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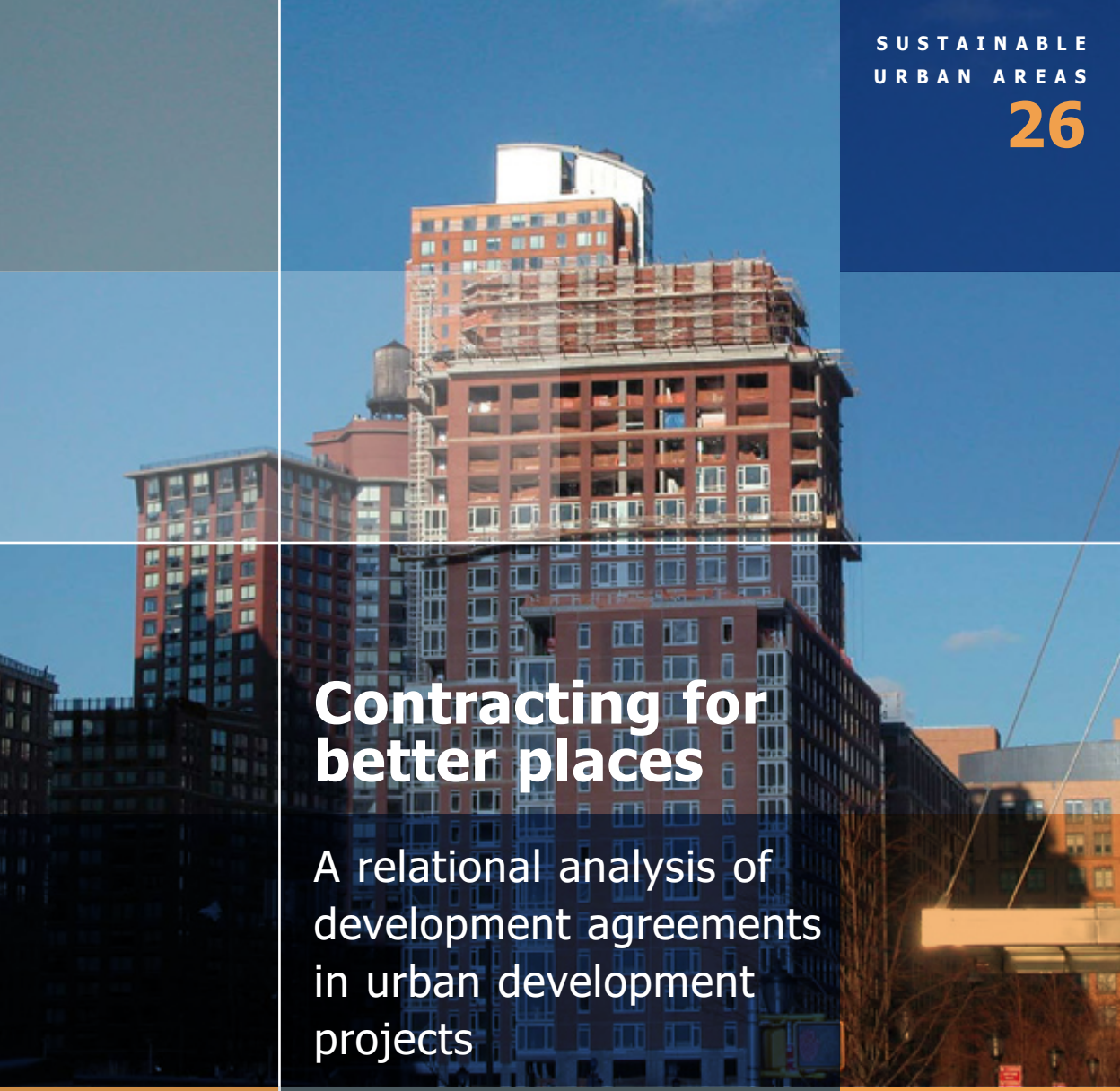

Contracting for better places

A relational analysis of development agreements in urban development projects

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Contents

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1 Introduction

1.1 A fascination with urban development projects

The world is changing. Cities are changing. Contracts are changing. These statements are probably true for every era. But developments since the 1980s have made these statements particularly relevant. What do they mean in the context of the present day? They mean that the world economy has changed and is still undergoing enormous changes, that the economies of major western cities have changed and that there are many indications that cities need to do away with their remaining heavy industries and instead invest in a service-based economy if they are to be successful in the 21st century (Zukin, 1995; Florida, 2005).

This is precisely what the cities examined in this study – New York, Amsterdam and London – have done during the past three decades. In particular, their economies have become much less dependent on their port facilities. They are all national leaders in service and finance. New York and London are global leaders.

To maintain or improve their leading positions, they need to create new spaces. Not just office space, but new attractive neighbourhoods that combine office space with attractive green zones, infrastructure, shops, leisure facilities and apartment buildings that range from top-end to assisted rental units. These newly planned neighbourhoods aim to combine the dynamics for which their cities are known – such as the great variations in height and the energy of Manhattan, the Victorian architecture of London, and the tolerant mix of the Amsterdam canals – with the competitive demands of the 21st century. If globalisation ever had a meaning, it can certainly be found in the competition between cities to attract international head offices and the people that come with them.

Some of these newly planned neighbourhoods are in fact centuries old, but now find themselves in a run-down state and in need of a new future. Other neighbourhoods are being created on new or underdeveloped land. What they have in common is that they all share the ideal of becoming new, successful, 21st century-proof places.

These new development projects are fascinating because they involve so many public and private parties, so many ambitions and billions of dollars, pounds or euros. They aim to combine the best features of their cities' rich past, the insights of the present and the forecasts of the future.

This study finds its point of departure in the author's fascination with urban development projects and the public-private coalitions that are necessary for their realisation.

The projects shape the cities in which they are located, provide them with new skylines and new landmarks, but their makers still have to acknowledge, in the light of so many past failures, that it is very difficult to plan successful

neighbourhoods.

For its realisation, a project has to rely on coalitions of public and private parties that are committed to its goals and are reasonably sure that their participation will yield a profit (cf. Van Ark, 2005).

There are many of these coalitions, and they operate at all project levels from the drafting of the first plan to the decision to invest in a part or the whole of the project. Public and private parties – that have different identities and set different goals for the future – have to convince one another that they can be reliable partners in the context of these projects. I am interested in these coalitions.

Not only the world is changing, not only cities are changing, contracts are also changing. Or should we say: when the world changes, when cities change, contracts have to change as well? Contracts create obligations: they embody the expectations and commitments of the parties concerned. When these expectations change, contracts have to change too. It should be noted that we are not primarily discussing contract law here, which has changed for various internal and external reasons (Luhmann, 2004), but the content of agreements. This content may eventually change the law (cf. Luhmann, 2004: 232) but that is only of passing interest in this study, which focuses mainly on the content of development agreeements: the agreements that contain the specific conditions under which all parties are willing to cooperate for the realisation of an urban development project. Such projects are found in many western cities, and their aims are often surprisingly comparable, but the legal systems that govern them are, at first sight, quite different. Every country has it own laws that apply to urban development projects. However, London, New York and Amsterdam are similar in that urban development projects take place in all three, there are laws applicable to those projects, and there are legal documents in which the parties to such projects write down their agreements.

Legal systems may differ, but when cities initiate urban projects that involve coalitions, would the actual agreements also differ? Would they not share the same mentality, the same aim to get things done?

The concept of the development agreement is presented in Chapter 4. These development agreements, made between public and private parties involved in urban development projects, are the main focus of this study.

The term ‘development agreeement’ is used in a specific sense throughout this study, but the terms ‘contract’, ‘legal agreement’ and ‘contracting’ will also be used in much the same context. These terms will be defined in greater detail in Chapters 3 and 4. At this point, I will only indicate their general meaning. An agreement lays down the sum total of obligations to be met by the parties. A legal agreement is an agreement that is enforceable in a court of law. In this study, the term ‘contract’ is generally used as a synonym for a legal agreement of this kind. Wherever possible, the more general sense of the term ‘contract’ is avoided. As we will see in Chapter 3, however, that is

not always possible. Finally, 'contracting' is used as a general verbal noun to denote the process of reaching a legal agreeement.

1.2 Projects covered by this study

I studied four major urban development projects. Within the context of each one, I looked for focal projects – smaller projects that involved contracts between public and private parties. These focal projects may differ in many respects, but that they are all subprojects of a major urban development projects and all include development agreements. Details of the focal projects investigated are given below.

New York: Battery Park City and Hudson Yards (Chapters 5 and 6)
Battery Park City is a 92-acre (37.2 ha) landfill site situated in the lower west side of Manhattan (see Figure 5.1), next to the World Trade Center (WTC) site. In 2005, it housed 9.3 million sq. ft. (86.4 ha) of commercial floor space and 9,000 inhabitants on 7.2 million sq. ft. (66.9 ha) of residential floor space. In addition, there were 22 restaurants, 3 public schools, two hotels and a cinema (BPCA, 2006). At that time, 6 plots were still open for development. Battery Park City is owned and managed by the Battery Park City Authority (BPCA), a public benefit corporation of the State of New York.

Two focal projects in Battery Park City were studied in depth. These included mixed-use buildings consisting mostly of residential space, which were developed as 'green buildings'. The development agreements for these projects were based on leases granted by BPCA, which owns the land, to private developers. They are subject to tensions between the environmental goals of BPCA and its aim to make money, as well as political tensions and the tension between short-term goals and long-term strategies.

The Hudson Yards project is situated in the Far West Side of Manhattan (see Figure 6.1). This part of Manhattan currently consists primarily of open parking lots, industrial units, small commercial and residential buildings, and transportation infrastructure including the entrance and exit roadways and plazas for the Lincoln Tunnel as well as approximately 26 acres (10.5 ha) of open rail yards serving the operational needs of the Long Island Railroad and Pennsylvania Station (HYIC, 2007).

Because of this underdevelopment on the otherwise highly urbanised island, the area is sometimes referred to as the 'last great frontier in Manhattan' (Fox, 2005). As rezoned, Hudson Yards has capacity for approximately 24 million square feet (2.2 million sq. m) of new office development, 13,500 units of housing (of which almost 4,000 units will be affordable), 1 million sq. ft. (9.3 ha) of retail space and 2 million sq. ft. (18.6 ha) of hotel space. In addition, the Javits Convention Center will be re-developed and expanded. This convention

center is located in the 'superblock' bounded by West 34th Street, 11th Avenue, West 39th Street and 12th Avenue.

I studied agreements relating to Hudson Yards in which the City of New York (on behalf of the state-owned Metropolitan Transportation Authority, MTA) leases land from private developers to construct the No. 7 subway extension. These agreements are subject to tensions between the interests of the speculative developers who bought land to construct large buildings on in and those of the city and MTA that want to construct the subway extension within their budgets.

Amsterdam: Zuidas (Chapter 7)

The Zuidas project is the biggest strategic urban project of both Amsterdam and the Netherlands. In 30 years time, it aims to develop 1.1 million sq. m (12 million sq. ft.) of office space, the same area of residential space and 500,000 sq. m (5.4 million sq. ft.) of public facilities. The Zuidas is created on land – until recently mostly used for sports facilities – at either side of the Amsterdam ring road linking the city centre with the national airport, Schiphol (see Figure 7.1).

Two focal projects in the Zuidas development were studied: Mahler4 that consists of 9 high buildings (8 office towers and 1 residential tower) and Gershwin, a project that focuses on residential space. The agreements here specify the conditions under which the City of Amsterdam that owns the land in the area is willing to close a lease with private developers. They are subject to many tensions that are mostly related to the complex interplay between the city as a pro-active, developing landowner and the private parties.

London: King's Cross (Chapter 8)

The wider King's Cross area measures 133 acres (54 ha) in the centre of London, situated in the boroughs of Camden (the larger part) and Islington. The largely run-down area (which is however already undergoing some gentrification) is located near three railway stations: Euston, St Pancras and King's Cross (see Figure 8.1). The redevelopment of the area is closely linked to the redevelopment of the two last-mentioned stations.

The focal project studied here is the Regent Quarter development that forms the heart of the redevelopment project. This area (67 acres or 27.1 ha) lies between King's Cross Station and St Pancras International Station and extends north beyond Regent's Canal. In 2007 outline planning permission was granted for approximately 743,000 sq. m. (8 million sq. ft.) of mixed-use development (including 455,000 sq. m./4.9 million sq. ft. of office space, 1,900 new homes, 46,000 sq. m./495,000 sq. ft. of retail space plus hotels, serviced apartments, student accommodation, leisure, health, cultural, community, education and other uses).

The agreement that applies here is known as a S106 agreement (see Sec-

tion 4.2 and Chapter 8). It specifies the planning obligations that the private parties have to undertake to receive planning permission from the planning authority (Camden Council). The tensions here are mostly related to the public-private nature of the agreement that includes both private law obligations and public policies.

1.3 Research questions

In defining the research questions of this study, we need to be aware that this is – to the best of my knowledge – the first study to look into development agreements in the context of urban development projects from a comparative perspective that focuses on the content (and not so much the 'oughts', cf. Camacho, 2005a) of the agreements. In Chapter 4 we will see that development agreements have been studied in some other contexts and meanings (see Section 4.4).

The research questions should emphasise this, while reflecting the author's fascination with urban development projects and agreements.
I identified five research questions.

1. *How do development agreements function in the context of urban development projects?*

This thesis studies development agreements in three cities, New York, London and Amsterdam, that all have their own laws and own legal cultures.

The main question that it poses is: How do these agreements function? In Chapter 4 we will distinguish four functions that characterise a development agreement: (1) the exchange function: the quid pro quo of the agreement; (2) the statutory function: the goals and rules governing the activities of the parties; (3) the planning function; and (4) the instrumental function: the goals that the public party hopes to achieve through the project.

These four functions are the first way in which we approach the question and they will guide the assessment of the agreements in Chapter 10.

A second, more inclusive, approach to the question is found in relational contract theory that was chosen as the theoretical framework for this study. We will assess the development agreements with reference to the norms and spirit of this theory. Relational contract theory states that ten common contract norms are present in every contractual relation. It further draws a distinction between discrete transactions and relational transactions. A discrete transaction may be sketched, in its most extreme form, as an anonymous transaction with a machine. It is completely planned and confines all relations between parties to one, unique transaction. A relational transaction in its most extreme form is a marriage or embodies the complex relations that emerge in a small village where different small family businesses engage in

similar transactions (one acting as the butcher, another as the baker and so on) while the different families are also related by marriage (Macneil, 1980). This distinction between discrete and relational transactions reflects that between classical contracts that leave everything out of the contractual relation except what the parties have expressly consented to and more flexible contracts based on an evolving relation between the parties.

These extremes are however almost never encountered in real life. But agreements have discrete and relational elements and may tend to either side of the spectrum. Relational contract theory is discussed at length in Chapter 3.

We will use the common contract norms this theory embodies to help us to understand how the various elements of the development agreements function, while the discrete-relational scale allows us to characterise the various agreements or their sub-parts. Application of the same approach to all development agreements means that we can compare the outcomes of the various analyses. This comparison is performed in Chapter 9, and leads to two further questions specifically related to relational contract theory.

2. *What is the significance of the ten common contract norms in the context of the development agreements studied?*

3. *What are the relative positions of the different agreements studied on the discrete-relational scale?*

When we have answered these questions, we are left with a lot of material on the various cases. That brings up the problem of comparing the outcomes, and assessing the various agreements from a normative perspective. Hence, our final questions are:

4. *Can we compare and assess the various development agreements?*

5. *Can we say anything about the development agreements that could lead to improvement of the contractual processes and their content in the future?*

1.4 Case studies

The case-study approach was essentially chosen for its ability to provide real-life agreements that could be studied while they were performing their tasks in the projects. In addition, the case-study methodology helps us to get a grip on the specificities of the cases.

The focus on a small number of cases facilitated in-depth analyses involving multiple observations. The focal project approach enabled us to place a subproject within the context of a larger urban development project (cf. Yin,

Table 1.1 Reference to the research questions in the various chapters

How do development agreements (DAs) function in the context of urban development projects?	Urban development projects are described in Chapter 1. The concept of a DA is the main topic of Chapter 4. This research question then leads to the case studies of Chapters 5-8.
What is the significance of the ten common contract norms in the context of the development agreements studied?	The ten common contract norms are discussed in Chapter 3. They are used as a basis for analysis of the development agreements of the case studies, and for comparison of the agreements in Chapter 9.
What are the relative positions of the different agreements studied on the discrete-relational scale?	The discrete-relational scale is discussed in Chapter 3. It is used to locate the case-study agreements, and for assessment of each individual norm in Chapter 9.
Can we compare and assess the various agreements?	The agreements are compared and critically assessed in Chapters 9 and 10, with reference to case-study data and the theoretical and methodological framework of Chapters 3 and 4. The theoretical background of this question is discussed in Chapter 2.
Can we say anything about the agreements that could lead to improvement of the contractual processes and their content in the future?	Suggestions for improvement of the agreements are discussed in Chapter 9 with reference to the common contract norms and in Chapter 10 with reference to the concept of the development agreement.

1994). In addition, the visits to the projects and the interviews helped us to get an idea of the mindset of the actors and of the project culture. We will see in the next three chapters how this approach yields a systematic analysis of the development agreements and a detailed description of the projects, but not a quantitative analysis of either the interviews or the contracts. The case-study approach does not provide enough data for a quantitative analysis. The underlying premise is therefore that every case reflects a specific aspect of urban development projects and development agreements, so that its analysis provides insights that extend beyond the individual case itself (George & Bennett, 2004).

1.5 Review of the successive chapters

Chapter 2 sets the scene for the study by specifying the various problems to be dealt with. Chapter 3 explains the theoretical background of this study, relational contract theory. It describes the main features of this theory and shows how it can be used to analyse the cases. Chapter 4 introduces and defines the concept of the development agreement, used in the present study to describe the cases and compare and assess the outcomes. Chapters 5-8 are devoted to the case studies. In Chapter 9, the cases are compared and assessed from the perspective of relational contract theory, while in Chapter 10 the concept of the development agreement is used in combination with relational contract theory as a basis for comparison and assessment of agreements. General conclusions are drawn concerning the minimal content a development agreement should have and the moment at which problems should be tackled. This chapter also provides rules of thumb for practitioners. It also revisits the research questions posed in this introduction, and considers whether they have been properly answered. Finally, it proposes further research and briefly evaluates the applicability of relational contract theory and

the development agreement concept for this and future studies.

I will end this introduction by introducing the figure of the 'undercover lawyer', a part I often felt I was playing while conducting this study. This rather playful term, which still has real relevance for the present work, was coined by analogy with the 'undercover economist' introduced by Tim Harford (2005). In his book of the same title, Harford takes the perspective of the economist who is confronted with phenomena of daily life such as the price of a cup of coffee at Starbucks or the attempts of politicians to reduce the use of motor cars. By discussing such matters from an economic viewpoint, he throws new light on issues that are more often discussed from another angle such as fairness (often thought not to be an economic concept).

I often felt myself to be an 'undercover lawyer' when I studied the urban development projects discussed in this thesis from a legal perspective, which often forced me to dig really deep to find an answer to the questions I had posed in legal terms.

Being an undercover lawyer in the context of the present study, however, mainly related to the kind of glasses I was wearing while conducting my research or, to stick with the original analogy, the text of the newspaper behind which I was hiding to spy on the urban developers. But as we will see in the next three chapters, one cannot study urban development projects solely with reference to the legal context: one has to become a contextualist as well.

2 Urban development projects and the problem of comparing contracts

This chapter intends to describe the context wherein this study takes place, it introduces some terms and scientific discussions that are in themselves not the main subject of this study but that provide the necessary context to understand the theoretical Chapters 3 and 4 and the case-study Chapters 5-8.

The chapter has three parts. In the first part we will discuss the main characteristics of the urban development projects that were studied for this thesis. It also explains why the term urban development project was chosen and how it relates to the focal projects of the case studies. Some attention is paid to the criticisms to which urban development projects have been subjected. It briefly introduces these focal projects; the urban development projects (that provide the larger context) were briefly introduced in Chapter 1.

The second part of this chapter starts with a scientific positioning of the study (Section 2.5). While focusing on development agreements, the study combines aims and methods from various scientific disciplines and can therefore be characterised as a mixed-discipline study. This section discusses the elements of which this mix consists.

Having discussed the scientific positioning of the study, we will have a brief look at the problem of comparing legal documents that are drafted in different legal systems. We will oppose the law-as-culture approach to a functionalist approach and use this comparison as a basis for discussion of the notion of a legal culture. The Dutch legal system is commonly known as part of the civil-law system, whereas the English and American legal system are part of the common-law system. We will discuss some main differences between the two systems and reflect on their importance for this study.

Having done that, we may take the final step towards the main focus of this study: the functioning of development agreements. We will discuss various dimensions of transactions and discuss which perspective this study should take on those dimensions. This brings us to the final topic of this chapter: the place of the legal agreement within those various dimensions.

2.1 Characteristics of the projects

In this section we discuss eight characteristics of the urban development projects of this thesis. The first six characteristics concern recent developments and trends in Western cities. Most readers will recognise these developments, they are not meant as statements or as arguments in a debate. The final two characteristics bridge the gap between the general characteristics and the focus of this study: the functioning of development agreements. The special project approach (Section 2.1.8) and processes of cooperation between public and private parties (Section 2.1.7) facilitate the use of agreements instead of – or in addition to – statutes and regulations. We may say that the list

of characteristics stops where the study starts; the characteristics are meant to provide the general context wherein the urban development projects exist. The specific contexts of the cases are found in Chapters 5-8 (the case-study part). Note that the first and second characteristics of the cases also apply to the context of the cases in Amsterdam but not in the same way to the context of London and New York. Amsterdam did not experience these developments in the same intensity as those two cities.

The reason for this may be found in the difference between the Anglo-American economies and the Dutch economy. In the scientific discipline named 'Varieties of Capitalism', the economies of England and United States are often characterised as liberal market economies (LME), whereas the Dutch economy is characterised as a coordinated market economy (CME). The latter is less open, and more controlled by various institutions wherein various interest groups – such as employers and employees – meet (Hall & Soskice, 2001; Touwen, 2006). For LMEs it are not so much these institutions but rather market forces that coordinate their economic systems. As a result these LMEs respond faster to economic changes than the CMEs, the institutional infrastructure of which is less responsive to trends in the market.

2.1.1 The need for office space

In the introduction to this thesis we noted that cities have changed in the sense that the economy of most western metropolitan areas no longer depends on heavy industries. Instead most successful cities now focus on the service sector (Zukin, 1995; Fainstein, 2001; MacLeod *et al.*, 2003; Florida, 2005). Not only has the economy of (most) western cities changed, the focus on service industries has also proved to be a way for cities to reinvent themselves economically. Two of the cities where the projects of this study are situated, London and New York, have experienced a strong economic growth based mostly on the growth of their (financial) service sectors, after a period of strong decline. And not only London and New York have experienced the growth of the service sector, Amsterdam – the third city of this thesis – has experienced the same development but that city did not suffer as much as New York and London from the economic downturn in the 1970s and 1980s. Now that the economies of these cities have become based on service industries – including finance, and creative industries – even in this 'wireless age', they need office space to facilitate the growth of these industries and hence the growth of their economies.

Amsterdam, London and New York have suffered of recent years from a lack of (state of the art) office space that would permit further growth and accommodate existing businesses that wish to relocate (City of Amsterdam, 2004; City of New York, 2005; GLA, 2002). The cases of this thesis can therefore be regarded as new business districts. The Zuidas in Amsterdam creates

a central business district (CBD), a concentration of office buildings that is regarded as the commercial heart of the city, that hardly has a counterpart in the city, since Amsterdam until recently lacked a (high profile) CBD (see Section 6.1.5). The head offices in Amsterdam were scattered over the historic centre and a few new business districts that lack the high profile of the Zuidas (City of Amsterdam, 2001).

The projects in New York and London are probably better described as extensions of existing CBDs but they are planned as new, up to date, business districts.

The first characteristic of the subject of this thesis is therefore that the three cities considered are planning for a future that, in their view, will most likely depend on the growth of the service industries. New office space has to be created to accommodate that growth.

2.1.2 Demand for apartments

The second characteristic of the cases is that cities try (or have tried, see Section 5.1.10) to meet the need for affordable housing – housing for the lower incomes – and affordable housing – housing at lower than market prices – in addition to prestigious up-market apartments.

During the last twenty years the population of the city centres has changed. After some decades where the middle and upper middle classes left the city centres for the suburbs, during the last two decades they have moved back (Macleod *et al*., 2003).

Cities have trouble to accommodate this new demand for apartments and have seen housing prices climbing very fast. The centres have changed in nature: until the late 1980s large parts were populated by lower income groups that could not afford to move to the suburbs. But during the last two decades, these groups have been gradually pushed out of the city centres that are now mostly dominated by the middle class that are willing (and able) to pay large sums for relatively small homes. In the three cities of this thesis, often even the middle classes can no longer afford a house in the centre. In London, New York and Amsterdam prices have gone too far up, forcing the middle classes to look at the fringes of the centre and pushing the lower income groups ever further out. Cities have acknowledged this shortage of residential space that exists for both the lower and the middle-income groups. In their new neighbourhoods and renovated neighbourhoods they implement programmes to accommodate the needs of both groups.

This movement was most visible in New York and London but can also be observed in Amsterdam where the centre and the fringes of the centre have experienced a boom in housing prices. And although, due to its high levels of affordable housing, these neighbourhoods remain more mixed than their counterparts in New York and London, the trend is the same. The cities al-

ways had trouble to provide enough affordable housing but now they are experiencing that even the middle classes can no longer afford an apartment in the city.

At the beginning of the 21st century, there aren't too many areas left in the centre of cities that can facilitate a planned mix of social, affordable and commercial housing. Sometimes projects in the centre are referred to as the last chance, or the last frontier, to create new social and affordable housing (e.g. City of New York, 2005).

2.1.3 Mixed neighbourhoods

The third characteristic of the projects is that they seek to create mixed neighbourhoods.

During the last decades, opinions have changed on the kind of neighbourhoods a city needs to plan for (Garvin, 2002; Majoor, 2008; Jacobs, 1962). A strong separation of functions between residential and commercial neighbourhoods is not longer the norm. Residential neighbourhoods often lack liveliness during daytime whereas commercial neighbourhoods become quiet and sometimes scary places after working hours. The prestigious commercial neighbourhood la Défense in Paris offers an example of this and there are many others (Swyndegouw, 2005; Trip, 2007; City of Amsterdam, 2001). Thus, in the 21st century cities plan for mixed neighbourhoods that accommodate combined residential and office development and also include cultural, educational and other facilities (Florida, 2005).

2.1.4 Focus on infrastructure

Infrastructure forms an important part of urban development projects. We notice that, with an ever increasing intensity of traffic, the accessibility of places has become of key importance. A short commute is one of the reasons for people to accept a job and is regarded as a valuable asset of the company that aims to hire them (Florida, 2005).

To be successful, a new district has to be accessible. City centres however experience high traffic densities, forcing companies to look for locations at the outskirts of the city or on ring roads. New projects need to focus on infrastructure; they are preferably situated at a hub of infrastructure. This is exactly what the projects of this thesis have in common: infrastructure is an important aspect in all of them. All projects are situated near – existing, newly created and/or renovated – railway and lightrail stations.

Another reason for this approach is that the inaccessibility of the area was widely understood to be one of the main reasons why it took so long for the London Docklands project, a very large urban renewal project that created a business district in the former docklands, to become successful. It took years

before Docklands was connected to the city's subway system (Fainstein, 2001; Foster, 1999). Cities have learned from these mistakes and a 21st century project provides the infrastructure in an early stage of its development.

2.1.5 Sustainable strategies

Nobel and Costa (1999) describe sustainability as the ideal of ensuring continued availability of resources, maintaining standards of living in already developed areas and addressing the steadily mounting concerns about environmental pollution. These concerns have received more attention during the last twenty years.

We may say that the focus on infrastructure and the focus on mixed neighbourhoods go hand in hand with this fifth characteristic. Cities try to implement sustainable strategies, where 'sustainable' has (at least) three meanings: it means foremost that with an ever worsening climate and the constant problems of air pollution, cities try to have new projects developed in an environmentally sustainable way; it refers to policies aimed at reducing the energy use of buildings and at making the mobility of its inhabitants and visitors less dependent on cars.

The second meaning reflects the aim of cities to create their neighbourhoods in such a way that they find a balance between different population groups. They try to not push (all) the present residents out of the deprived areas that will soon be renovated but to create a 'sustainable social climate' of different income groups and different kinds of households (single person, multi family/students and elderly etc.).

By creating the neighbourhoods in a sustainable way, cities also hope that over time the new buildings will not be abandoned but, like their historic centres, will be able to accommodate new functions (City of Amsterdam, 2004). Here economic and sustainable policies become reconcilable. One of the problems of real estate development is to construct the right buildings at the right time. Planning is an important aspect because you can only use one location once in so many years and because it takes so long to develop a building that it may no longer be needed by the time it is finished (Gordon, 1997b; Van der Veen & Korthals Altes, 2009). Buildings that can accommodate various uses will not as easily become redundant as mono-function buildings.

2.1.6 Competitiveness

The projects are not just of local importance. They also matter for the state or country where they are situated; they are meant to accommodate economic growth, and keep global cities on the map of 21st century.

In her thesis on Shanghai's business district Pudong, Chen (2007) discusses literature that seems to hint at a new kind of competitiveness between cities.

What is meant is that the competitiveness is not so much between the factories or the companies within the cities, but between the cities themselves that compete with each other to attract new businesses, preferably the head offices of multinational companies (cf. Swyndegouw, 2005; Castells, 1997).

2.1.7 Public-private cooperation

Urban development projects require cooperation between public and private parties.

Local governments in most western cities, including the three of this study, have embraced models in which they work closely together with private parties. Either in public partnerships whereby some risk sharing takes place or in forms whereby private parties – such as developers and large companies – participate in plan-making processes at an early stage and new regulations are implement to support instead of hindering their wishes and needs.

Macleod *et al.* speak of a development that might lead to the hegemony of entrepreneurial Neo-Liberalism (2003: 1658): "One effect of this new urban politics sees the responsibility for 'regenerating' many erstwhile disintegrating inner-city zones and neighbourhoods falling on the shoulders of so-called public-private partnerships and growth coalitions."

Indeed the case studies discussed here all involve some kind of public-private partnership with a strong focus on commercial interests. Freeman (2000) speaks of a shift towards a negotiation paradigm. The government no longer adopts a 'command and control' model but instead sits round a table with stakeholders. All parties can put their interests on the table and every outcome has the same value. If one party wins something, another party loses. In other words, this is a zero-sum process. The problem is however that the table may not be accessible to the parties who, in sense of social urgency, need to be there most, which may result in a sell-out of (some) public interests (Camacho, 2005a).

2.1.8 Special project areas

The projects are all situated in special project areas; special rules and policies apply to them. Sometimes these rules are a mix of political agreements and informal policies embedded in regular city policies. But there may also be an interplay of hard rules (special policies) and other agreements. The result is more or less the same: the area becomes a separate part of the city (see also Section 2.4)

If one were to draw a map with rules and regulations of the cities where the projects are situated, one would find that all projects are in some respects isolated from surrounding areas. The different rules and policies that apply to the projects mostly concern business-friendly tax rules and subsidies. It is

not uncommon for projects to become special in the sense that a higher layer of government takes over authority for them. In Amsterdam's Zuidas, the city government took authority over the project from the borough, in New York's Battery Park City, the state took over authority from the city.

2.2 The concept of an urban development project

The preceding section provided characteristics of the urban development projects but not a definition of the term. I will refer to the cases as urban development projects. This is meant to be a neutral term that states nothing more than that land development in the sense of the preceding section takes place within a city.

The reason for choosing a neutral term is that the main focus of this thesis is on development agreements that are used in urban development projects and not on the projects themselves. The aim, in other words, is not to contribute to the discussion on the nature of projects or the theoretical differences between various projects.

A short discussion of other terms I found in the literature may help to clarify the choice of this neutral term. It is hard to find a meaningful label for the projects. They have been called megaprojects, city projects etc. In a recent article with a somewhat different focus we have called them strategic city projects (Van der Veen & Korthals Altes, 2009). In this context, 'strategic' refers to the aim of cities to position themselves strategically on a world map of global cities. It is mainly related to the first and sixth characteristics of the projects (Sections 2.1.1 and 2.1.6): cities want to accommodate new economic developments and take part in – and win – a competition to attract prestigious head offices and the jobs that come with them.

Chen (2007) discusses the term urban mega project (UMP). She follows Carmona (2003) who defines a UMP as a single and unitary project, planned, designed and implemented according to determined phases, with different stakeholders, clear goals and objectives, a responsible authority and a predetermined cost and benefit structure.

The mega-part of of UMP refers to the size of the project. The four projects studied in this thesis would qualify under this definition. I find this definition quite meaningless, however, since we may ask ourselves if such megaprojects really exist. In reality UMPs are often better understood as a collection of smaller projects that fall within one plan.

In his thesis on new urbanity in large-scale development projects, Majoor (2008) chooses the term large-scale development projects as a label for his cases. He defines a large-scale development project as a comprehensive and large programme of spatial investments, in combination with a timeline of

investments made by a variety of actors to realise this program, which is located in a geographically bounded area (2008: 24).

He distinguishes between a project and a plan and follows Koolhaas (1978) who names the Rockefeller Center project in New York City as an example of a relatively compact, spatially contained and distinct investment project within a more strategic overall scheme for the development of Manhattan. A plan is a framework for several concrete investments, a project is characterised by its concreteness.

From that perspective, the distinction between a large-scale development project, and a plan becomes vague. Certainly, a project has a more concrete connotation than a plan. But the four large-scale development projects of the case studies considered in the present thesis are also plans that have to be materialised in more concrete (sub-)projects. The projects considered by Majoor (2008) – Amsterdam Zuidas, Barcelona's Forum and Copenhagens Ørestad – are no exception to this rule.

Majoor (2008) speaks of large-scale development projects because of their programmatic characteristics (their size) but also because of their symbolic characteristics. By the latter he means that the projects are laid down in strategic policy documents.

Although the second characteristic in Majoor's definition – the timeline of investments – is meant to distinguish between the plan and the project, I would hold that where large-scale development projects are concerned in the sense that Majoor uses the term, the distinction mostly fails to have real meaning. The projects of my (and his) case-studies are plans and the subprojects of which they consist may not be executed as planned – for example in the event of an economic downturn or other unforeseen events. The Zuidas-project in Amsterdam is an example of a plan that connects several projects. This distinguishes them from concrete materialisations like the Rockefeller Center or, for that matter, the development of a new railway station.

For this study, it does not matter whether the local government chooses the term project or plan since our study does not focus on the symbolic meaning of the term. The decisive feature is that a plan or a project must be associated with a specific area. However, in land use planning, this is almost by definition the case.

I therefore hold that the term project, as found in policy documents, must itself be understood as a rhetorical term. It is often used to suggest a concrete timeframe and specific and measurable actions. It is meant to convince private investors and the public (in that order) that there is not just a plan but a concrete initiative with limited goals. By the latter I mean that projects are framed in terms of competitiveness, mitigation of environmental impact, creation of new residential space and not in utopian terms of greater political ideals such as the realisation of 'a new kind of city for a new kind of man'. Such utopian ideas were found, for example, in the 1960s when the first plans

Table 2.1 Various definitions

Plan	A framework wherein one or more projects take place
Project	A concrete materialisation of a plan
Large-scale development project	Plan that uses the concrete terminology of a project
Urban development project	Neutral term referring to urban development plans in which projects of focus are realised
Focal project	A project within the context of an urban development project on which the case analysis focuses

for Battery Park City were drafted (see Section 5.1.5)

I end this discussion by stating that labels are only meaningful within a specific context. Hence, we do not have to label the larger frameworks wherein the focal projects exist. This thesis focuses on the concrete materialisations within the UMPs, large-scale development projects, urban plans or whatever one wishes to call them. It would have made sense to call the broader context of the projects plans and the focal projects (see Section 2.3) 'urban development project'. The only reason not to do this is that a neutral term should stay neutral; these initiatives refer to themselves as projects, as do the writers we just discussed. I will therefore also call them projects.

To sum up, I choose the term urban development project as a neutral designation for the cases considered. Within these urban development projects, we will discern 'focal projects' (see Table 2.1).

2.3 Focal projects

The focal projects consist of specific projects within the context of an urban development project.

The urban development projects of the case studies are divided into smaller projects (see Table 2.2). These smaller projects range from the creation of parks to the construction of office buildings and from the creation of apartment buildings to the construction of new subway stations. This may be visualised as a kind of tree, where an urban development project provides the overall framework within which a specific project takes place while this project in its turn may provide the framework for a smaller project. An example of this is found in the Amsterdam Zuidas: one of the manifestations of the Zuidas project is the project Mahler4, that consists of 9 buildings that can also be regarded as separate projects (Section 6.3). For this study, the decisive factors are whether the project involves land development and how it is dealt with in the development agreement. The focus is on the agreement between public and private parties on the project, not on the projects that stem from that agreement. The museum that will be constructed in the Symphony tower in the Gershwin project of Amsterdam Zuidas lacks these decisive factors. Focal projects involve one development agreement between one or more planning authorities and one or more private parties.

For this thesis, I had to be strict: I picked only those projects of which I could study the agreements. This results in a variety of focal projects, as some

Table 2.2 Characteristics of the four projects of focus

Urban development project	Project of focus
Battery Park City (New York)	The Riverhouse. Mixed building that focuses on residential space.
	The Verdesian. Mixed building that focuses on residential space.
Hudson Yards (New York)	Subway extension on private land, combined with new towers that will most likely have a commercial function.
Zuidas (Amsterdam)	Mahler4. Eight office towers, one residential tower and some commercial facilities.
	Gershwin. Mixed buildings that focus on residential space.
King's Cross (London)	Main site. Office towers, apartment buildings and various facilities.

agreements only deal with one building (Battery Park City, New York) where others deal with a whole new neighbourhood (King's Cross, London).

Varieties exist not only in size but also in function. The functions range from residential and commercial to other functions – such as the creation of parks and cultural facilities – associated with the development of new neighbourhoods. The agreements in the Hudson Yards project (Chapter 6) mostly deal with the lease of land by the local government to create a subway extension under land where developers want to develop – most probably – large office towers.

The decisive factor that makes the projects comparable is that all focal projects involve agreements between public and private parties and that all projects exist within the context of urban development projects that share the characteristics described in Section 2.1.

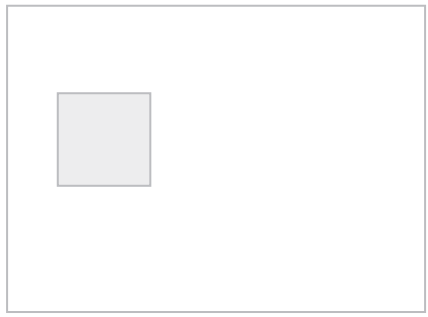
To summarise, focal projects have in common that they all exist within the broader context of the urban development projects and that they all involve a development agreement between planning authorities and private developers. These agreements are the main focus of this thesis.

2.4 Special project approach

We already discussed the special project approach as a general characteristic of urban development projects in Section 2.1.8. In the present section I want to use this approach as a basis for discussion of some of the criticisms that have been aimed at urban development projects.

The special project approach involves the creation of a special project area to facilitate the implementation of the urban development project (see Figure 2.1). The 'special status' of the project is used to create specific rules and procedures that replace normal city rules. In that way, public authorities can circumvent their own bureaucracies and create specific incentives to attract developers. Often a special public entity is created for the implementation. The urban development projects of this study have all used this kind of techniques but not to the same extent. In Amsterdam, the parties intend to start a company in which public and private parties will cooperate. However, at this moment the special project approach is not found in regulations but rather in plans, vision documents and political agreements. In London, the same

Figure 2.1 An area separated from the city



is true for King's Cross: the legal status of the project hardly differs from other projects. This is not true in New York, where special districts are created and where Battery Park City is managed by a special purpose corporation. We should note that the special project approach is often associated with the urban development corporation (UDC). The UDC is an American invention that was also used in England in the 1980s whereby a public corporation received the right to expropriate land and develop it, setting aside the local political structures and instead being only accountable to the state government (U.S.) or the national government (UK) (Foster, 1999). The cases in New York involve the participation of UDCs (see e.g. Section 5.1.3). Here we take a broader view of a special project approach, using the term to cover all situations where a planning authority separates an urban development project from the regular approach of the city involved.

The special project approach has been criticised for a number of reasons (e.g. Fainstein, 1993/2001; Swyndegouw, 2005; Camacho, 2005).

The first reason is that the process of creating special project areas often leaves the public (deliberately) out of the decision-making process. Decisions are now taken by a special purpose entity that is created to implement the plan, and no longer by the city council. This example often affects other authorities as well as the UDCs: a city council may be locked in by commercial interests when it decides on a project.

In addition, the special project approach results in decision-making procedures that exist outside of the regular democratic procedures of (local) governments. This therefore makes it very difficult for elected members to have a full understanding of how decisions within the project area were taken. The problem is that the people who take these decisions are not accountable (at least not to the elected bodies) for those decisions. This approach shows democratic shortcomings and results in a lack of transparency (Edwards, 2006).

Finally, the parties involved in urban development projects may, especially in times of economic downturn, be inclined to give greater weight to business interests than to the broader interests and needs of the city. Commercial interests are said to be in the interest of the whole city – they provide jobs in difficult times – and as a result facilities such as parks and affordable housing projects are cut to a minimum level. The projects of this study all provide examples of this (e.g. Section 7.2.11). When there is no democratic procedure to involve the public in these decisions, the public parties are just as inclined as the private parties to give greater weight to commercial interests than to other interests. The choice is then mostly framed as a choice between the immediate construction of the project that results in direct economic profits for

the city and the long-term sustainable interests that might result in no construction at all if private parties decide to step out of the project.

Still, the special project approach is not only criticised, it is also praised as being less bureaucratic than other approaches and for helping to fast-track the implementation of projects, meaning that it saves time. It is also praised because it implements the interests of private parties instead of creating an adversarial situation whereby the private parties have to fight to have their (legitimate) interests recognised. As a result, projects actually get developed instead of staying plans. Finally, a special project approach urges planning authorities to hire or train professionals to deal with the private parties involved. These professionals understand both sides of the project (the private and the public); in negotiations they are able to defend the public interests when dealing with private parties while they are also able to defend the interests of the private parties towards the public officials (see Table 2.3) (Camacho, 2005a and 2005b).

The critics of urban development projects have convincing arguments (Moolaert *et al.*, 2003; Swyndegouw, 2005). But the special project approach is not necessarily so undemocratic, lacking in transparency and pro-business as to constitute a sell-out of public interests. Development agreements, the focus of this study, offer tools for a more inclusive and collaborative approach (Freeman, 2000; Camacho 2005b) and the in-depth analysis of these agreements contributes to this goal by revealing their structure. If planning authorities understand their agreements better, they may be able to adopt these other models. Planning authorities are often local governments that lack the expertise needed to run a project of this size (Camacho, 2005b; Swyndegouw, 2005; Majoor, 2008). As a result, public parties often do not get the best possible deal, either because of a lack of expertise or sometimes because of political pressure to incorporate the interests of specific businesses (for an example of this, see Section 5.1.19).

An example of these processes is provided by the negotiations on the setting up of the Zuidas Corporation, a public-private entity in which a combination of Dutch government entities and private parties will work together for the realisation of the most expensive part of the project, the dock. The dock consists of a plan whereby infrastructure (lightrail, rail and roads) will be tunnelled over a length of 1.1 km (0.7 mile). The land above the tunnels can then be used for the construction of buildings (see Section 7.1.3). Over the last three years, it turned out that private parties are not willing to bear the (high) financial risks of the project. The corporation will now probably be forced to adopt a model whereby many risks fall within the sphere of the public parties whereas the private parties will receive more powers of control. A Dutch politician writing in a national daily (Het Parool, 2008b) wondered what, in that case, was the point of working together with private parties, since the local government of Amsterdam would have been capable to execute the project by itself. The reason why it does not do that is first and foremost that it wants to

Table 2.3 Negative and positive aspects of the special project approach

Criticisms	Positive arguments
Undemocratic	Unbureaucratic
Too much emphasis on business interests	Balance between public and private interests
Incentive to choose short term interests	At least something gets built
Lack of transparency	Professionalism
Huge investments of public money in special area	Whole city profits from the new project
Not integrated with the rest of the city	New urban space
Growing (social) fragmentation of the city	New job opportunities for local citizens

share the financial risks involved in the project and believes that cooperation with private parties will increase the quality of the project. If the private parties are not willing to accept these risks, it makes less sense to work together with them in one project organisation. Still, political pressure will probably result in a scenario whereby even in that case the public parties will invite private parties to take part in the corporation.

A lack of insight into the process of contracting is one of the reasons why public parties do not always end up with the best possible deal. Chapters 9 and 10 aim to provide this insight. Here we may summarise the argument given there by stating that local public parties often do not incorporate the concept of ongoing negotiations in their vision on contracts but instead choose one 'go/no go' moment when all aspects of the deal are agreed to or not. Representatives of the public can either consent or not consent to a document describing all aspects of the deal (see Section 8.2.8b for an example). Public authorities are often better at making rules than at bargaining to reach an agreement in which the best provisions are built in.

Camacho (2005a; 2005b) has proposed a model to overcome these criticisms. He embraces the use of development agreements but recognises the problems involved in them. He states that his "model recognizes the limitations of prospective, command and control regulation, but seeks to reincorporate principles of community involvement, local and regional equity, and flexible comprehensive planning into agreement formation and implementation. The model embraces a multilateral orientation and seeks to resolve local land use disputes in a way that fosters unbiased, efficient, and well-planned – that is, adaptable, and thus durable – land-use agreements" (2005b: 272).

One of the aims that have shaped this study is to contribute to this way of theorising. Instead of opposing unstoppable developments, there is much to gain from improving the contracts and the contracting processes in urban development projects. The title of this thesis: *Contracting for better places,* reflects this aim.

2.5 Scientific positioning

In the preceding sections we have sketched the context of the urban development projects investigated here. Before we describe the approach this study

takes to them, it is appropriate to position the study within the relevant scientific fields. The present section deals not so much with the methodology of the study (which is discussed in Sections 3.10 and 4.6), but rather with the relation between this study and established scientific disciplines. Starting from the author's fascination with urban development projects and agreements, this study mixes various scientific disciplines. The ingredients of this mix are the subject of this section.

