen as a shifting of the burden of invoking judicial protection. By lowering the required number of votes, it becomes easier to take a decision and as a result, the minority of owners against the decision will have to seek judicial protection more often, while the majority in favour of the decision can take the decision without having to seek judicial authorisation.

One major advantage of this shift is that it acts as a filter for owners voting against a decision on illegitimate grounds. A recurring issue in Dutch condominium law is the tendency of owners to abuse their votes by blocking decisions for reasons not related to that decision, such as a conflict with their neighbours. A lower required number of votes makes it more difficult for owners to block a decision on these grounds, and it is unlikely a judge will void the decision if there are no legitimate reasons for their vote against the decision.

There are, however, two disadvantages as well. Firstly, requiring owners who voted against a decision to invoke judicial protection puts an additional burden on those with a legitimate interest against the decision. This is especially problematic when it concerns condominium owners with little money: they will have to pay the costs for the trial, with the risk of having

39 Hof Amsterdam 11 December 2012 – ECLI:NL:GHAMS:2012:4274, para. 3.7 et seq.

paid for nothing if the court does not void the decision, on top of having to pay the costs for the execution of the decision. Additionally, there is the mental and time burden of having to go to court. Finally, they must decide whether to invoke judicial protection within the unusually short timeframe of one month. These factors combined create a barrier to seeking judicial protection.

Secondly, the shift from those in favour of a decision having to seek authorization to those against a decision having to seek avoidance of that decision also entails a shift in the scope of judicial review. Judicial review under the authorization procedure of article 5:121 DCC is a full review, with room for a careful weighing of the different interests involved in the decision, while judicial review under article 5:130 and 2:15 DCC is limited: judges can only evaluate whether the AoO could reasonably take the decision in question.[40]

Dutch case law on the scope of judicial review under article 5:130 and 2:15 DCC shows there are two aspects that are important in this review. The first of these aspects is the way the decision was taken. A decision conflicts with the standards of reasonableness and fairness when there was no weighing of interests by the AoO at all.[41] The second aspect is the consequences of the decision. When the consequences are patently unreasonable, such as an owner facing significant financial difficulties as a result of the decision, the decision can also be unreasonable.[42]

Judicial review under article 5:130 and 2:15 DCC is significantly more limited than the full review of article 5:121 DCC. Avoidance under article 5:130 and 2:15 DCC is only possible when the AoO could not reasonably have taken this decision, which leaves room for decisions that are unreasonable towards some owners, as long as the interests of those owners were in some way acknowledged and the consequences are not so unreasonable that they cause significant difficulties for the owners.

The question is whether the positive aspects of the proposed change to the voting requirements for sustainability decisions weigh up against the negative aspects, specifically the increased burden on the minority of owners against the measure and the decreased scope of judicial review, thus creating more room for decisions that negatively impact some owners.

40 HR 12 Juli 2013 – ECLI:NL:HR:2023:BZ9145, para. 3.4.3.
41 Rechtbank Oost–Brabant 8 February 2024 – ECLI:NL:RBOBR:2024:829, para. 5.10.
42 Hof Arnhem–Leeuwarden 29 September 2024 – ECLI:NL:GHARL:2024:6655, para. 3.6.

III. Is private law regulation the way forward?

This paragraph focused on two examples of private law regulation that aim to promote sustainability. In both examples one or more private persons are empowered to compel one or more other private persons to perform or tolerate and pay for sustainability measures, even when it goes against their own interests.

The degree of protection of those interests differs massively, however. The rental law measure discussed in paragraph 3.1. requires *ex ante* judicial review, which includes an evaluation of the burden placed on the landlord and the degree to which the proposed rental fee increase covers his costs. By requiring judicial review, the reasonability of the proposed measure is guaranteed.

The proposed condominium law measure discussed in paragraph 3.2. is fundamentally different. It does not directly grant anyone the ability to compel another condominium owner to tolerate and pay for the sustainable retrofitting of the shared building. Instead, it lowers the voting threshold to take decisions regarding sustainability within the AoO, indirectly increasing the amount of situations in which a minority of condominium owners opposes a certain decision, and creating more room to take decisions that negatively impact one or multiple owners. There is room for *ex post* judicial review, but a combination of the short timeframe during which an owner can invoke judicial protection, the limited scope of judicial review and the uncertainty of outcome lead to a situation where a condominium owner can be negatively affected by a decision of the AoO without successfully seeking judicial protection.

D. Conclusion

The Dutch legislator has opened several avenues through which the owners of buildings can be compelled to make their buildings more sustainable, both in public law and in private law. There are, however, major differences in the ways the legitimate interests of the owners of the buildings are protected in these two fields of law.

For the public law measures, the interests of the owners have to be taken into account based on national legal principles and the article 1 of Protocol 1 to the European Convention on Human Rights. Administrative bodies have to weigh the interests of those affected by the measure before taking

a decision and potentially provide compensation for the damage suffered by them, either because the measure would otherwise not be proportionate to the public interest it serves, or because an owner is disproportionately affected by the measure.

The private law measures function without interference by a public body. Both measures are aimed at promoting a public interest, the prevention of climate change, by granting individuals the power to compel others. By implementing these measures in private law, the measures are placed outside of the public law framework designed specifically for situations in which a private person has to make a sacrifice in the public interest.

Instead, private law balances interests through a general reasonableness and fairness test, either administered *ex ante* or *ex post* by a judge. In either case, seeking judicial protection raises barriers to the effective use of those measures or to the effective protection of the legitimate interests of those compelled to perform or pay for the sustainable retrofitting.

A fundamental but still unanswered question is whether private law is the most suitable place for interventions in the public interest, in light of the lack of public involvement in the protection of the justified interests of private individuals.