Part of this study may be characterised as an example of sociology of law (Campbell & Wiles, 1980). The starting point of the study is the place of a legal phenomenon (the agreement) in the context of urban development projects. But then the question is turned on its head and becomes: "How do these development agreements deal with urban development projects?" This question provides the basis for Chapters 9 and 10, where an internal perspective on the agreements leads to a normative analysis (cf. Banakar & Travers, 2002).

Campbell & Wiles (1980) draw a distinction between the sociology of law and socio-legal studies, stating that the sociology of law is interested in the relation between the legal order and the social order while socio-legal studies on the other hand focus on problems related to justice and law. In other words, socio-legal studies take a more internal perspective in their aim to improve legal systems. Banakar & Travers (2002) point out that, at least in British law schools, the term socio-legal studies is used for both the sociology of law and the discipline concerned with policy debates on public sector institutions and services. They add that the discussion on the nature of sociological approaches to the law and on whether the sociology of law should be a sub-discipline of sociology or an independent discipline is still in full swing (Barnett & Travers, 2002; Nelken, 2002), and conclude that study of the relation between social theory and law is fruitful, but has not yet reached any definitive conclusions.

The main complicating factor in this discussion is probably that law in itself is a system that deals with most aspects of (social) life. Like economics it deals with all aspects of society but unlike economics it does not possess a single value like efficiency to measure behaviour by (Luhman, 2004; Nelken, 2002; Teubner, 1993).

The distinction drawn by Campbell & Wiles does however help to clarify the approach taken in the present study. The use of techniques such as case studies to understand how development agreements function (see Section 1.4) may be characterised as a 'sociology of law' approach. However, the normative focus of the study on the quality of the agreements reflects a socio-legal approach related to private law. And, if this difference matters, its interest is not entirely sociological. By this I mean that urban planning, the discipline of the development of cities in an efficient and sustainable way (Camacho, 2005a), may also offer a framework of reference here. In the last resort, development agreements aim to contribute to an efficient and sustainable use

Table 2.4 Elements of the study

Sociology of law approach	Socio-legal approach	Planning studies approach	Emphasis on private law
The study finds its point of departure in the author's fascination with development agreements in urban development projects.	Normative focus on the content of agreements within the context of public-private cooperation in urban development projects.	The study derives its subject from the context of urban development projects and aims to contribute to the creation of 'better places' as reflected in the title of the thesis.	The study focuses on the content of contractual agreements, not of public law documents.

of scarce space in the city. As a result, they are both social phenomena and planning devices (see Chapter 3 and Section 4.4). The term socio-legal covers the planning function when used in the context of policy studies. The distinction drawn by Campbell & Wiles helps to separate the two interests. We may thus conclude that the study combines interests derived from the sociology of law and socio-legal studies, whereby the context of urban planning defines the aim of the contracts and private law – or the law of obligations – defines which documents are subject of study and which are not (see Table 2.4).

2.6 Comparing agreements from different legal systems

Now that we have positioned the study in its relation to scientific disciplines, we are left with the problem of comparing legal agreements closed in different projects in different legal systems. Every study that conducts research in more than one system must explain why it thinks that it can compare outcomes from different systems. Different countries and different legal systems are associated with different institutions, different languages and different mentalities. Nelken (2002) makes us aware of the main problem of comparative research: in some cases, the findings of a scholar studying another system may tell us more about the preoccupations of his home system than about the system under study.

Since the main part of the present investigation is dedicated to the study of legal documents, the first fact that one should be aware of is that the projects are situated in three different countries, each with its own legal system. The English legal system and the American legal system are known to be part of the common law (the law of Anglo-American systems) whereas the Dutch legal system can be regarded as part of the civil law system, the dominant legal system in the world. The civil law is also known as Romano-Germanic law (Zwalve, 2000; Zweigert & Kötz, 1998).

Questions may arise about the importance of these differences for this study. Development agreements are legal documents with many other dimensions. The prevailing legal culture explains the way in which these contracts are drafted, whereas the nature of the project and the relation between parties explains the content of the provisions. We therefore need some awareness of these differences and the debate on their importance before we can move to the main subject of this thesis, the content of development agreements.

2.6.1 Law-as-culture

When society changes, the law will not automatically follow. While it may be true that important political, economical and cultural changes will sooner or later be reflected in a legal system, a one-on-one relationship between law and society does not exist. Law operates in a society and is at the same time an autonomous system. The law does not get its validity from a source without the law, it is self-referential (Luhman, 2004; Teubner, 1993; Luhmann, 1986). In his work, *Law as an autopoetic system*, Günther Teubner (1993) describes the law as a self-referential, self-reproducing system that is adaptive to its environment. Key terms are: autopoiesis, self-reference, self-description, reflection, self-organization, and self-regulation. Notice all the 'self'-words: a legal system is first and foremost a system that keeps itself alive through various processes of reproduction. The next question is then how many of these legal systems exist and how they are related.

Another difficulty is the tension between a legal culture and the culture of a society. The cultural approach to comparative law starts from the proposition that legal cultures exist and that there are, generally speaking, four legal cultures. The first is the Western culture that is characterised by its rationality and individualism, the second is Asian culture, known for the emphasis it puts on moral, religion and Confucian principles, the third is Islamic based on the Koran and the final one is African legal culture, which does not separate itself from religion and morals and starts from a collectivist rather than an individualistic point of view (Van Hoecke & Warrington, 1998).

Van Hoecke and Warrington (515) offer 6 basic elements of a legal culture: a common legal culture will have shared understandings on at least these six points.

1. *A concept of law* – What is law? What is its relationship to other social norms?
2. *A theory of valid legal sources* – Who has the power to create law, and under what conditions? What is the hierarchy of the legal sources? How, and by whom, are problems of collision between legal sources solved? What is the respective role of the various legal professions? Are non-legal texts or decisions, such as religious ones, direct sources of law?
3. *A methodology of law* – both for the making (at least if there is any deliberate law-making in the legal orders concerned) and for the adjudication of law. This consists in the first place in interpretation of the law. To what extent do the adjudicators of the law have the freedom and/or the duty to interpret the law? Which methods of interpretation may be used? Do they have any hierarchical relationship? Which is the standard style of writing, e.g. for statutes or for judicial decisions?
4. *A theory of argumentation* – Which kinds of argument and of argumentation strategy are acceptable? Are these strictly legal elements, or social, eco-

nomical, political, ideological and religious ones as well?

5. *A theory of legitimisation of the law* – Why is law binding? What if it conflicts with some other, non-legal, social norms, such as religious norms? What kind of legitimisation may give a binding force to the legal rules: a purely formal or (also) an ideological legitimisation (e.g. moral or religious values)? What kind of legitimisation gives the whole legal system its binding force? Is it sociological, historical or axiological? And, in case of more than one kind of legitimisation, in which combination and under what conditions do these various legitimisations apply?
6. *A common basic ideology: basic values and a common basic worldview* – A common view of the role of law in society and of the (active or passive) role of lawyers. A view on which problems are considered to be *legal* problems, to be solved properly by the legal system, and which (such as moral or economic problems) remain outside the realm of the law.

Within cultures, legal families can be distinguished. In Western legal culture two legal families exist, the first being Romano-Germanic, the second being Anglo-American. The families are also known as civil law and common law respectively. The two families are both determined by their rationalist and individualist view on man and society, by a positivist view on law – unmoral law is still law – and an instrumentalist view on law: there are formal procedures to make law.

Differences also exist between the two families. Differences are found, for example, in the third and fourth area (the methodology and the argumentation). But, since both families are part of the same culture and share so many characteristics it is possible to compare them.

Van Hoecke & Warrington note that we have to recognise that the context is an important part of comparative research (1998: 532): "This context is not only the material context of sociology, history, economy, but also the ideological context of the law and what could be called the "juridical way of life" (i.e. all elements not belonging to ideology in the strict sense but, rather to tradition, or to fashion)."

Within the law-as-culture approach they distinguish three levels of comparison:

1. Legal systems have to be located in the context of large cultural families on a world scale.
2. Within the cultural families, comparative law is possible and should start from the basic six elements named above.
3. A technical comparison is possible when systems have the same paradigmatical theories in each of those six areas, like the civil law countries of the European Union.

Common law and civil law can be said to be different families but they are also part of a common Western culture that makes it possible to compare the two. This can however not be a purely technical comparison since cultural differences between the two systems do play a role, as do other sociological, historical, and anthropological factors.

Legal culture is not only found on a world scale, it also exists at a national level. We may define a national legal culture as the view that aspects of law are themselves embedded in larger frameworks of social structure and culture which constitute and reveal the place of law in society (Nelken, 2002: 333). The relation between a legal culture and society as a whole is what makes the concept complex. And it is especially hard to know whether a certain phenomenon – such as the way contracts are commonly drafted – is caused by the legal culture or by another cultural practice. Still, the notion of a legal culture is helpful. Common law culture does exist, as does civil law culture. Within those cultures various differences can be found that are related to national legal cultures. Nelken (2002), for example, refers to Blankenburg and Bruinsma (1994) who find that Germany has one of the highest litigation rates with regard to traffic incidents, whereas the Netherlands have one of the lowest, despite the cultural and social similarities and economic interdependency of the two countries. Blankenburg & Bruinsma explain these differences by referring to the paralegal alternatives to litigation (the supply side of law) that are absent from the German system. We may call this a difference of national legal cultures, but Nelken (2002) notes that it is doubtful whether the presence of such alternatives in Germany would also lead to a reduction of litigation rates there. In other words, what counts as an alternative to litigation in one society may not be regarded as such in another. The question then becomes: what can be explained by national legal culture and what by national culture?

For a socio-legal approach to law, both perspectives matter: we should locate a legal system in one of the four above-mentioned legal cultures, in its legal family and at the same time be aware of the legal culture of the country of study and its relation to society. This is a less complicated task than it may seem, it has more to do with making explicit what one is normally aware of when conducting research in various systems. The law-as-culture approach tells us that we should be aware of context and of the limits of cross-country comparisons, but we need to move one step further in the present study since our analysis takes place on the level of development agreements and not of statutes and rules. This demands a more instrumental approach to the study of the content of those agreements.

2.6.2 Functionalism

Opposed to the law-as culture approach is the functionalist approach. Functionalists hold that, with the exception of those parts of the law that are in-

tertwined with national culture, all modern economies need the same rules. If economic systems are converging, then their laws must also be. Zweigert & Kötz (1998: 40) state that: "(...) if we leave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively 'unpolitical', we find that as a general rule developed nations answer the needs of legal business in the same or in a very similar way. Indeed it almost amounts to a '*praesumptio similitudinis*' (...)".

This praesumptio similitudinis does not mean that rules are found in the same place. The structure of a legal system may very well cause a rule that is found in the private law domain of one system to be part of the public law domain of the system with which it is compared. A functionalist denies the importance of these different categorisations but instead focuses on the function the rule performs.

If he were to find a rule applicable in Dutch law, he should presuppose that English law probably has a rule that performs the same function and then start looking for it.

The position of the functionalist only makes sense when one takes an external view of the legal system; he is not interested in the function of a rule in a legal system but rather in its function in society. We may conclude that the law-as-culture approach on the one hand and the functionalist approach on the other might be irreconcilable but first and foremost they operate on different levels. The law-as-culture approach operates on the level of mentalities, the inherent meaning of rules in different legal cultures. Zweigert & Kötz stick to the more down-to-earth level of the rule itself and the function it performs.

Thus, when on the one hand a functionalist would say that all legal systems have adopted rules of good faith in consumer law or rules that perform a similar function, and on the other hand Teubner (1999) states that the rule of good faith that was imposed on English law by a European directive on consumer protection may very well be a different kind of good faith than the kind a continental lawyer is familiar with (Teubner calls this kind of transfer of a concept to another system a 'legal irritant'), both views may be right. The question is: are the functionalist and the law-as-culture scholar on the same wavelength? I would argue that they are not, unless they transform their discussion into one on 'legal transplants' (the concept of transferring a rule from one system to another). If the functionalist holds that a rule from the system of origin will have the same meaning in another system, the law-as-culture scholar may respond that this is not at all sure.

A functionalist approach to law in this study means that we look at legal agreements simply as documents with a function to perform.

Nelken (2002: 344) mentions a trend towards a pragmatic legal instrumentalist view on the law, on the basis that a rule should first and foremost do its job. I would like to take this notion one step further and state that his view

Table 2.5 Approach to study

Law-as-culture	Functionalism	Pragmatic legal instrumentalism
Awareness of differences between: 1. Legal cultures 2. Legal families 3. National legal cultures	Focus on the function of a rule, not on its legal characterisation.	Combines awareness of cultural differences and the importance of context while remaining aware of the strategic function of contracts.

does not mean to deny the notion of a legal culture, but regards law primarily as something with a function to perform. This is an external view of the law, since it judges a rule on whether it is fit for purpose. It makes sense to take this perspective on development agreements, which are in themselves meant as strategic documents, drafted as a means to an end. In that sense pragmatic legal instrumentalism is the most helpful approach to the agreements of this study.

The three approaches to study are summarised in Table 2.5.

2.7 Differences between common law and civil law

Legrand (2003) states that there is an unbridgeable gap between the common law and the civil law systems, not so much because of their differences on the level of rules, but rather because of the different mentalities of the systems.

Differences between the common law and the civil law can hardly be denied. The historical roots of the systems differ, the methodologies they use to discuss a legal problem differ, as do their legal categories (Smits, 2002; Zwalve, 2000). At the same time, Legrand (2003) argues that common law and civil law are such broad denominators that they lack meaning in specific circumstances. The systems have different mentalities but knowing whether one system is part of the common law or the civil law family has no predictive value for the content of a specific rule. It is rather a question of mindset, of mentality. A common law lawyer and civil law lawyer live in different worlds and will probably have a hard time when they want to discuss the approach to a specific case. But I would not argue that the two could not communicate at a rule level. When one thinks in terms of existing problems and not of legal categories, it is possible to understand each other. This study focuses on the problems lawyers had to solve in their contracts. The question then becomes: can we understand these problems and see how the specific section in the legal agreement aims to solve it? This however, is not so much a strictly 'legal comparison' but results in a multi-dimensional analysis of agreements (see Section 2.8). The above-mentioned notion of pragmatic legal instrumentalism is also applicable here (see Section 2.6.2).

2.7.1 Different mentalities

The common law and civil law systems have different roots (see Table 2.6). The roots of the civil law are Romano-Germanic and those of the common law system are the laws of 12th century England (Zwalve, 2000).

Table 2.6 Differences in mentality between civil law and common law

Civil law	Common law
Romano-Germanic roots	Roots in 12th century England
Deductive methodology	Inductive methodology
Contracting takes place within the context of existing codifications and statutes	Contracts are approached as statutes; the context is explicitly written down
Law is predominantly thought of in its relation to the state	Focus on relation between law and economy

Generally speaking, the main difference between the two families may be said to be that between an inductive and a deductive method of legal reasoning. The method of legal reasoning in the common law is inductive: arguments start from the case, not from the general rule. In civil law, it is the other way around: the legal arguments depart from legal – and mostly codified – principles and apply them to the facts of the case. These methods are better regarded as general approaches or starting points than as absolute differences: in the end we may sketch the common law method of reasoning as inductive-deductive and the civil law method as deductive-inductive (Lordi, 2002).

We will also encounter these different mentalities in the cases studied in this thesis: a civil law lawyer uses his civil code as the starting point for writing his legal agreements. A common law lawyer on the other hand starts from the case and will – in a manner of speaking – write his own statute and call it a contract. If he thinks any statute to be of particular importance he will incorporate its provisions in his contract by quoting the relevant articles or definitions. Here again, we may also say that a civil law lawyer uses the civil code and case-specific agreements whereas the common law lawyer works the other way around (and then refers to statutes and general rules).

The systems are not so different that a civil law lawyer could not take a common law approach (and vice versa). In fact, the common law approach to a contract can, and often is (Flood, 2002), used for civil law contracts. The difference in approach reflects the difference in mentality that we are discussing here rather than an unbridgeable gap between the legal systems concerned.

Another difference of mentality is that despite the shared individualist world view of the two families, common law scholars and practitioners are inclined to judge the quality of a rule with reference to its economic efficiency. Civil law scholars and practitioners put the unity of the system up front (Smits, 2002; Nelken, 2002). Civil law countries have all adopted civil codes and this may be an example of the stronger relation between the state and the law than in common law countries where the unity of the system (a state task) is traditionally regarded as less important.

We will now discuss three striking instances of the difference between the common law and civil law systems, with reference to the notions of codification, good faith and consideration.

2.7.2 Codifications, good faith and consideration

Codifications

Civil law countries had all codified their laws by the 19th century or the very beginning of the 20th century. The common law is based on principles derived from case law, the decisions of the highest courts. Statutes do of course exist but they only apply to the situations for which they are specifically written. Even the more general attempts to codify legal principles have a more concrete meaning than the general principles of the European civil codes (Smits, 2002; Zweigert & Kötz, 1998; Zwalve, 2000).

The general attempt to collect the principles of private law in one book is typical of civil law. Some authors hold that because of these codifications civil law systems are less flexible and creative than common law systems (Posner, 1992).

Good faith

The good faith principle in civil law systems is a general norm, found in most civil codes, which can be used to interpret, complement and set aside contractual terms or statutory duties (Rijken, 1994; Hesselink, 1999). The principle applies to the whole body of private law (Hartkamp, 1996). In the end, good faith is a general standard of fairness.

In comparative law the term general or objective good faith has been used (cf. Hesselink, 1999; Brownsword, 1996) to distinguish the civil-law principle from its common law counterparts.

While the term 'good faith' is often used in common law contracts, it does not have an independent meaning. A 'good faith' standard is a standard of honesty that can be used to interpret other duties. There is no such thing as an objective principle of good faith, or a general standard of fairness in common law systems (Summers, 2000; Chitty, 2004).

Some differences exist between English and American law (see Table 2.7). English law has not adopted a good faith principle but American law has codified a principle of good faith that refers to fair dealing and trade standards in the Uniform Commercial Codes that most states adopted in the course of the 1960s (Summers, 2000; O'Connor, 1999; Brownsword *et al*. (eds.), 1999; Burton, 1980). The principle there is also intended to implement a duty of honesty in contracts. It does not, for example, apply to the pre-contractual phase nor can it provide a basis for independent duties. This is the main difference between the common law and civil law approach. In the following quotation, the renowned American jurist Allan Farnsworth (1928-2005) comments on the UNIDROIT principles for international contract law where the principle of good faith is introduced and the hope that the common law will adopt this principle in full, in a way that clearly illustrates the difference in mentality between the two systems (see Section 2.7.1). "Civil law lawyers demonstrate

Table 2.7 Good faith principle in three legal systems

Dutch law (civil law)	English law	American law
Good faith principle is the crucial open standard. It can interpret, complement and even set aside existing duties.	Good faith is not absent from English law but it does not exist as a general principle.	A good faith principle is found in the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts. It is a general duty, but cannot be used as an independent source of obligations.
Good faith also applies to the negotiation phase.	As a general rule, good faith does not apply to the negotiation phase. Specific legal categories have to be applicable.	As a general rule, good faith does not apply to the negotiation phase. Specific legal categories have to be applicable.

an unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines. While a common law lawyer would not combine the doctrine of good faith with that of unconscionability, it is not unheard of for a civil law lawyer to argue that a party who seeks performance of an unconscionable contract does not act in good faith. While a common law lawyer also would not confuse the doctrine of good faith with that of frustration of purpose, it is not unheard for a civil law lawyer to state that a party who seeks performance of a contract after its purpose has been frustrated also does not act in good faith. In this fashion, many contract doctrines can be subsumed under a single amorphous doctrine of good faith" (Farnsworth, 1995: 60-61).

The common law prefers piecemeal solutions for specific situations to a general principle. The ongoing debate on this topic (Bridge, 1999; Campbell & Vincent-Jones, 1999; Wightman, 1999; Summers, 2000; Chitty, 2004) has not yet led to any appreciable change in this common-law approach.

Consideration

A third important difference between common law systems and civil law systems that we need to discuss here is that the common law requires a 'consideration' for a contractual obligation to come into existence whereas civil law systems do not. While this requirement is not in fact mentioned explicitly in the legal documents studied here (see Section 4.2), it is such a basic principle in common law (Chitty, 2004) that the legal documents analysed here cannot be properly understood without some awareness of its significance.

In common law countries, as a general rule, every contractual promise must be supported by consideration – something of value in the eyes of the law – to be enforceable; without consideration, contractual promises are unenforceable. A promise by C to give D an amount of money with no obligation on the part of D other than to accept the gift is thus in principle unenforceable in a common-law court of law because C's promise is not supported by consideration provided by D. Such a requirement does not exist in civil law systems.

The consideration requirement is also important when contracts are modified. The 'legal duty rule' states that a promise to perform an existing duty is not a consideration. This rule can be illustrated as follows.

Suppose that A has contracted to build an office tower for B, for the price of € 1 million. While the work is in progress it turns out to take more time than A thought when he signed the contract. B agrees to pay him € 1.1 million

Table 2.8 Some differences between civil law and common law

Civil law	Common law
Most general principles are codified	Most general principles are formulated in case law
General principle of good faith	The requirement of good faith is embodied in various legal categories
Consideration is not required for a contractual duty to be enforceable	Every promise has to be backed by consideration

instead of the original € 1 million if he finishes the work within the agreed period. The legal duty rule holds that B is not liable for the extra € 0.1 million because A's duties have not changed and the original consideration was € 1 million.

This rule also works the other way around. Suppose that A owes B € 1,000. A later agreement states that B will accept € 900 instead of the € 1,000. This amendment is in principle unenforceable by A. In other words, even if A can prove that B agreed to accept the € 900, the amendment would be void because the original consideration was € 1,000 and nothing has changed with regard to B's duties.

2.7.3 Weighing up the differences

Discussions of the nature of the differences between common law and civil law tend to focus on two key concepts, substantive shift and convergence.

Substantive shift

While differences between common law and civil law systems still exist, the systems are also members of the same overall culture (see Section 2.6.1) and share significant experiences. One of the most important experiences of the 20th century is that courts in both systems have focused on principles that allowed them to come to a fair decision in specific cases rather than on formal rules. We may call this development the substantive shift. One of the scholars who makes this substantive shift full part of his view of the legal system is Melvin Eisenberg (2000). His theory of dynamic contract law starts from the normative thesis that contract law reasoning "should be substantive rather than formal, and that the rules of contract law should, where appropriate be individualized rather than standardized, subjective rather than objective, complex rather than binary, and dynamic rather than static" (Eisenberg, 2000: 1745). Eisenberg's positivist thesis is that Anglo-American law has indeed undergone this development.

In civil law countries, substantive shift was mainly achieved by using the good faith principle (Zimmermann & Whittaker, 2000). In common law countries, other principles, such as promissory estoppel, unconscionability, and (notions of fairness in) implied terms, specific performance and injunction, were used to achieve the same results (Chitty, 2004). Gjerdingen (1993) speaks in this respect of the end of classical common law culture. In classical common law culture an ideology of non-state interference and personal autonomy prevails, resulting in a state that has no role in redistribution of welfare

and that should not interfere in the private affairs of its citizens. As to the disputes, judges use common-law categories to rule on a case but do not look behind those categories. This means that when an individual contracted in way that strikes us as unjust but that is not illegal, he should win the case.

Gjerdingen holds that the law has changed but the way in which the law is discussed by legal scholars and lawyers has not. In other words, classical common-law liberalism no longer exists in the courts but most writers keep using it as a common background.

There are many similarities between Gjerdingen's view of classical common law culture and the liberal culture in civil law systems of the late 19th and early 20th century (Zimmerman & Whittaker, 2000). The difference may be that, as Gjerdingen puts it, while civil law theory has already fully embraced the changes that have taken place over the past century or so, common law theory has not yet done so. In fact, the changes are often regretted, since they reflect an interference of the state with the content of contract. Gilmore (1995) goes as far as speaking of the death of contract. We already saw that common law culture is more closely linked to economic rules than civil law culture.

Convergence

The convergence thesis holds that the legal traditions of common law and civil law systems are converging, which should make unification of their laws ultimately possible (Smits, 2002). The main causes of this convergence are Europeanisation and globalisation. The question is now whether this convergence takes place at a surface level related to institutions, the binding force of precedent, the sources of law and the ways of reasoning employed or at a deeper level concerning fundamental questions about the nature of law, the functioning and content of rules and the role of law in society (Smits, 2002: 103). Convergence of the legal systems at surface level is not much disputed, but the existence of convergence at a deeper level is still under debate. Legrand (1996) and Teubner (1998) state that there is no convergence at this level, whereas others hold that it does exist (cf. Smits, 2002). The existence of convergence at rule level can hardly be denied, but there is no convincing proof that legal traditions or even national legal systems are converging at a deeper level (cf. Smits, 2002; Nelken, 2002). The substantive shift discussed above as a common experience of western legal systems cannot be taken as evidence of a wider convergence.

2.8 Dimensions of a transaction

Before we move towards the main subject of this thesis – the content and functioning of development agreements – we may ask ourselves why parties enter into transactions. The existence of a legal system that secures their

rights and obligations would probably not be a sufficient inducement: they would not be likely to enter into a transaction if they were not expecting to gain from it, and if they did not trust their counterparty in the transaction enough.

In this section, we will discuss a short overview of approaches to the questions of why parties enter into a transaction and how they see the task of the law in this context.

2.8.1 Three approaches

We may distinguish three approaches to the question of why parties enter into transactions. The first approach holds that the parties' calculations have shown sufficient proof that a specific transaction will be profitable for them. The second approach holds that the deliberations of a party do not only focus on economic profitability but that other reasons apply as well. Of those reasons, trust is arguably the most important one. Another important reason to enter into a specific transaction is the wish to invest in a long-term relation. This may lead a party to accept less favourable terms or a smaller profit than it is used to because it expects that the relationship with the other party will be more profitable in the long term. The third approach is intermediate between the other two: it takes the same starting point as the first approach but tries to calculate the costs of the other aspects included in the second. For instance, it may take the costs of leaving a long-term relationship and starting up a new one into account. But its main focus is still economic profitability. I will refer to these three approaches as the law and economics approach (Cooter & Ulen, 2004; Posner, 1992), the relational approach (Campbell & Vincent Jones, 1996; Macneil, 1980), and the transaction costs approach (Williamson, 1985; 1981) respectively.

In the cases investigated in this study, public parties are always a party to the transaction. This, however, does not change the picture of this analysis for two reasons. The first reason is that when governments act in their private law capacity, they are also (but not only) commercial parties since they need to make a profit to realise their (public) goals. Thus, economic reasoning forms a part of their behaviour. The second reason is that we will use an approach that focuses on specific contractual relations, this means that the fact that one of the parties in a transaction is a public party may influence the relation between the parties (and therefore the agreement) but not the analytical approach to it.

2.8.2 The law and economics approach

The law and economic approach has its roots in the Chicago school (Posner, 2007) and holds that the inherent purpose of a legal system is to find the most

efficient rules. It incorporates the economic approach into the law (Thomas & Ulen, 2004). It pictures the individual as a utility maximiser. Whenever a party wonders whether he should enter into a transaction or not, he should make a calculation to find out whether the specific transaction will maximise his utility. A transaction will maximise his utility when he trades a good for the highest price, or buys the good for the lowest price. If a party can choose between two similar products from two different sellers, he should buy from the seller offering the good for the lowest price. And when he trades a good, he should sell it to the buyer who is willing to pay the highest price.

The main reason for a party to enter a transaction is that he has reason to believe that the transaction will maximise his utility. The legal system should facilitate the enforcement of the most efficient rules. It fulfils an important role in the construction of markets. And it makes sure that parties will perform their duties. In doing so, it abstracts from the actual behaviour of parties both normatively and descriptively. The law and economics approach holds that parties are utility maximisers, and if they are not they should be, as rationality requires parties to enter into a transaction because it maximises their utility.

2.8.3 The relational approach

The relational approach states that transactions are embedded in relations between parties (Macneil, 1980; Collins, 1999). There are other norms and reasons than the combination of economic profitability and legal security that constitute a decisive part of the decision as to whether or not to enter into a transaction. Relational aspects are decisive in this context. The attitude towards transactions adopted in the relational approach may be said to be similar to that found in sociology. It examines what parties actually do when they enter into a transaction. In other words, while the law and economics approach holds that one should enter a transaction if it enhances one's calculated utility, the relational approach holds that this calculation is only part of the story and does not in itself provide the basis for a normative theory (Macneil, 1980; Collins, 1999).

In the relational approach, trust plays an important role. Trust is commonly defined as three different kinds of expectations (Sanner, 1997: 54):

1. Expectation of the persistence and the fulfilment of the natural and the moral order.
2. Expectation of technically competent role performance from parties involved with us in social relationships and systems.
3. Expectation that partners in interaction will carry out their fiduciary obligations and responsibilities, that it is their duty in certain situations to place the other's interest before their own.

An element that is often added to the definition of trust is risk. Since trusting someone is essentially a gamble, risk is what distinguishes trust from confidence. Confidence is a legitimised variation of trust; this means that a party bases his confidence on reasons outside himself, and when it is violated he will probably not blame himself. Whereas when his trust is violated, he will probably also blame himself for trusting the counterparty (Weber & Carter, 2003).

Collins (1999) distinguishes three functions of trust in the decision of parties as to whether to enter into a transaction or not. (1) Trust guides the selection of other parties. If one party trusts another party it will probably not examine every detail of the latter's organisation but will rely on previous positive experience or the previous experience of others. (2) Trust overcomes the problem of the vulnerability of the first mover and serves to reduce the complexity of the information to be considered about a transaction. Trust makes it possible to reduce the complexity of the available information. Parties that trust each other will decide that the actions of the other party are to a certain degree predictable (since they fulfil, or have fulfilled in the past, the three expectations mentioned above). Hence, they don't need to examine every detail of the other party's behaviour. (3) Trust reduces the need to guard against disappointment by making very specific contracts in which a party explicitly guards itself against every eventuality. Instead, parties trust that the other party will fulfil reasonable expectations.

The legal system, as Collins states, plays a role in this process, and parties may put their faith in the legal system. But its importance should not be over-estimated. A legal sanction is only one of three possible forms of sanction, and will often not be the most effective one. The other two forms are the non-legal sanction of a refusal to deal with the other party in the future if he does not fulfil his obligations and the non-legal sanction of self-enforcement, which is constructed by using legal rules but does not require litigation. An example of this kind of sanction is provided by the pawnbroker who keeps the pawned object when the money he has lent is not repaid.

Collins (1999) concludes that a close examination of the way in which people decide whether to enter into transactions leads to the conclusion that the role of law is at best peripheral and in many instances irrelevant. Trust and sanctions are vital in order to overcome the risks of betrayal and disappointment, but within this mechanism the legal sanctions available for breach play only a marginal role.

2.8.4 Transaction costs approach

A transaction costs approach takes the findings of the relational approach into account and reformulates them as costs (Williamson, 1985; Williamson, 1981; Macneil, 1978). It thus states that parties when they consider if they will

enter a transaction also take the costs of the transaction process and other costs into account. When a party (A) wonders whether he should enter into a transaction with another party (B) with whom he has dealt to his satisfaction for a number of years, or with a party (C) of whom he has no experience but who offers a better price, the transaction cost approach will not ask which counterparty is most trusted, nor will it focus only on the best price. Instead, it will ask what the costs are of not dealing with the party A has dealt with for years. What are the costs of negotiating a new deal? What are the costs of getting to know the other party well enough to be willing to enter into the transaction with him? In other words, what are the costs of leaving the business relation with B to start up a new one with C?

The transaction cost approach thus remains faithful to the law and economics approach, but goes further. It holds that the most profitable transaction is not the one that promises the lowest price, but the one that results in the lowest costs together with the highest profit after all transaction costs have been calculated. In contrast, the relational approach denies that it is even possible to estimate all costs that are involved in a transaction and holds that even if it were possible, parties would never do that because the costs of calculating all transaction costs are too high (Macneil, 1978).

2.8.5 Balancing the above three positions

In the case studies described in this thesis, private parties were asked why they entered into the transaction in question. Their answers can be summarised as: "first the price, and then a number of other reasons follow." These parties however were successful enterprises, not individuals. Individual agents of those parties often trusted their instincts or first impressions but then had to wait until their financial departments had done their calculations. Still, they all stated that those calculations were in the end not the only reason why they would decide to enter into a transaction. Since calculations can only predict next year's market situation or quantify the risk of delay to a certain (limited) extent, trust in both the project and in the other's party willingness to act reasonably was almost equally important. In brief, the reasons for entering into a transaction are complex and only a part of them (although arguably the most important part) are economic ones.

However, a law and economics approach cannot explain why parties invest in projects that are profitable but seem less profitable than other projects, whereas both the relational approach and the transaction costs approach can easily explain this. The most important flaw of the relational approach, on the other hand, is that it can only tell us that an unlimited number of aspects matter when parties enter into a transaction (see Section 3.10). It does not help us to choose between these aspects. Still, an open approach that starts its analysis from the relation between parties is the most attractive one for

the purposes of this thesis because it does not force us to reduce the complexity of reality in advance. and it can easily incorporate the aspects related to the maximisation of cost efficiency and utility without neglecting other aspects.

2.9 The place of the contract in the context of the deal

Collins (1999) distinguishes three different frameworks in which contractual behaviour takes place, namely that of the business relation, that of the economic deal and that of the contract. These three frameworks are characterised by different types of reasoning and different types of communication systems (see Table 2.9).

1. *Business relation* – The business relation between parties both precedes the transaction and is expected to persist after performance of the obligations. Trust and trustworthiness are essential elements of this relation (cf. Section 2.8.3). Collins states that failure to keep a promise that was only sealed by a handshake may be understood as a deliberate signal that the business relation is no longer a source of trust. And equally, if a party performs a duty that was only sealed by a handshake but was not legally enforceable, this performance may enhance trust.
2. *Economic deal* – The framework of the economic deal is the agreement between parties which specifies the reciprocal obligations created by the discrete transaction and which establishes the economic incentives and non-legal sanctions (Collins, 1999: 129). It suggests a calculus of short-term and long-term economic interests by which to measure and assess contractual behaviour. Its key term is not trust; instead, parties use rational self-interest as the reference in their communication system (cf. Section 2.8.2 and 2.8.4). The presence of a legally enforceable contract makes little difference to the credibility of commitments (1999: 130). Parties act in a cooperative manner, not because they feel they have to, but because they expect a profit from it. A contract, or contract law for that matter, cannot force parties to act in a cooperative manner.

   Economic transactions can be described as non-cooperative games (Collins, 1999: 132). It should be stressed that the non-cooperative game model also provides a basis for understanding cooperative behaviour. It is derived from game theory and states that most transactions occur within a trading relation that persists over a period of time. Thus, normally not one transaction but a series of transactions exists. A party will only act in its short-term self-interest if it regards the specific transaction as the last of a series. And it will only be willing not to regard a transaction as the final transaction if it expects more benefit from the continuance of the series of

Table 2.9 Three frameworks of contractual behaviour

Framework	Description	Frame of reference
Business relation	Expected to persist after performance of obligations	Trust
Economic deal	Financial incentives and non-legal sanctions to perform obligations	Self-interest
Contract	Standards of the deal that are provided by self-regulation	Rights and obligations established by formal documents and customs

transactions than it expects from the short-term benefits of the endgame. In other words, only in the latter situation will it not cheat. In most cases, professional traders will expect more benefits from the continuance of the transactions since the benefits of a one-time cheat are unlikely to exceed those of an indefinite number of transactions.

Collins (1999) provides in this context the example of a consumer's purchase of goods in a store. This kind of transaction is likely to be one of an indefinite series of transactions. Only in the final transaction does an incentive exists for the shopkeeper to sell goods that he knows to be defective (i.e. an incentive to cheat). But because this is a non-cooperative game and series of transactions are inherently unstable, the consumer may be afraid that the shopkeeper will regard the current transaction as the final one; as a result, the consumer may be unwilling to enter the transaction. The solution to this problem lies in ensuring that for every transaction in the series, the shopkeeper will profit more from continuing the series than from cheating which would result in the consumer withdrawing from the series of transactions. In case of retail sales, this condition is likely to be met.

The transactions (projects) examined in our case studies take place over a relatively long period of time. Parties are then forced to adopt a more cooperative attitude, since they need each other to realise the project. Still, this provides only more incentives to act in cooperative manner, whereas it does not change the conclusion that cooperative behaviour (within the economic framework) is better analysed from a non-cooperative perspective.

3. *Contract* – The framework of the contract is the third normative framework that Collins distinguishes. This framework is constituted by the standards provided by the self-regulation contained in the contract. The frame of reference consists of the identification of rights and obligations established by any formal documents, explicit agreements and accepted customary standards.

Of the three frameworks, only the third (the specific obligations laid down in the contract) is one where a default will result in an award of damages or other relief by a third party. But facilitating these awards of damages and other reliefs is not necessarily (and will often not be) the main function of a contract (here understood as a legal agreement). The main function of the contract will often be to enable the parties to formalise their agreements in a specific document, without any expectation that they will ever use that contract

in a legal dispute. The contract is merely used for "the purposes of clarifying the problem and determining the allocation of risks and liabilities in advance" (Collins, 1999: 131). In other words, the contract has a planning function. Collins wants us to distinguish between how the law thinks about the contract, and how the contract thinks about the relation between parties. The contract may contain provisions that the law regards as unenforceable but that parties consider as binding. He therefore describes the third framework as the one that determines how the contracts think about the relation between the parties (Collins, 1999: 132): "The way in which the contract thinks about disputes is a framework which isolates the transaction from its economic and social context. The communication system of contract treats the obligations undertaken as absolute undertakings, firm commitments, which cannot be revised except through the process of revising the contract itself by agreement. It is this framework which describes the discrete communication system represented by the contractual relation."

Collins' three dimensions are helpful, but it is better to conclude that these three dimensions are present and meaningful than to presuppose that there are *only* three dimensions. However, when Collins states that all his dimensions are present in every relation, he is probably right. That conclusion is perfectly reconcilable with the relational contract theory that we will discuss in the next chapter.

In a transaction the dimensions of a business relation, of an economic relation and of the contractual relation are probably always present. In some transactions the business dimension will be of enhanced importance, whereas in others the economic dimension will be dominant. The problem that arises is then that of the nature of the contractual dimension that seems to be able to encompass the two other dimensions: it can formalise both kind of expectations in one document. This problem can easily be resolved if we decide not to accept Collins' dimensions as the only ones to be considered, but instead to opt for an approach whereby more aspects matter. Then trust and rationalised self-interest become (constitutive) parts of the relation. The function of the contract that formalises the relevant obligations and rights will then change from one context to another.

Collins' re-framing of the conclusions of Steward Macaulay (1963) on the non-use of contracts in courts is interesting. Collins states that the parties may not intend to enforce their contracts in a court of law, but rather to use them as documents that comprise their central normative orientation. This makes sense and, as we will see, fits the results of our case studies (cf. Section 10.4). The three dimensions that Collins discerns do help us to understand why this non-enforcement comes about. In the first place, it may not be in the parties' interest to jeopardise their relation or it may be against their (long-term) economic interest if they expect a (long) series of transactions. The written document (contract) thereby merely serves to specify their expec-

tations concerning their mutual relation.

In the following chapters we will see that relational contract theory (Chapter 3) and the concept of a development agreement (Chapter 4) both embody the dimensions discerned by Collins.

2.10 Conclusion

This chapter has paved the way for the main parts of the present study by introducing the scientific fields of urbanism, (social) legal theory and the problem of comparing projects in different systems. We ended with a discussion of the dimensions involved in the process of contracting. The end of this chapter, however, is only the beginning of our study. The investigation of the relation between development agreements and the focal projects in urban development projects is a complex field because both the urban development projects and the legal documents that govern them comprise so many dimensions. We need to focus on specific aspects while at the same time bearing these many dimensions in mind, since this study aims not only to add to the results of previous investigators but also to open up a new field: the relation between development agreements and urban development projects has, to the best of my knowledge, not been subject of study yet.

3 Relational contract theory

This chapter presents the theoretical framework of the study. We will use relational contract theory to assess the development agreements of the case studies. The chapter has three parts. (1) In the first six sections, the theory is introduced. Section 3.7 then provides an example where the theory is used as a basis for criticism of a case. (2) In Sections 3.8 and 3.9, the theory is put in a broader perspective; it is criticised and we will have a quick look at how it is embedded in other approaches to contracts. (3) In the final Section, 3.10, we will show how we will use the theory to assess the development agreements of the cases.

As Macneil (1980) uses the term 'contracts' and 'contractual relations' we will follow him in this chapter. However, in further parts of this study we will reserve the term contract for those legal documents that are regarded as contracts (and not, for example, as leases or deeds) by the legal system in force locally. We will use the term 'agreement' as a neutral designation for obligations that parties have mutually agreed on. If we are specifically discussing the written part of the agreement, we will emphasise that. The term 'contractual relations' is also used in a neutral sense, to denote the relations involved in development agreements but not necessarily related to contracts in the strict legal sense of the term. It should be noted that misunderstandings can arise when Macneil uses the term contract in an ambivalent way to designate both the written agreement, the unwritten part of the same agreement and all other forms of human behaviour related to bargaining and exchange.

3.1 Introduction

All contracts are embedded in relations

"Just as contractual relations exceed the capacities of the neo-classical contract law system, so to the issues exceed the capacities of neo-classical contract law scholars. They must become something else – anthropologists, sociologists, economists, political theorists, and philosophers – to do reasonable justice to the issues raised by contractual relations" (Macneil, 1980, quoted in Campbell (ed.), 2001: 9).

The quotation that starts this chapter clearly indicates the methodological problems involved in this study. Development agreements do not usually result in litigation and are therefore better interpreted as plans – or normative guides – for the future (see Section 2.9). The agreements underlying the cases we study, although laid down in legal documents, are embedded in other realities. To understand them, we need to know something of their economic, social, political and other backgrounds.

The quotation also highlights another important fact. Although in the end the agreements are about profits and risk allocation, we would miss many rel-

evant aspects if we only studied the agreements from an economic perspective. Not all elements of the agreements can be analysed from a perspective of efficiency and 'utility maximisation'. Other considerations, such as preservation of the relation, are just as important when parties enter a long-term relationship. In Chapter 2 we already introduced the three frameworks within which contractual behaviour occurs (Section 2.9) and discussed the scientific positioning of this study with special reference to the sociology of law and socio-legal approaches (Section 2.5).

In this chapter we discuss the theory that provides a social view on contracts and that can easily include other dimensions of contractual behaviour than the plain legal dimension in its analytical framework.

This analytical and normative approach to contracts is known as relational contract theory and was developed by Ian Macneil (born in New York City, 1929). It starts from the idea that a contract is "no more and no less than the relations among parties to the process of projecting exchange into the future" (Macneil, 1980: 4). Although this approach has been criticised for its lack of specificity and its focus on the context of transactions instead of general principles (e.g. by Fried, 1981; Posner, 1992; Eisenberg, 2000, see Section 3.10), I regard it as the best approach for this study for the reasons indicated below.

Reasons for choice of relational contract theory

The first reason for choosing relational contract theory as a starting point for the analysis of our cases is that it urges us to study the context of the development agreements involved. It demands a contextual approach. The theory states that if we leave the context out of our analysis, we are left without a clear image of the actual agreement; if we were to restrict ourselves to analysis of the written documents, we would only know the general legal meaning of the contract but we would be left without a clear idea of the relationship between the parties and the meaning of the contract for that relationship. It may be the case that parties use a standardised contract without having the intention to use the remedies mentioned in the contract or to stick to the planning laid down in the contract (cf. Macaulay, 1985; 2003).

This argument relates to the differences between the contract as a real life document and contract litigation that takes place when the contract cannot longer serve as a plan for the future on its own. The mere text of an agreement may provide you with a good idea of the outcome of a court case but that does not mean that it also tells you how parties plan to work together and if they are willing to start litigation when conflicts arise. The distinction between contracts that function in real life processes – the law-in-action approach – and contracts as the courts deal with them is important since the cases of this study do not usually involve litigation (Gordou, 1985; Campbell, 2001; Macaulay, 1985; 2000).

Some economic research exists on the difference between soft remedies

and hard remedies. Soft remedies are remedies such as loss of reputation whereas hard remedies are classical legal remedies such as liquidated damages (Macleod, 2005). The distinction between the two kinds of remedies fits the three dimensions of contracts as conceptualised by Collins. Soft remedies are then mostly related to the framework of the business relation (see Section 2.9).

The distinction between soft and hard remedies has in other words been recognised in academic literature but it cannot be recognised as such in the courts. Courts might theoretically be aware that a soft remedy could be a severe punishment (loss of reputation could cost a party a lot of business) while a hard remedy could be relatively meaningless (for example a € 20,000 fine on a profit of € 10 million). But in current legal practice, courts exist to grant or not to grant a hard remedy.

Courts do not exist to recognise the meaning of a contract outside their walls. They may try to take the daily life meaning of a contract into account in their verdicts but they cannot act the other way around; courts cannot – in their verdicts – conceptualise the fact that parties do not always refer their contractual disputes to them. This does not mean that an individual judiciary cannot be aware of this 'daily life' meaning. But it does means that a law-in-action approach to contracts cannot be achieved by studying court verdicts. And it has to be a law-in-action-approach, rather than an approach that studies the law as written down in verdicts and statutes (black letter law), that can include the non-use of litigation in its conceptualisation of contracts.

The second reason to choose relational contract theory as a basis for this study is that it offers a normative framework to assess the development agreements of the cases. A contract can for example pay too little attention to the complex problem of role integrity, that is the problem of sticking with a contractual role and the tasks that come with it (see Section 2.4.2). Relational contract theory can criticise the contract for that reason without being bound to the terminology of one legal system that would make the findings subject to the criticism that such a view is irrelevant for other legal systems. And, the other way around, the theory does not put every judgment in the perspective of cultural differences, which would make it impossible to make any judgment at all. It thus provides a theoretical framework against which we can weigh the various outcomes of our research.

Relational contract theory has its origins in an Anglo-American debate that holds (among other things) that contracts need to be approached from a new perspective as opposed to a classical (strictly legal) approach. This makes the theory useful for this study as the classical approach to which Macneil and other writers refer (e.g. Benakar & Travers, 2002; Posner, 2000; Brownsword, 1999) is very much associated with the common law approach, whereas relational contract theory is not linked to a common law or civil law system (see Table 3.1).

The upshot is that relational contract theory develops an inclusive, coherent concept of contracts that suits our case studies and is reconcilable with

Table 3.1 The relational approach versus the classical approach

Relational contract theory	Classical legal approach
Contextual approach	Focus on the written document
The meaning of a contract is found outside the walls of the courts	Litigation provides the horizon in which the agreements are understood
Law-in-action approach	Black letter law approach: this means that agreements are understood within the context of the legal system
The normative framework can be used to criticise a contract from both an internal and a comparative perspective	Agreements are criticised mostly from a perspective of legal soundness within the context of a (national) legal system

American, English and Dutch law (see also Section 3.8), not in the last place because it uses its own terminology to analyse a contract and is not limited to the legal concepts of one system with their specific, technical meanings.

3.2 Four core propositions

Relational contract theory, being a socio-legal approach to contracts, starts from its social perspective on the process of contracting. Understanding contracting also requires an understanding of the concept of society. The theory is developed starting from four core propositions (Macneil, 1980):

1. Every transaction is embedded in complex relations.
2. Understanding any transaction requires understanding all essential elements of its enveloping relations.
3. Effective analysis of any transaction requires recognition and consideration of all essential elements of its enveloping relations that might affect the transaction significantly.
4. Combined contextual analysis of relations and transactions therefore produces a better analytical product than a non-contextual analysis.

The four propositions are meant as an overarching theory; they stand on their own and do not depend for their validity on the validity of relational contract theory or any other theory (Macneil, 2001a/2001 : 370). Every student of transactions should accept these principles, no matter his view on the law. These propositions are not controversial; what is debatable is how much of a transaction one needs to understand to be able to discuss it or judge it. A legal system depends on its capability to abstract from the many realities of a contract, as does for example an economic theory. Still, the focus of this study is not on the question of what courts do or should do, but on how development agreements function in the context of urban development projects. If you want to know how an agreement functions, you must accept the need to take into account many aspects that are not merely legal. A concept of a contract has to find a balance between these aspects (the legal and the contextual). We may say that once again the tension lies essentially in the difference between the law-in-action approach and the law as it is enforced in the courts. In other words, the first approach needs to take into account all elements it can possi-

bly find, and the second only the elements it has recognised as important for the verdict of the court.

Macneil (1983) admits that the provability of his four propositions varies. The first proposition is a virtually undeniable observation of human intercourse whereas it is impossible to find empirical proof for the last proposition. He draws a distinction between the behavioural aspects and the substance of contracts. The behavioural aspects of a contract relate to the way in which parties act towards each other, whereas the substance of contracts is best understood as their legal content. The core propositions apply to both. Does that mean that Macneil disagrees with the remark made at the end of the previous paragraph, that one's understanding of a contract depends on whether one takes a law-in-action or a law-in-the courts approach? Probably not; he speaks of the study of contracts and not of the study of the law as it stands. He introduces himself as a positivist: an agreement is what parties say it is, whereby 'saying' does not necessarily involve words, it can be implied in their actions.

Macneil thereby solves the problem of finding a balance between the legal content of a contract and other aspects by introducing four general principles that apply to both the behavioural and the substantive elements of a contract.

However, the criticism that he fails to tell us where one has to stop studying a contract has a point (Barnett, 1992, see section 3.9). How much context do we need? Does the context of a transaction also include previous transactions? Does it include the cultural traditions of parties? And if so, to what extent should a student of transactions be familiar with them? We will see below that Macneil has addressed this problem by providing some rules of thumb. Still, his theory remains open-ended.

I solve this problem of vagueness and open-endedness in this study by arguing that the amount of context we need to know depends on the nature of the transaction. Secondly, the purpose of the study is also of importance. The context of a credit-card purchase of a bottle of perfume in an airport shop matters less (in most circumstances) than that of the sale of a family cottage in a small village. And it also matters whether the researcher wants to quantify his results, since that would almost necessarily mean that he would have to leave much of the context out. It is doubtful, however, whether the contract can ever be really understood if much of the context is omitted.

Macneil (2000a, 2001: 371) is more precise when he states that an analysis of any contract requires at least four elements:

1. A statement that the area of study includes extremely complicated contractual relations;
2. A brief description of these relations (with suggestions for further sources of information);
3. An explanation why the analyst has concluded that the relations will not affect the outcome of the analysis that focus on a narrow element (e.g. the price); and

4. The conclusion that *ceteris paribus* is therefore appropriate in this case and constitutes adequate consideration of these relational impacts.

These four rules imply that one cannot say beforehand which aspects of a transaction need to be studied. It depends on the nature of the transaction and the purpose of the study.

Macneil defends his theory against the more accepted approach of rational choice theory and the law and economics approach (which uses rational choice theory). These theories all presuppose that an individual is a rational person who wants to maximise his utility. The most efficient rules (rules that enable as many individuals as possible to maximise their utility) are also the best rules. The best contracts and the best court verdicts are all based on the most efficient rules (cf. Section 2.8.2).

Macneil's argument is that these approaches are not descriptions of real human behaviour, as is often claimed, but are first and foremost theories in the sense that they are based on a core belief which is ultimately more a matter of faith than of scientific proof. The reason why these approaches are dominant is that the ideology of capitalist systems is based on the concept of a rational individualist (the utility maximiser) and rational choice theories fit in well with this approach. Macneil speaks of the domination of the *ceteris paribus* (other things being equal) rule. Rational choice theory and game theory sweep away all relations except pure competition, by bringing them under the *ceteris paribus* rule (Macneil, 2000a/2001: 369).

The main difference between the proponents of the Chicago School, known for its neo-liberal ideals and focus on law and economics, and the proponents of relational contract theory is that the Chicago School believes in a form of contract law that starts from the idea of the individual utility maximiser whose aim is to act in the most profitable way (cf. Section 2.8.2). Their analysis of contracts therefore focuses mostly on a minimisation of costs and a maximisation of efficiency.

The best example of this approach is probably the concept of efficient breach (Posner, 1992). Suppose that B contracted with A to buy a wagonload of tomatoes from A by the end of next month, but just before the end of the month B finds that he can buy a wagonload of tomatoes from C for only half the price he agreed to pay A. Suppose further that there are no penalty clauses in the contract and that B would only have to pay A's damages if he broke the contract. If A was able to sell the tomatoes to another customer for the market price which was by then 80% of the price that B would have to pay A, A's damages would amount to 20%. This means that B could buy the wagonload of tomatoes for 70% of the price (C's price + A's damages) he agreed to pay. A law-and-economics scholar would conclude that B should therefore breach his contract with A because it leads to the most efficient result (note that A would still get the full price).

Macneil objects to this approach. He says that you would have to take a number of factors in account to reach this conclusion. What if B has been dealing with A for more than 20 years? Shouldn't the resultant value of the relation be taken into account when examining this example? What about the transaction costs that were involved in the making of the first contract, what about the costs of the loss of reputation (B would be known as a less trustworthy person), what about the costs of (potential) litigation? (Campbell, 2001; see also Section 2.8).

We may agree with Macneil's critique of the law and economics approach that it is often not more than a model. But the question is whether he is really opposing their approach or their methods here or whether he is oversimplifying their points of view.

Macneil takes a more favourable view of transaction cost approaches. A transaction cost approach has an open eye for other aspects of a transaction than competition and price aspects. It starts from a concrete transaction and then looks at the costs that may be involved in it. For example, suppose that A (buyer of Dutch tomatoes) has a long-term contractual relation with B (who sells tomatoes) whereby he buys B's tomatoes for price x. When C provides A with the opportunity to buy Dutch tomatoes for a price lower than B's price, A will take into account not only C's price but also the costs of ending his relation with B. These costs are not only the damages that he will have to pay B but also the costs that are involved in entering into a new long-term relationship (B has been a trustworthy business partner for years, how long will it take before C becomes such a partner?). Transaction-cost theories take these costs into account.

But according to Macneil (2000a, 2001: 376): "In transaction cost analysis, once what appear to be the key transactions costs are identified, they take over as surrogates for the real interaction between the relations and the transaction." What he means is that transaction cost analysis starts from the wrong end. A theory should start from the relations in which the transactions are embedded, not the other way around. However, a transaction cost approach takes 'the transaction' as its starting point and replaces the relations it found with the key costs of the transaction. It moves back to a rational choice approach as soon as it has found these other costs.

Relational contract theory does not abstract the transaction from the relations in which it is embedded but studies both at the same time. The difference is that it takes a contextual approach whereas the transactional costs approach is essentially non-contextual as it takes the costs out of their context as soon as it has identified them. Since we are not primarily interested in costs in this study (costs are an important aspect of the agreements but not the only one), I find this a strong argument in favour of a theory that takes more aspects into account.

In the same way, an efficiency theory (which holds that if the costs of a

Table 3.2 Focus of different approaches to agreements

Relational contract theory	Law and economics	Transaction cost theory
Does not exclude any aspects of an agreement	Focuses on efficiency and leaves the rest out	Does not exclude any aspects of an agreement but discusses them from an efficiency perspective

given transaction are lower for party A than for party B, then A should bear these costs) cannot explain the allocations of all costs. Thus, it makes sense to study the relations between parties to understand why costs were allocated in a certain way, rather than focus only on transaction costs. It makes sense to study the cost allocation and the relations at the same time: a law and economics approach or a transaction cost approach could then be used to criticise the outcomes.

Table 3.2 sums up the focus of different approaches to agreement.

3.3 The definition of contracts

Macneil defines a contract as the projection of exchange into the future (Section 3.1). In the previous section (3.2) we have discussed the four core propositions of relational contract theory. These propositions, combined with the focus of the theory, require that the context should be included in an analysis of contract and defend this point of view as of more descriptive value than theories that describe contracts from the point of view of costs and efficiency (Section 3.2). It may now be asked which elements are included in the definition of contracts. Macneil speaks of 'roots of contract', the preconditions that are necessary for contractual behaviour to take place, and includes four such roots in his definition of contracts (Macneil, 1980: 1) that we will discuss these four in turn below:

1. society (the fundamental root)
2. specialisation of labour and exchange
3. choice
4. awareness of a future.

Society

"Contract without the common needs and tastes created only by society is inconceivable; contract between totally isolated, utility-maximizing individuals is not contract, but war; contract without language is impossible; and contract without social structure and stability is – quite literally – rationally unthinkable, just as man outside society is rationally unthinkable. The fundamental root, the base of contract is society" (Macneil, 1980: 1).

Macneil distinguishes three different levels of relations in society that enable contractual cooperation. The first level relates to the ontological fundamental social relations that constitute all human interaction. The quotation above refers to that level.

The second level relates to the bourgeois society that provides the political boundaries of the market. The existence of bourgeois society is of crucial

importance to understand the form of contracts that we are used to. Macneil (2001: 12) speaks of a sovereign imposition of norms by the external God Leviathan. The background of the social matrix comprising first-level and second-level norms is essential to this relational level (see Section 3.4.11).

The third level relates to the internal and external norms that constitute contractual cooperation. The external norms are imposed by the law of the sovereign but also by other sources like private law (e.g. the standard norms of trade organisations). The internal norms are the ten norms that are common to all contracts (see Section 3.4). A development agreement, from this perspective, consists of provisions that stem from legislation (the sovereign), other sources, and the agreements that stem from the specific relations in which they are embedded.

Specialisation of labour and exchange

In a society different people specialise in different tasks; they exchange the fruits of their work and use contracts for the exchange when it doesn't take place immediately.

Specialisation of labour is inevitably accompanied by the more obvious concept of exchange that defines a contract. A contract is about exchanging something for something (like money for labour). But there must be something to exchange and that is why we need specialisation of labour. Specialisation of labour is, in other words, the root of the exchange-part of the definition of contract.

Choice

Without a sense of choice, i.e. the freedom to elect among a range of behaviours, a contract would become inseparable from the genetically programmed specialisation of labour and exchange that characterises the live of ants and other hardworking non-human creatures. The concept of a contract presupposes that individuals are able to choose between several options.

Awareness of a future

The last root that contract needs to come in full bloom is the conscious awareness of a future, since a contract is basically about projecting exchange into the future. That is what distinguishes contract from immediate exchange. A contract is about dealing with insecurity; in a contract parties try to control the future. A and B, for example, may agree that B will start construction a year after the contract is signed. Thereby they try to control (part) of each other's future actions subject to circumstances beyond their control. The emphasis Macneil puts on society as the fundamental root of contract can hardly be disputed.

A question that remains open is what the necessary conditions are to make contracting between individuals from different societies possible. Willie

(2004), following Campbell (1990) and Durkheim (1964/1984), states that the socio-legal approach to contract holds that the constitutive part of a contract is not the work of individuals but of society; the institute of contract exists because of the regulations made by society, not by individuals. This would lead to the conclusion that (legal) cultures must not vary too much if intercultural contracting is to be possible. This is the case for civil law and common law countries that are different families within the same legal cultures, as we saw in Section 2.6.1. Still, we will see that the development agreements of the cases studied in this thesis do not provide examples of cross-country contracting. One of the reasons may be that a development agreement is so much embedded in the local context of the project that it is preferably executed by a local developer.

3.4 Common contract norms

3.4.1 Introduction

Now that we have introduced the overarching theory of contracts, a definition of contracts and four roots of contract, we arrive at the core of relational contract theory, namely the ten common contract norms that Macneil discerns and the difference between discrete and relational norms. We will start this overview with a discussion of the ten common contract norms, after which I will introduce the discrete and relational norms. Macneil (2001: 11) uses the following definition of a norm, taken from Webster's dictionary: "A principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behaviour."

Relational contract theory holds that ten norms are common to all contracts (Macneil, 1980). Their content may differ in different contracts, as may their importance, but all contracts will involve all ten common norms. The theory does not name one of these norms as the most important one, as it does not hold that contract law can be described in terms of one principle (cf. Section 3.8.2). We will use the common contract norms as a framework to compare the contracts of the case studies (see Section 3.10).

During the discussion of the ten common contract norms, I will sometimes refer to the differences between the classical and the relational contract. The notion of a classical contract refers to the ideal of a contract as the document that governs fully the relation between the signing parties in a manner that deals with every aspect of their relation (i.e. complete contracting) but is also confined to the subject of the contract. The relation between the parties outside the agreement in question is not relevant to the contract. The notion of the relational contract puts Macneil's definition of the contract up front. The focus on relations implies that the content of the contract changes when re-

lations change (see also Section 3.5 and 3.6).

The ten common contract norms that relational contract theory discerns and that we will discuss below, are:

1. Role integrity
2. Mutuality and reciprocity
3. Implementation of planning
4. Effectuation of consent
5. Flexibility
6. Contractual solidarity
7. The linking norms: restitution, reliance and expectation interests
8. Creation and restraint of power
9. Propriety of means
10. Harmonisation with the social matrix.

3.4.2 Role integrity

…promoting stability through expectations about recognised social roles[1]

Parties enter into a transaction in a certain role, for example that of landowner, developer or financer. A role will result in different tasks that come with it. The role of a doctor, for example, involves not only the prescription of cures for patients but also informing family members in case of serious diseases.

Macneil (1980) discerns three aspects of role integrity: consistency, conflict and complexity. Consistency relates to the importance of adhering to your role over a longer period of time. It also means internal consistency, which relates to specialisation and the limited capacities of particular roles. A problem of consistency may arise when a board changes and decides to adapt a different strategy and also when different divisions of an organisation use different policies.

Conflict relates to the gap that exists between long-term and short-term goals and between the desire to maximise immediate selfish gains and to maintain social solidarity with other parties. Macneil (1978; 1980) uses exchange tension as the descriptive label here. A conflict situation arises when parties that are usually competitors join forces in a specific project for which they set up a specific organisation. Conflicts may then arise between their role as part of the project organisation and their roles as competitors outside that relation.

Complexity has its roots in the many different tasks a role may require a party to perform, some of which may be disliked. Macneil (1978) mentions the example of a doctor who dislikes some of the administrative tasks associated

1 All short definitions in italics are taken from Vincent-Jones (2006: 4-6).

with his role. Another real-life example of complexity is when a government enters into a transaction whereby it is at the same time landowner and regulator of the land. Its role then involves a mixture of its proprietary and administrative capacities, both of which comprise different tasks.

The principle of limited order combines the principle of temporal and internal consistency and the principle of assessing the permissible ranges of conflict (Macneil, 1980: 44). It requires that areas of potential conflict, involving the need for struggle and compromise, are limited in scope and intensity. In other words, a conflict should not dominate the relationship between parties since that could result in a state of 'war'. A conflict about one aspect of the transaction could be submitted to arbitration while, in the best-case scenario, the parties could continue to co-operate in fulfilling the obligations of the contract the content of which is not disputed.

3.4.3 Mutuality and reciprocity

…the idea that exchange is a process of mutual benefit

The norm of mutuality and reciprocity does not call for equality but for some kind of even-handedness. The concept of a contract presupposes that something is exchanged, and although this does not mean that the division of benefits is equal, it still requires that both parties bear some burdens and collect some benefits (Macneil 1980: 44). Suppose that one party sells a building to another party for the sum of ten euros. This may be a disproportionately small sum; in other words, there is not enough mutual benefit. And if the seller were to go bankrupt, a court might then force the buyer to undo the deal because it considered the transaction so uneven that the interests of the creditors deserve to be protected over those of the buyer. However, in most other circumstances the law will enforce the transaction.

Macneil (2001: 103-110), following Durkheim (1984) distinguishes three types of reciprocity. Generalised reciprocity is oriented toward a maintenance of social solidarity, it occurs when a donee is in need of something the donor has. The donor hopes that when he will be in need (some time in the future), the donee will help him too. The transactions of the case studies do not naturally involve this kind of reciprocity, although forms of it may exist. An example is when a developer provides a public facility in project A, hoping that a local government will grant him project B.

Non-specialised reciprocity occurs in situations where exchange is not a result of the division of labour. Macneil follows Durkheim (1984), in stating that this kind of reciprocity creates mechanical solidarity and also serves to enhance social solidarity. Mechanical solidarity is found in self-providing societies. We do not encounter this kind of solidarity in our case studies.

Specialised reciprocity results from the division of labour and produces or-

ganic solidarity. It is characterised by a large exchange surplus. The keyword of this type of reciprocity is interdependence. Two parties need each other to reach a result. This is the kind of reciprocity most often encountered in our cases. Specialised reciprocity may be associated with varying degrees of solidarity (trust), ranging from a maximum as in a husband-and-wife relationship to a minimum as when an exchange takes place between strangers. Most cases of specialised reciprocity exchange take place somewhere between these extremes, however.

Macneil's views on the level of even-handedness needed for a contract to exist have shown some inconsistency. In his earlier work he stated that even in a slave labour camp there was some reciprocity, as food was exchanged for labour (Macneil, 2001: 119) whereas in his later work he stated that such cases of coercion should be ruled out (Campbell, 2001) because their level of reciprocity is simply too low. I disagree with Macneil's view that such cases should be ruled out in advance because they lack sufficient reciprocity. It would be more appropriate to rule them out because they do not fit in with the concept of contract, since a slave worker will not normally have chosen to be in the position in which he finds himself.

Suppose that A threatens to kill B's son if B does not agree to work for him and B then agrees to work for A. It is difficult to call this agreement a contract, since B made it under duress. But the norm of mutuality is perfectly met, since by signing the agreement B earns the life of his son; it could be argued (somewhat cynically) that this is an excellent rate for the job.

An example of a situation where there is no mutuality is one in which physical force is used to force somebody to do something. If somebody beats me when I stop working or do not type fast enough, there is no mutuality – only force.

Macneil (1986) states that there can be no contract when one party is unable to exercise any choice (that is, he is powerless). But normally there will be some choice (it could be argued that the father who agrees to work to save his child's life in fact chooses to do so), which means that there will be significant contractual elements present. This leaves us with a scale on which some relationships determined by force are more contractual then others. Although the law may not recognise all these relationships as real contracts (the kidnapper of a child cannot go to court to enforce payment of the ransom he demands), they have contractual elements. These extreme examples may help us to understand why some parties may feel bound to comply with an agreement that is not enforceable at law: their motivation is that they expect a significant benefit from it.

The upshot is that mutuality and choice are related. It makes sense to restrict the idea of choice to free choice, but to take a more positivist view of mutuality or reciprocity. As long as something is exchanged, there is an element of reciprocity – even in the case of slave labour, for example. But in this

case, free choice – an essential aspect of a contract – is clearly lacking and it is this that makes the contract void.

3.4.4 Implementation of planning

…as a means of reducing uncertainty about the future

Contracts are about dealing with the future; their main function is to secure the way future circumstances are to be dealt with. This requires planning (see also Section 10.4).

The difference between a classical and a relational contract is that the latter will incorporate learning mechanisms and acknowledges the unpredictability of the future by putting the relation up front. The classical contract must by definition implement a complete planning (see Section 3.6). The classical contract will emphasise the importance of this planning while at the same time it will hold that whenever a court ruling is required on a particular issue, the court must focus on the moment the contract was closed because that was when parties considered all issues. If on the other hand a court ruling is required from a relational perspective, the court would have to look at how the relation has evolved.

Suppose that A contracted with B that B would pay him the rent on a property every first day of the month. However, after a couple of months B starts paying on the 15th day of every month and A accepts this arrangement and never says a word about it for years. Now suppose that B wants to end the contract. The contract states that he can do that by notifying his landlord A two weeks before the rent is due. He notifies A on the first day of a certain month. A objects that he cannot end the contract before the 1st of the next month whereas B holds that the contract ends on the 15th of that month. If the dispute is taken to court, a 'classical' judge would probably decide the case in favour of A (on the basis of consideration of the contract as originally drafted), while a judiciary orientated towards the relational contract theory would probably decide in favour of B.

3.4.5 Effectuation of consent

…acquiescence of choice as a basis for obligation

The norm of effectuation of consent is linked to the concept of choice. Every choice results in the sacrifice of other opportunities, but the contractual exercise of choice means that the power to restrain one's future choices is conferred on the other party. If A agrees to pay B € 100 for his services within a month, A confers on B the power to decide what A can and cannot do with that € 100. On the other hand, A has the power to decide what B can do with

(part of) his time since B consented to provide services to A.

Choices are however not absolutely limited but only to the extent that legal and other remedies are effective. Classical contract law equates consent with planning, and holds that we must act as if all effects of a contract are subject to conscious consent at the moment of closing. It is this equation – denying the relevance of evolving relationships – that Macneil (1980: 49) opposes: "The equation of consent and planning is hardly an eternally valid one. Its artificiality is immense: indeed as we look at complex, ongoing contractual relations we see that consent can play no more than some kind of a triggering role, that equating consent to the full scope of complex planning is downright silly."

Although the two may not be equated, the combination of choice and planning is what distinguishes contracts from torts or free choice from coercion.

Suppose that a contract, as is often the case, includes a provision that urges a developer (A) to work harmoniously with other developers that own plots next to his land. A classical approach to the contract would spell out what that means. But suppose it does not, then a subsequent plan made by the several developers would be regarded in classical contract law as based on the original consent whereas relational contract theory would hold that A is bound by the plan because of the nature of his relation with the other developers.

A more debatable example is one where the contract includes the same provision but now all other developers make a working plan to which A does not agree, although they consulted him. Suppose that the provision urging him to work harmoniously with the other developers is used to get him to cooperate with the plan anyway. Would we now construct his consent because he agreed to work harmoniously with them, which means that if he is the only one who has a problem with a working plan that should be his problem since the plan is only an effectuation of his consent? Or would we say that even though he consented to the general provision, he never consented to the particular plan? I hold that although his consent may be constructed here, the point is that he was asked to consent with the plan and he did not. The reason why his consent may be constructed is because it was unreasonable of him to withhold it and stick to his own planning. But we may also say that the nature of the relation obliges him to cooperate (this approach is in line with the good faith principle embodied in civil law, see Section 2.7.2).

Another example is when a party consented in advance to comply with a planning of a third party. An example of such a provision is when a developer agrees to implement the forthcoming planning of a utility company in his own planning. However, the reason why that party would be bound by that planning is still because he consented to be bound at some moment in the future.

The upshot is that consent and planning may not be equated but there has to be a connection between the two if we are to be able to speak of choice and not coercion.

3.4.6 Flexibility

…the recognition of the need to avoid rigidity in implementation and facilitate adaptation to changing conditions

Flexibility in contractual relations arises from bounded rationality, limited availability of information and the dynamics of the socioeconomic world (Macneil, 1980). Every contract has a capacity for change; in the last resort, it may even be breached under the pressures of change. In classical contracts flexibility is found outside the document whereas the relational contract with its emphasis on the ongoingness of contractual relations must necessarily incorporate principles of flexibility within the transaction. The norms relating to planning and role integrity norms may conflict with the flexibility norm. Macneil (1980: 51) speaks of the tension between the complete planning of a classical contract (the discrete transaction, see Section 3.6) and the changing world: "Thus we find, in a discrete transaction such as a properly drafted short-term commercial loan, very precise planning respecting payment, lender's remedies for breach, and the like; however the world may change, the planning and consent norms will govern the transaction. But the norm of flexibility will govern everything outside."

In a long-term relation, flexibility is incorporated in the relationship and results in a two-way flow of consultation, advice, admonition etc. Macneil emphasises that this is true, even when a long-term contract looks the same on paper as a short-term loan.

Suppose that A and B closed a long-term finance contract whereby A receives funding for its store from B. The contract may look unambiguous, but when A has performed over a long period and then misses a term, B will probably look for a solution and not immediately use his right to terminate the contract or use a debt-collection agency to get his money. The point is that B's readiness to use extreme remedies will depend on his relation with A and not exclusively on the terms of the contract.

Flexibility unavoidably enters a relation. The question however is whether it is embodied in the contract itself or whether the need for flexibility may have to lead to a change of the contract.

3.4.7 Contractual solidarity

…involves the extension of reciprocity in social relations through time

Contractual solidarity is the norm of holding exchanges together. Its sources are both internal (based on the contract itself) and external, which means that contractual solidarity is a general norm of justice. For discrete transactions, norms of contractual solidarity are mostly external. The norm of con-

tractual solidarity contributes to the preservation of the relation. It clearly embodies the concept of trust. A minimum level of trust is necessary to close an agreement and, in long-term relations, to stick to it when an opportunity for quick success appears (see also Section 2.8.3). For Macneil, solidarity and trust are almost synonyms (Macneil, 1981; see Campbell, 2001: 16-17). The norm serves to describe the web of interdependency that is externally reinforced as well as self-supporting, and expected future cooperation. Solidarity also refers to a merger of selfish interests, which means that what increases (decreases) the utility of one participant also increases (decreases) the utility of the other. This merger is seldom complete. An example that relates to the cases examined in this thesis is when a local government and a private party contract to implement an urban development project in which the local government will develop the public infrastructure and the private party will construct, say, the condominium buildings. Suppose that the local government owns land and the private party agrees to lease or buy it when the infrastructure is completed. When the work progresses faster than foreseen, the private party will have to pay the agreed sum earlier. But the project will also be finished at an earlier stage and the condominiums can therefore be sold earlier. In other words, both parties profit (although not necessarily to the same extent) from the fact that work went faster than was predicted. The parties will most likely cooperate to make it possible for each other to finish the work as soon as possible. This element of cooperation makes the notion of individual utility maximisation inappropriate to describe contracts that also value the worth of the relation (Campbell, 2001).

The upshot is that a minimum of solidarity is required for contracts, since it promotes cooperation and prevents a party from dropping out at the first setback. In relational contracts solidarity is an internal norm, whereas in classical contracts it is imposed by courts and other institutions.

3.4.8 The linking norms

…expectation, restitution and reliance interest

Linking norms connect contractual obligations to contractual remedies. Since contracts are projections of exchange into the future whereby at least one party expects to receive his profit from the transaction in the future and not immediately, this expectation can be regarded as an interest and when it's not met, the other party may under circumstances such as fraud, duress, misrepresentation, or other unforeseen circumstances be ordered to return what was already paid or to even pay (part of) the profit that the other party legitimately expected to gain.

Macneil discerns the restitution, reliance, and expectation interests of a contractual relation as the linking norms. He notes that these norms need

not have their roots in (explicit) promises: for example, restitution may be required where no promise has been made but one of the parties simply receives too big a share of the benefits. An employee who has been treated decently in the past may expect to be treated decently in the future even when no such explicit promise has been made. A businessman enters into negotiations about a future transaction when he expects to make a profit and the other party should be aware of this expectation. Macneil also calls these interests linking norms because they link all the other contract norms and because in many circumstances they will link the other norms to more precise rules of behaviour. For example, the expectation interest links promise and consent to rules of contract law.

3.4.9 Creation and restraint of power

…to control relations of domination and subordination

A contract can be described as a transfer of powers: powers that used to be vested in one party are now vested in the other and vice versa. We already saw an example of this in the discussion of effectuation of consent in Section 3.4.5.

Suppose that A contracts with B to construct a building for B for the price of € 1,000,000 in 12 months. The contract places certain restraints on A's actions for the next 12 months, to the extent that he has undertaken to construct the building. It also vests power in B to control some of A's actions: B can enforce A's construction of the building. On the other hand, B can no longer spend his one million euros freely, since he has to pay A for his work. A can enforce B's payment to him of the price they have agreed on.

A contract will usually consist of several elements of creation and/or restraint of power. It will give parties a say in each other's actions that they would normally not have. Such a say may also consist in the right to prevent them from competitive actions. As we discussed in relation with the mutuality and consent norms, the power norm is also related to the concept of choice. Choice underlies the difference between coercion and contract.

An example that relates to the cases studied in this thesis is the following: Suppose that A and B have contracted that A will construct a building and B will construct the corresponding public infrastructure. The contract may grant A the right to review the designs of this public infrastructure. It may also prevent A from constructing a new building in the same area within the next five years.

Still, the power norm is limited: it can never vest absolute control in one party over the other party's actions. The controls are limited to the context of the contract and find their limitation in the legal system. In Anglo-American legal systems remedies are usually limited to payment of damages. In

the civil law systems like that of the Netherlands courts usually order specific performance of contractual obligations but in the end, the party that refuses to obey such an order will have to pay damages (a fine) as well (Chitty, 2004; Zwalve, 2000). The upshot is however that every contract creates one or more powers for a party that it would otherwise not have and restrains it in the execution of some its powers.

3.4.10 Propriety of means

…placing constraints on the ways in which ends may legitimately be achieved

The propriety of means norm relates to the requirement that parties should be in possession of adequate means to perform their obligations. A contract in which A, a Dutch farmer, promises to deliver the famous Parisian landmark the Eiffel Tower to B's house in the Dutch City of Groningen, at 9 a.m. tomorrow will in most circumstances not comply with this norm because unless A secretly doubles as Superman, he will not possess the means needed to reach the intended result.

Contracts sometimes presuppose that parties are in possession of adequate means. In the development agreements of the cases studied here, we will accordingly find a balanced division of tasks, providing the parties with the tasks for which they are in possession of the 'most adequate' means to reach the intended result. Sometimes, a party is in possession of the most adequate means but rules of law or customs prohibit their use. Classical contracts are indifferent as to how results are reached, constraints are put on them by external norms. Relational contracts on the other hand often impose restrictions on the means that a party may use.

For example, a contractor could draw up a contract with one of his subcontractors embodying an agreement for the latter to increase production to a specified level. A classical contract might simply add, 'no matter by what means', while a relational contract would stipulate that this may not harm the quality of the work or be in conflict with relational norms such as preservation of the relation between the parties (see Section 3.5).

3.4.11 Harmonisation with the social matrix

…reflects the need for contract norms to be consistent with wider social norms

Contracts are closed within a society and can only flourish when they fit the norms of that society. Macneil uses the term supra-contract norms for the norms of the social matrix. The supra-contract norms are set by society and not by the contract or the law of contract; they support a contractual relation but are not purely contractual. They include broad norms concerning such

matters as distributive justice, liberty, human dignity, social equality and inequality, and procedural justice (Macneil, 1978), and must be compatible with the requirements of social acceptability and (to some extent) with the abovementioned norm of social justice. It would be impossible to provide an exhaustive list of supra-contract norms.

Note that the norm of harmonisation with the social matrix does not necessarily imply a restriction on the powers of the parties; sometimes laws are made that urge firms to compete more instead of less, for example. Macneil (2001: 370) discerns four characteristics of a social matrix: it provides (1) at least a means of communication understandable to both parties; (2) a system of order so that the parties exchange and do not steal from or kill each other; (3) a monetary system; (4) an effective mechanism to enforce promises. A social matrix thus incorporates some of the characteristics of a legal system (2 and 4) but does not define these characteristics as necessarily legal in nature. We could imagine a society where those characteristics are not considered to be part of the legal system.

It follows that the supra-contract norms are the most difficult norms to grasp conceptually in the present context: they influence a contract, but are not in themselves contractual norms.

3.5 Discrete and relational norms

Common contract norms become binding guides for action in a specific contractual situation. They may be either relational or discrete in nature, or something in between.

3.5.1 The discrete contract and the relational contract

There are two archetypal contractual norms: the discrete norm and the relational norm.

The *discrete norm* relates to the ideals of (neo-) classical economy, and includes the concepts of discreteness and presentiation. Macneil (1980: 60) defines these two concepts as follows: "Discreteness is the separation of a transaction from all else between the participants at the same time and before and after. Its ideal, never achieved in life, occurs when there *is* nothing else between the parties, never has been, and never will be. Presentiation, on the other hand, is the bringing of the future into the present. Underlying both is the ideal of 100 percent planning of the future."

The discrete norm is attractive, as it embodies the ideal of liberal contract theory whereby free businessmen enter into a transaction of mutual profit and then go their separate ways. But the ideals of the classical contract have been outlived and no longer reflect the current state of the law, nor do they

provide us with an ideal we feel we should strive after. According to Macneil, the ideal world of classical contract law is a world of self-interested businessmen and only serves their interests, not any broader definition of justice.

Relational norms on the other hand take shape in the context of ongoing contractual relations. They put the relation in which the contract is embedded up front, which means that they emphasise the value of the preservation of a relation and try to resolve any relational conflicts that may arise.

Macneil (1980) defines a discrete contract as a contract that leaves out every relation between the parties apart from the simple exchange of goods. He equates this paradigm with the transaction of neoclassical microeconomics (Macneil, 1980). In fact, Macneil points out that this paradigm has conceptual drawbacks, since every contract involves relations that are separate from the exchange of goods itself. Nevertheless, the ideal of the discrete contract and the two concepts of discreteness and presentiation that it embodies still dominate the conceptualisation of contracts. As the quote from Macneil given above indicates, discreteness means that no other relation exists between the parties except for the exchange, while presentiation is the associated ideal of bringing the future into the present (of being in full control of the future). The goal of presentiation is a by-product of discreteness and is best described as the restriction of future effects through definition and stipulation of events in the present. Like discreteness, presentiation enhances stability but it also results in risk-averse, conservative strategies, which do not generally suit present-day dynamic markets that are better served by contracts that offer parties the opportunity to adapt their behaviour to changing circumstances than by stability. As Salbu (1991) puts it: "Risk aversion has been blamed for portfolio management of corporations as well as a consequent failure to innovate and operate effectively in competitive markets. Classical contracting and its orientation toward stability may provide a disservice in today's volatile markets." In line with this observation, we may conclude that the discrete approach is not suitable for development agreements in urban projects since these projects require an approach that puts more emphasis on relational norms that value flexibility, learning, cooperation, and preservation of the relation (see Section 10.6).

Consideration of the time element is perhaps the best way of clarifying the difference between discrete and relational norms. At which moment do obligations take shape? This is a difference between a static and a dynamic view of contracting, but also between legal security and uncertainty.

Relational contract theory argues that contracts are rooted in relations. If these relations evolve, the content of contractual obligations must evolve with them. The discrete approach presupposes that contractual obligations, once agreed to, do not change. If the relations in which the contract is embedded change, the parties are still bound to their original consent unless they negotiate a new contract. The discrete norm therefore holds that after a contract

is signed, it is a matter of executing the (complete) planning. By putting one on-off moment up front for contractual obligations to come into existence, the discrete norm offers the best possible security for a party; he knows what he has consented to and will not be faced with (unpleasant) surprises. Therefore, lease contracts in the cases studied in this thesis usually offer a complete planning for the payments, for periods as long as 70 years (see Section 5.3.1). The discrete norm denies that the world outside of the contract will change and cannot be known completely. Relational contract theory, however, acknowledges these two (basic) facts and internalises them in its approach to contracts. In doing so, it introduces a dynamic and flexible approach but it loses some security. If a party wants to know what his obligations will be two years from now, the answer has to be: "well, come back in two years and we'll see." Note that this is not necessarily a problem: since each party knows that his obligations will stem from his relationship with the other party, he is 'protected' against unpleasant surprises. It is generally third parties – like a bank that finances the transaction – that demand security.

3.5.2 Three types of contracts-relation with discrete and relational norms

In Section 3.4, we already encountered the difference between the classical contract and the relational contract. There is also an intermediate form, the neoclassical contract. This leaves us with three ideal types of contracts (Macneil, 1974; 1980; 2000; Macaulay, 1996; 2000): the classical contract, the neoclassical contract and the relational contract (see Table 3.3).

The classical contract serves the enhancement of discreteness and presentiation. Relatively clearly marked standards of offer and acceptance mark the stages of being within or without a contractual relationship. The remedies for breach are relatively standard. The identities of the parties and nature of the agreement are more or less written out of the contract; because the contract is defined with reference to standard remedies, the identity of the parties doesn't really matter (Salbu, 1991). For a standard short-term finance contract between a bank and its client, for instance, it is not relevant what the identity of the lender is; the contract will (to a certain extent) always look the same.

Neoclassical contracts are situated on a continuum between classical and relational contracts. The neoclassical approach seeks to enhance flexibility in long-term contractual relationships while maintaining a significant degree of stability and commitment (Salbu, 1991; Macneil, 1980). It can be described as planning for flexibility and incorporates the use of standards (such as criteria for dissolution of the contract), direct third-party determination of performance (non-judiciary settlement of disputes), one-party control of terms (option to continue or discontinue the relationship), and agreements to agree (agreements to settle things later). The agreements to agree are of questionable

Table 3.3 Three types of contract

Classical contracts	Neoclassical contracts	Relational contracts
A contract should be 100% discrete: completely planned and embodying no relation with parties outside the contract.	Acknowledges the impossibility for a contract to be 100% discrete and tries to incorporate this in the contract by planning for flexibility.	Content of contract depends on ongoing relations: this means that contracts should encompass learning processes and ad hoc solutions.

legal force because in most cases it is not clear which legal sanction should follow if a party refuses to fulfil this obligation but otherwise performs its contractual duties. In common-law countries, another problem exists; it is easy to plead that these agreement-to-agree provisions lack consideration (see Section 2.7.3). Agreements to agree are however important for a good faith relationship as they leave room for flexibility and learning practices.

The neoclassical approach acknowledges that it is impossible for a contract to be fully discrete because it exists in an open system subject to environmental change, and it cannot attain presentiation because the parties aren't prescient or in full control over potential future contingencies (Salbu, 1991; Macneil, 1983). The neoclassical approach thereby seems to offer the best of both worlds: it is firm and classical when it can be and leaves things open that cannot be determined at the moment of closing.

A relational contract is commonly described as an incomplete long-term contract that emphasises the importance of ongoing relations (Eisenberg, 1995; Goetz & Scott, 1981). The longevity of the contract is not a constitutive part. Macneil uses the term relational contract somewhat differently from other authors: in Macneil's work, relational contracts emphasise relational norms. The main relational norms that are common to all contracts are the preservation of the relation between the parties and the resolution of conflicts (see Section 3.7). In addition, since all contracts are embedded in relations, it can be argued that in the end all contracts are relational (see Section 3.10). The main point of the relational contract is that it acknowledges that a contractual relation changes when the nature of the relationship between parties changes (Eisenberg, 1995; Macneil, 1980). A relational contract leaves room for those changes: it incorporates learning processes and ad hoc solutions.

3.6 The discrete and relational norms

The discrete norm is a norm of precision that enables people to deal with one thing at a time. Relational norms tend to harmonise more with human relations than discrete norms, but nothing in the relational norms precludes an emphasis on precision and focus.

3.6.1 Characteristics of the discrete norm

Macneil distinguishes discreteness and presentiation as elements of the discrete norm (Section 3.5.1). The discrete norm is a product of an enhanced importance of the common contract norms of implementation of planning and effectuation of consent.

Discreteness and presentiation combine the norms of effectuation of consent and implementation of planning. For a transaction to be one hundred percent discrete, one hundred percent planning and one hundred percent consent are required. Macneil (1983) distinguishes the following seven characteristics of the discrete norm, though it should be noted that in practice a given characteristic may be precisely the reverse of that predicated here.

1. *Precision* – The discrete norm urges parties to focus on the deal alone; it is a norm of specificity. The norm is very precise. According to the discrete norm, a contract exists in an on-off manner: either there is a contract or there is not, there are no in-betweens. This is not only true for contracts but also for all obligations mentioned in them. The background of this norm is the liberal ideal that in a contract an individual can only be bound to do those things he has explicitly agreed to.
2. *Planning* – The discrete norm presupposes that the future can be planned in a complete manner. Macneil (1983: 355-356) states that the fundamental principle, pacta sunt servanda (agreements are binding), also means that the planning should be followed through irrespective of consequences such as excessive costs to one of the parties. This used to be the point of view of courts before the substantive shift (Section 2.7.3). In the 20th century, civil law countries adopted principles of unforeseen circumstances (*rebus sic stantibus*) while common law countries adopted their common-law counterparts of impractibility, frustration and impossibility.
3. *Efficiency* – Efficiency is a key concern of the discrete norm. The discrete norm provides the basis for the efficiency required in neoclassical microeconomics whereby the most efficient rules govern relations between parties when they close a contract, plan for the future and allocate risks to the party that can bear them at the lowest costs. But the discrete norm also serves other concepts of efficiency such as specificity and the effectiveness of action that results from focusing on only one thing at a time.
4. *Freedom of consent, freedom of choice* – Although the discrete norm emphasises freedom of consent and the freedom of individuals to choose, it is doubtful whether it really succeeds in realising these ideals because of the emphasis it puts on the implementation of planning. The discrete norm forces parties to make only one choice at a given time; this can come into conflict with the value of autonomy, since a party will be bound to his original consent when he wants to choose something else. Fried (1981) argues that in the long run enforcing peoples' promises will increase peoples' options of choice. Macneil states that that is only an empirical argument; the increase in the number of options does not follow from the principle itself. He states that in some cases the enforcement of promises will increase freedom of choice (autonomy) in the long run, but in some cases it will not.
5. *Conservative stance* – The discrete norm presupposes the status quo and goes on from there; it is a conservative norm. However, the emphasis put

on the discrete norm during the industrial revolution of the 19th century led to great social economic changes (Macneil, 1983). Therefore, in some cases the discrete norm may result in change rather than stasis. In other words, the discrete norm is conservative because it is not a norm of redistribution, it does not interfere with (economic) power relations. This emphasis may still lead to changes in society.

6. *Inegalitarian stance* – Although choice appears to be dominant for the discrete approach, which may lead one to believe that the discrete norm is egalitarian, it is in fact an inegalitarian norm. Most notably because it presupposes the status quo and refuses to correct unequal bargaining positions. Therefore, because the discrete norm presupposes a free individual who enters freely into a transaction, it does not correct existing inequalities but rather deepens them by embedding them in enforceable contracts.
7. *Sacrifice of relational norms* – The discrete norm conflicts with the values of preservation of the relation and resolution of relational conflicts because it abstracts from the actual relation between parties and focuses only on the contract and the promises that are made in it. In other words, the discrete norm does away with all other relations except for the temporary relation specified in the contract.

3.6.2 Characteristics of relational norms

Relational norms are not opposed to planning or efficiency, but they focus on other aspects. The basic claim of relational contract theory is that contracts are embedded in relations and that different relations result in different contracts. Since the main focus of the theory is not autonomy or freedom of choice but the relation between parties, relational contract theorists are not – like classical theorists – opposed in principle to contractual norms that are imposed by the government. They are for example not opposed to norms that enforce the bargaining position of 'weaker parties' like consumers and employees. The norms that are emphasised in relational contracts are role integrity, preservation of the relation, resolution of relational conflict, propriety of means and supra-contract norms.

Three of these norms (role integrity, propriety of means and supra-contract norms) are also part of the above-mentioned set of common contract norms. However, their meaning changes when they are placed in a relational context. Role integrity becomes a complex norm (see Section 3.4.2), propriety of means becomes a norm of adequate means (see Section 3.4.9) and the supra-contract norms become an internal part of the contractual relation. Preservation of the relation and resolution of relational conflict are specific relational norms, they are not common contract norms because they are absent from the discrete norm. Preservation of the relation means that parties put value on their relationship. They are not inclined to make use of a short-term gain

if it will put the relationship at risk. The norm is therefore related to contractual solidarity (see Section 3.4.7).

In this context, resolution of relational conflict means that parties will try to work conflicts out when they arise and will not immediately make use of remedies. The norm is related to role integrity (see Section 3.4.2). An example may illustrate this: Suppose that a principal has closed an agreement with a contractor. When the contractor cannot finish the work on time, the discrete norm implies that the principal should make use of whatever remedy is available to him. The relational norms hold that the proper remedy depends on the nature of the relation between the principal and the contractor and that the former should be inclined to work things out with the contractor to preserve a good working relation and resolve any conflicts that may result from the delay.

3.7 Using relational contract theory as a basis for a critique of the law

Before we move to a discussion that places relational contract theory in a broader perspective, I want to provide an example of how the theory can be used as a basis for a critique of court rulings which may lead to different outcomes from those derived from classical legal argumentation. It is more about how arguments should be weighed than about replacing contract law systems by something entirely new.

Joshua Rubin (1996) used relational contract theory to assess the court case brought by the township of Ypsilanti in the American state of Michigan against General Motors (GM). The Ypsilanti case was ruled on in 1993. After four years of a twelve-year tax exemption, GM announced plans to close its Willow Run facility in Ypsilanti and move it to Arlington, Texas. The town brought suit, and a state trial court judge placed an injunction on GM's closure of the plant. The court held that GM had promised to retain jobs at the plant in return for the tax exemption. The verdict was reversed by the appellate judge, who ruled that the GM had made no such promise (Rubin, 1996: 1277).

Rubin uses the common contract norms to assess the case and he reaches a different result. He shows that relational contract theory does not ask which promises were made when the contract was closed but assesses the case at the moment it reaches the court and then asks what kind of exchange relations exist. Rubin starts his analysis by stating that: "The relationship that develops over time between the owner of a large industrial facility and a host community is particularly complex and multifaceted…[and]…Ypsilanti provides an excellent illustration of how one negotiating party in an ongoing, complex relationship can string along the other without making an explicit

promise" (Rubin, 1996: 1820).

Rubin thus moves away from the theory of promissory estoppel, that would hold that a party may be estopped from executing a right because the other party could legitimately trust a promise that it would not do so (Feinman, 1984). The usual way for a common law lawyer to assess a case like Ypsilanti is to find out whether GM had – explicitly or implicitly – made the promise referred to. The state court found that the township of Ypsilanti could reasonably rely on the behaviour and statements of GM that it needed the tax abatements to guarantee jobs. It then concluded that a counter-promise had been made by GM to retain the jobs.

Rubin shows that this line of reasoning is flawed because a neoclassical approach that starts from a promise should conclude that GM never intended to make a promise since it could induce the incentives it required without making one. Making such a promise costs more than not making it, since in the latter case GM will still have the right to move its factory. The dominant position of GM must in a neoclassical analysis lead to the conclusion that it never promised to keep its factory in the township open. This was indeed the conclusion that was reached by the appellate court.

But relational contracting is not a purely economic practice. A relational approach holds that the relationship should in itself carry some weight. Even when unequal bargaining power does not justify a contract remedy, which is also the case under a relational approach. Parties desire to preserve their relationships and do so for reasons beyond pure wealth maximisation. Relationships involve complex entanglements of reputation, interdependence, morality, altruism, friendship, and self-interest.

Parties in an ongoing economic relationship expect that each of them will lend the other support in bad times and will not stand on their rights to gain advantage from changed circumstances. This is the norm Macneil identifies as preservation of the contractual relation (Rubin, 1996: 1294). Relational contract theory then suggests an inquiry into the degree to which the relocating corporation might be found to be violating the norms or spirit of the relationship it maintained with the community by altering the balance of power and then seizing upon it.

Rubin points out that in cases like Ypsilanti a long-term relationship exists between GM and the township. In such a relation the norms of role integrity and solidarity are of enhanced importance and they produce the (relational) norms of preservation of the relation and resolution of relational conflict. Rubin distinguishes the Ypsilanti case from the situation where a company has to close a factory because of economic necessity (one should not force an unprofitable plant to stay in business). Both the nature and length of the relationship and the circumstances should therefore play a role in adjudicating the Ypsilanti case. The nature of the incentive (as-of-right or involving bargains) should also play a role, as should whether representations have been

made according to their purpose and use.

Rubin's main argument is that in this case the issue is not whether explicit promises were made but whether GM took advantage of the relationship's norms.

One of the key terms in the relation between the township of Ypsilanti and GM is the word dominance. GM was the dominant party in the relationship with the community. But in a relational inquiry the dominance of GM becomes relevant in a different manner. The relationship between GM and Ypsilanti is situated towards the relational end of the discrete/relational continuum, which makes the relational norms of enhanced importance. Rubin (1996) states that town officials may have believed that a direct request for an explicit promise was not necessary because of the nature of the relation with GM.

He discerns that the common contract norms of reciprocity, role integrity and solidarity are involved here as is the relational norm of preservation of the relation. Since GM took advantage of its power under changed circumstances, the norms of restraint of power and propriety of means are also implicated. They may lead to the conclusion that preservation of the relation should override the option to profit from an advantage that becomes available due to new economic circumstances. The law should not eternally bind parties to each other against their wills, but exit should be in line with relational norms. Rubin concludes by emphasising that neo-classical law fails to protect relational interests by overstating the importance of discreteness and presentiation.

I find his arguments convincing: this approach not only makes sense, but is also specific enough to help a court to rule on a given case. However, one of the problems that arise is that this approach does not tell us in advance whether GM has the right to leave the contractual relation and what elements are of importance in this context. Rubin urges us to look at 'all elements' but as one of the arguments of the relationalist is that we cannot have full knowledge of the world, how then can we know what all the relevant elements are, especially when our time is limited?

Notwithstanding this drawback, the approach Rubin proposes does on the whole seems fair for both parties.

3.8 The common contract norms in a broader perspective

Before we decide to use relational contract theory as the framework for the present study of development agreements, we need to answer two questions: (1) does relational contract theory, designed by a scholar with a common law legal training, also work for the civil law – more specifically the Dutch – ap-

proach to contracts? And (2) how does the theory relate to the fundamental debate on the nature of contracts that is also of concern for this thesis?

Relational contract theory claims to give a description of contracting practices. While Macneil claims universal applicability for the common contract norms, he also acknowledges that he is no expert on civil law systems (Macneil, 2001a). This may not matter for a theory that takes a broad perspective on law and studies contracts as a social phenomenon. But relational contract theory also claims to provide a critical perspective on contract law, and since the subject of study of this thesis consists of existing contracts that were drafted in specific legal systems, we need to know whether relational contract theory can be applied in detail to in the three legal systems – English, American and Dutch – considered in this study. Since as mentioned above Macneil was trained in the traditions of the common law, it may be assumed that application of his theory to English and American law as embodied in the contracts studied will not give rise to serious problems. It therefore remains for us to ascertain whether the theory can also be safely applied in cases involving Dutch law.

3.8.1 Relation between common contract norms and Dutch legal principles

We will now consider the relation between the common contract norms and the principles of Dutch contract law.

Dutch contract law theory starts from the ideal of freedom of contract (see e.g. Cohen & Pitlo, 2002). Hartkamp, in a standard handbook of Dutch contract law, surveys five general principles that explain under which circumstances contracts have or should have binding force (Hartkamp, 1996: 34):

1. The principle of autonomy explains that parties have a private sphere in which they must be free to act as their own legislators.
2. The principle of trust holds that expectations based on the conduct and statements of another party should be protected. It also protects the expectation based on the norms of society that certain circumstances will fall within the sphere of risk of one of the parties (principle of risk).
3. The principle of social justice demands compensation for some social inequalities so that one party cannot profit too much from its superior bargaining position.
4. The principle of being faithful to your promises basically requires that one should be kept to his word.
5. The principle of social acceptability demands that the content of contracts must be in line with the general demands of society (a contract to kill somebody isn't socially acceptable). Hartkamp (1996) states that this principle is about finding the right balance between the protection of personality, maximisation of everyone's freedom and efficient handling of judicial matters.

These principles are not typical for Dutch law and they are certainly not absent from Anglo-American law. We have seen that the difference may be that the common law puts more emphasis on principles related to neoclassical economic ideals and less on ideals that relate to social justice (Waddams, 2000; Barnett, 1992, cf. Section 2.7). But efficiency is also a concern of the civil law, and social justice of the common law. Being part of the same culture, general principles that explain the authority and concerns of the law of contracts apply to both legal systems (see Section 2.6).

Barnett (1992), a common law lawyer, regards for instance will, reliance, efficiency, bargain and fairness as the main concerns of the law. These principles don't seem to contradict the principles mentioned by Hartkamp but provide mostly different labels for what are basically the same concerns. At an abstract level, will and autonomy are equivalent as are reliance and trust, while bargain and fairness both fall under the heading of social justice.

In line with the different mentalities of common law and civil law systems (see Section 2.7) the exception is that Hartkamp (1996) does not mention efficiency as an independent principle of contract. It can however be included as an element of the principle of being faithful to one's promises. We could also argue that it is more efficient for a society when promises are generally kept instead of having to wait and see in every specific case. And if that is true, it could be argued that the most efficient rules should be formulated that enforce the most efficient promises.

Since the principles behind Dutch contract law are in line with the principles of common law contract law, they must also be in line with the common contract norms. The difference between the principles behind Dutch contract law and the common contract norms is that these principles are mostly of a normative nature, whereas the common contract norms are both normative and descriptive and have to be read in combination with the four roots of contracts (see Section 3.3). The common contract norms apply to all contracts, sometimes as an internal norm and sometimes as an external norm. This is in line with the five principles that Hartkamp surveys. The principle of sticking to one's promises can be an internal norm, but is always an external norm. It may finally be mentioned that the most important external norm of Dutch law that does not exist as a general norm in English and American law, the principle of good faith (for a discussion of this point, see Section 2.7.2), is not included in Hartkamp's five principles. The reason is that this principle is a concern of the whole body of private law (including contract law) but is not a specific norm of contracts. Good faith may dominate the interpretation of contracts in the courts, but on the level of contracting it can easily be part of the norm of harmonisation with the social matrix. Good faith is the ultimate supra-contractual norm (see Section 3.4.11).

The autonomy principle can be related to the mutuality norm (Macneil combines mutuality with choice – an important aspect of autonomy; see Sec-

Table 3.4 Relation between common contract norms and Dutch legal principles

Principles of Dutch contract law	Corresponding common contract norms in relational contract theory
Autonomy	Mutuality/Creation and restraint of power
Trust	Contractual solidarity linking norms/Role integrity
Social justice	Mutuality
Being faithful to your promises	Effectuation of consent/Implementation of planning/Propriety of means
Social acceptability	Harmonisation with the social matrix

tion 3.4.3) – and role integrity since role integrity implies autonomy of an individual. It can also be related to the creation and restraint of power norm, since autonomy implies the ability to transfer some of one's power to someone else.

Trust is linked to contractual solidarity (Section 3.4.8). It can also be related to the linking norms insofar as it can be understood as a reliance interest. Finally, it can be related to role integrity since trust requires the other party to act consistently over a longer period.

Social justice can be related to mutuality; it requires a minimum level of reciprocity (combining the two also solves the problem of determining the minimum level of reciprocity that is actually needed as we discussed in Section 3.4.3).

The principle of being faithful to your promises is related to the effectuation of consent norm, but also to the propriety of means norm: you can't keep your promises if you do not possess the necessary means. The implementation of planning norm can also be related to this principle, because contracts are about dealing with the future. Keeping one's promises in other words implies at least a minimum level of planning.

Social acceptability, finally, is equivalent to the harmonisation with the social matrix norm we discussed in Section 3.4.11.

The relation between common contract norms and Dutch legal principles are summed up in Table 3.4.

3.8.2 Unifying principles

In Chapter 2, we discussed the law and economics approach and the transaction costs approach to contracts and contract law (Section 2.8). We argued that these two are essentially single-aspect approaches; they regard efficiency as the purpose of law and describe and assess contracts and rules from that perspective. The relational approach however takes a broader perspective; it includes more aspects and holds that law does not have one single purpose.

Another debatable point is whether contracts and contract law can be brought under one unifying principle. Such a principle would then have both a descriptive and a normative/ exclusive function (the term 'exclusive' here means that if an obligation does not fit the principle, it cannot be enforced).

We may hold that there are two types of contract theorists: the first type

Table 3.5 Views on the nature of contracts

Promise	A contract is nothing more than a promise to perform a certain obligation
Consent	A contract implies that a party has consented to perform an obligation; this consent may be implied
More principles	Various, possibly conflicting principles apply to a contract
Reconciling principles	More principles apply to a contract but in case of conflict, these principles can be reconciled by using one theory

doesn't believe that contract theory can be reduced to one unifying principle, the other type believes that finding a unifying theory is possible and is indeed contract theory's main task. In the latter category you can distinguish between authors who propose promissory principles and those who propose non-promissory principles (Oman, 2005; Barnett, 1999; Hillman, 1997; Fried, 1981). This debate, which takes place mostly in the Anglo-American literature, is of some importance here, because relational contract theory is strongly opposed to 'unifying theories' (Macneil, 1980). We will restrict our discussion of these unifying theories to the ideas of promise and consent (see Table 3.5), both of which have received considerable attention in the Anglo-American literature.

Promises

An influential theory of contract relates contracts to promises. Charles Fried is often quoted in the American literature but he is certainly not the only one who believes that the unifying principle of contract law is the concept of a promise (see e.g. Gordley, 2001).

Fried (1981) maintains that contract is based on the moral obligation to keep one's promises and that contract doctrines reflect that obligation (Wellman, 1987; Fried, 1981). This view is called the contract-as-promise theory. The contract-as-promise theory has lately attracted new attention but is, for Anglo-American law, in fact rooted in an old debate on English law in which most writers and the court held that the law of obligations knew only two categories: tort and contract, if we leave the category of unjust enrichment out of consideration. This subdivision seems to imply that the only grounds for legal action are failure to keep a promise or a wrongdoing (Chitty, 2004). Generally speaking, civil law has also witnessed an evolution whereby consent became the decisive element of a contract; the question then arises which kinds of consent are enforceable (Gordley, 2001).

The theory of contract-as-promise is attractive because it offers a clear principle that explains why people are bound to agreements. You are bound to perform your duties because you promised to fulfil them. This principle is compatible with both Catholic law and liberal contract theory. Catholic law introduced the '*pacta sunt servanda*' principle in the Middle Ages: you are morally bound to stick to your promises, even when the law doesn't offer a way of making you keep them (Balliam, 1991). When contract law makes sure that you keep your promises, it is therefore doing the morally right thing. The contract-as-promise principle is also attractive from a liberal perspective, where it is held that the state should keep interference with the life of its citizens

to the minimum. Individuals should be allowed to make agreements without the state interfering with their content. But the liberal will acknowledge that it is more efficient when the state tries to guarantee that citizens keep their promises, than when every citizen has to find his own way to do that (Rawls, 1999). We have seen that 'promise' is also one of the principles of Dutch contract law (Section 3.8.1).

The contract-as-promise approach is also compatible with the definition given in the Restatement (Second) of Contracts (1973). This Restatement is an attempt by the American Law Institute to formulate the leading principles of contract as laid down in American law; it is an authoritative source of law, though it does not have the force of law itself. The definition given in the Restatement is: "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

The English standard work *Chitty on Contracts* (2004, 29th edition) discusses two similar definitions of contract applicable to the English legal situation:

- a contract is a promise or sets of promises which the law will enforce (26th edition);
- a contract is an agreement giving rise to obligations which are recognised by law (2nd edition).

The first definition, which seems to be preferred by the current authors, includes a promise as the unifying principle of a contract. They hold that this first definition is in line with the common law requirement of a consideration (see Section 2.7.3) whereas the second is mostly a civil law approach to contracts. This implies that a difference exists between contracts in civil law and common law countries in that the common law systems put more emphasis on the importance of promise. We will see below that this is only one way of looking at the common law. Relational contract theory strongly opposes this view.

Promises in relational contract theory

The final question that rises in this section is thus how the roots of relational contract theory relate to the concept of a promise. Macneil (1980: 5) distinguishes his concept of contracts from classical definitions, saying that it is the difference between a contract-in-law and a contract-in-fact. He pleads for a more inclusive concept of contract: "While law may be an integral part of virtually all contractual relations, one not to be ignored, law is not what contracts are all about. Contracts are about getting things done in the real world – building things, selling things, cooperating in enterprise, achieving power and prestige, (…). If we wish to understand contract, and indeed if we wish to understand contract law, we must think about exchange and such things first, and law second."

We may conclude that contracts precede contract law. Macneil objects to a theory of contracts that takes promise as its central concept. A promise is a mechanism for projecting exchange into the future, and it is the essence of the classical contract but not of all contracts.

If we take a closer look at the concept of a promise to exchange, we may distinguish five elements:

1. the will of the promisor
2. the will of the promisee
3. present action to limit future choices
4. communication
5. measured reciprocity.

All these elements are important features of a contract, but in addition a great range of non-promissory exchange projectors exists (Macneil, 1980: 8): "Key ones include custom, status, habit and other internalizations, command in hierarchical structures, and expectations created by the dynamics of any status quo, including markets."

These non-promissory exchange projectors are *often* accompanied by promises. On the other hand, however, promises are *always* accompanied by non-promissory projectors. The reason for that is that non-promissory exchange projectors interact with the social matrix. A promise does not exist on its own but operates within the structures of the social matrix. A promise can therefore never encompass more than a fragment of the total situation. In addition, transforming promises into communication symbols takes effort. Since effort is a cost, not everything that can be transformed into promises will be (Macneil, 1980: 10, cf. Section 2.8.4): "A second factor in the inevitably limited role of promises is overt or tact recognition that the promise made is never exactly the same as the promise received. Every promise is always *two* promises, the sender's and the receiver's. The resulting non-mutuality ranges from subtle to gross differences in understanding. These differences can be resolved only by bringing into the picture something other than the promises themselves. This something, whatever else it may be, is a non-promissory projection of exchange into the future."

It is through this 'something' that words like reasonableness, good faith and legitimate expectations come into play here. And whereas the discrete approach does away with these norms, holding that contract law is better off when it focuses on classical ideals, relational contract theory holds that the acknowledgment of these relational norms should be central to contract law. There is no reason why they should all be combined in one principle.

Consent

We saw that a flaw of the contract-as-promise approach is that it fails to show why the concept of a promise is the fundamental root of *all* contractual

obligations. In all legal systems, the law protects legitimate expectations as contractual obligations even when no promises have been made and the defendant did not intend to make a promise (e.g. Macneil, 1980; Wellman, 1987; Pitlo, 1995; Oman, 2005; Valk, 2003; Chitty, 2004). The concept of an implied promise hardly solves this problem; why should we call something a promise when it isn't?

To solve this problem, Barnett (1992) introduced a theory of consent which he claims can tell us which concern should prevail in a specific case. As we saw at the start of Section 3.8.1, he regards will, reliance, efficiency, bargain and fairness as the main concerns of contract law. According to Barnett, the criterion of manifest intent or consent to be legally bound could be used to reconcile the competing demands of these disparate concerns. While Barnett does not choose one of these concerns as the dominant one, it is clear in any case that consent to be legally bound shows the same flaws as the principle of promise as a reconciling principle: it has to use artificial constructs to be consistent. The consent approach does however solve the reliance/ expectation problem of the contract-as-promise theory: when an expectation deserves legal protection, the defendant should at least have behaved in a way that showed his intent to reach an agreement. A real intention to be bound isn't necessary to create the expectation that a party wanted to be bound: it is enough that the other party was legitimated in its belief that the other party wanted to be bound (Waddams, 2003).

Waddams (2003: 7) discusses the concept of consent and then states that: "actual consent to be bound has been neither sufficient nor necessary in Anglo-American contract law: not sufficient, because it's ineffective in the absence of a bargain or a formality; not necessary, because contractual words and conduct are given effect according to the meaning reasonably ascribed to them by the promisee, not that actually intended by the promisor."

Waddams (2003: 15-16) goes on to state that all approaches to subordinate Anglo-American contract law to a single classifying concept have failed: "(...), many instances of liability as part of contract law do not involve 'contracts' in any ordinary sense of the word: the body of law so called has been concerned with promises (as much as with agreements) and with reliance or expectations (as much as with consent or will), and with utility (as much as with morality)."

Still, it may be true that at some point some kind of intent to contract has to be shown (either intentionally or unintentionally) to get the whole process of contracting started. This would mean that without any manifest intent, there cannot be a contract (cf. Eisenberg, 2000). We will discuss this point in Section 3.9.2.

3.9 Criticisms of relational contract theory

The discussion between Macneil and proponents of the law and economics school has been mostly one-sided, since not many scholars have responded to Macneil's views (Feinman, 2001). However Richard Posner (2000) – probably the best known proponent of the law and economics approach – has addressed them to some extent (see Section 3.9.1). Other scholars (see Section 3.9.2) have also criticised Macneil's account of relational contract theory for its lack of specificity and its ambiguities.

3.9.1 The criticism of formalism

Let us first take a closer look at the critique of Macneil's views given by Posner (2000) at a symposium held in honour of Macneil in 2000. The main difference between Macneil and Posner is not that Posner objects to Macneil's view that many factors go to determine a contractual relation. He does however argue that most people, and certainly judiciaries, are incompetent to understand these factors and hence to enforce the content of a contract. In Posner's view, we should assume that courts fail to understand even the simplest of business transactions. There is no difference between long-term relational contracts and one-shot contracts in this connection. In both situations the contracts are subject to many contingencies that courts generally fail to understand. We may then ask why people make use of the courts if they are incompetent. Posner (2000: 754), an eminent judge in the USA Court of Appeal for the Seventh Circuit in Chicago himself, argues that their incompetence is not relevant here: "Some might argue that because contract law exists, and parties freely take steps to ensure that their agreements are legally enforceable, it must be the case that courts are not radically incompetent. If they were, people would abandon the formal legal system. In this paper, I argue, on the contrary, that even if courts are radically incompetent, people would still voluntarily enter legally enforceable contracts. Indeed, I go farther and argue that many elements of our legal system make most sense if we understand them to be a response to the regrettable but unavoidable fact that our courts are incompetent when it comes to enforcing contracts."

Posner adds that if the law were competent to regulate relations among strangers, people would rely on it rather than spending so much time and effort establishing their reputations for trustworthiness and learning the reputations of others. And he argues that courts are not very good at deterring opportunistic behaviour in contractual relationships. This is why so much contractual behaviour depends on reputation, ethnic and family connections, and other elements of non-legal regulation, and not on carefully written and detailed contracts enforced by disinterested courts. People are better at recognising opportunistic behaviour than courts.

Courts can determine whether a contract exists or not but are no experts on the intentions of parties. Posner (2000) provides the example of family relations: it is widely accepted that courts are not capable of understanding the ins and outs of such relations but they can determine whether two people are married or not. He then refers to a survey in which courts were asked about a credit price in a consumer contract that was higher than the cash price. The overall opinion of the courts was that the credit price was unfair, even though it was in line with regular interest rates and reflected the higher risk of the vendor when selling on credit (Posner, 2000: 758). Posner concludes that when Macneil asks a judge to become more than a judge, namely also a sociologist or anthropologist so that he can enforce the real contract – the full content of the contractual relations – he asks the courts to do more than they are, generally speaking, capable of.

The main function of contract law is that it serves to deter certain kinds of high-value opportunism, by which Posner refers to the situation whereby the incentive for A (buyer) to defect from his promise to B (seller) is so high that it is profitable even at the risk of loss of reputation which will normally prevent A from profiting from low value opportunism. The award of damages by the court, but above all the high costs of litigation, may additionally deter A from profiting from high-value opportunism (Posner, 2000: 768): "… although non-legal sanctions are powerful, they cannot deter defections when the benefit from defection is high enough. When this occurs, the injured party benefits from the contract even when it is incompetently enforced. And both parties, not knowing in advance whether they will be injured or benefited by the price change, agree to the contract in order to protect themselves from defection."

The main function of courts is thus to order the parties to pay the costs of litigation even when the outcome of that litigation is merely a question of luck – as judges are radically incompetent – and as a general rule will rule in favour of the party that has spent the most on litigation.

Thus, if A cheats B, both parties will be punished when B decides to sue A over the breach of promise. Posner states that this is in fact an important function of the courts and draws an analogy with a parent who punishes both of his children when he does not know which one of them has been naughty. The punishment (although unfair to one of the children) still makes sense because of the moral lesson can be drawn from it that bad behaviour cannot be tolerated.

The final element of Posner's argument that courts should focus on formalism is that such behaviour is self-correcting: the courts have made the requirements for contracts to be enforceable more flexible over time. This substantive shift (see Section 2.7.3) towards a lower emphasis on forms by courts may however not be as desirable as we tend to think, if we believe with Posner that the courts are incapable of fathoming the true nature of the contractual relationship (Posner, 2000: 770-771): "… courts are no longer as formalistic as

they used to be, there is no reason to believe that this trend is desirable, that judges are more competent than they used to be, or that contracts are more complex, or that the old attitude was wrong. The modern view is based on an empirical hunch, and no more, and on this basis contract law has slowly shed some of its formal requirements."

The good thing about formalism is that parties can predict the outcomes.

Two elements are inherent to Posner's point of view. The first is that he agrees with Macneil on the complex nature of a contract but holds that it is not the legal system that should embrace these complexities because courts are not capable of doing so. The second point is that he does embrace an economic (utility maximising) approach by the law and uses that approach to determine the best rules and functions for courts. Society is better off with a legal system that abstracts from the relation between parties and takes a formal approach. The second point is of less relevance for this thesis, since its intention is not to propose changes to the American, English or Dutch legal system but to study the contractual relations and their complexities. I find the arguments of Posner on the incompetence of courts challenging but even if he is right – which I doubt – it would not make any difference for this study since it focuses on the actual behaviour of parties within the context of their legal systems and not so much on how the courts or the law should generally operate within that field. This study thus demands an approach that takes more aspects into account than only the formal signals. If it did not, this would almost imply that we might as well do away with a socio-legal approach to the law entirely.

3.9.2 Critique of Macneil's ideas by other relationists

A more complicated critique of Macneil's work is found in the work of Randy Barnett, most notably in an article that he wrote in 1992 in which he positions himself in relation to Macneil's concepts. Unlike Posner, Barnett is also a relationist. In this section, we will concentrate on his arguments, which may be taken as representative of those of a number of other adherents of relational contract theory. He states that that to a significant degree, we are all relationalists now (Barnett, 1992: 1200). Barnett means to say that most lawyers admit that there are more types of contracts than the discrete ones. But Barnett also sees significant flaws in Macneil's theory and states that it fails to distinguish adequately between legally enforceable and non-enforceable contracts. Moreover, Macneil's account of relational contract theory lacks a legal concept of contracts. Barnett claims that a theory based on consent can overcome these flaws (see also Section 3.8.2) but that Macneil could never accept such a theory because his concept of consent is too narrow and his views of relational contract theory are communitarian as opposed to Barnett's liberal approach to relational contract theory.

Barnett agrees with Macneil however that a formal model, to be anything other than a mere abstract conceptualisation, must have some basis in the real world. Otherwise a theory is nothing more than just a game of logic. Barnett and Macneil both look at concepts and theories as problem-solving devices (Barnett, 1992: 1178, cf. the notion of pragmatic legal instrumentalism in Section 2.6.2).

Barnett also agrees with Macneil that the role of theory is to evaluate legal rules, instead of determining them. Legal theory should provide principles (norms) that can be used to criticise doctrine. But Barnett also discerns three fundamental flaws in Macneil's account of relational contract theory. According to Barnett, Macneil does not distinguish between consent and an explicit promise.

Barnett's first point of criticism is that Macneil draws too stark a contrast between conscious consent and no consent. As a result he equates consent with an explicit promise. But consent may be subconscious or tacit. For example, when someone consents to enter into a legal relation he can hardly be expected to (explicitly) consent to all the consequences thereof. Thus, the difference between consent and custom seen by Macneil is not a real one. As Barnett (1992: 1190) puts it, "When Macneil argues that "the 'great sea of custom' ... forms the main structure of contract" and explicit promise the exception, he does not realize that this argument against consent turns on itself."

Consent helps to determine which contracts should be legally enforceable and which should not.

Barnett holds that the problem of distinguishing ex ante in a principled manner between legally enforceable and legally unenforceable commitments is simply not a social problem that interests Macneil enough for it to play a role in his social theory of contract. He goes on to state that (Barnett, 1992: 1191): "…it does persons who would contemplate engaging in Macneilian contractual exchanges little good to be told that "maybe legal sanctions will be used to 'reinforce' your relationship, but maybe not. Ask us again *after* you exchange"."

While this point makes sense, it is not really relevant to the issues discussed in this thesis as it does not criticise the common contract norms but Macneil's failure to distinguish between contracts that are (should be) legally enforceable and those that are not. Although the focus of this study is not the law as it is enforced in the courts, we cannot deny that black letter law is also a dimension of contracts and the theory may not do that well in case of conflicting norms in the courts. Still, what is gained by not choosing one reconciling principle may be of more value than what is lost: by not choosing a unifying principle, the theory can describe every aspect of a relation as valuable (cf. Section 3.8.3). Finally, I would like to add in response to Barnett that the principle of consent helps to protect against an overenforcement of commitments by the courts but it does not help to understand all contractual

agreements that are (in fact) enforced. Sometimes courts enforce agreements because of the customs that exist in a certain trade. Does it help us to argue that by entering that trade, a party also (tacitly) consents to its customs?

Barnett's second point is that a socially enforced system of property is not an inclusive part of Macneil's theory and moreover. Macneil does not fully recognize the vital social function of freedom of contract.

Barnett argues that Macneil, although he repeatedly acknowledges the importance of property rights, fails to acknowledge the social functions of contract. Macneil speaks of the power to contract instead of the freedom of and from contract (that is, the freedom to contract or not to contract). For Barnett, freedom of and from contract arises from the recognition of background rights (in this case property rights) and he can judge the validity of legal rights from that perspective. Macneil fails to recognise such background rights. For him, the power to contract does not stem from property and liberty rights; he sees contracts merely as a transfer of entitlements. A consent theory would never do that, according to him, but instead gives an account of the background rights that enable the individual to contract. It positions contracts within a broader spectrum of entitlements to property and in that way provides an account of the functional relationship between contracts and property rights. For Macneil it is almost as if the two are separate worlds: the property rights on the one hand, and the contracts that transfer them on the other.

As a result of the lack of a functional relation between property rights and freedom of contract, Macneil's view leads to an overenforcement of commitments that ought not to be enforced because it only focuses on exchanges and not on the relation with background rights. This is what Barnett means when he states that: "Macneil presents a relational theory that is at once too encompassing and not encompassing enough. His conception of contract is too encompassing in that it is unable (or perhaps, more accurately, unwilling) to distinguish between legally enforceable and legally unenforceable exchanges, preferring to focus instead on the common characteristics and functions of all exchanges. At the same time, Macneil's account lacks sufficient breadth inasmuch as it fails sufficiently to integrate his conception of contract into the set of social norms that it presupposes" (Barnett, 1992: 1182).

Finally, by focusing on the power to contract instead of the freedom of contract, he claims that Macneil focuses on exchanges and only seems to find them productive when the value of the exchanged products rises. But he does not give any account of the productive value of consensual exchange itself. Products can only get a market price if one can refuse to exchange.

These points of Barnett are valuable, but should be read in the context of the contradiction between the communitarian views of Macneil and Barnett's own liberal views – which are mostly of importance when we discuss contracts between individuals. For the contracts between planning authori-

ties and private companies involved in the cases studied in this thesis, the difference may not matter so much. Companies are perfectly aware of their property rights and they are relevant for contracts – but not to the extent that the question of whether they are background rights or separate rights significantly influences the contracting process. The question may impinge on the way in which a court rules on a certain case – will it include or exclude background rights in its verdict? – but court law is not the focus of this study (see Section 3.1).

Relational contract theory is ambiguous

The ambiguity in question resides in the fact that Macneil states first that there are discrete and relational contracts, suggesting that a discrete-relational spectrum exists, and then goes on to claim that all contracts are relational – even the discrete ones. Macneil himself believes that this ambiguity is only a matter of words and he solved it later by using the term intertwined instead of relational (e.g. Macneil 1987). Campbell (2001) states that the ambiguity is not only a matter of words and has its roots in an even deeper ambiguity that exists between communal and individual interests. Every human being is both a utility maximiser and a social person and this tension between solidarity and selfishness is what creates the fundamental problem for the theory.

The point that Campbell is trying to make is that Macneil wants to acknowledge that both the classical contract and the relational contract exist. But where the classical contract is based on selfishness, the relational contract also leaves room for cooperation. I agree with Macneil that there can both be a spectrum that goes from classical to relational contracts while at the same time all contracts are relational (or intertwined). But it is not clear why he initially chose the same terminology for these different arguments.

The critique of Campbell, who can be regarded as a proponent of Macneil's views, is related to that of Barnett. Both claim that Macneil's theory is not precise enough as a guide for the courts; it needs refinement when applied to specific legal doctrines (see Table 3.6).

The problem can be solved by accepting that the idea of a contract makes it possible to contract out of the relational approach. By doing that you agree to apply a set of norms (for example classical contract law or a consent-based theory) to your contract that is based not so much on reality as on a legal fiction that is imposed on it. These contracts would still be rooted in the relation with the other party but may be interpreted in a classical way. This would mostly mean that a court would be led by the text of the contract and not by the relation as it has evolved when it has to decide a case.

But this goes beyond the scope of this thesis. Here I prefer to emphasise that I will look at contracts from the perspective that a spectrum exists that makes a contract more or less relational or discrete and use the common con-

Table 3.6 Critique of relational contract theory

A.	**Critique from a non-relational perspective**
1.	Courts are radically incompetent to understand even simple business transactions. Macneil asks courts to do something of which they are incapable.
2.	The law should encourage more formalism to increase predictability.
B.	**Critique from a relational perspective**
1.	Macneil does not discern between promises and consent.
2.	Macneil lacks a legal concept of contracts: he does not discern between enforceable and non-enforceable elements.
3.	Macneil is wrong to separate property rights (and liberty rights) from contracts.
4.	Macneil fails to see the productive nature of exchange itself.
5.	Macneil's theory is ambiguous: it uses a discrete-continuum while at the same time asserting that all contracts are relational.
6.	The ambiguity is fundamental: Macneil cannot solve the tension that exists in every individual between his wish to maximise utility and his wish to act as a social being.

tract norms to provide an overview of the content and specificities of those contracts.

We may end this overview by concluding that critics of Macneil's views concentrate mostly on the fact that he tends to disregard the problem that contracts have to be enforced by courts. This however leaves the descriptive value of his views mostly untouched.

3.10 Case methodology

In the final section of this chapter I will provide a summary of relational contract theory and end by explaining how I intend to apply this theory to the case studies.

3.10.1 Brief summary of relational contract theory

Macneil (1980; 1983) defines ten common contract norms that are present in all contracts. He also recognises the existence of relational and discrete norms that govern the content and importance of the ten common contract norms. The ten common contract norms are:

1. Role integrity: *promoting stability through expectations about recognized social roles*[2].
2. Mutuality and reciprocity: *the idea that exchange is a process of mutual benefit.*
3. Implementation of planning: *as a means of reducing uncertainty about the future.*
4. Effectuation of consent: *acquiescence of choice as a basis for obligation.*

2 All short definitions in italics are taken from Vincent-Jones (2006: 4-6).

5. Flexibility: *the recognition of the need to avoid rigidity in implementation and facilitate adaptation to changing conditions*.
6. Contractual solidarity: *involves the extension of reciprocity in social relations through time*.
7. The linking norms: restitution, reliance and expectancy interest.
8. Creation and restraint of power: *to control relations of domination and subordination*.
9. Propriety of means: *placing constraints on the ways in which ends may legitimately be achieved*.
10. Harmonisation with the social matrix: *reflects the need for contract norms to be consistent with wider social norms*.

The discrete and relational norms govern the meaning of the common contract norms. They have their own characteristics: some of them are in fact common contract norms in their own right, while others are present in other norms.

A discrete contract leaves out every relation between the parties apart from the simple exchange of goods. The discrete norm is thus an approach to contracts that we may associate with such terms as (neo-) classical economics and formal legal rules. The discrete norms are:

1. Discreteness
2. Presentiation
3. Implementation of planning
4. Effectuation of consent.

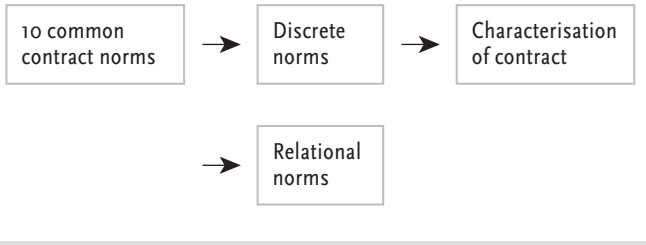
Discreteness means that no other relation exists between the parties outside the exchange, whereas presentiation is the associated ideal of bringing the future into the present (to be in full control of the future). In other words, the goal of presentiation is a by-product of discreteness and is best described as the restriction of future effects through definition and stipulation of events in the present.

Macneil states that discreteness and presentiation are products of the enhanced importance of the (possibly conflicting) *common contract norms of implementation of planning and effectuation of consent in certain situations:* one hundred percent planning and one hundred percent consent are required *for a transaction to be one hundred percent discrete*.

Unlike discrete norms, relational norms put the relation between parties up front and aim to preserve that relation. In addition, every relation produces its own norms. The relational norms are:

1. Role integrity
2. Preservation of the relation
3. Harmonisation of relational conflict
4. Propriety of means
5. Supra-contractual norms.

Figure 3.1 The methodology used to characterise a contracty



Three of these norms are common contract norms: role integrity, propriety of means and supra-contractual norms. The other two, preservation of the relation and harmonisation of relational conflict, are the relational version (an intensification and expansion) of contractual solidarity, whereby preservation of the relation is the background of resolution of relational conflict. The difference between the two is that the latter almost aims at 'peace on any terms'.

3.10.2 Methodology

I use the common contract norms and the discrete-relational continuum to analyse smaller projects ('focal projects') that took place within the strategic urban projects. We focus on agreements that were closed between the planning authorities and developers. These projects are complex long-term projects that require a considerable amount of co-operation.

As a general designation, I use the term development agreements (see Chapter 4 and Section 3.1) and I then study how the content of the agreements relate to the common contract norms and the discrete-relational scale.

I start from three premises. The first premise is that an agreement that gives a more specific account of the relations in which it is embedded is better than one that fails to do so. The second premise is that such an agreement will be able to solve more of the problems that occur in these relations than one that fails to do so. The third premise is that it follows from the nature of the cases that relational norms are of key importance for a focal project to be successful.

I then assess every norm on a discrete-relational scale and characterise each contract by asking which discrete or relational norms were of enhanced importance in it (see Figure 3.1). This provides the basis for a case-specific analysis of the importance of the ten common contract norms, and a characterisation on a three-point scale for every norm that ranges from more discrete to more relational. In Chapter 9 these outcomes will be used to compare and assess the agreements. In Chapter 10 we will also draw conclusions about the value of this method.

Tables 3.7 and 3.8 can be filled in to give concrete form to the analysis of each case. Table 3.8 is particularly useful in this context, as it gives a kind of 'discrete/relational profile' for each agreement under investigation. Comparison of the profiles for the different cases can throw useful light on the nature of the different focal projects.

Table 3.7 Importance of discrete and relational norms

1. Discrete norms		
Enhanced importance of:	Yes	No
Discreteness		
Presentiation		
Implementation of planning*		
Effectuation of consent		
2. Relational norms		
Enhanced importance of:	Yes	No
Role integrity		
Preservation of the relation		
Resolution of relational conflict		
Propriety of means		
Supra-contractual norms		

* When the norms of discreteness and presentiation are not of enhanced importance, it makes more sense to view the implementation of planning norm as a relational norm. In other words, the importance of planning in such projects then follows from the nature of the observed relation between the parties rather than from the wording of the agreements.

Table 3.8 Relational/discrete profile of the ten common contract norms in a specific case

Norm	More discrete than relational	Equally discrete and relational	More relational than discrete
Role integrity			
Mutuality			
Implementation of planning			
Effectuation of consent			
Flexibility			
Contractual solidarity			
Linking norms			
Creation and restraint of power			
Propriety of means			
Harmonisation with the social matrix			

4 Development agreements

4.1 Introduction

This chapter discusses the concept of a development agreement that provides the content for the description of the urban development projects and the focal projects of this study. We will link the concept of the development agreement to the content of the cases and discern its various functions. This also means that we will already introduce some examples of the case studies to illustrate and clarify the functions of development agreements. The chapter ends with a methodological description of the first two parts of the case-study chapters. In the final section of Chapter 3 (Section 3.11), we discussed how relational contract theory is used to assess and compare the cases of the following chapters.

We have already explained in Chapter 1 that the main subject of this thesis is development agreements as used in the context of major urban development projects in three world cities – New York, Amsterdam and London; these agreements yield the material for the detailed case studies presented in Chapters 5-8. We may define a development agreement as the agreement that contains the specific conditions under which parties are willing to cooperate for the realisation of an urban development project. Examples of such conditions are: the payments for land, agreements on job trainee programs, agreements on public space and other planning obligations and the phasing of the project. But the conditions may also include procedural obligations, such as the obligation on the parties to meet regularly. In line with the theory of the previous chapters, we may acknowledge that not all conditions will be enforceable in a court but that does not make them less relevant or less a part of the agreement (see Sections 2.8 and 3.1, and other parts of Chapter 3).

Contracts and agreements

In the interests of clarity, I recall here that a distinction is often drawn between an agreement and a contract (see also Section 3.1) according to which a contract consists of the legally enforceable part of an agreement. An agreement consists of all promises made by the parties whether they are enforceable or not (e.g. Wilmot-Smith, 2006). It follows from this distinction that a contract is normally in writing and interpreted in line with the rules and norms of contract law. In Chapter 3 we saw that Macneil's account of relational contract theory does not strictly follow this distinction and is sometimes criticised for that reason (see Section 3.10). One of the reasons for not applying the distinction between a contract and an agreement is that the distinction is mostly relevant if it is applied to courts and even there it is often vague (cf. Section 3.9). We will not use the distinction in the theoretical account of the development agreement. In addition to the reasons just mentioned, one of the reasons for that choice is that the documents we study include, from a legal perspective, not only contracts but also leases and deeds (see Section 4.2.1).

Note however that the main documents we examine in the case studies are the written agreements that the parties have signed and that examples are derived from these documents unless otherwise stated. The tension between the written document and the agreement as a whole is discussed at length in Section 4.3.

4.1.1 Possible approaches to study of the selected agreements

We start this section by taking a step back to the discussion of Section 2.5 on the scientific positioning of the present study. We saw there the study has elements that can be related to the sociology of law, to socio-legal studies (it takes a normative approach towards development agreements), to planning studies (it aims to help create urban environments) and to private law because of its focus on legal agreements. This scientific positioning informed the approach to the study of the agreements selected.

One could in principle use three different approaches to the study of these agreements (see Table 4.1): firstly, in each case one could select from the various development agreements that came into consideration one that would be recognised as a contract in law; secondly, one could use a single non-legal criterion to evaluate the selected agreement; and thirdly, one could focus the analysis on a certain relevant phase or topic within the context of the urban development projects in question.

It will come as no surprise that I chose the third approach: it allows us to study the selected agreements in their own contexts. In practice, our investigation of development agreements concentrated on the phase that starts with the decision of the parties to jointly undertake the project as a whole and ends when the parties lay down the details of their cooperation in the actual construction work. The agreements that the parties close may include more phases, but will never include fewer. Our interest stops at the moment that construction starts.

By contrast, the first approach simply limits the scope of the investigation by concentrating on a single type of agreement legally recognised as a contract, e.g. finance contracts or contracts of intent. Evaluation of the content and quality of contracts would take place within the context of the legal system in force in the country in question, and the enforceability of rules in a court would be the dominant criterion here. In this approach, we look at the project from the perspective of the legal document, not the other way around.

The second approach would involve using non-legal criteria such as efficiency, sustainability or social justice – to mention but a few – to assess the agreements. The criterion selected could then be used either (1) to judge whether the provisions of the contract are fit for purpose or (2) to assess how the contract functions in the context of the project. If we chose efficiency as

Table 4.1 Possible approaches to study of development agreements

Selection of appropriate type of legal document	Single-criterion analysis of fitness for purpose	Single-criterion analysis of function in context of project	Concentration on appropriate phase of project
Focus on type of contract	Focus on contract	Focus on project	Focus on project
Evaluation in context of legal system	Criterion-based evaluation	Criterion-based evaluation	No evaluation in first instance. Contracts are studied in context of project
Focus on black letter law	Focus on context of criterion (e.g. economy)	Focus on context of criterion (e.g. economy)	Focus on law in action

our criterion, in case 1 we would ask whether a certain provision of the agreement is the most cost-efficient one, while in case 2 we would assess the extent to which the development agreement contributes to the efficient execution of the urban development project in question.

Although this type of research based on use of a single criterion is attractive, it is probably too specific to be the best way of investigating how development agreements function in the context of urban development projects in general. That is the main reason why it was not used in the present study. Of course, more than one criterion could have been chosen to assess the agreements. An agreement could for example do really well from an efficiency point of view whereas it functions badly from the perspective of social justice. At a more abstract level, however, this approach simply comes down to the use of two or more single-criterion approaches so it was also rejected for the purposes of the present study.

4.2 Nomenclature

4.2.1 Significance of the term 'development agreement'

The term 'development agreement' is used in two different senses in the literature. In the first sense (usually encountered in an industrial context), it is a contract whereby the parties agree to work together to develop for example a new kind of technology. This definition is useful because it implies the idea of a shared and concretised project; the various tasks are thought of from the perspective of one indivisible project (Salbu, 1991).

In the second sense, a development agreement (often called an urban development agreement) is an agreement whereby a public party closes a contract with a land developer concerning the conditions for the development of a certain area. The public party thereby typically offers not to change public regulations and provides some benefits in exchange for facilities that the landlord will provide (Camacho 2005a; Wellman, 1987). The source of this description is American law but the American agreements of our study do not directly concern an agreement on the use of public regulation. The land use agreement (*bestemmingsplanovereenkomst*) in the Netherlands also fits the second definition (Hennekens, 1995), but these land use agreements were not used in the cases we study here. The King's Cross development involves an S106 agreement, which can be regarded as a typically English variant of the

development agreement (see Section 8.1).

But even though they may not fit one of these two definitions perfectly, the agreements used in the cases we study all share features of both types. We may say that the first type of development agreement emphasises the private law aspects of such agreements whereas the second emphasises the planning goals (cf. Section 2.5). From that perspective, the S106 agreement used in London leans over to the second definition, the Battery Park City leases combine both elements and the other agreements lean over to the first definition in that private law is important – though of course they are not aimed at the development of a new type of technology in these cases, but at the development of a new built environment.

Government by contract

The development agreement, as the term is used in this study, combines two different ways in which the government uses contracts: as a means of administration (public contracting) and for transactions with private parties (private contracting). All kinds of mixes between the two now exist and the term government by contract involves both forms and all their intermediate provisions. Vincent-Jones comments on this term as follows (2006: 3): "The term 'government by contract' is commonly used to describe a wide range of contractual arrangements involving public bodies, including traditional public procurement, contracting out, public/private partnerships, franchising or state concessions, agreements between the government and self-regulatory organizations, agreements between state agencies and individual citizens, and various types of agreement within government."

Vincent-Jones (2006) discerns three types of contracts that are used by the government: administrative contracts, social contracts and economic contracts. The category of social contracts, whereby the government contracts with social groups or individuals, does not really apply to the cases of this study although one might say that contracts that implement the interests of various local action groups share features with the contracts that fall within this category.

The economic contracts fit the development agreements of the cases best. Vincent-Jones defines them as (2006: 22): "…contractual agreements directed at improving public services through competition and/or the devolution of management powers to public purchasing or commissioning agencies in a variety of hybrid forms beyond simple market or bureaucratic organisation." The numerous examples of public private partnerships and other types of contracts between the state and private parties fit into this category, as do procurement procedures.

Administrative contracts (2006: 21) "…are contractual arrangements intended (or having potential) to increase the transparency and effectiveness of the operation or machinery of government." An example would be an agree-

ment between different departments to clarify who is responsible for which parts of a certain policy and to do away with contradictory policies. Development projects often involve administrative contracts that are closed before the contracts with the private parties. Within the context of this study, we will place them in the category of enabling contracts (see Section 4.3).

The difference between the development agreements of this study and the economic contracts and administrative contracts of Vincent-Jones is that most of the contracts of this study where closed by the government in its 'private-law' capacity. The exception being the S106 agreement in the King's Cross project that basically implies a selling of planning permission (see Section 4.2.1 and Section 7.2). Although the contracts that are discussed by Vincent-Jones are private law documents, they are used as a way to perform administrative tasks. The agreements of our cases, on the other hand, do both. They are first and foremost legal agreements that could have been closed between private parties, but they also include public goals. Again, the exception is found in the King's Cross case.

4.2.2 Names used to denote the development agreements in the case studies

The written agreements that we encountered in the case studies have different names and fall into different legal categories (see Table 4.2).

In New York, the agreements were leases: in a lease the right to possess property is transferred from one party to another for a certain period. A lease consists of a direct, not a projected, transfer of rights, it may (and will usually) do so under the condition of a continuous flow of money (payments to the landlord) but the transfer of the property takes place when the lease is signed (Smith, 2003).

The agreements in Amsterdam are named cooperation and development contracts but they have the same legal purpose as the agreements in New York: they provide the conditions under which the City of Amsterdam and the private parties are willing to enter into a lease agreement in the near future (Hartkamp, 1996; City of Amsterdam, 2005).

The agreement in London is both a deed and an S106 agreement. A deed is a document in writing, under seal, that grants a right to another party. It resembles a contract (as opposed to a license that consists of a unilateral promise) under classical common law definition but is not subject to the requirement of consideration (Smith, 2003; see also Section 2.7.2).

An S106 agreement is an agreement under the British Town and Country Planning Act 1990. Section 106 of this statute allows local planning authorities to make their planning permission subject to an agreement on planning obligations. In this agreement, a developer offsets the impact of his development with (in kind or financial) payments for public facilities (Booth, 2003: see Section 7.2).

Table 4.2 Names of agreements in case studies

Case study	Type of agreement
Battery Park City	Lease
Hudson Yards	Lease
Zuidas (Mahler4)	Cooperation contract
Zuidas (Gershwin)	Development contract
King's Cross	S106 (deed)

4.3 Aspects of the development agreement

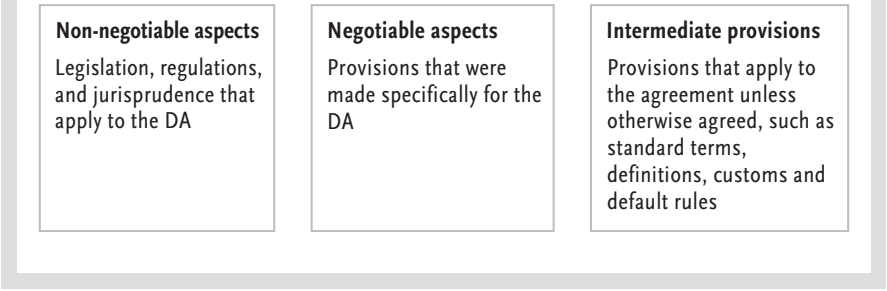
A development agreement has an important legal aspect but it also exists outside of its legal realisation; as we have seen, it is embedded in the relations between parties (see Section 3.1 and further). This means that a development agreement is an agreement that has both enforceable and non-enforceable features. Elements of the development agreements find their way into legal documents that sometimes but not necessarily carry the same name (see Section 4.2.2). In addition, the development agreement can also be situated in agreements that are not formalised (for example, oral agreements) or in the actual conduct of parties. However, in the cases of this study, the larger part of the agreement will normally be written down in a legal document (see Section 4.2).

We may further draw a distinction between aspects of the project that were negotiable and aspects that were not (see Figure 4.1): you may hold that the constitution of the United States influences a specific project in New York City, but the provisions of the constitution aren't negotiable. The customs of a trade influence the project and are not negotiable either but they do not necessarily apply to the specific contract. We therefore call them intermediate provisions since they will usually apply to the agreement if they were not specifically dealt with. The negotiable aspects of a development agreement finally are those aspects that are dealt with specifically during the negotiations. An example is a price that will be paid for a good.

The negotiated part of the agreement can be divided into:

1. *Legally enforceable agreements that are in writing* – An example of a legally enforceable agreement in writing is the price that will be paid for land or a provision in the contract that holds that the apartments that are built for affordable housing will be conferred to a affordable housing corporation. Examples of enforceable agreement in writing in the Gershwin project:
   - Article 4 of the development contract mentions that the obligation of the consortium is to realise the (project in the) 'Plan area'.
   - Articles 15.1 and 15.2 mention as the core obligation of the government that it has to deliver the project lands in a full serviced state.
2. *Legally enforceable agreements that are unwritten* – Examples of enforceable agreements that are not written down include the promise to realise (an unspecified amount of) commercial rental units (case interview Amvest, GER 02-06-A1) and the promise to use a specific type of architect. Generally speaking, most agreements that are unwritten are enforceable as long as

Figure 4.1 The methodology used to characterise a contracty



their existence can be proved (Hartkamp, 1996; Chitty, 2006).

3. *Legally unenforceable agreements that are in writing* – An example of an unenforceable agreement in writing is the agreement that parties will bear a prestigious project like la Défense in Paris in mind when they discuss the project under hand. Such a point of reference is mentioned in the development agreements that were closed in the focal projects in the Zuidas in Amsterdam (Chapter 7). It can also be found in some documents that represented the shared vision of the private consortium and the boroughs of Camden and Islington in the King's Cross case (Chapter 8). Furthermore, some of the many obligations of reasonable endeavour found in the agreements we have studied would appear to be unenforceable. An example of an unenforceable duty from the Meushar lease in Hudson Yards:
   - Section 9.03 states that landlord shall endeavour to promptly advise tenant of any calls or complaints with respect to tenant's occupancy of the premises. But the section also specifies that failure to do so shall not be deemed a default under the lease.
4. *Legally unenforceable agreements that are unwritten* – An example of an unwritten unenforceable agreement is the expectation of a party – often based on promises made by or behaviour of a government representative – that if he agrees to make a lesser profit on the project under hand, the city government will offer him another project. Private parties in the Amsterdam Zuidas case mentioned this expectation sometimes as a kind of collateral (case interviews Fortis real estate, MAH 10-04-A2 and Amvest, GER 02-06-A1).

4.4 Positioning of the development agreement within the project universe

The development agreement is a core agreement around which other agreements are located: it is the centre of the project universe. But it may not always be that easy to locate. The development agreement may be hidden in several documents and oral agreements. It may be part of a lease, the document embodying it may be so short that its importance is easily overlooked, or it may not be found in one single document, its provisions being spread over different written agreements. One of the reasons for this complexity is

Figure 4.2 Positioning of contracts

that a development agreement finds its roots in the relations between private parties and public parties. In most cases, negotiations with more than one government agency are necessary.

In the case of King's Cross, the council of the borough of Camden signed the agreement, but other governmental agencies had to co-sign. The project also involved negotiations with English Heritage and the Greater London Authority (GLA). What looks like a written agreement between one public party and a consortium of private parties will often consist of a complex relation between various public and private parties. In the case studies of this thesis, we will find the problems and complexities that result from this mostly expressed in the role integrity norm (see Section 3.4.2). Sometimes the agreements specify the various parties involved. An example are the signing parties in King's Cross (S106 agreement for main site):

- Art. 2.1 Identifies as the contracting parties the Mayor and Burgesses of the London Borough of Camden (the Council), The Secretary of State for Transport, London & Continental Railways Limited (LCR), National Carriers Limited (NCL), Argent (King's Cross) Limited (the Developer) and Transport for London (TfL).

A development agreement does not confine itself to a signed legal document. It will evolve after it has been closed. When new issues come up – or just because of the fact that the relation between parties evolves – the agreement will change.

It is therefore not easy to describe the precise scope of a development agreement. Where does an enabling contract end and a development agreement start? (see Figure 4.2)

Parties deal with each other at more than one table and at all those tables they will play (slightly) different roles and perform different tasks. In some cases, parties that have not signed the contract may still be a party to the agreement. In the Mahler4 agreement, for example, a German bank that signed the contract of intent was not included in the cooperation contract. Its role in the project changed from a leading party to a party that agreed to buy some of the assets when they were built. But its influence remained since it had been involved in the project in a preliminary stage and would be one of the buyers of the new buildings. Its name was mentioned in the cooperation contract (see Section 7.2.7a).

It is necessary to focus also on the relations between parties and not only on the texts of their agreements. Texts provide an important point of focus because they create mutual expectations and will be the most important

sources of information for a third party who wants to explore the nature of the relationship, but they are not necessarily decisive.

Scope of the agreement

We started this chapter by defining a development agreement as the agreement that contains the specific conditions under which all parties are willing to cooperate for the realisation of a project.

A project may be as small as the development of one single building within a larger project. But the agreement must be crucial for the development in question. From that point of view, other agreements are positioned around the development agreement: they enable the development agreement, are complementary to it or derived from it. In addition, not all these contracts necessarily involve all parties that signed the development agreement.

Enabling agreements

Examples of agreements that enable the development agreements to exist are a finance contract between a bank and a developer or a contract of intent between the planning authority/ local government and the developer(s).

A contract of intent was signed in the Mahler4 project between the developers and the City of Amsterdam. Its goal was to set the limits within which the parties would try to reach a final agreement.

Another example of an enabling agreement is a contract between different tiers of government and/or government agencies that they will join forces for the realisation of the project. Such a contract was closed between the state of New York, the City of New York and the Metropolitan Transportation Authority (MTA) in the Hudson Yards Project. Another type of enabling agreement is a written agreement wherein developers join forces, by starting a separate company in which they will work together for the realisation of the project. Such agreements were closed between the developers in the Mahler4 and Gershwin projects.

Complementary agreements

A complementary agreement specifies (provisions of) the development agreement, but does not set aside or change the latter. If it were to change the core agreement, it would not be a complementary agreement but part of a new development agreement.

An example is a contract in which parties specify requirements on the design of the premises in the project. The Hudson Yards (construction) leases state that a cooperation contract may be necessary to coordinate the work between the lessee and the landlord. This would be a complementary contract (see Section 6.2.3).

Derived agreements

An example of an agreement derived from the development agreement is a contract between a developer and a contractor who will actually carry out the work. To make things more complicated, a development agreement for an urban development project may give rise to development agreements for smaller projects. An example is the realisation of a museum within the context of one large mixed-use building. Such a museum is a project in itself, for which a development agreement could be closed (cf. Section 7.2.3 and Section 2.3).

There may also be a coordinating agreement – that could be a contract, a lease, etc. – and one or more contracts that are positioned under it in an umbrella construction. An example of this is the contract between a developer and the landowner under which contracts with the contractors and sub-contractors are positioned. In the end, these contracts can all be led back to the contract between the developer and the landowner (case interview Mary Jane Augustine, NY 03-07-A3). The cases in Amsterdam, New York and London all provide examples of such structures.

The Battery Park City leases state for example that the tenant's general contractor will meet with the tenant (the developer) and the BPCA (Battery Park City Authority) on a bi-weekly basis to discuss the progress of the project. It also states that the tenant must use his best efforts to ensure that 25% of his contractors are women-based or minority-based enterprises (WBEs and MBEs).

4.5 Main functions of a development agreement

The development agreements of this study perform at least four functions: (1) they sum up the conditions under which exchange will take place; (2) they are used as a project statute; (3) they comprise a plan for the execution of the project and (4) they serve as a development tool (see Table 4.3). These functions encompass the public-private nature of the agreements. The actual contracts may perform more functions than those mentioned here, but not less.

They may, for example, include provisions on how the project will be maintained after its completion, or under which conditions it can be sold (post-development provisions).

4.5.1 Exchange

The exchange part is not a distinguishing characteristic of the development agreement, since exchange is a crucial element of any contract. We saw that 'projection of exchange into the future' is the definition of a contract in relational contract theory, and this is further emphasised in the mutuality norm

Table 4.3 Functions of development agreement

Development	The development function is presupposed in the discussion of all functions
Exchange function	The conditions for exchange
Statutory function	The (procedural) rules parties agree to obey
Planning function	The measures the parties intend to take to realise the project
Instrumental function	A DA can be a means to realise public goals

(see Section 3.4.1 and 3.4.3).

But even when not a distinguishing feature, the conditions for exchange are still an important (if not the main) function of the development. An example of exchange in plot 18b, Battery Park City (plot 18b lease):

- Art. 2 (first part) reads: "Landlord, does hereby demise and sublease to Tenant, and Tenant does hereby hire and take from Landlord, the Premises, together with all easements, appurtenances and other rights and privileges now or hereafter belonging or appertaining to the Premises (...)."

4.5.2 Project statute

One of the main functions of development agreements is to enable parties to write their own laws within the borders of general legal rules and values

The development agreement serves as a statute for the project. One of the main functions of contracts is to enable parties to write their own laws within the confines of general legal rules and principles; both the classical and the relational approach put this up front (cf. Section 3.3). This also applies to development agreements, which embody the conditions under which the parties are willing to cooperate for the realisation of the project. I therefore use the term 'project statute' as a label to emphasise that parties find each other in the context of a project, which provides a broader context for cooperation than for instance a sales contract. It is better to state that the characteristics of the project give rise to the specific rules that parties draw up than to emphasise the closed relation between the signing parties since, as we saw, that closed relation is mostly a legal fiction.

This yields an interesting picture, in which the project brings parties together in a specific context. The relations between the parties influence the project, but the project also influences the relations between the parties.

More specifically, we may discern four aspects of the statutory function: (1) the goals that parties commit themselves to; (2) rules for cooperation; (3) rules for dealing with conflicts; and (4) rules for non-compliance.

We may say that the statutory function includes the procedural rules that both parties have to obey. Examples are the procedures that have to be followed when one of the parties wants to modify a contract, when time schedules are not met or when environmental inspectors want access to the land.

An example of procedural rules in King's Cross project (Main Site):

- Article 31.1. and 31.2 state that the contract ends when all obligations have been fulfilled.

25 years after the implementation date, the developer can apply to the council for the written approval of the termination of the obligations that do not have

an end date. It can also do that five years after 75% of the total permitted floor space of the development has been practically completed. The council shall give such written approval when the developer has fulfilled all its material obligations, the planning purpose underlying the obligation can be reasonably said to have been met and the costs to the developer of continuing to comply with the obligation do not justify the obligation continuing in effect.

An example of procedural rules in Battery Park City (plot 16/17):

- Article 24 (events of default; conditional limitations, remedies, etc.) states which events shall be an event of default.
- 24.01(c) reads that "if Tenant shall fail to observe or perform one or more of the other terms, conditions, covenants, or agreements contained in this Lease, including, without limitation, any of Tenant's obligations under the provisions of article 11 of this Lease (other than the obligations referred to in the preceding Section 24.01(b)), and such failure shall continue for a period of thirty (30) days after notice thereof by Landlord to Tenant specifying such failure (unless such failure requires work to be performed, acts to be done, or conditions to be removed which cannot by their nature or because of Unavoidable Delays reasonably be performed, done or removed, as the case may be, within such thirty (30) day period in which case no Event of Default shall be deemed to exist as long as Tenant shall have commenced curing the same within such thirty (30) day period and shall, subject to Unavoidable Delays, diligently, continuously and in good faith prosecute the same to completion);…".

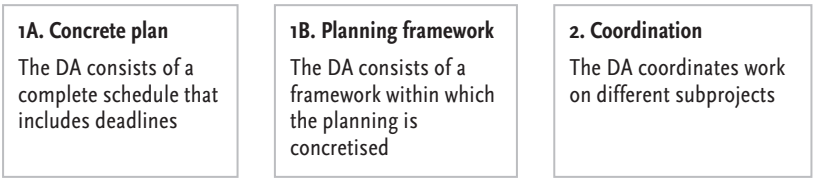
4.5.3 Planning function

We have seen that implementation of planning is a common contract norm (see Section 3.4.5). This means that planning is present in all contracts. The planning norm is of enhanced importance in discrete transactions (it is part of the discrete norm), whereas it depends on the circumstances of the case under hand what the meaning of the norms is for relational transactions.

It follows from the nature of the development agreement that the planning function is of enhanced importance. A development agreement is about developing a project in the (near) future. It should contain detailed planning or refer to documents and meetings wherein this planning is made.

The difference between the statutory function and the planning function of the development agreement is that the former focuses on procedural rules. The planning function focuses on how parties will work and cooperate to realise the project, and not on the formal procedures of the written agreement. The plan does not presuppose that something will go wrong but starts by supposing that everything will be developed according to plan. The statutory function encompasses that function in the sense that it provides the procedures wherein the planning will be made or executed (or both).

Figure 4.3 Planning function of development agreements



Concrete plans and planning frameworks

Development agreements not only provide rules for cooperation, they also contain a plan for the development of the project (see Figure 4.3). This plan can be more or less specific: it can be a concrete plan with deadlines and schedules for the realisation of the project, or it can create a (planning) framework within which the project will be realised. The most highly specified plan will include deadlines and will state that when they are not met the non-performing party has to pay damages. Examples of such deadlines are found in the leases of the cases in New York (see Sections 5.2.5 and 6.2.5).

An agreement may also include deadlines but determine that when they are not met, parties will have to look for a solution. Alternatively, a contract may specify phases (design phase, building phase, maintenance phase) and then determine that when a phase starts, steps have to be taken within fixed deadlines. In some agreements we will find a combination: they set a deadline for when the project needs to be realised, but use a system of phasing for all other moments.

Coordination function

An important aspect of the planning function is that a development agreement may coordinate different aspects of the project, for example the construction of the private infrastructure and the public infrastructure. The public infrastructure usually has to be completed before construction of the private infrastructure – entrances, private pavements – may start. The development agreement may coordinate the works in question. It may also coordinate work on adjacent sites, to prevent nuisance. It would then, for example, determine that work on one plot cannot start before the work on the adjacent plot is finished. Finally, an agreement may coordinate the work of various parties involved such as architects, contractors and subcontractors by implementing meetings between the various actors involved in the project.

An example of deadlines in Battery Park City (plot 16/17):

- Article 24.01(b) states that a default exists if commencement of construction has not occurred within thirty days after notice from landlord to tenant and if substantial completion of the building has not occurred within 522 business days from the construction commencement days and such failure continues 10 days after notice for landlord to tenant. Both are subject to unavoidable delays.

4.5.4 Instrumental function

The term 'instrumental' refers here to the fact that a private law agreement is one of the instruments (tools) that can be selected to achieve public goals. It includes the function of governing by contract discussed in Section 4.4 but its application is not necessarily confined to the government. Other instruments that governments use are forms of specific legislation, tax abatements, subsidies etc.

The instrumental function of the development agreement differs from the other functions in that it – in this study – focuses specifically on the public parties. Note however that the availability of the instrumental function is not limited to the government. It can also be used by a private party or by a public action group. The cases studied here do not include an example of public action groups that use development agreements to enforce certain developments in their neighbourhoods, but I did encounter such an example in the Atlantic Yards project in New York City (New York City, 2005). Here various public interest groups joined forces to close a development agreement with the developers in which the government did not interfere. As a consideration, they undertook to support the developer in the project instead of trying to prevent it from implementing it by starting litigation.

We may discern two situations in which the instrumental function is applied. In the first situation, a public party makes use of a development agreement to promote development in an area that isn't very popular amongst developers. The government could for instance share in the risks of the development. Other instruments that may be used are agreements on subsidies and tax abatements or re-zoning of the area (cf. Section 4.4). We will not encounter these agreements at the level of the focal projects studied here, but they are found in some urban development projects. In the New York and London cases, the areas concerned shared a history of low popularity with developers (see Sections 5.1.5, 6.1.5. 8.1.5), while the Amsterdam case involved some uncertainties that required the government to step in to share a part of the development risk (see Section 6.1.8).

In the second situation, the area is already popular with developers but the government wants to steer the development in a certain direction and to promote other interests that are easily overlooked by developers. The government may for instance want affordable housing to be created in an expensive neighbourhood, office towers to be built in a sustainable way or lower-wage jobs to be created for the original inhabitants of a gentrifying neighbourhood. Our case studies all involve one or more examples of such situations.

In the sense that development agreements are instruments for the realisation of public goals, they can supplement legislation to specify legal obligations. They are sometimes the most important instrument the government uses to reach its public goals; for instance, in the English planning system the

above-mentioned S106 agreement, in combination with planning permission, is the main instrument used by (local) government to steer development and promote public interests (Van der Veen, 2006a). In the Zuidas project in Amsterdam, the obligations laid down in the development agreements that relate to public interests are merely specifications of private law obligations. In Battery Park City the public goals are all part of the lease, which is mostly due to the legal characteristics of the BPCA (see Section 5.1.7).

Public goals

The interest of the public is either to attract development to an underdeveloped or deprived area, or to steer development in a way that serves a broader range of interests than only those of the developer and his partners. Since these various interests do not necessarily coincide, there are likely to be frictions. Another situation occurs when the public objects to new development and wants everything to stay as it is (e.g. Cullingworth & Nadin, 2006). The projects studied here provide no examples of this, however.

In King's Cross, for example, the friction between the community groups on the one hand and the local government and the private consortium on the other was mostly about the percentage of affordable housing that would be built and the moment at which it would be built (see Section 7.1.18).

We may distinguish two groups of public goals:

1. The first group is not project-bound; the need for affordable housing or green areas also exists outside the project. The project may be used to foster these general goals.
2. In most cases, the government will urge the developers to minimise the impact the project has on the area (e.g. by paying for extra infrastructure or by providing new jobs to compensate for those that will be lost because of the new development). In that case the public has an interest that is related to the development of the project itself.

A development agreement may cover both groups of public goals, as is the case in the projects studied in this thesis. In smaller projects, public authorities often confine themselves to minimising the negative impacts of new developments (Camacho, 2005b).

Most public goals are not fixed but are subject of debate, and the public will often disagree on whether its interests are served by the new developments. In the cases studied here, strong public opposition was only encountered in King's Cross. This may be explained by the fact that the other projects are situated in new (BPC) or underdeveloped (Zuidas) areas.

An example of Public Goals (type I) in the Zuidas (Gershwin, Zuidschans):

- Article 5.1 states that 129 homes out of 390 mentioned in the contract will be leased for a social rent and 15% will be leased or sold for an affordable price (middle segment).

An example of Public Goals (type II) in King's Cross (Main Site):

- Section I mentions that a police office will be constructed by the developer and leased to the Metropolitan Police.
- Section K deals with the support of local schools needed to teach more children as a result of rising number of inhabitants in the project area.

4.6 Methodological approach of the case studies

4.6.1 Introduction

In this final section, we discuss how the features of the development agreement are approached in the case studies. We saw in Section 3.11 how relational contract theory will be used to analyse the contractual relations in the focal projects of the cases studied. The development agreement as described in this chapter provides the context for the project: where is it located, how is it supposed to look when it is finished, how much it will cost, etc. Every case study therefore starts with two sections. The first discusses the urban development project that forms the broader context of the project(s) of focus investigated (see Section 2.2). This is not meant as an analysis – it is not written from a normative point of view – but rather as a description that puts the focal projects (my particular object of research) in perspective.

The second section describes the focal projects for which the underlying contracts are subjected to relational analysis. This second section is descriptive, using the functions of the development agreement as a framework for the description given. In Chapter 10 we will use analysis of the content of the second sections as a basis for discussion of the development agreements from a somewhat broader perspective than Chapter 9 where we will compare the outcomes of the relational analyses. The aspects described in the following chapters will be selected from three sources. Case interviews were used to get an idea of the context and specifics of the cases and the interests of the various parties involved. Expert interviews were used to get a grip on (1) the specifics of the project within the broader context of the city, and (2) the specifics of the legal documents within the context of regular legal practice (see Appendix A for an overview of the questions asked in the case interviews, and Appendix B for a list of the interviewees).

I made a list of 43 questions as a basis for study of the development agreements (see Appendix C). These questions guided me through the various legal documents and showed where the gaps had to be filled with information from other sources (interviews, plans etc.). The content of the first section of each case-study chapter was informed by the 'ingredients of success' identified by Alexander Garvin. In his book *The American City: what works, what*

Table 4.4 Aspects of large urban development projects in the case studies

Ingredient of success	Corresponding section in case study
1. Market	1.4, 1.9, 1.14, 1.15 (momentum, finance, goals, delays)
2. Location	1.2 (area)
3. Design	1.3 (description)
4. Financing	1.8, 1.9 (ownership and project finance)
5. Entrepeneurship	1.7, 1.16, 1.18b (project management, private parties, conflicts)
6. Time	1.4, 1.5, 1.6, 1.15 (momentum, time frame, history, delays)
7. Involvement of the public	1.10, 1.11, 1.12, 1.13, 1.18a (social housing, sustainability, public facilities, involvement of the public, critique)

doesn't (1995/2002), he discusses numerous development projects using these ingredients. They are:

1. Market: is there a market for the new buildings?
2. Location: is the area easily accessible and otherwise feasible?
3. Design: does the design fit the surroundings?
4. Financing: is there enough money? How is the project financed?
5. Entrepreneurship: is anybody taking the lead, does he really want the project to succeed?
6. Time: is the time right for the project?

These factors are challenging, although they do not focus on agreements they claim that for a project to be successful all these questions will have to be answered in the affirmative. Case interviews were consistent with this practical 'bottom up' approach. I added an extra factor to these six and that is the involvement of the public since, as we saw in Chapter 2, this is a critical element of urban development projects.

In the remaining chapters we will try to say something about the relative success of the various development agreements studied. How well were they prepared, did they seem to provide the parties with the best deal? In the following two sections I will briefly introduce the aspects of the cases that we will discuss in the case studies and explain how they relate to the other parts of the study.

4.6.2 Description of urban development projects

In this section we will discuss the descriptive elements of the urban development projects. The numbers refer to the section numbers in the case studies of Chapters 5-8. This first section provides the context for the study and analysis of the focal projects.

The way in which the various topics discussed in each case study are related to Alexander Garvin's above-mentioned 'ingredients of success' is summarised in Table 4.4.

Contents of the case study sections 5.1, 6.1, 7.1 and 8.1 (the urban development project)

1.1 Introduction
The introduction provides a short general description of the urban development project in which the focal project is situated.

1.2 Description of the area
The description of the area answers three questions:
- Where is the project area located?
- How is it connected to other parts of the city?
- Are there already any landmark buildings or other significant places such as parks or railway stations in the area?

1.3 Description of the project
This section provides a general description of the phases of the project and the result envisaged.

1.4 Momentum
Momentum is understood here as the sum of the factors that were decisive in determining why the project started up at a specific moment. They include economic circumstances, public pressure, public leadership, private leadership and political circumstances. The main questions in this section are:
- Can we discern the reasons why the project started at a specific moment?
- Were there any decisive factors?

1.5 Time frame
This section answers three questions:
- How long will it take to develop the project?
- When will it start and when will it end?
- How long will the various phases take?

1.6 History and background
This section provides some background information on the project.
Key questions here are:
- Were there any plans prior to the one that we are dealing with now?
- How does the project fit the city's needs?

1.7 Project Management
Urban development projects are often managed in a specific manner. This section focuses on the management structure of the project.
- How and by whom is the project managed?
- Is there a specific agency, company or individual that oversees the project?

1.8 Project finance
This section focuses on the financing of the public parts of the project. The questions asked here are:
- How is the project financed?

And in case of public private partnership (PPP) structures:
- Who will pay for what?

1.9 Ownership
The main questions in this section are:
- Is the area mostly publicly or privately owned?
- And by which or what kind of public agencies or companies?

1.10 Affordable housing
Affordable housing is one of the goals that public parties pursue. Since affordable housing is not a cost-effective way of using expensive land, negotiations often focus on this issue. Not all kinds of affordable housing are meant for the lowest incomes, other forms focus on middle incomes or specific target groups. The main questions in this section are:
- How much affordable housing is envisaged in the plans?
- What kinds of affordable housing?
- How do public parties ensure the realisation of their housing targets (and how did they do so in the past)?

1.11 Environmental sustainability
Environmental sustainability is usually one of the key issues in plans for urban development projects of Western cities. The key questions in this section are:
- Is environmental sustainability a concern of the project?
- How is it defined, and how do the public (and other) parties ensure the realisation of their sustainability goals?

1.12 Other public facilities
Plans for new neighbourhoods may envisage all kinds of public facilities, such as museums, gymnasiums and theatres.
This section provides an overview of the public facilities that are of importance for the project as a whole, either because they were strongly debated or because they are crucial for the identity of the project.

1.13 Involvement of the general public
The general public is defined in this context as the residents of the project area and of the city as a whole. Public parties, by their nature, are obliged to take the interests of the general public into account, while private parties will often also want to do so nowadays.
The main questions in this section are:
- How is or was the public involved in the project?
- Is the involvement of the public considered to be extensive or minimal?

1.14 Goals of the project
This section focuses on the goals of the project as described in various plans and other documents. The main question here is:
- What are the explicit goals that the urban development project pursues?

▶

1.15 Delays
It is not uncommon for urban development projects to be subject to delays. The main question in this section is thus:
- Has the project experienced any significant delays?

1.16 Role of private parties in the project
This section describes the involvement of private actors in the project. The main question here is:
- Did private actors play a leading, pro-active role with regard to the project as a whole?

1.17 Public parties
This section provides an overview of the public parties involved in the project and their various tasks.

1.18 Critique
This section discusses the critique to which the project has been subjected, including reports of these discussions in the media.

1.19 Conflicts of power
This section focuses on the conflicts of power that often arise between various layers of government (for example between the state and the city) and discusses their impact on the project.

4.6.3 Focal projects

Having discussed how we will describe the urban development projects of the case studies, this final section describes which aspects of the focal projects we will consider. Despite the many correspondences between this section and the previous one, here it was not so much the ingredients of success but rather the various functions of the development agreement that provided the background for choice of the topics under discussion. This means that the case interviews and the study of the legal documents (with the aid of the 43 questions listed in Appendix C) form part of the basis for description of the projects.

The aspects of the focal projects are summarised in Table 4.5.

Table 4.5 The aspects of the projects of focus described in the case studies

Topic	Corresponding section of case study
Project	2.3 Description of the project 2.4 Momentum 2.5 Pre-contractual procedure 2.8a Other shareholders and stakeholders 2.8b Involvement of the public
Development agreement	2.7 The contracting parties
Exchange function	2.9 Payments
Statutory function	2.10 Conflicts 2.10a Which conflicts arose with respect to the project? 7.2.10b How will parties deal with future conflicts? 7.2.14 Goals of the project
Planning function	2.6 Time frame 2.15 Delays
Instrumental function	2.11 Social housing 2.12 Environmental sustainability 2.13 Other public facilities

Contents of the case study sections 5.2, 6.2, 7.2 and 8.2 (the focal project)

2.1 Introduction
This section provides a general description of the focal project and describes the actors in the project and the experts who were interviewed.

2.2 Positioning (area)
This section describes the location of the project and any important buildings and other features (such as parks) that are already situated in the area.

2.3 Description of the project
The main question of this section is:
- What will be built in the project area?

2.4 Momentum
Why was the focal project built when it was? The reasons may differ from those given in Section 1.4, since we are discussing a smaller project here. The reasons given will therefore often depend on the specific market situations etc.

2.5 Pre-contractual procedure
This section focuses on the procedure, if any, used to attract developers. It also discusses the negotiations between the various parties that preceded the development agreement.

▶

2.6 Time frame
This section discusses the time frame of the project as a whole and its various phases.

2.7 The contracting parties
This section provides an overview of the private parties who signed the contract and discusses their roles in the project.

2.8a Other shareholders and stakeholders
This section provides an overview of parties outside the contract who influenced the project.

2.8b Involvement of the public
The general public is defined in this context as the residents of the project area and of the city as a whole. Public parties are, by their nature, obliged to take the interests of the general public into account, while private parties will often also want to do so nowadays.
The main questions in this section are:
- How is or was the public involved in the project?
- Is the involvement of the public considered to be extensive or minimal?

2.9 Payments
In this section, an overview of the payments is provided. The main question is:
- How much will be paid, by which party, for what and at which moment?

2.10a Which conflicts arose with respect to the project?
Were there any conflicts between the contracting parties? How did they influence the contract?

2.10b Future conflicts
Does the agreement provide a procedure for dealing with future conflicts?

2.11 Affordable housing
Affordable housing is one of the goals that public parties pursue. Since affordable housing is not the most cost-effective way of using expensive land, negotiations often focus on this issue. Not all kinds of affordable housing are meant for the lowest incomes, other forms focus on middle incomes or specific target groups.
The main questions in this section are:
- How much affordable housing is envisioned in the agreement?
- What kinds of affordable housing?

2.12 Environmental sustainability
- Does the development agreement contain agreements on environmental sustainability?
- How do these agreements relate to any targets that are set for the project?

2.13 Other public facilities

- Does the development agreement contain agreements on public facilities?

2.14 Goals of the project

- Are the goals of the focal project mentioned in the contracts and/or in other documents?

2.15 Delays

- Has the project been subject to delay?
- Does the development agreement provide procedures to be followed in case of delays

5 Case study Battery Park City, New York

Plot 16/17 (The River House) and 18b (The Verdesian) in Battery Park City's North Residential Neighbourhood

5.1 The urban development project: Battery Park City, New York

5.1.1 Introduction

Battery Park City is one of New York's most successful urban development projects of the 1980s and 1990s. It is one of the rare city renewal projects that actually succeeded in providing benefits for the City of New York (Gordon, 1997a). The esplanade along the Hudson River is one of the best known of New York City. The history of the project reflects some important elements of the post war history of urban planning. In less than two decades, the development plan for the project evolved from a typical 1960s mega-structure with a strong emphasis on affordable housing to a commercial neighbourhood that focused on sustainable building techniques and sustainable buildings but does not include any affordable housing.

Another example of the evolution of the project is that its first design conceived the project as a town-in-a-town, turning its back on the water, whereas the later designs conceptualised Battery Park City as a waterfront project with the Hudson River as its main asset.

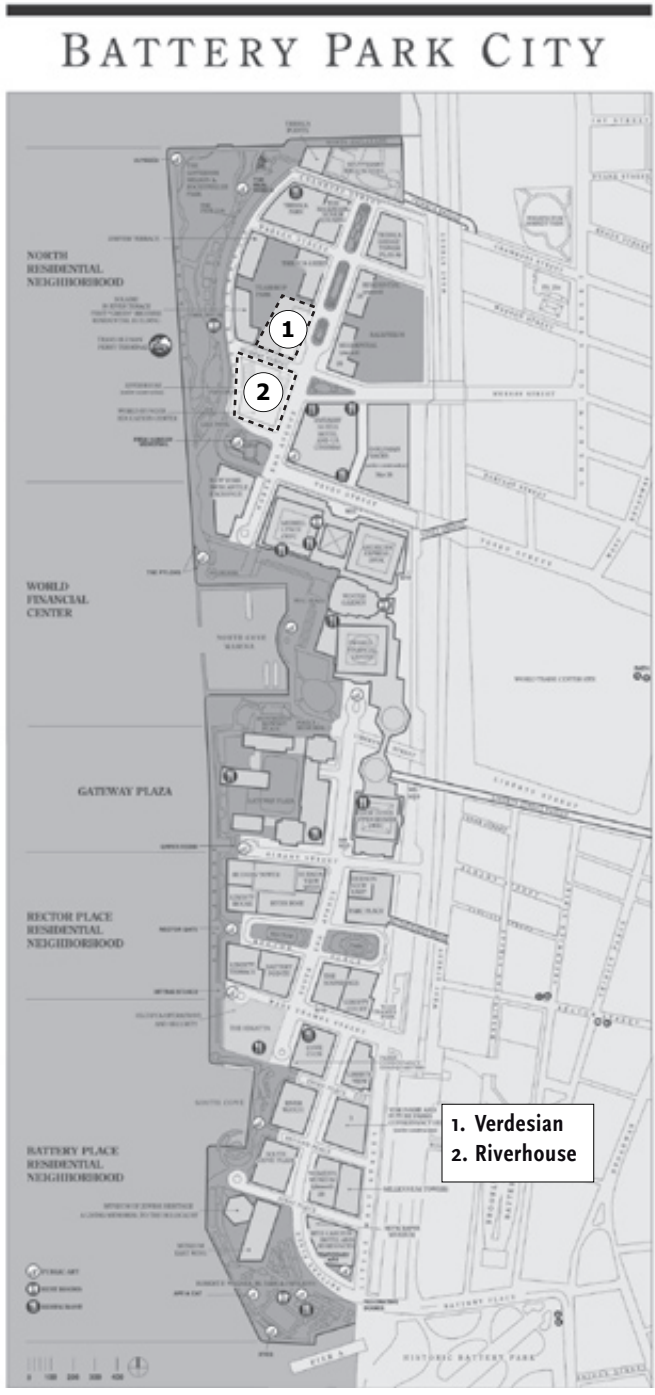
In Battery Park City, two focal projects were studied in the North Residential Neighbourhood. Both are mixed use towers with a dominating residential function of about half a million square feet (46,000 sq. m). Some attention was also paid to the lease for the 1.3 million sq. ft. (120,000 sq. m) head offices of Goldman Sachs. No specific case interviews were conducted for this last-mentioned project, however.

5.1.2 Description of the area

Battery Park City is a site of 92 acre (37 ha) created from landfill and situated in the lower west side of Manhattan (see Figure 5.1), next to the World Trade Center (WTC) site. In 2005, Battery Park City had 9.3 million sq. ft. (860,000 sq. m) of commercial space and 9,000 inhabitants on 7.2 million sq. ft. (670,000 sq. m) of residential space. In addition, there were 22 restaurants, three public schools, two hotels and a cinema (BPCA, 2006). Six plots were still open for development in 2005.

The heart of Battery Park City is the commercial centre that lies west of the WTC site. The southern area is residential, the households are small and built in high densities. The northern area is also residential; the households are larger here than in the southern neighbourhood. Nearly one third of Bat-

Figure 5.1 Battery Park City, including The River House and The Verdesian in the North Residential Neighborhood



Source: courtesy of Battery Park City Authority

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1 - 4 Impressions of Battery Park
5 River House redering
Source: courtesy of Battery Park City Authority

tery Park City consists of public open space. Landmarks in Battery Park City are the World Financial Center (WFC), the heart of the commercial area, that opened in 1985 and the 1.2 mile (1.9 km) long esplanade along the Hudson River.

A network of mass transportation facilities located in Lower Manhattan, such as City subway lines and City and Private Bus Lines, serves the area. The Port Authority of New York and New Jersey has established a commuter ferry service between the World Financial Center and several locations in New Jersey. Battery Park City is accessible to the entire regional highway system.

5.1.3 Description of the project

The 1979 master plan (see Section 5.1.6 for an overview of the master plans) of Battery Park City spells out four major land uses: Residential land (38.1 acre/15.4 ha), Commercial land (8.7 acre/3.5 ha), Public Open Space (28.0 acre/11.3 ha) and streets (17.8 acre/7.2 ha). It divides the area in three parts:

- The heart of the site is the commercial centre that lies west of the World Trade Center.
- The southern area is residential, the households are small and built in high densities.
- The northern area is residential; the households are larger than in the southern neighbourhood.

Based on this rough division, the Battery Park City Authority (BPCA) divided the site into five parts:

1. North Residential Neighborhood
2. World Financial Center
3. Gateway Plaza
4. Rector Place residential neighbourhood
5. Battery Place residential neighbourhood.

The WFC and Gateway Plaza are centrally located, while Rector Place and Battery Place together comprise the south residential district.

Over the years, the 1979 master plan has been modified, allowing for more commercial space. At the time of writing, with only a few plots left to be developed, Battery Park City comprises 9 million sq. ft. (836,000 sq. m) of office space. In total, about 6,800 residential units were developed in 2005 (and another 100 were under construction). There were eight plots left, one of which is reserved for Goldman Sachs (see Section 5.2.1) while the other seven will be used for residential development.

In 2005, Battery Park City further included two hotels, three public schools, some public monuments, 22 restaurants and a skyscraper museum. The most important amenity of the site is the waterfront and the esplanade.

The 1979 plan made sure that the major part of the site (64.8 acres/26.2 ha) is open space. 19.0 acres (7.7 ha) of the residential land is used as private public space, while public rights of way account for 17.8 acres (7.2 ha). The residual land is public open space.

5.1.4 Momentum

The project notoriously gained and lost momentum over the more than four decades of its history (see Section 5.1.6). However, an economic boom that resulted in extra demand for office space and strongly rising housing prices made the area very popular over the last decade and it has been easy to sell off the last plots.

The first impetus was given to the project in 1960, when the plans for the construction of the WTC were adopted by the Port Authority of New York and New Jersey, a bi-state agency that owned the land. There was a large demand for office space, much of which was planned to be met by the construction of the WTC. The soil and rock excavated during the work on the WTC and other buildings was disposed of in nearby landfill sites, thus providing an opportunity to create Battery Park City. However, demand for office space fell in the 1970s, and the WTC with its floor space of 10 million sq. ft. (930,000 sq. m) more or less met the entire needs of the whole office market in the area on its own (Gordon, 1997a). There was no market left for Battery Park City.

A new impetus was not given until the early 1980s when demand for office space was high again and construction of the World Financial Center, a combination of offices with luxury shops and a small harbour, started. At the end of that decade there was another market decline and it took until 1997 for the momentum to rise again as the economy improved. Since then demand has been constantly high. Although the area suffered from the 9/11 attacks that destroyed the WTC towers, government subsidies succeeded in keeping the area popular (see also Section 5.1.5).

5.1.5 Time frame

The Battery Park City project was initiated in 1962 (Gordon, 1997b). By 2008 – some 45 years later – it was almost completed. However, New York City experienced some serious economic downturns during that period, causing the project to be drastically changed in 1979 when a new master development plan was drawn up (see Section 5.1.6). One could therefore argue that the project in its current state started off in 1979 and took about 30 years to complete.

5.1.6 History and background

The name of Battery Park City comes from nearby Battery Park, which in its turn gets its name from The Battery – named after the artillery battery placed at the southern tip of Manhattan Island by the Dutch and British to protect the harbour in the early days of the settlement. Once its military function ended, it became a recreational area: the Battery provided a popular waterfront promenade since at least the 17th century. Later, the area went through many changes; for a time, it housed a reception centre for immigrants and a municipal aquarium. By the time that plans were made for revitalising the site, it was almost completely derelict. It was, however, the only place on the island of Manhattan that offered direct access to the Hudson waterfront. The fact that the project was named Battery Park City can be regarded as reminiscent of the 1960s ideal of building self-supporting neighbourhoods within the city (Garvin, 2002).

The history of Battery Park City can be described in four phases. The first phase started in 1962 and lasted until 1979 when after years of non-construction, the Battery Park City Authority (BPCA) – set up to direct the development – threatened to go bankrupt. The second phase lasted until 1989 when, after a successful decade, a new economic downturn started and construction stopped. The third phase started in 1997 when construction resumed. The fourth phase starts with the aftermath of the 9/11 attacks in 2001 (see also Section 5.1.15). Surprisingly, these attacks that destroyed the World Trade Center did not stop the development of Battery Park City. By 2004, land prices were already higher than before the attacks (BPCA, 2006).

The 1968 Master Development Plan

The project to revitalise Battery Park was initiated in 1962. The area had by then declined to "little more than rotting piers, ramshackle buildings and wayward souls", as the state Governor put it (BPCA, 2003). Political struggles, however, prevented the project from having a quick start.

Several plans were presented by state and city agencies, but it was 1968 before the first master development plan was drawn up – and 1969 before it was adopted. The plan was a compromise that resulted from negotiations between different state – and city agencies. The city owned the land and had regulatory powers over urban development, but the state had the necessary capital and legislative authority.

The four major topics on which the agencies disagreed were (Hayes, 1986, quoted in Gordon, 1997a):

1. The proportion of low income housing units.
2. The design of the project.
3. The financial return to the city.
4. The arrangements for continuing city participation in project implementation.

It was finally understood that the state would develop the site while the city would get the Governor's support for a Linear City Project over a Brooklyn expressway (Gordon, 1997a).

The state installed the Battery Park City Authority[3] (BPCA) to manage the project. The Authority would then pay the city ground rent, payments in lieu of taxes (PILOT, see Section 6.18) and any surplus revenue. Of the new housing, two thirds would be conventional and one third would be assisted (subsidised).

The BPCA was installed by the State of New York on 31 May 1968. The authority consisted of three members appointed by the Governor for six-year terms. State legislation allowed the BPCA to issue bonds for corporate purposes to a limited amount of $300 million. The City Planning Commission (CPC) approved the master plan on 30 August 1969. The city leased its property to the state for a period of 99 years (starting in 1970 and ending in 2069).

The 1968 plan envisaged seven pods (six residential pods and one commercial pod) that were tied together by a central pedestrian spine – a seven-storey structure about one mile long. The spine would incorporate retail stores and a people mover. Because of this spine, the project could best be described as a single mega-structure. It suited the town-in-a-town ideal of the time.[4]

The BPCA agreed to a time schedule that stated that site improvement would be completed by 1978 and the housing units by 1983.

The master lease between the city and the state specified the programme for the 1969 Master Development Plan. It aimed to develop (BPCA, 1979):

- 5 to 6 million sq. ft. of office space;
- 12,000-16,000 apartments (divided equally between luxury, moderate and low-income);

3 "The Hugh L. Carey Battery Park City Authority (...) is a public benefit corporation created under the laws of the State of New York to develop Battery Park City, in cooperation with the private sector as a mixed commercial and residential community with substantial civic facilities" (standard formulation, see for example RFP [request for proposal], plot 18b and 19b, North Residential Neighborhood, October 2000, page 1).

4 Lewis Mumford advocated the concept of the new towns-in-town to Congress in 1967. He didn't want to add endless acres and square miles of suburbs to the cities, but he wanted to build new planned communities within the cities. The big advantage of building these communities within the existing city was that they could capitalise on sewers, water mains, and traffic arteries that were already in place. In addition, the new-towns-in-town could provide the mass necessary for a full range of facilities that scattered real estate ventures could never develop. The Federal government provided money for the projects between 1968 and 1971, when President Nixon cut all federal housing expenses. In New York, Roosevelt Island was one of the two national projects that were approved for funding. But Battery Park City, especially in its original design, provides a perfect example of a town-in-town. Nowadays, it is believed that these communities can't turn their backs on the rest of the city, and since you need to acquire a site of at least 30 to 50 acres, within an urban environment, the projects can be very expensive. Some of them, however, turned out a success. Battery Park City, if you can still consider it to be a town-in-town, is certainly one of them (see Garvin, 2002).

- 960,000 sq. ft. of retail space;
- 28 acres of parks;
- community facilities including two schools, a library, police and fire stations, a health centre and a culture and recreation centre.

Some minor changes were allowed at the request of the BPCA and an additional 23 pages of zoning regulations were attached to the lease by the CPC. This was a result of the complex and rigid procedures that the city had included in the master lease, hoping that when adaptations were necessary, it could renegotiate for a better deal.

Only a few years later, problems emerged: there was no market for the office space, the implementation of the Master Development Plan turned out to be too difficult and both the City and the State were confronted with a fiscal crisis. Harry Helmsley (at that time the city's largest office owner, who had been selected to develop the site) and Samuel Lefrak (the city's largest residential builder, who had been elected to develop the residential units) refused to start construction because of the poor economic climate.

The BPCA had issued $141.8 million worth of bonds in 1972. Thanks to these funds the BPCA survived the recession of the mid 1970s, but it was faced with near-bankruptcy in 1979. By then only one project, Gateway Plaza, had made it through the 15-step approval process.

Perhaps the most important problem of the 1969 plan was that it conceived the project as one single continuous building, a typical example of the megastructures that were often designed in the 1960s but almost never built, and certainly not by private developers because of their expense. The plan was modified over the years but the spine remained the heart of it and as a result, it didn't give way to the construction of smaller projects because the plan couldn't be split into a collection of small projects. Only a few big companies were capable of developing the project and in the end it turned out that none of them was willing to. In 1979, only Gateway Plaza out of the large stock of planned apartment buildings was about to be constructed (Gordon, 1997a).

The 1979 Master plan

These problems resulted in a new agreement between the State, the City and the BPCA on 8 November 1979. As a result of this agreement (Gordon, 1997a; BPCA, 1979):

- the State acquired the site through expropriation by its Urban Development Corporation (UDC, now known as the Empire State Development Corporation);
- a new master plan was adopted to guide the general development of the site;
- the complicated approval process was abandoned;
- the city was to provide tax incentives for office development for ten years;

- the city would re-acquire the site when the BPCA had paid off its financial obligations; and
- the State would provide $ 8 million in loans to guarantee the bonds.

The new master plan involved a change of mind for the planners. The 1969 master plan had provided a whole new town, with its own public transport system, and a strong separation between pedestrians and traffic. It was a town in a town.

The 1979 plan – still in force – can hardly be called visionary or revolutionary; it may be described as a realistic, not too costly, project that suits the City of New York as a whole and especially the Borough of Manhattan. It involves more or less an extension of the Manhattan Grid. The commercial centre becomes the heart of the project. Land use and development control had to be flexible to permit future changes to meet market requirements. The Memorandum of Understanding between the State and the City removed the latter's planning powers. The only planning controls it retained were a height control (buildings not to exceed half the height of the WTC) and a floor area ratio (FAR) of 15.0. The BPCA prepared specific guidelines for each of its neighbourhoods.

The implementation process now involved only seven steps (instead of 15) and the city's influence was limited to the approval of building permits. The plan allowed the BPCA to approve plans and development proposals for more than fifty percent of the area, but only for a 5-year period. The details of the Master plan were influenced by the neighbourhood of Tribeca, situated to the north of Battery Park City. Loft apartments were very popular in Tribeca at the time the 1979 plan was drawn up, and it was therefore decided to build them in Battery Park City too (Gordon, 1997b).

5.1.7 Project management

Battery Park City is managed by the BPCA, a public benefit corporation of the State of New York. New York City was the landowner in the area until 1979, when the BPCA was installed by the State. The Urban Development Corporation of the State (UDC, see also Section 2.4) acquired the site from the city in that year; as a result, the BPCA became basically a subsidiary of the UDC (later named the Empire State Development Corporation) and therefore exempt from the city's planning procedures and public review procedures. With the exception of the zoning regulations, different rules – state rules – apply to Battery Park City than to the rest of the city.

The BPCA consists of three members appointed by the state Governor. Because of the way in which it is managed, it forms more or less an island within the city. Because of its agency status, it can implement its policies without the involvement of the public.

Despite the fact that Battery Park City is exempt from city rules, it takes a cooperative approach and works together with the city where it can (case interview with Department of City Planning, BPC 11-04-A6).

5.1.8 Project finance

Battery Park City is financed with bonds issued by the BPCA. The excess revenues are transferred to the City (in 2004 these excess transfers amounted to $100.9 million). In addition to the bonds, the BPCA leases its land to developers. Its main income consists of the revenues from these leases and of payments in lieu of taxes (PILOTS, see Section 6.1.8) made by the developers. In 2003 the outstanding amount on bonds was about $663 million with a statutory right to issue another $150 million (BPCA, 2003b) to be used for the finance of infrastructure and improvements of the (public parts of) area.

5.1.9 Land ownership

All land in Battery Park City is owned by the Battery Park City Authority that leases it to the developers. The ground leases are subject to the provisions of the Master Lease that consists of the general plan for Battery Park City. Since 1979 the BPCA is both the fee owner and the ground lessee of Battery Park City. Hence, it technically leases the land from itself. According to the leases its fee ownership does not merge with its lessee status. This means that the rules of the Master Lease still apply. It also means that, technically, it sub-leases the land to the developers. When the land is developed, developers commonly sell apartments and office spaces to corporations and individuals. All these leases end in 2069, when the land reverts to the BPCA with the termination of the Master Lease. It is not clear yet whether the lease relationships will then be continued or the land will be sold to one or more private parties.

5.1.10 Affordable housing

The 1979 Master development plan does not include provisions for any affordable housing. Gateway Plaza, the only building constructed under the 1969 master plan, includes some affordable housing. But apart from that, affordable housing disappeared from the plan. The City promised to use any excess payments for the construction of affordable housing but this was only a gentleman's agreement, it was never written down in a legally binding form.

The money that was reserved for this purpose has so far only been used for one project in the borough of the Bronx (BPCA, 2005). There were plans to use the money for the proposed football stadium for the New York Jets until that project was abandoned (see Section 6.1.4).

In a case interview the representatives of the BPCA (BPC 110-4-A1 and A2)

referred to the City's 80-20 programme (embodying tax incentives if 20% of the housing you construct is for moderate incomes); for a description of this and other programmes (see Section 6.1.10). In practice, however, developers never use the 80-20 programme in Battery Park City, because they make more profit when they don't use it than when they do.

5.1.11 Environmental sustainability

Since 2000, the BPCA has made environmental sustainability one of its main goals. It published residential environmental guidelines in 2000 and commercial/institutional environmental guidelines in 2002. These guidelines are implemented in the leases (see Section 5.2). In 2002 the first green building, the Solaire, opened (BPCA, 2004). A green building is designed to reduce energy and water consumption, enhance indoor air quality, utilise recycled materials in its construction and recycle construction waste, and monitor and maintain the efficiency of its systems through a process called commissioning (BPCA, 2004). In addition, developers are required to design all buildings in Battery Park City to an LEED rating of Silver or better (see Section 6.1.11 for an explanation of the U.S. Green Building Council's LEED system). It should be noted that the design and environmental guidelines would override the zoning if they were state rules, but in this case their enforceability is based on the fact that the BPCA – a State authority – owns the land and the guidelines in question become part of the lease. This makes them vulnerable: in the case of the Goldman Sachs lease, Goldman Sachs managed (thanks to City and State support) to negotiate themselves out of most of the provisions of the Environmental Guidelines (Goldman Sachs lease and case interview BPCA, BPC 02-07-A1).

5.1.12 Other public facilities

Three public schools are based in Battery Park City. But except for the parks and a cinema there are no other public facilities for the residents. The area is part of the business district of lower Manhattan and its facilities (shops and restaurants) mostly serve the employees of the offices based in the World Financial Center and nearby office buildings. Battery Park City is an integrated part of the island of Manhattan and its lack of facilities probably contributes to its relatively quiet character.

5.1.13 Involvement of the general public

The general public has mostly been kept out of the development of Battery Park City. The BPCA is a State owned special purpose company and is not obliged to organise public hearings on its policies or to involve the general public in any other way (Fainstein, 2001; Gordon, 1997b).

5.1.14 Goals of the project

The 1979 master plan names eight principles development should comply with:

1. Battery Park City should not be a self-contained new-town-in-town but a part of Lower Manhattan.
2. The layout and orientation of Battery Park City should be an extension of Lower Manhattan's grid system of streets and blocks.
3. Battery Park City should offer an active and varied set of waterfront amenities.
4. The design of Battery Park City should take a recognisable, and understandable form.
5. Circulation at Battery Park City should emphasize the ground level.
6. Battery Park City should reproduce and improve upon what is best about New York's neighbourhoods.
7. Battery Park City's commercial centre is the central focus of the project.
8. Land use and development controls should be sufficiently flexible to allow adjustment to future market requirements.

These principles provide the goals of the project. In addition, the project aims to make a profit for the city through its lack of affordable housing and its focus on commercial development. Finally, environmental sustainability is a main goal of the project (Section 5.1.11).

5.1.15 Delays

Battery Park City has experienced several severe delays in its development. They were due to political struggles, economic downturns and the 9/11 attacks. Political struggles meant that it took seven years to adopt the first master plan (1962-1969). Gordon (1997a) points out that the Mayor of New York at the time, John Lindsay, had a clear view on the desirable development of the site but so did the state Governor (Nelson Rockefeller) the New York City Department of Marine and Aviation (DMA), the Downtown Lower Manhattan Association (DLMA, led by famous banker David Rockefeller, the state Governor's brother) and the New York City Planning Commission (CPC). After the adoption of the master plan, nothing was built for over ten years. And when New York experienced an economic downturn in the early 1990s new delays occurred. Finally, the 9/11 attacks caused further delays since nearby buildings (including Gateway Plaza and the Winter Garden of the World Financial Center) were damaged and had to be repaired. As a result of the attacks, almost 50% of the residents left Battery Park City for environmental or other reasons (case interview BPCA, BPC 11-04-A2).

5.1.16 Role of private actors in the project

Private actors play a key role in the development of Battery Park City. The authority refers to the project as a prime example of public private partnership. The willingness of private parties to enter into a lease contract with the BPCA has been the crucial factor for success of the project.

In 1979, the Canadian firm Olympia & York was willing to develop the World Financial Center; this is regarded as the moment when the project took off. The 1979 master plan also incorporated the views of Olympia & York (case interview, BPC 11-04-A5).

The price that private actors are willing to pay for land very much determines whether a project is profitable or not. Battery Park City is financed by bonds and thereby also depends on its revenue from leases and payments in lieu of taxes (see Section 5.1.8) for the construction and maintenance of its public facilities. It can only pay off its bonds as long as private parties are willing to invest in the project.

5.1.17 Public actors

The following public parties participated:

- The Empire State Development Corporation (ESDC) – formerly the New York State Urban Development Corporation (UDC), was installed to foster economic development and support starting companies throughout the state of New York.
- The Battery Park City Authority (BPCA) – the State agency that manages the site.
- The Department of City Planning – responsible for the city's physical and socioeconomic planning, including land use and environmental review; preparation of plans and policies; and provision of technical assistance and planning information to government agencies, public officials, and community boards.
- The City Planning Commission (CPC) – reviews proposals for zoning map and text amendments; special permits under the Zoning Resolution; changes in the City Map; the acquisition and disposition of city-owned property; the acquisition of office space for city use; site selection for public facilities; urban renewal plans and amendments; landmark and historic district designations.

5.1.18 Critique

When this project was initiated there was, with the exception of some artists, no strong public protest against it. The main reason for this was probably that the project was created on landfill and did not involve the demolition of

a pre-existing neighbourhood. Later, authors have criticised the project for its exclusiveness. Fainstein (2001: 204) argued that the influence of private parties on the project has been out of proportion; the interests of the well-to-do and the developers were far better protected than those of the lower classes: "To ensure the safe pursuit of profit within the reconstructed city, designers essentially set projects off from their surroundings so as to create defensible space (...). A number of measures ensure that only certain people can gain access to the new constructions that define the urban landscape: isolation of projects behind highways, raised plazas, or actual walls; direct connections to parking garages and transit, obviating the need to use city streets; segregation of uses; extensive deployment of security measures; private ownership of outdoor parks and indoor courtyards, allowing the banning of unsavoury individuals and political speech; high prices for renting active quarters and for buying goods sold within the new stores; and stylistic markers that make lower-class people feel out of place."

Another point of criticism is that Battery Park City does not have an identity of its own. It is a new neighbourhood that does not in any way create a new city or contribute to the identity of the metropolis, it refers to nostalgic ideas of an old New York that may never have existed, a sort of replica of New York taken from a Disney movie (Fainstein, 2001). Battery Park City is an exclusive, perfectly clean, nostalgic neighbourhood that successfully keeps the less well-to-do out.

But as Fainstein, Gordon (1997b) and Garvin (2002) comment, the beautiful esplanades of Battery Park City are open to everyone, the city makes a profit out of the site and intends to use it to provide for subsidised housing. Another argument to defend the way in which Battery Park City was developed is that it did not involve the destruction of an existing, working-class neighbourhood: there was nothing on the landfill; its only amenity was that it was near some of the most expensive neighbourhoods of New York. The wish to profit from this amenity and to use the money earned to contribute to the welfare of the rest of the city does not seem improper.

5.1.19 Conflicts of power: State and City interests

The conflicts that arose with regard to Battery Park City were largely due to conflicts of authority between the City and the State.

Another source of conflict is that the BPCA itself sometimes has to set aside its own goals because of pressure from the City and the State. It is then that it most notably notices that it is not only a private landowner but also a public benefit corporation that has to defer to the wishes of the State. The Goldman Sachs lease offers a good example of this tension. The states of New York and New Jersey compete to attract businesses. The State and the City of New York were afraid that they would lose Goldman Sachs to New Jer-

sey. Goldman Sachs had in fact threatened to leave Manhattan for New Jersey, and had already built an office there. City and State then put great pressure on the BPCA to accept Goldman Sachs' proposal for its new head office (case interview BPC 02-07-A1).

5.2 Focal projects: plots 16/17 (the River House) and plot 18b (the Verdesian) in the North Residential Neighborhood

5.2.1 Introduction

Two projects situated on plots 18b/19b and 16/17 of the North Residential Neighborhood were studied in depth. Both projects are best described as residential towers that are mixed-use buildings in the sense that they include other facilities. Construction of 'the Verdesian' on Plot 18b was completed in 2006, and that of 'the River House' on plot 16/17 in 2008.

Both properties aim to attract buyers from the top end of the housing market. They were built in accordance with the environmental guidelines, and were advertised as 'green buildings'. Interviews were held in 2004, 2005 and 2007 with representatives of the BPCA, the CPC and the developers of plot 16/17 (the Albanese Corporation) and the plot 18b/19b (the Sheldrake Organization) as well as with lawyers involved in the project and academics.

5.2.2 Positioning (area)

Both projects are situated in the North Residential Neighborhood (see Figure 5.1). This neighbourhood will ultimately contain approximately 4,000 apartments. It is situated on the north side of Battery Park City, near the neighbourhood known as Tribeca. The plots are situated near three parks (Rockefeller Park, Teardrop Park and the park housing the Irish Hunger Memorial) and near the Solaire, the first residential building developed under the Green Guidelines.

5.2.3 Description of the project

Plot 16/17 consists of 44,790 sq. ft. (4,161 sq. m) of land with a maximum floor area of 537,400 ft (50,000 sq. m) if developed as-of right (FIS of 12). Plot 18b/19b allows for a maximum development of 260,000 sq. ft. (24,000 sq. m).

It was stipulated that the plot 16/17 site had to be developed as a residential building containing apartments with a building-wide average floor area of at least 1,000 sq. ft. (93 sq. m). These apartments could be developed either as condominiums or as cooperative apartments.

The building provides 26,000 sq. ft. (2,400 sq. m), predominantly on the ground floor, for non-profit uses, as determined by the BPCA. The design, construction and maintenance of this space will not be the responsibility of the developer. The space will be leased without charge to the BPCA that will sublease it to non-profit users.

A courtyard is accessible to the public and the seating and tables for it had to be provided by the developer. The BPCA will maintain the courtyard.

The developer must provide a minimum of 1,400 sq. ft. (130 sq. m) of space for retail establishments that will enhance the use of the courtyard. The developer will lease the cafe space to a tenant approved by the authority, but on terms set by the developer.

The building must contain 100 sq. ft. (9 sq. m) on the ground floor for use by the authority to store supplies and equipment for use by the Battery Park City Parks Conservancy.

The developer may provide below-grade parking but such parking may be provided under the courtyard only if all exhaust is through the roof of the tower and 36 inches (91 cm) is available for soil over the roof of the garage.

The developer had to provide sidewalks, street trees, street lighting and landscaped areas associated with the development free of charge. He was required to coordinate the construction of these elements with the Authority and with other parties developing neighbouring sites.

The lease spells out (in Section 26.01c) which civic facilities have to be constructed by the BPCA and which by the developer.

For both projects, the BPCA as the landlord has to construct and maintain the facilities defined as Landlord's Civic Facilities (in Section 26.01c of the lease). In the list of civic facilities given below, items v-ix and xvii are the responsibility of the tenant (tenant's civic facilities) while the others are the landlord's responsibility. Some of the civic facilities, such as xi (landscaped park), have to be constructed and maintained regardless of whether the project is actually realised. These civic facilities are:

(i) electrical, gas and telephone mains;
(ii) water mains;
(iii) sanitary and storm sewers;
(iv) fire hydrants and emergency response service ("ERS") conduits and boxes;
(v) street lighting (conduit, cable, poles, fixtures and connections);
(vi) streets;
(vii) curbs;
(viii) temporary concrete sidewalks;
(ix) permanent sidewalks, including planting strip, cobble strip and paving;
(x) landscaped esplanade including appurtenances located within the pierhead line of the Project Area ("North Neighborhood Esplanade");
(xi) landscaped park ("Governor Nelson A. Rockefeller Park");

(xii) Vesey Street turnaround area ("Vesey Street Area");
(xiii) landscaped triangle on Murray Street ("Murray Street Triangle");
(xiv) landscaped median strip on North End Avenue ("Median Parks");
(xv) a landscaped public open space between sites 19A, 19B, 18A and 18B as described in the Design Guidelines (the "Open Space");
(xvi) the Irish Hunger Memorial, located at the western end of Vesey Street;
(xvii) street trees.
Areas (xi)-(xvi) are named the North Neighborhood Residential Parks.

5.2.4 Momentum

Both leases were closed at a time when Battery Park City had recovered from the 9/11 attacks. Property prices were high, although not as high as they would be in 2007. Just before that time, the BPCA had agreed to re-negotiate leases for plots in the South Residential Neighbourhood that it had closed prior to the attacks, on better terms (case interview BPCA, BPC 02-07-A1). But in 2004 the prices were up again and the housing market was doing very well.

5.2.5 Pre-contractual procedure

The BPCA uses request for proposals (RFPs) to attract bidders. In the RFPs, the projects are described in considerable detail. A bidding procedure follows, in which not only the price but also other aspects – such as trustworthiness of parties, quality of design – matter. The BPCA invites candidates to a meeting and finally picks one. The procedure takes about three months (case interview BPCA, BPC 11-04-A2).

The BPCA asks for a deposit of the ground rent when a proposal is submitted, to make sure that candidates are serious bidders. It also asks for a 'pre-design' (an architectural outline) of the project.

The lease is a more or less standard document. Negotiations nonetheless usually take about three months. According to the case interviews with representatives of the BPCA, this was also the case for site 18b. The negotiations for site 16/17 were a little more complicated: the developer wanted to amend the lease to make sure that it would not experience any trouble because of the work and temporary parking in the adjacent plots (case interview Sheldrake, BPC 11-05-A3).

The period from the submission of proposal to the acceptance is divided into three phases:

1. *Submission of Proposal* – Initial deposit, waiver of any claim for any costs incurred or for any matters arising thereunder or in connection with the negotiation or execution of a Ground Lease. Undertaking to hold harmless and indemnify the BPCA from and against any and all expenses, damages or liability.

2. *Designation period* – BPCA may use the Request for proposals as a basis for further negotiations with more than one actor. The authority will designate the selected candidate no later than 60 days after submission of final proposals and any additional information requested.
3. *Pending designation* – When the developer is notified that his proposal is chosen, but before official action by the members of the BPCA, he must execute and deliver a designation letter. This letter spells out the rights and obligations of both the developer and the authority between the time of selection and the commencement date of the ground lease. The letter also specifies that the developer will execute a ground lease within 60 days of its delivery.

5.2.6 Time frame

The lease for plot 16/17 was closed on March 31, 2005, became effective on December 29, 2005 and will expire on June 17, 2069. It took about three years to develop the project after the lease had been signed. The lease for plot 18b was closed on August 19, 2004 and will expire on June 17, 2069. It took about two years to develop the project after the lease had been signed.

5.2.7 The contracting parties

Plot 18b is developed by the Albanese Organization, a privately held real estate firm that develops commercial and residential buildings. The company owns about six residential buildings and thirteen buildings with a commercial, institutional or not-for-profit use. In Battery Park City it has also developed the Solaire (see Section 5.1.11). The project is financed by Northwest Mutual Life Insurance that is a subsidiary of Northwestern Mutual, an insurance company specialised in long-term investments and insurance.

The lease describes the contracting parties more precisely:

- Plot 18b The contracting parties are the Battery park City Authority doing business as the Hugh L. Carey Battery Park City Authority and North End Associates, LLC. The latter is a company owned by the Albanese Organization. Section 17.04 of the lease state that: "the sole Persons owning direct or indirect interests in Tenant are Albanese North End, LLC, a New York limited liability company and The Northwestern Mutual Life Insurance Company, a Wisconsin corporation, and that the members of Albanese North End, LLC, are Vincent M. Albanese, Anthony A. Albanese, Russell C. Albanese and Christopher V. Albanese."
- Plot 16/17 is developed by Site 16/17 Development LLC, a subsidiary of the Sheldrake Organization, a company specialised in (re-)development of urban property. It owns, manages, develops and leases residential properties throughout the state of New York. The company claims that the River

House building shows its commitment to sustainability, calling it 'luxury green'. Sheldrake also claims to be committed to affordable housing but that commitment does not apply to its projects in Battery Park City.

The joint venture includes the Plaza Construction Corporation, a company specialised in construction management with a staff of about 450 people and an annual turnover of $ 1.4 billion. Its portfolio includes buildings throughout the United States.

The lease spells out more precisely how the tenants are composed (Section 17.04): "Tenant represents that, as of the date hereof: (a) the composition of Tenant is as follows: (i) Sheldrake Organization, Inc. (67.5%), whose sole stockholder is J. Christopher Daly; (ii) Plaza Construction Corporation (22.5%), whose sole stockholders are Steven Fisher (25.83%), Ken Fisher (25.83%), RW Plaza LLC (15%) (whose sole member is Rudy Washington), Arnold Fisher (11.12%), Richard Fisher (11.11%) and the Estate of M. Anthony Fisher (11.11%); and (iii) RW Consultants Inc., (10%) whose sole stockholder is Rudy Washington."

5.2.8a Other shareholders and stakeholders

There were, as far as we could determine, no other shareholders and stakeholders in the project than the parties mentioned in the contract.

5.2.8b Involvement of the public

The general public was not involved in any part of the process (see Section 5.1.13).

5.2.9 Payments

The developer is required to make the following payments:

- Base rent: the Authority receives a base rent payment for each year of the Lease Term. The base rent is more or less the selling price of the land.
- The core financial obligation of Site 16/17 Development LLC is to make an upfront lease payment of $ 60 million on the commencement date (3.01).
- In addition it agreed to pay a base rent for the building (3.02) and 3% of the Gross Sale Price for every residential unit it sold, unless the price was more than $ 875 per sq. ft. In that case it has to pay 20% over the amount by which the amount of $ 850 (sic) is exceeded. To be more precise, it then pays twenty percent (20%) of an amount equal to the product of: (x) the amount by which the Average Per Square Foot Gross Sales Price exceeds eight hundred fifty dollars ($ 850) per square foot; and (y) the aggregate square footage of all of the residential Units.

- It will have to pay the base rent (3.01) and other amounts mentioned in article 3 of the lease (a percentage rent of 10% over the gross non-residential revenue), and 100% of the net non-residential revenues (art. 3.07a).

In addition the developers have to make all kinds of payments in lieu of taxes (see Section 6.1.8):

- Transaction payments for condominium and corporative unit sales: the developer is required to make a transaction payment of at least one percent of the purchase price of the units.
- Payments in lieu of taxes (PILOT): since the BPCA holds title to Battery Park City, the site is exempt from real estate taxes. The developer is required to make annual PILOT payments that are no less than the taxes that would otherwise be payable.
- Payments in lieu of sales taxes (PILOST).
- Civic facilities payments: an annual payment as determined by the BPCA is required as its allocable share of the cost of maintaining portions of Battery Park City's infrastructure.
- Percentage rent: the developer must pay percentage rent with respect to any non-residential uses located on the site, equal to the greater of ten percent of revenue received by Developer from such uses.

5.2.10a Which conflicts rose with respect to the project?

There were no conflicts reported with regard to the project, only a long-lasting discussion on an amendment of the lease of plot 16/17. Sheldrake wanted the BPCA to guarantee that work would not be hindered by parking on the surrounding lots (case interview Sheldrake, BPC 11-05-A3).

5.2.10b How do parties deal with future conflicts?

Both leases provide an arbitration procedure to deal with future conflicts during development. A general article states that a party may appoint a 'disinterested party' as an arbitrator to deal with cases in which the lease expressly requires arbitration. Article 11 of the leases (see below) deals in both cases with the construction of the building and prescribes arbitration by a professional with at least ten years experience.

More specifically; Section 35 on Arbitration states that: "in such cases where this Lease expressly provides for the settlement of a dispute or a question by arbitration, and only in such cases, the party desiring arbitration shall appoint a disinterested party and give notice thereof to the other party (...) who shall within fifteen (15) days thereafter, appoint a second disinterested person (...). The two (2) arbitrators thus appointed shall together appoint a third disinterested person within fifteen (15) days (...) and said three (3) arbi-

trators shall as promptly as possible settle the matter (...) and the decision of the majority of them shall be conclusive and binding (...).

If the arbitration takes place according to Article 11 (that deals with the construction of the building, MvdV), or concerns any Capital Improvement or Restoration then each of the arbitrators shall be a licensed professional engineer or registered architect having at least ten (10) years experience in the design of residential buildings (...).

Any first Mortgagee shall have the right to participate in any arbitration hereunder, provided that such Mortgagee's participation shall be with an on the side of Tenant, and not of a third party."

5.2.11 Affordable housing

There is no affordable housing in the projects (see Section 5.1.10).

5.2.12 Environmental sustainability

Environmental sustainability is one of the key goals of the project (see Section 5.1.11). It is mentioned in the leases, and interviewees stated that it was a reason to accept (slightly) lower bids when the party showed commitment to the environmental goals (case interview BPCA, BPC 2-07-A1).

Section 11.14 (environmental guidelines) of both leases states that: "Tenant acknowledges that the incorporation of environmentally responsible building methods and systems into the Building pursuant to the Environmental Guidelines are important goals of Landlord, and are thus material obligations of Tenant under this lease (...)."

5.2.13 Other public facilities

We already saw that the projects do provide for some public facilities.

Plot 16/17 includes a publicly accessible courtyard and 1,400 sq. ft. (130 sq. m) of space for retail establishment that will enhance the use of the courtyard. In addition there will be a cafe space.

5.2.14 Goals of the project

The leases spell out some specific goals of the project, in addition to the realisation of the residential units.

They mention the environmental guidelines and the goals of non-discrimination (the BPCA has adopted an affirmative action and a fair marketing programme). The environmental goals were often mentioned in the case interviews whereas the non-discrimination programmes were accepted as standard terms and were only referred to in response to specific questions. The

non-discrimination programmes include affirmative action and affirmative fair marketing.

5.2.15 Delays

Both projects were finished within the time frame. No delays were reported.

5.3 Common contract norms

After the above general description of Battery Park City and the focal projects we have studied there, it is time to examine how this case fits in with relational contract theory as described in Chapter 3 and in particular to ask in terms of the second of the research questions posed in Section 1.3: What is the significance of the ten common contract norms (see Section 3.4) in the context of the development agreements in this case study?

5.3.1 Introduction: general sketch of the agreements

The core documents in the relationship between the BPCA and the developers are the ground leases. The leases lay down the guidelines to be followed in case of conflict. They are only subject to the master lease, since the leases are technically sub-leases (see Section 5.1.9).

The development agreements in Battery Park City have both discrete and relational elements. The discrete elements are first and foremost found in the sections of the lease that deal with the financial terms; the other parts of the agreements leave more room for flexibility. When a developer has won the bidding procedure, this means that his proposal meets the demands of the BPCA, of which – outside the price – the design guidelines and the environmental guidelines are the most noteworthy requirements (see Section 5.1.11). When the leases are closed, the development agreements provide some room for relational values such as flexibility, learning and cooperation.

This leaves us with an agreement that starts off with many discrete elements but turns out to have relational aspects as well. The leases are mostly standardised, they all have the same structure: sometimes articles are left out but the numbering stays the same.

First of all, I will give an overview of the make-up of the common contract norms of this case on a discrete-relational scale. Inspection of Table 5.1 shows that in this case, the common contract norms all lean over to the discrete side.

5.3.2 Role integrity: equally discrete and relational

The role integrity norm has both relational and discrete elements. The dis-

Table 5.1 Discrete/relational matrix for common contract norms in Battery Park City

Norm	More discrete than relational	Equally discrete and relational	More relational than discrete
Role integrity		×	
Mutuality	×		
Implementation of planning		×	
Effectuation of consent	×		
Flexibility		×	
Contractual solidarity		×	
Linking norms	×		
Creation and restraint of power		×	
Propriety of means	×		
Harmonisation with the social matrix	×		

crete elements are found mostly in the landowner-tenant relation between the BPCA and the lessee. However, the parts of the lease that deal with development have more relational aspects. Here the BPCA and the developer have a more intertwined relation although the responsibilities for the various tasks remain strictly separated; there are no shared projects.

Landowner and planning authority

The BPCA combines the roles of landowner and planning authority. As a landowner it wants to make a profit to pay off its bonds, while as a planning authority it wants to realise goals that are not only financial but also aimed at the realisation of a high-quality neighbourhood. The tension between the two roles does not result in many conflicts because the BPCA is a public benefit corporation and is as such not responsible for the public law regulations (such as zoning) that apply to the site. In cases where public law regulations conflict with the interests of the developer, the BPCA can choose the side of the latter. The role of the BPCA is probably best understood as a special kind of landowner that implements its vision in the leases.

The BPCA discussed the fact that it had accepted a bid that reserved more money for implementation of the environmental guidelines instead of taking the highest bid, thus experiencing the tension between its roles as landowner (wanting to make a high profit) and planning authority (trying to implement a wider range of interests); see case interview BPC 02-07-A1. It concluded that it had a perfect right to weigh up these various interests.

Landowner and lessee

The BPCA is both the landowner and the lessee of the plots. This seems complex but it basically simply means that the duties of the BPCA mentioned in the master lease did not vanish when it became the owner of the project area (in 1979) instead of leasing the land from the City. We saw that technically, you could hold that the BPCA does not lease but sublease the land to its tenants since it leases the land from itself. This fact has no bearing on our considerations here in practice.

5.3.3 Mutuality and reciprocity: more discrete than relational

The mutuality norm has more discrete than relational elements in the present case. In the last resort, the developer receives the right to construct a profitable building in line with the guidelines in exchange for a certain price. He is not required to enter into any intertwined relationships.

The *quid pro quo* of the leases in Battery Park City is first and foremost found in the fact that the tenant pays the base rent for the plot to the landlord, who in return allows him to develop it. The tenant not only agrees to pay money but is also bound to the design guidelines and environmental guidelines. In some leases (in particular that for plot 16/17), the tenant agrees to reserve a part of its building for rent-free use by the landlord. Because of the many rules imposed on tenants (compared to other projects in New York), the BPCA in most cases agrees to be reasonable when confronted with a request to change something in the plans (case interview BPC 11-04-A1 and A2).

The leases determine that all development rights that are not used in the initial building are retained by landlord; this is a standard formulation that does not have much practical meaning but nonetheless tells us that the *quid pro quo* for the developer is confined to what he actually realises and does not include the prospect of any new developments in the future.

The core obligations of the developers can be divided into an obligation to construct the building and an obligation to pay for the lease (see Section 5.2.9).

For plot 16/17 this means that that the tenant agrees to construct the building and, in addition to the profitable housing units, provide the non-profit space and the civic facilities. The other leases include comparable obligations (see Section 5.2.3).

Other obligations are that the tenant will supply the landlord with all information regarding the innovative building techniques used for educational and promotional activities and will cooperate or participate in demonstrations and other activities relating to the Green Building Systems.

The core obligation of the BPCA is found in article 34 (quiet enjoyment) that states that "Landlord only covenants that Tenant shall and may (subject, however, only to the exceptions, reservations, terms and conditions of this Lease) peaceably and quietly have, hold from Landlord or any Person claiming through Landlord and free of any encumbrance created or suffered by Landlord, except only those encumbrances, liens or defects of title, created or suffered by Tenant and the Title Matters."

In Section 17.03 (delivery of the premises) the contract states that "Landlord shall deliver possession of the Land on the Commencement Date vacant and free of occupants and tenancies, subject only to the Title Matters."

Finally, the BPCA (landlord) has to construct and maintain the civic facilities that are defined as Landlord's Civic Facilities (see Section 5.2.3).

5.3.4 Implementation of planning: equally discrete and relational

The development agreement has discrete elements in the sense that it includes a detailed planning. It also includes relational elements: the parties intend to work together to realise all aspects of the plans, and the leases provide a framework for this cooperation.

The lease implements a fairly detailed planning in phases, and sets a deadline for the projects. There are four phases: pre-schematics, schematics, design and construction. For all phases, the tenant has to provide plans within a fixed time frame that needs approval from the landlord.

The lease defines when a phase ends and when it begins. It binds both the landlord and the tenant to fixed periods for submission of plans and review (15 days as a general rule). The lease also specifies when the building must be completed. The building on plot 16/17, for example, had to be finished 522 days after the construction commencement date, which is no later than 40 business days after the approval of the construction documents.

It should be noted however that the ultimate date for completion mentioned in the lease is determined with reference to the tenant's estimates of the time required for the work plus safety margins. If the developer thinks that the building can be constructed in 400 days for example, he will probably only be willing to bind himself to a period of, say, 700 days thus allowing him a wide margin of error to deal with unexpected delays without incurring a penalty (case interview BPCA, BPC 02-07-A1).

The period between the initial design and the construction of the buildings is divided into four phases:

1. The pre-schematics consist of preliminary scale drawings of the project, which must be included with the proposal (as part of the requirements for participation in the bidding procedure).
2. The schematics have to be prepared by the approved architect and are submitted 84 days after the pre-schematics.
3. The design development plans have to be submitted 112 days after the schematics, together with an outline of the buildings.
4. The construction documents finally consist of the (approved) final contract plans and specifications of the building and have to be submitted 182 days after the design development plans.

The BPCA has to approve all these documents within 15 days of their submission.

The significance of these dates and terms should not be overestimated. They are mostly meant to provide a framework for division of the work, and not to put pressure on the developer. It is rather the other way around: the developer has the right to fast track the procedures (see also Section 5.3.7),

and the BPCA is required to provide the necessary support to make this possible. The leases leave room for consultation and reaching further agreements on most specific elements of the plan after the lease has been signed. For example, the concrete plan for affirmative action and fair marketing is drawn up and the definitive layout and design of the building are determined after the lease has been signed.

An exception was the Goldman Sachs lease, where preliminary design development plans and outline specifications had already been submitted by the time the lease was signed. Here the main developer (Goldman Sachs) obviously had more power than the two developers of the focus projects. Its designs were included in the negotiations. The City and the State both put pressure on the BPCA to accept a proposal that it did not agree with in all respects (Case interview BPC 02-07-A1). Goldman Sachs was given six years after the closure of the lease to construct the building and 300 days to prepare the final contracts plans and specifications. These long periods show that Goldman Sachs was not willing to allow the BPCA to speed up the process beyond the rather leisurely tempo Goldman Sachs wanted. Here the phasing of the plans was used to limit consultation with the BPCA to a minimum.

The part of the lease that deals with the financial obligations of the tenant is more discrete. It consists of a complete planning for the payments to be made by the tenant up to 2069. The only eventuality for which it does not plan is what is going to happen when the leases expire. The leases all terminate at the same moment, because the original plan was to find one company that wanted to buy the whole project. Since the BPCA is no longer sure what will happen after 2069, no concrete plans have been drawn up for this period as yet. This insecurity does not affect the prices of the condominiums, or of the buildings (case interview BPC 11-04-A3). All parties are confident that the BPCA and/or the State will work something out that will not affect their ownership and financial interests.

5.3.5 Effectuation of consent: more discrete than relational

The consent norm is very precise. Parties know what they consent to when they sign the lease. Although not all details of the project are clear, the core (the price, the size and the rough design) is. By signing the lease, the parties give their consent for the BPCA to sell the lease rights to the developer until 2069 for a rent mentioned in the lease. Parties also give their consent for the developer to realise the project according to the requirements mentioned in the lease and the documents the lease refers to. They further consent to work together according to the conditions of the lease.

It is clear what the parties consent to when they close the contract, but when they sign it, the definitive design of the building has, as a general rule,

not been made. It is then not possible to know precisely what the project will look like.

5.3.6 Flexibility: equally discrete and relational

At first sight, the leases do not leave much room for flexibility since they provide a detailed planning of the project. And indeed, many aspects of the project, including the pre-design, are already fixed when the lease is signed. But a second look shows that the lease leaves considerable room for flexibility in the development process. The parties, in other words, are bound to the 'what' but not so much to the 'how' of the project. In this context, the 'what' includes the design guidelines, the environmental guidelines, the requirements of the RFP and the submitted proposal while the 'how' includes the process of the cooperation – the pathway to results.

An example of the (limited) flexibility provided by the lease is the incorporation of the environmental guidelines in it: these guidelines are material to the lease, but the developer can decide during the development process exactly how he will follow them. One obligation that is fixed in this context, for example, is however that he has to file monthly reports that need to be certified by the environmental consultant of the BPCA.

The provisions of the lease on affirmative action and fair marketing use the same methodology; the results are fixed but the methods by which they are reached are mostly open.

We already saw that the time schedule mentioned in the leases is not very tight, and that development can be fast-tracked (see Section 5.3.4) to suit the developer/tenant. Another example of (limited) flexibility is the frequent use of the word 'reasonable' in the leases to make sure that the BPCA will not take a rigid, formal approach to its developers.

In interviews, the representatives of the BPCA stated that they tried to be flexible within the limits of the lease and the guidelines. They mentioned their approach to the size and colour of the bricks used in construction as an example of their flexible stance: they usually agreed to the developers' proposals for use of types of bricks differing from those specified in the design guidelines, if a good reason could be given for the change (case interview BPC 11-04-A2).

In the case interviews, representatives of Albanese and Sheldrake (the developers) confirmed the flexible attitude of the BPCA (case interview BPC 11-04-A3 and A4).

One exception to this rule of flexibility is the 'no discrimination' sign required by the fair marketing programme, which the developer is obliged to display on his premises. This states that the developer welcomes women and members of minorities to buy or rent the apartments. Here both the content of the sign and the manner of displaying it are laid down in the lease.

5.3.7 Contractual solidarity: equally discrete and relational

At first sight, the text of the lease does not provide many examples of contractual solidarity. However, a closer look shows that it does provide a framework for a long-term relationship in which parties assist each other in the performance of their duties. The exception is the specification of the financial obligations of the tenants: the lease does not show any willingness on the part of the landlord to assist defaulting tenants. This kind of solidarity does exist outside the contract, however, and may lead to renegotiation of the terms.

All leases include a 'no partnership' article that makes it clear that the construction of the building and the financial obligations that stem from it can never result in mutual liability for those obligations.

But despite this wording of the leases, the BPCA emphasises the fact that it sees itself as a sort of partner of the tenants. It assists in the implementation of the environmental guidelines and the design guidelines. Indeed, interviewees representing the developers were positive about the professionalism of the BPCA and its willingness to assist. The BPCA also stated that, as a general rule, it tried not to be too hard on its tenants. Instead of using the default clauses of the lease whenever it could, it preferred to consult with the developers in search of a solution (case interviews BPC 11-04-A1 and A4).

After the 9/11 attacks on the World Trade Center, the Albanese Organization (the developer of plot 18b) found itself unable to finance a previous lease that it had already signed. The BPCA then agreed to renegotiate the lease and gave the Albanese Organization a discount on the base rent (case interview BPC 02-07-A1). The BPCA even expressed willingness to finance parts of the project itself. This later turned out to be unnecessary, since the State of New York launched a 'Liberty Bonds' programme to help fund the development. However, the example clearly shows the interest that the BPCA takes in the development. In the last resort, both the BPCA and its tenants are best off when the area is flourishing, and the BPCA is willing to take risks to achieve this objective in emergency situations.

The Battery Park City leases provide two noteworthy examples of contractual solidarity. The first is the option of fast-tracking included as a standard provision in all leases. If the request is reasonable, the BPCA will try to shorten the period allowed for review of the plans below the normal fifteen days. This option allows the developer/tenant to start the work on the excavations and the foundations before all plans have been approved. This fast-tracking provision acknowledges the tenant's interest in finishing the work as soon as possible. The willingness of the BPCA to support the tenant in the achievement of this aim is a good example of contractual solidarity.

The other example is the percentage rate for commercial rental of the building and the percentage that the BPCA receives when units are sold.

The (rental) lease for plot 18b states that the BPCA will receive 3% of the rent for the parts of the building that have commercial (non-residential) uses. The lease for plot 16/17 states that the BPCA will receive 20% of the proceeds when the condominium units are sold above $850 per sq. ft. A representative of the developer I interviewed mentioned this provision as an example of how the BPCA became a partner in the project (case interview Sheldrake BPC 11-05-A3).

The representative of the BPCA, however, stated that these provisions have nothing to do with partnership, but simply reflect the fact that the provisions in the lease are the outcome of a bidding procedure. As in any such procedure, the principal (the BPCA in this case) will accept the offer that is most financially advantageous to it (case interview BPC 02-07-A1). The BPCA representative went on to explain that Sheldrake, the developer of plot 16/17, is not the same kind of company as the Albanese Organization. The latter, which has developed a number of projects in Battery Park City, prefers rentals to condominiums. This reflects its intention to stay in Battery Park City for a long time. In contrast, Sheldrake prefers condominiums to rentals: it wants to build units, sell them and move on. However, I still hold that these provisions do provide an example of contractual solidarity because they give both parties a shared interest in the project. They represent a financial incentive for the BPCA to assist in the quick realisation of the project and to assist, where possible, in the sale or rental of the units for the highest possible price.

5.3.8 The linking norms: restitution, reliance and expectation interests: equally discrete and relational

The parties enter the agreement in the expectation that development will go ahead and that they will make a profit out of the agreement. The expectation is also that the site is suitable for construction both on a factual and an administrative basis.

When the expectations under which the agreement was made are threatened, parties have a reason to renegotiate, as happened in the lease signed before the 9/11 attacks (see Section 5.3.7).

5.3.9 Creation and restraint of power: equally discrete and relational

The discrete elements of the creation and restraint of power norm are to be found in the financial terms and in the duty of the BPCA to provide quiet enjoyment of the premises in return. The relational elements are found in the parts of the agreement related to the 'how' of the construction. Here the BPCA seeks to assist the developers in the performance of their duties and also

gives them a say in how it fulfils its monitoring tasks.

The main transfer of power is that the BPCA has leased its land to the tenant/developers, and is thereby no longer in possession of it. The tenant/developers can no longer freely dispose of the money they have to pay for the land (the base rent). Section 2 (first part) of the leases reads: "Landlord, does hereby demise and sublease to Tenant, and Tenant does hereby hire and take from Landlord, the Premises, together with all easements, appurtenances and other rights and privileges now or hereafter belonging or appertaining to the Premises, subject only to the Title Matters."

These rights are transferred the moment the lease becomes effective. In addition, powers that were vested in the BPCA or in the tenant/developers are now shared. Most notably: the developer designs the buildings but the BPCA has to approve the designs. The developer draws up the environmental programme but the BPCA has to approve this too. The developers also draw up the fair marketing and affirmative action programmes, but these also have to be approved by the BPCA. These shared powers result in a duty to consult and cooperate.

When the lease rights are transferred, the BPCA has the right to monitor the work of the developer, to inspect the premises and to receive compliance reports.

The general provision is the article of the lease dealing with rights of inspection, etc., which states that Tenant shall permit Landlord and its agents or representatives to enter the Premises at all reasonable times and upon reasonable notice for the purpose of "(…) (b) determining whether or not Tenant is in compliance with its obligations (…)."

Section 20.02 states that when the landlord inspects the works of the tenant, he shall use his reasonable efforts to minimise any harm, annoyance etc. to the tenant caused by this inspection.

In addition, the developer has to furnish compliance reports with regard to goals of non-discrimination (affirmative action and affirmative fair marketing). An example is Section D-3, 7 (Monitoring) that deals with the fair marketing programmes. This section reads: "At BPCA's request and expense, Tenant shall allow BPCA to place a representative at Tenant's rental or sales office to monitor compliance with the Plan, provided that such BPCA representatives shall not interfere with Tenant's sales and marketing activities. BPCA shall determine, in its discretion, when and whether it wishes to commence, discontinue or renew monitoring Tenant's activities under the Plan."

5.3.10 Propriety of means: more discrete than relational

The lease does not presuppose that all parties are in possession of the means to perform their duties. It starts from distrust and asks for assurances and warranties.

Naturally, the BPCA must be in possession of the land to be developed. And it must have the expertise and the contractors needed to build the landlord's civic facilities (see Section 5.2.3). The developer/tenant must be in possession of the financial resources needed to pay the rent and the means needed to construct the building.

The lease tries to ensure that the parties use adequate means to realise the project – not so much the financial resources as the right kind of professionals. The lease requires the developer/tenant to have the contractors, architects and most other companies he uses approved by the BPCA. They all need to possess the licenses commonly required in New York.

In addition, the requirements on the building materials that the developer/tenants are allowed to use are quite specific. And although as we have seen in Section 5.3.6 the BPCA is prepared to be flexible in applying these requirements, it does not allow its developer/tenants to use means it has not approved.

5.3.11 Harmonisation with the social matrix: equally discrete and relational

The supra-contract norms that are most notably present in the leases are those requiring each party to take the interests of the counterparty into account. The BPCA has to understand that its tenant/developers are market players who want to make a profit and expect professionalism from the planning authorities. The market players, on the other hand, have to respect the fact that the BPCA is a state-owned special purpose corporation that also has to take the interests of the general public into account when it closes its agreements. These supra-contract norms are found in the parts of the leases where it is stipulated that the developer shall expressly recognise the goals of the BPCA. They can also be read in the word 'reasonable' that is found throughout the lease and that obliges the BPCA to make the interest of its developers part of its considerations.

5.3.12 Balance of discrete and relational norms in the agreements for the Battery Park City projects

The prevalence of discrete and relational elements in the common contract norms for these projects has already been surveyed in Table 5.1. We will now look at things from a slightly different perspective, by indicating the relative importance of the various norms.

The Battery Park City leases share discrete and relational elements. But on a discrete-relational scale they turn out to be more discrete than relational. As the above figure shows, all discrete norms turned out to be of enhanced importance. This finding is backed up by the fact that in Table 5.1, five of the

Table 5.2 Importance of discrete and relational norms in Battery Park City

1. Discrete norms		
Enhanced importance of:	Yes	No
Discreteness	×	
Presentiation	×	
Implementation of planning*	×	
Effectuation of consent	×	
2. Relational norms		
Enhanced importance of:	Yes	No
Role integrity		×
Preservation of the relation	×	
Resolution of conflict		×
Propriety of means	×	
Supra-contract norms		×

* When the norms of discreteness and presentiation are not of enhanced importance, it makes more sense to view the implementation of planning norm as a relational norm. In other words, the importance of planning in such projects then follows from the nature of the observed relation between the parties rather than from the wording of the agreements.

common contract norms were found to be more discrete than relational in the Battery Park City case, while none was more relational than discrete. It should be noted that the implementation of planning norm also has relational elements (this has already been mentioned in a footnote to Table 5.2), whereas the role integrity norm also has discrete elements. It follows that, in the terminology introduced in Chapter 3, the contracts in this case may be called neoclassical (see Section 3.5.2).

The leases, as we saw, combine a relatively short-term agreement on the construction of the buildings in question with a long-term agreement on the other conditions of the lease.

The relational norms were found to play a particularly important role in the parts of the leases relating to development. We find that the agreement puts a strong emphasis on propriety of means: the developer should possess the means not only to construct the buildings but also to meet the goals of the BPCA related to environmental sustainability. It is also the development part of the agreement that presupposes that parties will have to meet to discuss some issues in greater depth. Still, although interviewees emphasised their co-operative attitude and their positive approach to the idea of partnership, the development part of the lease takes a more adversarial stance when it comes to planning: it reasons from a submit-review model, not from one stressing a collaborative attitude between the parties to reach a jointly acceptable solution. The interviewees from the BPCA emphasised that the co-operative or adversarial nature of their approach depended strongly on which

developer was involved: they stated that their relationship with Sheldrake tended to be adversarial, while that with Albanese was much more co-operative. The leases, being mostly standard documents, do not reflect this difference.

6 Case Study Hudson Yards, New York

No. 7 subway extension

6.1 The urban development project: Hudson Yards, New York

6.1.1 Introduction

Between 2002 and 2007, New York, the leading American city in commerce and business, experienced a period of economic growth that came with an increasing demand for office space and booming prices on both the office and the residential markets. In this context, the Hudson Yards project area, also known as the West Side development, offers one of the last opportunities for a major development project on the island of Manhattan.

The Hudson Yards project is situated in the far West Side of Manhattan. The area currently consists primarily of open parking lots, industrial units, small commercial and residential buildings, and transportation infrastructure. That infrastructure includes the entrance and exit roadways and plazas for the Lincoln Tunnel as well as approximately 26 acres of open railyards serving the operational needs of the Long Island Railroad and Pennsylvania Station (HYIC, 2007). The area can be regarded as underdeveloped in the context of the highly urbanised island that constitutes Manhattan. Therefore, the Hudson Yards are sometimes referred to as the last great frontier in Manhattan (Fox, 2005).

Apart from the work on the infrastructure that forms a key part of this project, the redevelopment of Hudson Yards focuses on office and residential space but will also create new cultural facilities and parks.

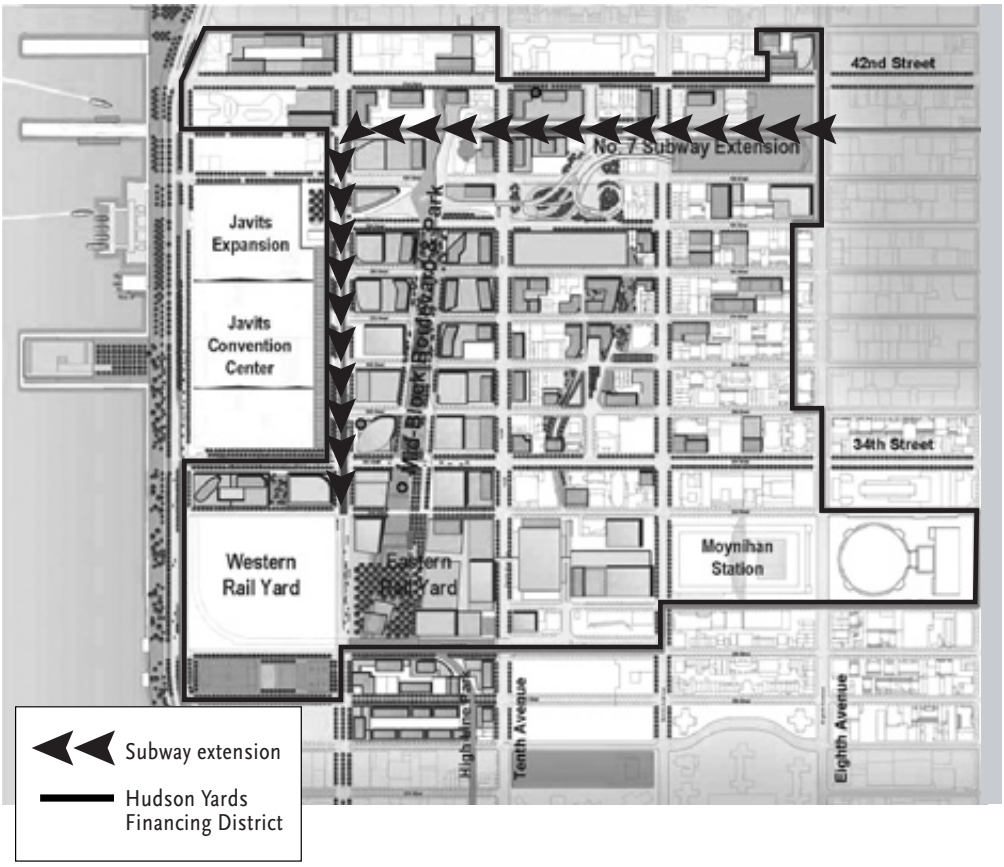
In 2005, the larger part of the project area was rezoned as the special Hudson Yards Finance District. This rezoning took place to facilitate the bonds programme that the City uses to finance its investments and to provide the new conditions for development (see also Section 6.1.8).

The City administration is highly committed to the project as was recently confirmed by Mayor Bloomberg when he stated that nobody would be able to stop the project when he left office in 2010 (New York Times, 2008b). But after a successful start, in October the project suffered from the economic downturn in the United States and the higher costs involved in the development of the state- and city-owned projects. I selected one of these public projects, the No. 7 subway extension, as the focal project in this case; it is discussed in detail in Sections 6.2 and 6.3.

6.1.2 Description of the area

The special zoning district of Hudson Yards comprises the approximately 45 square block area of Manhattan generally bounded by 7th and 8th Avenues on the east, West 42nd and 43rd Street on the north, 11th and 12th Avenues on the west and West 29th, 30th and 31st Streets on the south (see Figure 6.1). Land-

Figure 6.1 Hudson Yards, including the No. 7 subway extension



Source: courtesy of Hudson Yards Development Corporation

Hudson Yards, with the Hudson River in the background ▶
Source: Regional Plan Association, New York

mark buildings that already exist in the area are Pennsylvania Station – commonly known as Penn Station – on 34th Street, the Madison Square Garden arena on top of it and the Jacob K. Javits Convention Center on Eleventh Avenue. Noteworthy is also Hell's Kitchen, a district that runs from 31st to 59th Street and from 8th Avenue to the Hudson River and that is partly located in the project area. Hell's Kitchen is notorious for its history of ethnic conflicts and gangsters. The area has however experienced a rapid gentrification since the 1990s.

Another important part of the area is formed by the 26 acre (10.5 ha) John D. Caemmerer West Side Storage Yards that are divided in an eastern and western portion.

The Eastern Rail Yard (ERY) is an approximately 13 acre (5.3 ha) site located between West 30th and West 33rd Streets from 10th to 11th Avenue (see map). The Western Rail Yard (WRY) consists of the western portion of the railyards. It is also an approximately 13 acre (5.3 ha) site and is located between West 30th and West 33rd Streets from 11th to 12th Avenues, and fulfils the same function as the Eastern Rail Yard. In October 2008 it still awaited rezoning.

Of some importance in this context is Highline Park, the larger part of which is located in the adjacent area of South Chelsea but which curves into the Eastern Rail Yard. The High Line is an obsolete elevated railway 1.45 miles (2.3 km) long between West 34th Street (near the Javits Convention Center) and Gansevoort Street in the West Village (see map). Between 1930 and 1980, the High Line served the industrial buildings on the west side of Manhattan. It will now become a public park, the first part of which was opened in the summer of 2008.

6.1.3 Description of the project

The Hudson Yards area is intended to become a mixed-use community containing new medium- to large-scale commercial, residential, hotel and retail development. The City of New York thus aims to "accommodate the expansion of the Midtown central business district over the long term by providing space and incentives for commercial, residential, hotel and retail development, to expand the amount of public open space and to contribute to the cultural and recreational life of the City (HYIC, 2007: 1)."

The project can be divided in five parts:

1. with the creation of the special zoning district, the City aims to promote the construction of new high-rise buildings that could previously not have been developed on the site.

In addition there are four public (or public-private) projects:

2. the development of the John D. Caemmerer West Side Storage Yards ('the railyards');
3. the further development of the Jacob K. Javits Convention Center (the

'Javits Convention Center');
4. the development of a new stadium and financial district around Penn Station; and
5. the No. 7 subway extension.

All projects are in different phases of development, and in the current climate of higher costs and lower economic growth some projects may not be developed at all.

The special zoning district
As rezoned, the Hudson Yards zoning district has capacity for approximately 24 million sq. ft. (2.2 million sq. m) of new office development, 13,500 units of housing, of which almost 4,000 will be affordable units, 1 million sq. ft. of retail, and 2 million sq. ft. (204,000 sq. m) of hotel space.

The No. 7 subway extension
The No. 7 subway extension consists of a joint effort of the MTA (Metropolitan Transportation Authority) and the City of New York to extend subway line No. 7 by 1.5 miles (2.4 km). This $2.1 billion project is the focal project in this case, and is discussed at length in Sections 6.2 and 6.3.

The Javits Convention Center
The plans for the redevelopment and expansion of the Javits Convention Center include a 1,500-room headquarter hotel, the largest ballroom of New York City (6,000 places) and an extension of meeting and exhibition space from 790,000 sq. ft. (73,000 sq. m) to 1.3 million sq. ft. (121,000 sq. m). The expansion is financed by grants from the City and the State and by the issuing of bonds. The bid for the project was won in late 2006 by a consortium consisting of the English architect Richard Rogers, together with FXFOWLE architects and the design consultant firm A. Epstein International and Sons, Inc. The project area is located in the 'superblock' bounded by West 34th Street, 11th Avenue, West 39th street and 12th Avenue (see Figure 6.1).

The plans for the Javits Convention Center were abandoned at the beginning of 2008 (New York Times, 2008d), though the public authorities remain committed to this redevelopment. At the time of writing (October 2008), it is impossible to predict whether and in what form the plans will be taken up again. Most likely they will be a somewhat watered down version of those indicated above.

Penn Station and Madison Square Garden
Penn Station is situated at 8th Avenue and 31st Street. It is the busiest transport hub of New York, serving trains from Washington D.C. and Boston (Amtrak) as well as commuter railway services (by LIRR – Long Island Rail Road – and

New Jersey Transit) and six subway lines. On top of the station rests Madison Square Garden, a 20,000 seat arena hosting various sporting events – including the basketball games of the New York Knicks and the ice hockey games of the New York Rangers – as well as concerts and many other events.

Cablevision, the fifth largest American cable company that owns the arena, had announced plans to replace Madison Square Garden by a new arena on the site of the James Farley Post Office, the general New York post office building situated between 31st and 33rd Streets on 8th Avenue. The building would serve as the entrance of the new Penn Station, which would be named the Moynihan Station. Plans also existed to move Madison Square Garden one block to the west flank of the Farley Building. But in April 2008, Cablevision announced that it will instead renovate the existing arena, thus leaving no room to create a new financial district around Pennsylvania Station (New York Times, 2008a, see also Section 6.1.6).

Plans for Moynihan Station continue, and the proposed relocation of Madison Square Garden has not been completely shelved; however, the (state-owned) Pennsylvania Station Redevelopment Corporation is experiencing financial problems as its mother organisation, the Empire State Development Corporation, has been badly affected by the 'credit crunch' (New York Times, 2008c). The costs for the redevelopment of the station are estimated at $ 14 billion. Thus it is not clear at this time how the project will continue but it makes sense to suppose that, now that the plans for a financial district are abandoned, it will not be an integral part of the West Side developments.

The railyards

The railyards serve as a storage and maintenance facility for the LIRR operations at Pennsylvania Station and are owned by the Triborough Bridge and Tunnel Authority. Both are affiliates of the MTA. The railyards consist of 36 tracks.

They will stay where they are, but the future development of the yards will require the construction of a platform over the active LIRR operations (MTA, 2007a). This airspace was procured publicly in July 2007. The railyards were divided into two parts that were procured separately; the above-mentioned Eastern Rail Yard (ERY) and the Western Rail Yard (WRY).

The platform over the ERY will accommodate approximately 6.6 million sq. ft. (613,000 sq. m) of mixed-use development, including office, residential, hotel, retail, cultural and parking facilities, and public open space. Approximately 7 acres (2.8 ha) of public open space will be realised, including a significant public plaza. Additionally, it is anticipated that development of the Eastern Rail Yard will include a major new cultural facility. The open space programme of the Hudson Yards Development Program will connect the open space of the Eastern Rail Yards to the proposed Highline Park.

New development of the Western Rail Yard in a manner consistent with the

rest of the Hudson Yards area will require zoning changes and associated environmental review. In October 2008 the review had not been carried out yet.

In September 2006, the City and the MTA reached an agreement for a coordinated planning and development effort with respect to the Eastern and Western Railyards. Pursuant to that agreement, the Hudson Yards Development Corporation (HYDC), together with the New York City Department of City Planning and in cooperation and consultation with the New York City Council and the MTA, prepared a statement of planning as well as design guidelines for the Western Rail Yard. The design guidelines foresee development of the site as a world class urban environment with a vibrant mix of uses that is fully integrated with the surrounding Hudson Yards Area, creating high quality cohesive open space with a range of uses and activities, and a signature addition to New York City's skyline (MTA, 2007b).

The MTA made clear that with the procurement of the project, it first and foremost wanted to maximise value and revenue for its capital financial plan. In addition it wanted to assure safe, continuous, uninterrupted LIRR service and achieve excellence in architecture, urban design and sustainability (2007b: 3).

The request for proposals (RFP) for the site was issued in July 2007. The MTA, being the owner of the site, issued the RFP, with the HYDC participating in the selection process. The RFP states that the development will consist of at least 20% of residential development, 20% of commercial development and a school. The site allows for a floor area ratio (FAR) of 10, but densities can probably be increased since this FAR requirement applies to the site as a whole while higher FAR values are possible in the affordable housing programmes (MTA, 2007b).

At the time of writing (October 2008) the site had not been rezoned but in December 2007, five proposals were presented to the public forum that was organised by the Hudson Yards Community Advisory Committee. Rezoning of the area will take place after acceptance of one of the proposals (MTA, 2007b). The MTA will most likely enter into a 99-years lease of its airspace.

In March 2008, a bid for the Eastern and Western Rail Yards was initially accepted by the MTA, but the deal collapsed after further negotiations – allegedly because of a lack of security for the developer, Tishman Speyer, that had not attracted an anchor tenant for the buildings and wanted to start payments on the 99-years lease only after the WRY was rezoned.

However, a few days later it was announced that another developer, Related Companies, who had also submitted a proposal was still willing to step in despite the fact that its anchor tenant, News Corporation, had dropped out. Related Companies, that closed a financial partnership with Goldman Sachs bank, will pay $ 1.054 billion, which is more than the MTA had expected (New York Times, 2008d). Related Companies will develop both the Eastern and the Western part of the Railyards in a manner consistent with the RFP.

The plan provides for 12 million sq. ft. (1.1 million sq. m) of development with the tallest building having a floor space of 1.1 million ft. (102,000 sq. m) and 15.1 acres (61,108 sq. m) of open space (see Figure 6.1).

1. The eastern part of the plan provides for 5 buildings with a total floor area of 6.27 million sq. ft. (582,000 sq. m). The most important functions are:

- 1.67 million sq. ft. (155,000 sq. m) of residential units with 612,000 sq. ft. (57,000 sq. m) of rental units (830 units, built with the aid of the 80/20 programme) and 1.05 million sq. ft. (98,000 sq. m) of condominium residences;
- 3.57 million sq. ft. (331,000 sq. m) of commercial space;
- 265,000 sq. ft. (24,500 sq. m) of hotel space;
- 200,000 sq. ft. (18,500 sq. m) of community/cultural space.

55% of the site will be open public space.

2. The western part of the plan provides for 8 buildings, 5.75 million sq. ft. (530,000 sq. m) of which the most important functions are:

- 3.363 million sq. ft. (312,000 sq. m) residential (960,000 sq. ft. (89,000 sq. m), 1,324 units, 80/20) and 2.67 million sq. ft. (248,000 sq. m) condominium residences (approx. 1,927 units);
- 192,000 sq. ft. (17,800 sq. m) of retail space;
- 120,000 sq. ft. (11,000 sq. m) of school.

55% of the site will be open public space.

6.1.4 Momentum

Mayor Bloomberg (in office since 2002) helped to build up the momentum for this project, as he made the development of the West Side one of the key items of his election campaign in 2002. The project is also strongly supported by U.S. Senator Charles E. Schumer, who had appointed a group of 35 state and city leaders who produced a report under the title *Preparing for the future: a commercial development strategy for New York City* (Group of 35, 2001). This report states that New York and especially Manhattan is the nation's centre of commerce and business, with 60% of the dominant office market based in Manhattan. But Manhattan has trouble competing with other markets due to a lack of available land and inadequate zoning to provide for new office space. Hudson Yards would provide a splendid opportunity to develop new office space, they claimed.

The Mayor had hoped that New York would win the bid for the 2012 Olympic Games. Part of his plan was the construction of a new stadium for the New York Jets on top of the Western Rail Yards (see Section 6.1.6). Although the Olympic Games went to London and the plans for the stadium were subsequently abandoned by the State of New York (see Section 6.1.6), they helped to create momentum for the Hudson Yards project. In addition, New York's economy recovered remarkably well after the 9/11 attacks, and the City wanted to keep New York on the map as a leading financial centre – perhaps the

most important one in the world.

By 2007, the project had lost some of its momentum when the economy tipped into recession and after the crisis on the housing market and the related debt crisis, private parties were less willing to take risks. In addition, the new state Governor Eliot Spitzer (2007-2008) showed less commitment to the project than his predecessor George Pataki (New York Times, 2008b; 2008c).

As a result, the ambitious but costly plans for Penn Station and the Javits Convention Center collapsed. The railyards project continued, however, and the Mayor has at various moments confirmed his strong commitment to the development of the West Side (New York Times, 2008b).

6.1.5 Time frame

The project started with the rezoning of the Hudson Yards area in 2005 and is expected to be completed in 2035. It will thus take about thirty years to develop all parts of this area.

Insofar as City and State agencies are involved in the construction of the public infrastructure, the project is divided in two phases. These phases are expected to end in 2019.

- During the first phase, the No. 7 subway line will be extended from Times Square West to a new terminus at 34th Street and Eleventh Avenue that is expected to open in 2013 (see Section 6.2). In addition, a platform over the Eastern Rail Yards will be constructed that will allow the construction of buildings on top of it. The southern blocks of the new Hudson Boulevard (a mid-block street that runs north-south between Tenth and Eleventh Avenue from West 33rd Street to West 39th Street) will also be constructed during the first phase.
- The second phase (due to start in 2012 after completion of the first phase) will comprise construction of a subway station on 41st Street and the northern blocks of the new Hudson Boulevard. The costs of first phase for the City are estimated at $2.8 billion and those of the second phase at $775 million. Some of these plans are now, at least temporarily, abandoned (see Section 6.1.4; Section 6.2.3 gives full details of the focal project).

The project now has to reframe itself in a changed economic climate, whereby most of the subprojects are now criticised for their high costs. The costs of the redevelopment of Penn Station are estimated at $14 billion, and those of the redevelopment of the Rail Yards at about the same; both are State projects.

Still, while the public projects suffer from high costs, the economic downturn and lower political commitment at State level, the rezoning of the area has been successful and the (re-)development of the parts owned by private developers – most of the area – has moved fast.

6.1.6 History and background

The Hudson Yards area was a rough industrial neighbourhood until the 1990s, built in relatively low densities and with a poor population. In fact, there was little housing here, most of the area being occupied by warehouses and infrastructure support. During the past decade, the area – in particular the historically infamous neighbourhood of Hell's Kitchen that is partly located here – has experienced a rapid process of gentrification.

The history of the present Hudson Yards project starts with the failed proposal for the development of the new West Side Stadium.

The West Side Stadium was supposed to be located on the WRY site (see Section 6.1.3), and is the main reason why the Western Railyards have not been rezoned yet. Until 2005, the construction of the stadium on a deck to be placed over the railyard was central to the plan for the whole area. The plan for the stadium coincided with the wish of the City of New York to have the New York Jets play in their own city instead of at the Giants Stadium in New Jersey where they have been based since 1984 (and will stay for the foreseeable future).

Opposition against the stadium was strong from the beginning, and despite the strong support of the Mayor (Michael Bloomberg) and the state Governor (George Pataki) for the plan, it was abandoned after New York City lost the bid for the 2012 Olympics to the City of London and the New York State Public Authorities Control Board (PACB) decided against a $300 million state subsidy for the stadium (Fox, 2005). The PACB is worth mentioning in this context: it is a powerful body that was created in 1976 to manage public authority debts and consists of the speaker of the State Assembly, the State Senate majority leader and the State governor. The board must unanimously approve the financing and construction of any project proposed by various state public benefit corporations (Fox, 2005). The New York State Urban Development Corporation (now known as the Empire State Development Corporation), the authority that was going to finance the West Side Stadium, falls under the purview of the PACB.

The successful opposition against the stadium was led by Christine Quinne, who is the speaker of New York City Council – said to be the most important city job after the mayor – and representative of Manhattan's West Side on the City Council. Interviewees stated that her influence makes Manhattan community board No. 4 (which she chairs, and which is responsible for shaping policy for the West Side) politically very powerful (case interview HYDC, HY 02-07-A1).

After the abandonment of the Stadium plan, the planners expected that the expansion of the Javits Convention Center and the subway extension together would create the buzz needed to ensure a successful project (case interview HY 02-07-A1). However, the convention centre plans were abandoned

at the beginning of 2008. While private development was moving fast until mid-2008, we will now have to wait and see how the project will take shape in a period of economic decline.

6.1.7 Project Management

The Hudson Yards project is managed by various City and State agencies. Despite the existence of a special agency for the implementation of the project, there is no single planning authority that oversees the whole project.

The state agencies involved are the Metropolitan Transportation Authority (MTA) and the Convention Center Development Corporation (CCDC).

The MTA runs the public transportation lines in New York and Long Island. It owns the Rail Yards and will construct and run the planned subway extension. The CCDC is a subsidiary of the Empire State Development Corporation (see Sections 6.1.3 and 6.1.17) that owns and runs the Javits Convention Center. These two State agencies, the City and the City agencies work together in the redevelopment process. In 2006, the City and the MTA signed a Memorandum of Understanding and an agreement on redevelopment for the parts owned by the MTA. The core of this agreement is that the City will finance the subway extension with bonds, whereas the MTA has agreed that the air rights related to the space above its lands (see Section 6.1.8) can be used to pay the interest on those bonds (estimated at $ 200 million).

The role of the City in the project is mostly to create the conditions that will allow the area to be redeveloped in line with its goals. The City does this by financing the infrastructure, rezoning the area (see Section 6.1.2), by providing tax incentives and density bonuses (see Section 6.1.8 and 6.1.10), and by setting up the Hudson Yards Infrastructure Corporation (HYIC) and the Hudson Yards Development Corporation (HYDC). The HYIC was established to provide financing for the infrastructure improvements that will be executed by the MTA.

The HYDC is a special agency created to spearhead the implementation of the Hudson Yards plan. In addition, it works closely with the State agencies that own and manage the State-owned parts of the project. The City has also acquired some property, necessary to facilitate the subway extension, and some public infrastructure. The City does not however develop any significant parts of the project.

6.1.8 Project finance

The City and State of New York finance and implement their projects with the aid of bonds, tax incentives and the sale of density bonuses. The City is not a major landowner (90-95% of the area is privately owned) and as a general rule does not finance its projects from its capital budget. It only rarely provides

direct subsidies instead of tax incentives. The State of New York is involved in the Javits Convention Center, the Rail Yards project, the No. 7 subway extension and the Penn Station/Madison Square Garden project.

PILOT system

The largest part of the Hudson Yards project (85%) is financed in the same way as Battery Park City (see Chapter 5), by using payments in lieu of taxes (PILOTS).

PILOTS resemble the tax increment financing (TIF) schemes that are widely used throughout the USA. PILOTS are used relatively infrequently, whereas TIF financing exists in all 50 states of the United States. The difference between the PILOT system and TIF is that only the payments made under specific PILOT agreements will go into a special project fund while all other taxes collected on PILOT properties will continue to go to the City's general fund (Cerciello, 2005). All revenue from a TIF system, on the other hand, goes into a special project fund.

The TIF system allows local governments to finance redevelopment projects with the (projected) increased tax revenue generated by the redeveloped property. It uses this future income to back bonds that are issued for the project. The proceeds of those bonds are used to invest in the project.

Cerciello (2005: 706) summarises how the TIF system works: "The initial property tax base of the redevelopment zone is frozen on the tax roll. As the redevelopment progresses, property values and property tax collections should increase. The taxing authorities continue to receive tax revenue based on the frozen base value while the excess tax collections (the "tax increment") flow into a special fund that is used to make interest and principal payments on the TIF bonds. The original taxing authorities do not get any of the tax increment until the TIF bonds are repaid."

The TIF system requires a redevelopment agency to issue the bonds and collect the tax increments.

Two central assumptions underlie the use of TIF (Cerciello, 2005). The first is that property values would remain constant without the stimulation provided by TIF. The second is that the redevelopment drives the increase in property values.

TIF schemes are contested for their supposed unconstitutionality. The State constitutions limit the amount of debt that municipalities can occur, and the bonds exceed these debts. The constitution of the State of New York limits New York City debts to 10% of the average full valuation of taxable real estate (N.Y. Const. art. VIII Section 4). The bonds more or less circumvent that requirement. They are also contested for their unlawful delegation of legislative power to an administrative agency and for their lack of voter accountability. Finally, they are criticised because when the increase of the value of property does not meet expectations, the City often ends up paying the debts.

The Bonds/PILOT system in Hudson Yards

The Hudson Yards Infrastructure Corporation (HYIC) issues bonds that total up to more than $3 billion. The HYIC will first collect $2 billion and has the authority to collect up to $1.5 billion of additional Senior Bonds. It may not issue more than $3 billion of bonds backed by interest support payments.

The interest on these bonds is paid by the PILOT payments (recurring), the sale of transferable development rights of the Eastern Railyards (a portion of which has been acquired by the HYIC) and payments in lieu of mortgage recording taxes.

The Hudson Yards PILOT system works as follows: private landowners mortgage their lands to the Industrial Development Agency of New York City (IDA). The IDA assigns each PILOT agreement and PILOT mortgage to the HYIC that assigns the obligations to the Trustee of the fund. The trustee is empowered to exercise the rights and remedies of the mortgagee (Cerciello, 2005).

The IDA is a tax-exempt entity. The developers will make payments to the IDA for the duration of the agreement. Developers are not obliged to close a PILOT agreement but the PILOT payments are less than the amount of property tax that would generally be due if their land fell under normal property taxes regulations, which makes the agreement attractive for them. The schedule provides a substantial discount on the real property taxes that would otherwise be due for up to 19 years. It provides an annual rate of increase that is equal to the lesser of 3% or the actual increase in assessed valuation of the property. After the 20th year of the agreement, the amounts payable equal the real property taxes levied by the city but the agreements are expected to last for 35 years and can be extended to 64 years. It follows that this arrangement is no longer advantageous to the contractor after the 20th year of the agreement. The MTA has agreed to use the same system when it leases or sells the air rights of the Railyards for development (MTA, 2007b).

The IDA will funnel the payments into a special fund that is overseen by the HYIC. The HYIC then uses this fund to make interest and principal payments on the bonds. The HYIC and the City have closed an IDA assignment agreement, pursuant to which the IDA has assigned the payments to the HYIC. The agreement terminates when all principal and interest has been paid on the Corporation's Bonds.

In addition to the PILOT programme, there are (one-off) PILOTS for the mortgage registration taxes (PILOMRT) that follow the same system.

The PILOT finance method in Hudson Yards can be criticised because it relies heavily on the presumption that New York will experience an increasing demand for office space, which may or may not occur. In addition, Cerciello criticises it for its lack of voter accountability and because the bonds it pays for do not provide funding for additional facilities such as schools and a fire station (Cerciello, 2005b).

Since the bonds are backed only by the proceeds of the project and not

by the general funds of the City (that would be unconstitutional), they carry a higher risk which makes the interest on them higher than that on regular bonds. However, in practice the bonds are always backed by the City. Thus, the result may be that the general taxpayers end up paying for a failed project, while they never had a chance to vote for or against the way in which it was financed. This backup was indeed confirmed (off the record) by some of the interviewees. Cerciello would rather see the city financing the project from its general funds. In previous decades, when the city was very poor, this would have been impossible. Now that the city is better off, it would be possible, though as pointed out above, it has been suggested that this solution is unconstitutional. A related problem is the continual underrating of cities' bonds by credit rating companies such as Standard and Poor's; cities started to rebel on this point in 2008 (New York Times, 2008a). Still, PILOT financing also allows cities to confine the city budget for a given project (and the attendant risks) to the amount of the bonds issued to cover it, while this construction also works as an incentive for developers. An interviewee from the HYDC stated that they were surprised by the way in which Amsterdam financed its projects, which demanded so much pre-investment from capital funds (case interview HYDC, HY 02-07-A4).

It may be noted that in 2003, the BPCA received an AAA rating on its bonds, the highest level of trustworthiness awarded by Standard and Poor's (BPCA, 2007). It could thus hardly be claimed that these bonds were underrated at the time.

Other financial incentives

In addition to the PILOTS, there are other incentive programmes in Hudson Yards that are intended to generate funds for the public infrastructure (including parks), to promote the construction of affordable housing and to increase densities in designated areas. A small programme also exists to promote cultural facilities.

District improvement bonus

The city has created a district improvement bonus (DIB) system, which allows developers to increase the floor area ratio (FAR) of their buildings in designated areas (see map) in return for a contribution of $ 109.36 per sq. ft. of FAR (price of July 1, 2007). (It may be noted here for the sake of clarity that in this context 'bonus' is not used in the usual sense of an extra payment in return for good performance but to denote permission for developers to construct taller buildings than would otherwise allowed under the zoning regulations, in return for a fee paid by the developer.) The price of the bonus is yearly set by the Department of City Planning. The maximum bonuses change per plot (the zoning heights range from 6 FAR to 33 FAR). The DIB fund is used to pay for the public infrastructure.

Air rights can be traded from Phase 2 areas to large-scale plan areas and to the 10th Avenue Corridor. The price of those rights is set through private transactions. The bonuses may not exceed the DIB bonuses.

Purchase and transfer of air rights at the Eastern Rail Yard by the HYIC
At the Eastern Rail Yard site, the FAR is set at 19.0 but only 11.0 FAR can be used on site. This leaves 8 FAR that can be transferred to large-scale plan areas. A minimum of 4.6 million sq. ft. can be transferred in this manner. Prices are set through appraisal and negotiation. The air rights are transferable to large-scale plan areas. The rights are only available after maximum use of DIB and Phase 2 air rights. They are meant to promote the construction of mega-projects in the area.

The HYIC has purchased for $ 200 million a portion of the ERY air rights that can be used in other parts of the district. It will sell these air rights to developers and use the proceeds to pay the interest on the bonds, and to cover its own administrative costs. Any residual proceeds will be transferred to the MTA.

6.1.9 Ownership

Most of the land is privately owned, and the City's influence on the developments in those areas is limited to zoning, tax incentives and density bonuses (see Section 6.2). State agencies however own some crucial areas – the convention centre and the railyards – that will be re-developed (see Section 6.1.3).

6.1.10 Affordable housing

The City and the State have committed themselves to affordable housing and plan 4,000 affordable housing units (out of 13,500 residential units) in the project area, some of which will be created on the Railyards sites (see Section 6.1.3). Affordable housing is not for the lowest incomes but is meant for family incomes between $ 32,300 and $ 126,700 per annum.

The City and State do not impose strict rules to achieve this goal. All commitments depend on whether developers want to make use of the bonuses and tax programmes offered. The RFPs for the Railyard sites (see Section 6.1.3) for example make incentive schemes available but do not require the developers to make use of them. They only state that if the developers choose to develop any rental housing, 20% of the units they build should fall under the 80/20 programme (this arrangement is not permanent, but only applies for a stated limited period). But the RFPs do not oblige the developers to develop any rental housing.

Two inclusionary housing bonus programmes (IHB) exist to promote affordable housing:

- The Clinton IHB can be used to acquire an additional FAR of 2.0 in the 42nd Street corridor programme, and the Hudson Yards IHB can be used to acquire an additional FAR of 5.5 if 20-30% of building is affordable and DIB payments are made (or 3.0 FAR if the proportion of affordable housing is set at 10-15%).
- For the Railyards, the New York State Housing Finance Agency's 80/20 programme is available. This programme offers tax abatements when 20% of the residential units are developed as affordable units. The Housing Finance Agency has stated that it will give priority to applications from WRY and ERY projects (letter of June 21, 2007).

Additionally, the City supports a density bonus to foster the creation of permanently affordable low income housing. This boils down to a 5% zoning floor area bonus when 20% of the units within a building are permanently affordable housing.

The plans of Related Companies, the developer that won the bid (see Section 6.1.3), allow for 20% of permanent affordable housing (440 units) among the rental units.

In addition to the Railyards plans, the City plans the provision of the sum of $ 40 million for the construction of off-site units. Two off-site plots that are City-owned are considered as locations for such affordable housing (the sites are located at West 54th Street and 9th Avenue and West 48th Street and 10th Avenue). The first site is now leased by the MTA and the other is under full City control.

In May 2008, the City presented a plan for this project, called Harbourview, that envisages two buildings comprising 324 apartments, 220 of which are meant as affordable housing. The project is supposed to be constructed by the Atlantic Development Group that will pay the city $ 10 million for the right to do so (New York Times, 2008e).

6.1.11 Environmental sustainability

The city and state agencies have committed themselves to (modest) environmental goals in joint policy documents. These goals are most visible in the projects that are led by public parties. No specific rules with which private developers have to comply have been adopted.

Nor are there are any specific environmental guidelines for the project. The Metropolitan Transport Authority and the City Planning Commission have prepared an environmental impact statement in line with their obligations under the SEQRA (state) and CEQR (city) regulations. The executive summary of the final general environmental impact statement (FGEIS) names six environmental objectives of the project (MTA & CPC 2004):

1. protection of significant cultural, community park and open space resources;

2. relocation of incompatible uses from Hudson River Park;
3. minimal energy consumption, non-transit vehicle miles of travel, and congestion of city streets by providing enhanced transit access to major regional facilities in the Hudson Yards area;
4. sustainable design and development;
5. minimal community disruption and environmental impacts during construction of new land uses and traffic improvements, including impacts during construction of new land uses and transit improvements, including impacts on existing businesses and residences, parklands and open space resources, and historic resources;
6. measures to avoid, minimize and/or mitigate adverse impacts.

The RFP for the Railyards demanded a LEED Gold Standard. LEED stands for Leadership in Energy and Environmental Design. The standard was developed by the U.S. Green Building Council, a non-profit organisation that has members representing every sector of the building industry, which was set up in 1998. LEED scores different aspects of environmental quality up to a possible total 68 points, corresponding to a Platinum rating for the building in question. Gold means between 39 and 51 points and is the second best standard (there are also Silver and Certified).

The rating system addresses six major areas: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, innovation and design processes.

The goals of the standard are: to define green building by establishing a common standard, promote integrated, whole-building design practices, recognise environmental leadership in the building industry, stimulate green competition, raise consumer awareness of green building benefits and transform the building market (USGBC, 2005).

Interviewees from the HYDC stated that the City had considered implementing its own environmental guidelines for Hudson Yards, as it had done in Battery Park City (see Section 5.1.11). This initiative was abandoned because it would lower the worth of the air rights and the willingness of the private sector to participate in the project. In addition, the City is preparing a new environmental code (case interview HYDC, HY 03-07-A2).

6.1.12 Other public facilities

Except for housing and residential space we saw that the plans for Hudson Yards include a cultural facility in the Railyards, parks and open space, hotel space, residential space, an extension of the convention centre and new infrastructure. The 'preferred direction plan' also mentions an elevated market and a High Line market on 32nd Street (Department of City Planning and Economic Development Corporation, 2003).

There is a density bonus programme available to promote cultural facilities on 42nd Street, known as the 42nd street Corridor Theater Bonus. The program must be used together with the Clinton IHB programme (see Section 6.1.10) and can then be used to acquire an additional 3.0 Far. Whereby 1 sq. ft. (930 csq. m) of every new 3 sq. ft. (2,800 csq. m) must have a cultural use.

6.1.13 Involvement of the general public

The involvement of the general public is mostly channelled through the Community Board 4 of Manhattan (CB4), which has up to fifty members who are appointed by the President of the Borough of Manhattan. The community boards have the task of reviewing most applications and procedures that concern land use, and are concerned with all other problems that may arise in their neighbourhood. CB4 organises meetings where the plans concerning Hudson Yards are discussed with local residents (CB4, 2008).

In addition to the CB4 there is the Hudson Yards Community Advisory Committee, a representative body that was formed pursuant to the zoning agreement between the City administration and New York City Council.[5] The HYCAC advises the HYDC regarding the financing, planning, design, and construction of the Hudson Yards redevelopment area from a neighbourhood perspective.

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5 The HYAC represents various interest groups. The following list of its members dates from July 2006 (source: http://www.manhattancb4.org/HKHY/docs/HYCACstructure.htm):

- Manhattan Community Board 4: Lee Compton, Anna Levin, Walter Mankoff, Joe Restuccia, Jean-Daniel Noland
- U.S. Representative Jerrold Nadler (or proxy)
- City Council Speaker Christine C. Quinn (or proxy)
- Manhattan Borough President Scott M. Stringer (or proxy)
- State Senator Thomas K. Duane (or proxy)
- Assembly Member Richard N. Gottfried (or proxy)
- Hell's Kitchen Neighborhood Association – Kathleen Treat
- Housing Conservation Coordinators – John Raskin
- Friends of Hudson River Park – Ross Graham
- Friends of the High Line – Joshua David
- Manhattan Plaza Tenants Association – Marisa Redanty
- Rep from 544 West 35th street – Camilla Pettle
- 44th Street Block Association – Renee Stanley
- 45th Street Block Association – Justin Krebs
- Hudson Crossing Tenants Association – Brian Sogol
- Save Chelsea – Andrew Berman
- West Side Neighborhood Alliance – Anita Black.

6.1.14 Goals of the project

The goals of the project are summed up in the FGEIS (see Section 6.1.11). The statement also refers to the report *Preparing for the future: a commercial development strategy for New York City* (see Section 6.1.4). The main goal of the project can be defined as the aim to secure future (economic) growth of New York by providing new office space and thereby securing an income for the City from the payment of property taxes (MTA & Department of City Planning, 2004; Group of 35, 2001).

The FGEIS mentions as the goals of the Hudson Yards project:

- to ensure the future growth of New York City through redevelopment of the Hudson Yards area;
- to provide transit services to support the Hudson Yards area redevelopment;
- to maintain or improve environmental conditions.

It also names specific transit objectives and environmental objectives (for the latter, see Section 6.1.11).

The specific redevelopment objectives are:

1. Zoning to permit a mix of uses and densities;
2. New opportunities for new commercial, residential, recreational and open space uses;
3. Zoning that reinforces the existing residential neighbourhoods and encourages new housing opportunities;
4. Expansion and modernisation of the Javits Convention Center;
5. Creation of potential sites for public facilities needing relocation and/or consolidation;
6. A network of new open spaces;
7. Improvement of the pedestrian environment and access to Hudson River Park from upland areas;
8. Promotion of transit-oriented development;
9. Opportunities for high-quality architecture and urban design in conformance with sustainable design principles.[6]

6.1.15 Delays

The project has experienced some severe delays over the past year (2007-2008). They were mostly caused by a lack of funds and a decline of economic growth and prospects. Expensive projects were abandoned or postponed. These projects include the expansion of the convention centre that was deemed too ex-

6 In 2004, these goals also included the creation of the West Side Stadium that was later abandoned.

pensive and for which a new plan will have to be drafted. It also includes the refurbishment of the area around Penn Station. We have already mentioned that the Railyards deal was delayed by a few months when the developer Tishman Speyer dropped out (see Section 6.1.3).

Still, the city has collected more money on its bonds than it had counted on and the rezoning turns out to be very successful (Bond Buyer, 2008). The delays therefore concerned mostly the public projects that require City and State funding.

6.1.16 Role of private actors in the project

Private actors play an active role in the project. Most of the project involves the redevelopment of privately owned land. We saw that the main goal of the project is to foster economic development. The zoning regulations therefore promote the construction of large buildings (case interview, Department of City Planning, HY 03-07-A1). However, there are no public-private partnerships (PPP) involving risk sharing in a joint development corporation. We may consider the bond financing methodology an example of PPP at a more abstract level, as it causes private investors to accept some risk in the project.

6.1.17 Public actors

I hereby provide a list of the most important public actors in the project, drawing a distinction between State and City actors and local actors.

- State actors
  - The MTA – owner of the Railyards and the public transport systems. The MTA plays an active role in the redevelopment: it issues the RFPs for the air rights above the Railyards and it will construct the No. 7 subway extension.
  - The Empire State Development Corporation (the former Urban Development Corporation) – owns and develops the site on which the convention centre is situated.
  - The Convention Center Development Corporation (CCDC) – its subsidiary that actually owns and runs the area and has issued the RFP.
  - The State Public Authorities Control Board (PACB) – responsible for major investment decisions of the State of New York and as such blocked the development of the West Side Stadium.
- City actors
  - The Department of Transportation (NYCDOT) – will rehabilitate the 11th Avenue viaduct (between 2008-2010) and is involved in all transportation issues.
  - The City Planning Commission (CPC) – division of the Department of City Planning and has rezoned the area.

- The Industrial Development Agency (IDA) – responsible for the PILOT scheme (see Section 6.1.8).

- Local Actors
  - The Hudson Yards Infrastructure Corporation (HYIC) – is the public benefit corporation that finances the infrastructure of the project.
  - The Hudson Yards Development Corporation (HYDC) – responsible for the spearheading of the implementation of the development and is as such involved in all negotiations that concern the area.
  - Community Board No. 4 of Manhattan (CB4) – organises the involvement of the (local) public in the development plans. It succeeded in achieving the preservation of the low-rise units of part of the historic district of Chelsea, which attracts much popular support (the organisation Save Chelsea has a representative on the HYAC; see footnote 5, p. 164). It is very active and played a forward role in the Uniform Land Use Review Procedure (ULURP). It has a seat on the board of the HYDC.
  - The Hudson Yards Community Advisory Committee (HYCAC) – representative body of local organisations and other representative bodies that advises the HYDC from a neighbourhood perspective.

6.1.18 Critique

The HYCAC criticised the limited amount of affordable housing in the plans. It has also criticised the plans for creating an isolated area instead of an extension of New York City blocks (HYCAC, 2008). Other criticisms of the project include the costs, the PILOT system (see Section 6.1.8) and the low emphasis it puts on environmental goals. One newspaper reported that some wondered why the administration provided room for 20,000 parking spaces in the area (Daily News, 2007). The New York State Assembly member Richard Brodsky organised a hearing to assess the status of the projects on the West Side. He had also proposed to start a Railyards authority that could buy the development rights from the MTA (instead of the developer), in much the same way as Battery Park City is organised (see par 5.1.7). Brodsky criticises the high costs of the various projects and believes that the Railyards deal does not reflect a well thought-out economic strategy for what the city and the region needs (Atlantic Yards Report, 2008).

6.1.19 Conflicts of power: State and City interests

When the project started off, the city and the state worked (relatively) harmoniously together in their plans for the area. They produced the FGEIS together and signed a memorandum of understanding on the No. 7 subway extension (see Section 6.3).

However, Governor Spitzer (2007-2008) turned out to be less committed to

the project than his predecessor. In addition, the Empire State Development Corporation is suffering from a lack of funds and internal troubles (New York Times, 2008c). The State blocked the development of the West Side Stadium, which was a defeat for the City mayor. We have also noted that State Assembly member Brodsky organised a hearing to air his critical views on the project (see Section 6.1.18).

6.2 Focal project: the No. 7 subway extension

6.2.1 Introduction

The project that was studied in Hudson Yards differs from the other focal projects in this thesis. It does not involve the construction of mixed-use buildings, but concerns the No. 7 subway extension.

The main documents that were the studied were 7-year leases in which the City leases land from private landowners for the construction of the subway extension. The City does so on behalf of the MTA that will construct and own the extension. Privately owned land is thus leased by the City for a specific purpose. The City chose this approach to avoid the transaction costs that would be involved with expropriation (see Section 6.2.13).

The official name of the No. 7 subway line is the Interborough Rapid Transit Community (IRT) Flushing Line. It is about 8 miles (12.9 km) long and runs from the Flushing terminus in Queens to Times Square in Manhattan (see map). The line opened in 1915. The IRT became part of the MTA in 1953.

The focal project involves extending the line westwards by about 1.5 miles (2.4 km) (see Section 6.2.3). The main reason for choosing the subway extension as our focal project here was that it provides an interesting case in which public actors (the City and MTA) need the cooperation of the private developers for a public project and have to cooperate with private developers who want to construct their 1 million sq. ft. (92,000 sq. m) of buildings on top of it. This double use of the land makes the project complex.

A more practical reason was that the Railyards lease was not closed until May 2008 (see Section 6.1.3). It made sense to study a project of which I was sure that I could study the development agreements and interview the parties involved.

When the project was visited, in February 2007, the City was still negotiating with private developers who had bought land in the area concerning the terms of the leases on their property. The leases were closed in the first half of 2007. The City now leases the land from the private developers on behalf of the MTA that will construct, own and run the subway.

Interviews were conducted with affiliates of the HYDC and the City Planning Commission (CPC) as well as two of the three developers in the area (Ex-

tell and Moinian, see Section 6.2.7). The leases were drafted by the in-house lawyer of the HYDC. Additional interviews were conducted with lawyers with experience in the field. In May 2008, an additional visit was paid to the community board CB4 (see Section 6.1.17). I divided the four leases that were studied into two categories: construction leases and the storage lease. In the latter, a piece of land is leased for the storage of goods, equipment and materials used for the construction of the subway extension. In the three construction leases a piece of land is leased to the City for the construction of the subway extension, including stations, entrances and exits. The construction leases are more important for this study than the storage lease. They involve a complex interplay between the interests of the MTA that wants to construct the subway extension, the interests of the private developers that want to construct buildings on their lands and the interests of the City (represented by the HYDC) that wants the subway extension and the development of a new neighbourhood in which private developers play a key role.

The storage lease is a standard document of which only some aspects are relevant in the sense that they provide some insight into the project and the contractual relations between the parties. Naturally, as the lease only deals with storage it does not include any parts with regard to the actual work on the extension.

The main parties that were involved in the negotiations were the MTA, the CPC, and the developers. They were brought together by the HYDC that recognises both public and private interests (case interviews HY 02-07-A1 and A4). The developers spoke highly of the professionalism of the public parties. The problems that arose during the negotiations were not so much about the carrying costs of the leases, but mostly dealt with planning of the work and regulation issues. According to the developers, the underground rules did not match the above-ground rules (case interviews HY 02-07-A6 and A7). The regulations therefore had to be changed. The most complex negotiations dealt with planning of the work and the location of the columns of the buildings. The subway runs under the land that has to carry the buildings, and the MTA does not allow any columns to rest on its tubes. A different solution had to be found at a time when the parties were not sure what they were going to build on the land.

About 20 people – including engineers – were present during the negotiations. The atmosphere was described as professional, rather than adversarial or cooperative (case interviews HYDC and developers, HY 02-07-A2, A4 an A6). Although one would think that developers shared some interests, they did not aim to coordinate their actions, and never met to discuss their mutual interests.

6.2.2 Positioning (area)

The No. 7 subway extension runs from east to west. It is about 1 mile (1.6 km) long and extends the existing line that terminates at Times Square westwards to 41st Street and 11th Avenue and then southwards to 34th Street and 11th Avenue (see Figure 6.1). Plans exist to extend the line further south to 23rd Street (see Figure 6.1). The precise locations of the leased areas are:

- Areas covered by construction leases:
  1. 400 Eleventh Avenue and 550 West 35th Street, Block 706, Lots 1 and 55, Borough of Manhattan (Meushar lease). The site is known as the P site.
  2. 220 Eleventh Avenue, Block 697, Lot 1 (Eleventh lease). The site is known as the A site.
  3. Block 705, Lots, 1, 5, 53 (portion) and 54 (portion) (Extell lease).

  The site is known as the J site.
- Area covered by storage lease:
  4. Block 1069, Lots 29 and 34 (Goldman lease). This site is known as the M site.

6.2.3 Description of the project

The project is described as 'the Subway Project' in the leases and consists of the construction of the No. 7 subway extension as described above. It involves the construction of the necessary tunnels, 1 or 2 stations and ancillary facilities such as electrical substations, ventilation facilities, mechanical equipment rooms and maintenance rooms (FGEIS, 2004: 2-27).

The two stations are named intermediate station and terminal station. The terminal station will be located on West 34th Street at Eleventh Avenue. The intermediate station was planned to be located on West 41st Street and Tenth Avenue. In October 2007 the plan for the intermediate station was abandoned because of the high costs. However, new funding and political and public pressure might be successful in reviving the plan (New York Times, 2007b).

In addition to the entrances of the stations, additional entrances are mandatory for new developments on designated sites. This involves the acquisition of some properties and a number of easements to allow for the tunnels and entrances (FGEIS, 2004: 2-26).

Although the original plans spoke of acquisition of the property required, it was decided to lease the properties from the landowners instead of expropriating them. The agreements involve these leases (and the easements that I leave out of consideration here).

The leases focus on the division of responsibilities between the landowners and the tenant (City).

Responsibilities of the landlords (developers) and the tenant (the City of New York)

The Meushar lease speaks of specific responsibilities of the landlord for the demolition and cleaning work on the site. The Moinian Group, the owner of the site (see Section 6.2.7) is responsible for the sheeting work, the demolishment of existing structures on the premises, the excavation work, the re-routing of existing water, sewer and other pipes, the backfilling of the premises (other than an Amtrak easement area) with crushed stone or recycled concrete, and the dewatering of the premises. The interviewee from the Moinian Group stated that Moinian wanted to do this work, to profit from the brownfield programme of the State of New York that offers an interesting tax abatement, and was willing to risk the fine of $20,000 per day levied if the work is not finished on time (case interview HY 04-07-A6).

As the tenant, the City assumed (financial) responsibility for the construction of the subway line and the station, though the actual work would be done by contractors engaged by the City.

The subway project involves the construction of the extension and the preparation of the land but the construction leases take a broader view. A key element for the developers was that their future buildings, or at least the foundations of these buildings, would also be subject to the agreement. They wanted to construct the foundations simultaneously with the extension of the subway to make sure that the underground infrastructure would fit their interests. These interests were defined as the option to construct a large building the function of which could be decided later.

From the recitals of the construction leases, it becomes clear that the city closes the leases, but it is the MTA that requires possession of the premises to construct the subway. The city closes the leases on behalf of the MTA. The MTA is also the third party beneficiary of the easement agreements in the Meushar lease that are necessary to permit use of the subway entrances. The most important reason why the City and not the MTA closed the agreements with the developers is that the City will pay the rent for the land (see Section 6.2.9).

Two of the construction leases spell out the various responsibilities of the parties more precisely.

- Unlike the Moinian lease, the Extell lease does not speak of any responsibilities of the landlord with regard to the project. It does mention the option that landlord may undertake some of the actions needed to make the land ready for the construction work. If this option is taken up, it will be the subject of a separate agreement (Section 6).
- The Storage lease (Goldman lease) defines the project in terms of a lease of land and focuses on the delivery of the site empty by the landlord. It specifies that the landlord only has to ensure that tenants and occupants have left the premises by the commencement date but will not be required

to perform any 'demolition, construction, improvement, alteration or other work'. The tenant accepts the premises in a 'as is' condition, the condition in which he found it when the lease was signed (Section 1.3). The project of the tenant (the City) here consists only of the staging and storage of trucks and construction materials in connection with the subway extension (Section 1.2).

Shared projects

There are hardly any shared projects. The leases name one in the Meushar lease whereby the MTA will acquire and install escalators to street level for the subway station at the costs of the landlord. But the MTA will be responsible for and carry the costs of the operation, maintenance and replacement of such escalators. The agreement is in line with the requirement that new developments have to provide subway entrances. The Meushar lease also speak of the sharing of a part of the costs that the landlord had to incur to deliver the site in the required condition (Section 6.01).

6.2.4 Momentum

The momentum for the project was triggered by the bid for the 2012 Olympics (see Section 6.1.6). But even after that bid failed, the City administration remained committed to the projects and the construction of the subway extension is regarded as a necessary part of the project. Thus, the momentum of the project is based on the commitment of the City administration to the development of the area and its conviction that the subway extension is necessary to create a successful new district.

The interviewee from Extell stated that her company followed political developments and then made the decision to invest in the area. With regard to Hudson Yards, the New York State Senator Schumer was the first to talk about the need for new development because commercial jobs need office space. In may be noted in addition that the Bloomberg administration has radically changed the development climate in New York City. One of the things it did was to provide large amounts of relevant information on the Internet, thereby creating more transparency. Before that, it was more difficult to discover whether your neighbour had applied for permits etc. Now, it is easy to follow what is happening.

Next to that, Amanda Burdon (head of the CPC) has been very proactive with regard to rezoning. The CPC thus opened the West Side for development by rezoning Farley Hudson Yards as a primary business district. All these facts contributed to Extell's decision to buy land in Hudson Yards (case interview HY 03-07-A7).

6.2.5 Pre-contractual procedure

It took about six months to reach agreement on the terms of the lease (case interview HY 03-07-A5) but after that negotiations on specific issues still continued. Section 9.05 of the Meushar lease states that the precise location of the shaft has to be settled after the leases are signed. And recital 4 in the Extell lease mentions the negotiation of additional documents. The interviewee from the Moinian Group stated that the project more or less grew up around its land (case interview HY 03-07-A6, see also Section 6.2.7).

At the time when the representative of the Moinian Group was being interviewed, the company was involved in two processes of negotiation. The first was about the properties next to the subway entrance that the City wanted to take over via a condemnation procedure to make room for the proposed parklands. The second process of negotiation dealt with the projects related to the construction of the subway tunnel and station.

The parties decided to separate the negotiations because those concerning the proposed condemnation of some properties developed an adversarial character whereas the second set of negotiations was characterised as more cooperative (case interview HY 03-07-A6). This example indicates that the parties aimed to act cooperatively when possible not for ethical motives but because it suited their interests.

6.2.6 Time frame

The subway project started in 2002 with the MTA's initial conceptual engineering design.

The actual construction of the subway extension will take about seven years, after which the land reverts to the private developers, who can then start putting up their buildings.

The leases were closed between May 22 and June 10, 2007 and have an expected expiry date between April 30 and October 31, 2014. The leases can be extended for another year, but the price will go up by about 30% if the City decides to exercise that option. This provides a strong incentive to finish work on time.

The construction leases include the option for the City to terminate the lease earlier when construction work has finished. The Extell lease determines that this shall be not earlier than May 16, 2009 (Section 2.02), The Meushar lease determines that this shall be no earlier than November 1, 2012 (Section 2.02), and the Eleventh lease determines that this shall be no earlier than June 1, 2012 (Section 2.02).

The construction leases (with the exception of the Meushar lease) also include an option to extend their term for one year (Section 2.04 of the Extell lease, and 2.03 of the Eleventh lease).

The storage lease determines that landlord and tenant intend to terminate the lease if the owner of the adjacent property makes a portion of his land available for the purpose of goods and truck storage (Section 1.4 of Goldman lease).

6.2.7 The contracting parties

The leases investigated in this study were closed between:

- The City of New York and Meushar 34th Street LLC, a subsidiary of the Moinian Group;
- The City of New York and the 220 Eleventh LLC, a subsidiary of the Moinian Group;
- The City of New York and Strategic/ Extell 34th Street, LLC and West 33rd Street LLC, which are subsidiaries of the Extell development company;
- The City of New York and the Goldman family, consisting of: (1) Louisa Little, Allan Goldman and Jane Goldman as co-executors of the estate of Sol Goldman (2) Jane Goldman, Amy Goldman, Diane Goldman Kemper and Allan Goldman as co-executors of the estate of Lillian Goldman and (3) Jane Goldman, Allan Goldman and Louisa Little, as co-trustees of the Lillian Goldman marital trust under the will of Sol Goldman.

Three major developers (Extell, Moinian and Sheldrake) bought the land under which the subway and the subway station are to be constructed as a speculation on future developments.

- Sheldrake also develops one of the projects in Battery Park City (see Section 6.2.7). It was not interviewed on the Hudson Yards Project.
- Extell Development Company is a developer of residential, hotel, office and retail properties based in New York City. Its portfolio exceeds 10 million sq. ft. (930,000 sq. m; see www.extelldev.com). Extell owns three plots in the area. The most important one is site J directly to the south of the site of the Javits Convention Center (see Figure 6.1).
- The Moinian group is a real estate developer with a portfolio of about 20 million sq. ft. of industrial, residential, retail, commercial and hotel properties throughout the United States, 13 million sq. ft. of which are located in Manhattan. It owns and manages about $8 billion of assets. The company specialises in the development of underutilised land (it holds 5 million sq. ft./465,000 sq. m of vacant land (see www.moiniangroup.com). Moinian owns the midblock at 34th Street, as well as property at 11th Avenue and 34th Street. It also owns the site where the subway will go underground (about 1/3 of the total budget will be spent on Moinian land).

6.2.8a Other stakeholders

Other stakeholders in the project are residents of the neighbourhood and future users of the subway extension. The Convention Center Development Corporation (CCDC, see Section 6.1.3) is a stakeholder since the extension will terminate near the Javits Convention Center.

6.2.8b Involvement of the public

The public is less involved in the subway extension than in the development of other parts of the Hudson Yards area (see Section 6.1.13). The main reasons for this are probably that the extension of the subway is widely deemed to be necessary, and does not involve expropriation or demolition of existing areas. Debate focuses on the costs of the project and the way in which it is financed. The CB4 expressed fears that rising costs may mean that the extension is never finished (CB4, 2008a). As mentioned in Section 6.2.3, the current plans do not include construction of the intermediate station, but some groups are lobbying to have the original plans (including construction of the intermediate station) revived.

6.2.9 Payments

The City will pay the developers rent on the land equal to the carrying costs of the leases. These costs are estimated to be about $10 million for seven years in total (for an overview of the costs of the project, see Sections 6.1.7 and 6.2.15).

6.2.10a Conflicts that arose during the project

Conflicts that arose between the parties during the negotiation phase had to do with the different interests of the developers and the MTA. These differences stemmed from the difference in focus between the parties: the City and the MTA want to build subway tunnels, whereas the private developers want solid foundations for their buildings. These conflicts were however resolved without litigation or arbitration procedures (case interviews HYDC and developers, HY 02-07-A2, A6, A7).

The disagreement about whether the intermediate station should or should not be built (see Section 6.2.8) may also be regarded as a conflict associated with the project. It has not however had any impact on the progress of the project so far.

6.2.10b Future conflicts

The leases do not provide in any arbitration procedure but they include penalties for non-compliance with their provisions and planning.

The Meushar lease mentions that when the landlord has not delivered the site to the tenant on December 1, 2007 he will pay $20,000 per day to the tenant until he has delivered the premises.

The other construction leases all speak of an extension of the lease agreement by one year when tenant is not finished on time. The Eleventh lease then raises the rent by 33 percent (Section 3.01b), and the Extell lease by 25%.

The construction leases also specify that in a case of a default the landlord will have the right to damages, and/or to the payment of interest and/or to seek an injunction (for an example, see Section 13.02 of the Extell lease).

The storage lease stipulates a 5% fine if the tenant is late with the payment of the rent (Section 3.3). It also states that in the case that the tenant has asked for a consent and the landlord refuses, his only remedy is to seek an injunction of specific performance: he is not allowed to claim damages (Section 27.1).

6.2.11 Affordable housing

The subway extension project does not involve any affordable housing. Affordable housing is a part of the Hudson Yards plans (see Section 6.1.10).

6.2.12 Environmental sustainability

The leases do not mention any specific requirement on sustainability. The MTA, however, has developed an Environmental Management System (EMS)[7] that is designed to promote efficient use of energy, enhanced indoor environmental quality, conservation of resources and materials, water conservation and site management (CPC & MTA, 2004: 2: 29, see also Section 6.1.11).

6.2.13 Other public facilities

The leases do not mention any public facilities with the exception of the subway line itself and the intermediate station mentioned in the Meushar lease. As discussed above, this intermediate station has been dropped from the development plans, but there is a possibility that it might be reinstated (see Section 6.2.8).

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7 EMS requires designers to comply with the internationally accepted ISO 14001:2004 standard for environmental management systems (see www.iso.org).

The FGEIS (2004, see Section 6.1.11) does mention the Arts for Transit programme used by the MTA to promote the exhibition of art in subway and commuter rail station in the Metropolitan area of New York. It also mentions the requirement that every subway entrance will at least have one entrance for disabled persons under the American Disability Act.

6.2.14 Goals of the project

The FGEIS (CPC & MTA, 2004) discusses the purpose of the rezoning of the Hudson Yards area and the construction of the No. 7 subway extension.

The specific objectives of the subway extension (2004, 2:24) are to:

- Provide transit services to support the anticipated level of development resulting from the rezoning;
- Minimize effects of the new service on system-wide reliability and performance;
- Maximize use of existing transit infrastructure;
- Minimize the energy consumption and congestion associated with auto use; and
- Minimize disruption during construction.

Goals of the parties

The recitals of the construction leases state that parties have opted for a lease instead of a condemnation procedure to avoid unnecessary transaction costs and otherwise seek to achieve the public interest for implementing the subway project in an as prompt and cost-effective a manner as possible.

The storage lease does not mention the goals of the parties as such but implies them in its formulation when it determines that tenant will only use the premises for the staging and storage of trucks and construction materials of the MTA (Section 1.2, Goldman lease). It implies the wish of landlord to terminate the lease if the City acquires the adjacent property before January 1, 2008, which implies that the landlord of the latter property does not want to rent the land to the City (Section 1.4, Goldman lease).

Despite the 7-years lease term, the two developers that were interviewed (Moinian and Extell) were not willing to wait seven years before they could start construction of their buildings. But at the same time, as we saw, the developers did not know what kind of building (office, hotel, residential) they would put on their land. They only knew that it would have a size of about 1 million sq. ft. (93,000 sq. m). Thus, they wanted to construct the foundations of their building in such a way that it would be able to carry a building of that size while not being confined to any specific function. The Extell lease specifically mentions that Extell desires to lease the premises to the tenant (the City) in a manner that allows the company to use of the premises for construction laydown and staging in connection with the development of the

subway and with the goal of constructing a highrise building.

The interviewee from the Moinian Group (case interview HY 02-07-A6) stated that Moinian prefers rental buildings to condominiums. The Moinian Group wants to own and develop. He stated that if his company were only to develop a building and then sell it, it could only profit once from the transaction. If it owned the building, on the other hand, it could profit from the rise in market prices. Although Moinian did not yet know what kind of building it would construct on the site, it knew that it would be either a residential building, an office building or a hotel building. Moinian does not prefer mixed-use buildings, because of their complexity. The interviewee stated that his personal preference for the site was a large office building and his least preference was a 'large floor head-office/residential-hotel building'.

The market in 2007 made it most likely Moinian would build an office building on the site, but the market may change. To make sure that the site would fit every kind of building, the company would build the foundations on a regular 30 x 30 ft. (9 x 9 metre) grid. This grid would have to be created before the work on the subway started.

The interviewee from Extell (case interview HY 02-07-A3) took an opposite position to Moinian when she stated that her company favoured mixed-use buildings even though these buildings are complex with regard to the elevators and you need a large footprint to build them. The incentives made it interesting to build residential space on the site but if a buyer needed 1 million sq. ft. (93,000 sq. m) of office space without any residential space, her company would decide to build a 'single-use' building after all.

6.2.15 Delays

The project has experienced some serious setbacks related to rising costs and the slow-down in the economy. The estimated costs of the project are still $2.1 billion, even after the abandoning of the plans for the 10th Avenue station. The project was left out of a cost review of the MTA because of the ongoing negotiations between the City and the MTA on the expected higher costs of the project (NY Observer, 2008). Still, in October 2007 it turned out that one bidder was willing to carry out the work for $1.14 billion (without the intermediate station, New York Times, 2007a). This means that the project is more or less on schedule. When the project was visited in 2007, work was expected to begin in late 2007 or early 2008. It did indeed start in December 2007 (Real Estate Weekly, 2007).

6.2.16 Critique

The subway project was mostly criticised for its high costs. Some have argued that cheaper alternatives for the subway would have been available if existing

tracks were used. Senator Schumer, who played a leading role in the project, does not share mayor Bloomberg's opinion that the No. 7 subway extension is a top priority. He would have preferred the City to make the Moynihan station (the revamped Penn Station, see Section 6.1.3) its top priority (Reuters UK, 2008).

Some have also argued that the $1.14 billion that the MTA paid for the construction work (not including the intermediate station) was too high (New York Times, 2007a).

6.3 Common contract norms in Hudson Yards No. 7 subway extension

After the above general description of Hudson Yards and the focal projects, we now examine how this case fits in with relational contract theory as described in Chapter 3, with particular emphasis on the ten common contract norms (see Section 3.4) in this context.

6.3.1 Introduction: General sketch of the agreements

The core documents that define the contractual relationship between the city and the landowners are the ground leases wherein the city leases the land from the developers for a 7-year period. These leases are accompanied by perpetual easements and in some cases by cooperative agreements on how the work will be done. In the cooperative agreements, the MTA is not just a designee but a contract party. When the projects were studied, the cooperative agreements had not been negotiated yet and it was not certain whether they would be. The need for additional cooperative agreements depended on the final plans of the MTA for the construction work. If these plans were found to fit the interests of the landowners/developers, there would be no need to negotiate further agreements. The easements and cooperative agreements (if any) will spell out what both parties (developer/landowner and MTA) may do and what they may not do to make sure that all parties can realise their projects. The agreements will ensure that both parties help each other to carry out their projects.

The common contract norms on a discrete-relational scale

I start the description of the various norms with an overview of the outcome of an assessment of the norms on a discrete-relational scale. Note that this analysis focuses on the construction leases that were studied (see Section 6.2.1).

Inspection of Table 6.1 shows that in this case, the common contract norms tend on balance to the relational side.

Table 6.1 Discrete/relational matrix for common contract norms in Hudson Yards

Norm	More discrete than relational	Equally discrete and relational	More relational than discrete
Role integrity			×
Mutuality	×		
Implementation of planning			×
Effectuation of consent		×	
Flexibility			×
Contractual solidarity			×
Linking norms	×		
Creation and restraint of power		×	
Propriety of means		×	
Harmonisation with the social matrix		×	

6.3.2 Role integrity: more relational than discrete

Hudson Yards is a complex project because it involves both State and City entities. The leases deal with the problem of role integrity by making clear that there is only one contracting party (the City) that contracts on behalf of itself and, with regard to the construction work, on behalf of the Metropolitan Transport Authority (MTA) – which is an agency of the State of New York. It sometimes refers to the Hudson Yards Development Corporation (HYDC) as its designee. The State of New York is not mentioned in the agreements. The leases also deal with role integrity by determining that the City of New York signs them in its capacity as tenant of the sites and in not in any other capacity.

But the matter is more complicated than that. We saw that the leases state that other contracts may be necessary in which the parties may assume other roles (Section 6.3.1). A landlord may, for example, become an undertaker of work that has to be executed by the tenant (the City). A cooperation contract may be necessary in which the MTA coordinates its work with that of the landlord/developer (see Section 6.3.1).

The City acknowledged the risk of confronting private parties with its complex organisation, and the problem that these private parties may have to deal at the same time with the City and with State agencies (in particular, the MTA). It therefore founded the Hudson Yards Development Corporation (HYDC) that brings parties together and is meant to facilitate the relation between the private parties and the government departments and agencies (see Section 6.1.7). The HYDC is the key government actor in the project. The private parties were enthusiastic about the professionalism of the HYDC (case interview HY 03-07-A6 and A7) but stated that still about 20 persons from different agencies had to be present during the negotiations (representatives of the MTA, HYDC, of the private parties, their contractors and their lawyers). This, according to the interviewees, was however more caused by the complexity of the project than by the complexity of the relationship between the parties.

Another issue is that the private parties want to start working on the (foundations of the) buildings at the same time as the MTA starts the construction work. The private parties are not only landlords, they also sign in their capacity as developers. This makes the agreements so complex that interviewees stated that not everything could be written down (case interview HY 03-07-A6).

6.3.3 Mutuality and reciprocity: more discrete than relational

The quid pro quo in the leases is first and foremost the rent that the City has to pay to the landowners (see also Section 6.2.9). The leases explicitly state that they (and the easements that come with them) are meant to facilitate the construction of the subway line and have no other purpose. The City pays the carrying costs of the leases, whereas the developers will see their land increase in value because of the new infrastructure.

The other quid pro quo in the agreements is that the MTA will own the new subway extension. The landlord provides the opportunity to develop it. The collateral of the private parties then lies in their readiness to cooperate with the plan: if they were to refuse to transfer certain properties that the City requires (such as those at the entrance to the subway – see Section 6.2.5) to the City on a voluntary basis, the City would lose time and money by having to start a condemnation procedure. Conversely, the City could adopt a more cooperative stance by choosing a construction that allows the private parties to retain the rights to their land, thus obviating the need for a condemnation procedure. We have seen that the cooperative attitude of the parties is mostly caused by their well understood self interest, while they may adopt a different attitude in other negotiations (see Section 6.2.5).

6.3.4 Implementation of planning: more relational than discrete

The planning in the leases is strict in the sense that it only specifies an end date of the lease and raises the rent by at least 25 percent if the City wants to extend the lease by another year (see Section 6.2.15). The time scheme (5-7 years) relates to real expectations of how long it will take to build the subway extension (unlike the Battery Park City leases; see Section 5.3.4). One of the interviewees stated that the duty to deliver the land within the agreed time frame actually favoured the City (HYDC) whereas it did not favour the MTA. That is because for the City the subway extension is a top priority whereas for the MTA it is only one of its priorities (case interview HY 03-07-A2).

Planning is a key issue in the agreement since the parties need to work simultaneously. But, except for the moment when the land has to be delivered

to the City and the provisions for the expiry dates of the lease, the planning is not specified. There is no phasing of the project implemented in the lease. The planning thus exists in the plan documents and in specific agreements that may be closed at a later stage; the leases acknowledge in this context that a flexible approach is necessary.

An example is the Meushar lease: Section 9.05 "The parties acknowledge that while Exhibit D represents the general scope of the most current drawings as of the date hereof; and the location of the permanent is not expected to change, the parties continue to negotiate the locations of the permanent infrastructure (…)."

6.3.5 Effectuation of consent: equally discrete and relational

The core element of the consent of the parties is that the City will pay rent to the various private parties (landlords) and in return receives the land so that the MTA can build the subway extension.

The leases are mostly an elaboration of this agreement. Part of the consent is a flexible approach of the City and the MTA that acknowledge the interest of the private parties in the construction of buildings on top of the subway extension.

6.3.6 Flexibility: more relational than discrete

The agreements name flexibility as an important aspect of the contractual relation. The end date of the lease is not clearly defined and the parties acknowledge that they will have to reach further agreements on the phasing of their work. It is clear that flexibility is a key element of the contractual relationship, from the fact that two complicated projects have to be carried out simultaneously. This requires a flexible approach to the construction work and the acknowledgment that not everything can be planned in advance (case interviews HY 02-07-A2, A6, and A7)

6.3.7 Contractual solidarity: more relational than discrete

Contractual solidarity is, within the limited scope of the development project, of enhanced importance. Parties need each other for the realisation of their goals. The City regards the subway extension as vital for the successful realisation of the project. The various private parties want to develop their high-rise buildings in the most profitable way. The City also has an interest in profitable development because its investments have to pay themselves off by the collection of property taxes (case interview HY 02-07-A1). The parties

thus need each other to a certain extent. To a certain extent because, while they are better off when they work together they do have other options. The City might ultimately decide to acquire the land by means of a condemnation procedure, while conversely the private parties can also realise their buildings without the subway extension.

6.3.8 The linking norms: restitution, reliance and expectation interests: more discrete than relational

Parties have closed their agreements in the expectation that the subway extension will be constructed. Although not building the subway extension is nowhere mentioned as a default option, it is a clear that the contract would be pointless if the City and the MTA were not to start construction.

The private parties rely on a cooperative attitude of the City with regard to the work they need to do to prepare for the construction of their high-rise buildings.

6.3.9 Creation and restraint of power: equally discrete and relational

The private parties do not own the land covered by the leases during the lease period, while the City cannot use the money that goes to pay rent on the land for other purposes.

Parties sometimes give each other a say when plans change, but this is more or less confined to changes with regard to the agreements.

However, the contracts are generally drafted in a classical terminology, which means that the landlord has to grant permission for everything that the tenant wants to do and that is not explicitly or implicitly permitted in the lease.

The leases do not include a general article that permits the tenant to do everything that is necessary for the realisation of the project, the leases authorise the landlord to monitor the work of the tenant.

6.3.10 Propriety of means: equally discrete and relational

The tenant (the City) has the financial means required for construction of the project, but it is the MTA that will actually constructs the subway line.

During the negotiations, the private parties sometimes felt that the public parties (the City and the MTA) did not know enough about the building techniques used for the construction of (high-rise) office and residential buildings to build the subway extension (and the platform above it; see Section 6.1.3) in such a way that they (the private parties) could later construct their high-rise

buildings on top of that. This is one of the reasons why they decided to start work on the foundations of their high-rise buildings simultaneously with the construction of the subway extension. The stress on the need for possession of adequate means (in the sense of adequate knowledge of constructional techniques) reflected by these negotiations gives the propriety of means norm a particularly relational character in this case – though it should be noted that the possession of adequate means always lies at the heart of the definition of this norm (see Section 3.4.10).

6.3.11 Harmonisation with the social matrix: relational and discrete

According to the interviewees, trust plays an important role in the relation between the parties in this case. The reason is that they could not write everything down and thus had to trust each other. Trust can thus be regarded as an external norm here.

Another aspect of harmonisation with the social matrix, in a broader context, is that one of the reasons why the City opted for a lease construction is that there is no broad political support in New York for public ownership of land. A scenario in which the land stayed privately owned was thus preferred to one where the land would be expropriated (case interview, Department of City Planning and HYDC HY 03-07-A1 and A2). These views were well known to the developers, who used them as arguments against expropriation of their land (case interviews HY 03-07-A2, A6, A7).

6.3.12 Balance of discrete and relational norms in the Hudson Yards agreements

The prevailence of discrete and relational elements in the common contract norms for these projects has already been surveyed in Table 5.1. We will now look at things from a slightly different perspective, by indicating the relative importance of the various norms (see Table 6.2).

The Hudson Yards agreements share discrete and relational elements. But on a discrete-relational scale they turn out to be more relational than discrete. We also find that most of the relational norms turned out to be of enhanced importance whereas the norms of discreteness and presentiation are not.

The main reason for this is that the assessed agreements are relatively simple: they are basically about the lease of land by a government authority for a relatively short period for the construction of the subway extension. The key factors here are then only the price to be paid and the duties of landlord and tenant with regard to the land. But when the agreements start dealing with the projects, the need for cooperation, flexibility and a lower degree of specificity arises. This automatically leads to an emphasis on contractual

Table 6.2 Importance of discrete and relational norms in Hudson Yards

1. Discrete norms		
Enhanced importance of:	Yes	No
Discreteness		×
Presentiation		×
Implementation of planning*	×	
Effectuation of consent	×	
2. Relational norms		
Enhanced importance of:	Yes	No
Role integrity	×	
Preservation of the relation	×	
Resolution of relational conflict	×	
Propriety of means	×	
Supra-contract norms		×

* When the norms of discreteness and presentiation are not of enhanced importance, it makes more sense to view the implementation of planning norm as a relational norm. In other words, the importance of planning in such projects then follows from the nature of the observed relation between the parties rather than from the wording of the agreements.

solidarity, since the parties need each other to realise their projects and it becomes less likely that one of them will, in case of default, favour an action or remedy for damages to a solution where the other party fulfil its (material) obligations. The projects that form part of the agreement are the subway extension on the one hand – which is the reason why the local government wanted to lease the land – and the high-rise projects that the developers want to realise on the other. These projects require close co-operation, since they have to be executed simultaneously.

A flexible approach is particularly required because of the complexity of underground construction, which means that not everything can be planned precisely in advance. The leases reflect this need for flexibility and sometimes explicitly state that their text is deliberately imprecise because the parties were unable to commit to a precise planning at the time when the leases were drawn up.

7 Case Study Amsterdam Zuidas

The Gershwin and Mahler4 projects

7.1 The urban development project: the Amsterdam Zuidas

7.1.1 Introduction

Until recently, Amsterdam, which wants to grow in the (financial) service industry, lacked a central business district. Head offices were scattered all over town.

The Zuidas project started off with the aim of creating an international business centre that could attract national and international head offices. In addition, the city also aims to create a lively mixed neighbourhood of high quality here. The Zuidas has become the biggest strategic urban project in the Netherlands. It is also one of the most ambitious and complex. The aim to create an international business centre combined with significant new infrastructure has resulted in major participation of the national government in the project.

The complexity of this project is due to the chosen type of public private partnership, which is unprecedented in Amsterdam. In addition, the infrastructure causes complexity as does the project's aim to create both a major business district and a lively urban residential quarter. The aim to create a lively neighbourhood, and more than just a collection of office buildings and expat apartments, seems to be the more difficult of the two to realise (Salet & Majoor, 2006). The main assets of the project are its strategic location and the ample room it offers for development. But, in October 2008 it was still not clear whether the Zuidas would be developed in the way that the main parties intended.

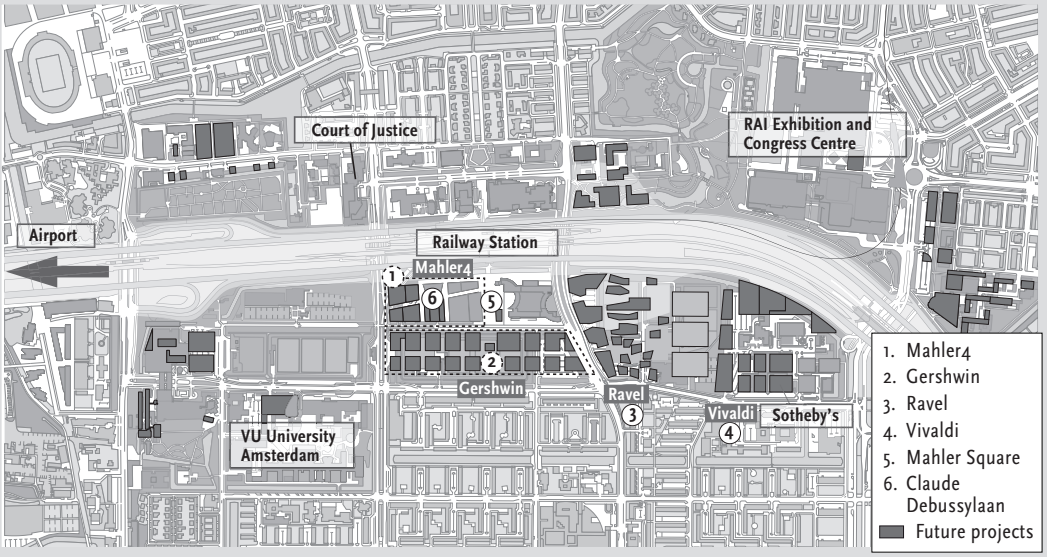
Still, the Zuidas promises to become a major business district to which most important Dutch banks and law firms have moved their head offices during the past five years. A lively high-density neighbourhood has also grown up here over this period.

7.1.2 Description of the area

The Amsterdam Zuidas (South Axis) is a more or less greenfield site 1.1 kilometres (0.7 miles) long on either side of the Amsterdam Ring Road, located on the edge of Amsterdam between Schiphol Airport and the part of the city to the south of the centre known as *Amsterdam Zuid* (Amsterdam South; see Figure 7.1). The region covered by the plan has a total area of 225 ha (556 acres).

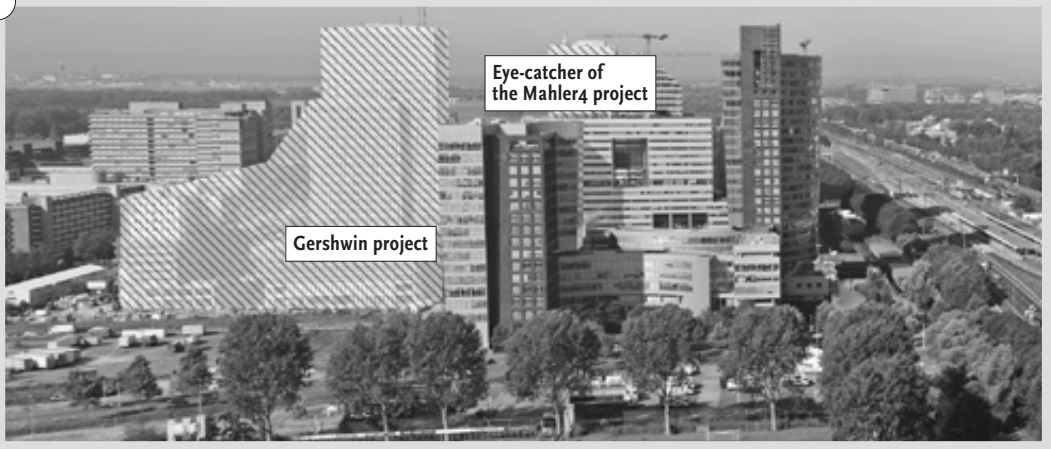
Until recently, the area was best known for the peaceful suburb of Buitenveldert (built in the 1960s) just to the south of the plan area, the football club AFC, VU University Amsterdam (and the university hospital attached to it, VUmc), the World Trade Center and the RAI Exhibition and Congress Centre.

Figure 7.1 Amsterdam Zuidas, including the Gershwin and Mahler4 projects



Source: courtesy of Zuidas Amsterdam/dRO

1



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3

4

1 View of the Gershwin and Mahler4 project
Photo: Zuidas Amsterdam/Doriann Kransberg
2 Gershwin view april 2008
3 Areal view of the Zuidas in progress
4 Gershwin Symphony redering
5 Two office blocks by the architects Raphael Vinoly (left) and Toyo Ito (right)
2-5 Courtesy of Zuidas Amsterdam/dRO

5

Other well-known buildings in the area are the Court of Justice and the Dutch branch of Sotheby's auction house. Despite these facilities, and the presence of two railway stations (Amsterdam RAI and Amsterdam Zuid), the area still has plenty of room for development. In the 1960s, it was developed in low densities and not as an integral part of the city: the various existing buildings were not part of any designated suburb. At night the neighbourhood was deserted since, despite the presence of VU University Amsterdam, there were no nightlife facilities. The situation has changed slightly of recent years, but a visitor to the area today will still see a neighbourhood largely dominated by offices and not very lively at night.

7.1.3 Description of the project

The most recent master plan (from 2004) provides for 50,000 people working in the area and 20,000 people living there. About 1 million sq. m (10.7 million sq. ft.) will be developed as residential space and 985,000 sq. m (10.6 million sq. ft.) as office space, while 320,000 sq. m (3.4 million sq. ft.) are reserved for facilities such as stores, museums, theatres and restaurants (Gemeente Amsterdam, 2004). These numbers do not include the ZuidasDok (Southern Axis Dock) area described in greater detail below.

The overall Zuidas project area is divided into three parts, Zuidas West, Zuidas Centre and Zuidas East. Within each of these three parts, various subprojects exist that are all part of the larger plan but the development of which is not interdependent. A distinction should be drawn here between Zuidas Dock, situated more or less on top of the Ring Road, and the projects on both flanks of the Ring Road. Some of the latter have already been developed, some are being developed and some will be developed in the future. The Zuidas Dock project is still under discussion; it is a prestigious project that is also very costly. Most public and private parties however agree that the development of the Dock is necessary to create an integrated neighbourhood instead of a collection of separate subprojects.

Zuidas Dock

The Zuidas Dock consists of 4,000 residential units (320,000 sq. m, 3.4 million sq. ft.), 338,750 sq. m (3.6 million sq. ft.) of office space and 115,000 sq. m (1.2 million sq. ft.) of other facilities. The aim of the Zuidas Dock project is to bring the infrastructure (ring road, light and heavy rail) underground over the entire length of the project area (see picture). This would do away with the present situation in which the Zuidas is cut in half by the ring road and create one integrated area. Extra residential and office space and other facilities could then be realised in the additional space created in this way (that is, on top of the ring road). The development potential of the whole Zuidas area would more than double to 2.7 million sq. m (29 million sq. ft.). The costs of the Zuidas

Dock operation are estimated at € 4 billion, and would be paid for by the lease rights on top of the infrastructure. Despite the attractiveness of this proposal from a planning perspective, the business case turned out to be very complex. In 2004, Elco Brinkman, a well-known former politician who headed the national coalition of 17 representative organisations in the Dutch construction industry (known in Dutch as the *Algemeen Verbond Bouwbedrijf*) was asked to write a report on the financial feasibility of the project. He presented his findings in 2005 (Brinkman, 2005) and concluded that enough private parties showed interest to make the project feasible. Pursuant to this report, in January 2006, public parties signed a contract in which they laid down how they would work together and how much they would invest in the project[8] (see Section 7.1.8). The City of Amsterdam decided to organise an auction in which selected parties could bid for shares in the Zuidas Corporation (see Section 7.1.7) but though the aim had been to attract international parties, only Dutch banks expressed interest. In 2005, it turned out that these parties were not willing to carry the risks of the project. The project was reshaped and it was put out to tender for the second time, which attracted one extra party, the Bank of Scotland. Be this as it may, the addition of the Bank of Scotland was enough to allow the Zuidas project to go ahead.

But despite these efforts, the Zuidas Dock project remains expensive and the tunnelling of the infrastructure is associated with many financial risks. In 2007, one of the leading banks in the project, ABN AMRO, was sold to a consortium of three banks, the Dutch-Belgian Fortis banking and insurance group, HBOS and the Spanish bank Santander. In 2008, Fortis suffered badly from the worldwide credit crisis, and later that year the Dutch part of the bank (Fortis-ABN AMRO) was nationalised by the Dutch government. This leaves the consortium of banks short of one member, while the other banks are also suffering from the credit crisis. The Zuidas Corporation will therefore probably have to look for new investors. In fact, the continuing effects of the credit crisis are such that it is doubtful whether the analysis of the Zuidas project given here will still retain its validity in a few years time.

Projects on the flanks of the Zuidas area

Other projects are or will be developed on the flanks of the Zuidas area, on either side of the ring road. Although development of the Zuidas Dock will influence the shape and size of neighbouring projects, the development of these subprojects does not depend on that of the Dock. The master plan (2004) dis-

8 *Bestuurlijke Overeenkomst Zuidasdok* (Administrative Agreement South Axis Dock), dated 31 January 2006, between the State of the Netherlands, the minister of Housing, Spatial planning and the Environment, the minister of Transport, Public Works and Water Management, the municipality of Amsterdam, the province of Noord-Holland and the Regional Organ Amsterdam (ROA).

cerns the following subprojects: Mahler4, Gershwin, Vivaldi, Noordzone (North zone), Ravel, Kop Zuidas (Head of the South Axis), Beethoven and the University Quarter (project centred on the campus of VU University Amsterdam)[9]. Decision-making on these projects takes place in three phases. In the first phase, the municipality takes a (draft) decision that gives a general outline of the different spatial functions and building volumes of the project. The second phase comprises public consultation on this decision. The third phase consists of an executive decision embodying a detailed building programme, an urban design concept and a cooperation contract with the developers (see Section 7.1.16). Details of the individual subprojects are given below .

Gershwin
3 subprojects (including Symphony, see below)
136,000 sq. m (1.5 million sq. ft.) of residential space
10,000 sq. m (108,000 sq. ft.) of office space
12,900 sq. m (139,000 sq. ft.) of other facilities.

Symphony
15,000 sq. m (161,000 sq. ft.) of residential space
10,000 sq. m (108,000 sq. ft.) of office space
12,600 sq. m (136,000 sq. ft.) of other facilities.
The Gershwin project focuses on residential space, but also includes a landmark development (Symphony) of two towers that will include a hotel and a museum. Gershwin is one of the focal projects of this chapter, and is analysed in depth in Sections 7.2 and 7.4.

Mahler4
166,500 sq. m (1.8 million sq. ft.) of office space
41,900 sq. m (451,000 sq. ft.) of residential space (194 apartments)
25,563 sq. m (275,000 sq. ft.) of other facilities (including 1912 parking places).
Mahler4 focuses mainly on office space, but also includes an appreciable number of upmarket apartments. Mahler4 is the other focal project in this chapter; see Sections 7.3 and 7.5 for an analysis of this case.

Vivaldi
88,000 sq. m (947,000 sq. ft.) of residential space
265,550 sq. m (2.9 million sq. ft.) of office space

9 Note that, although the RAI Exhibition and Congress Centre is located at the fringe of the Zuidas area, its redevelopment (consisting mainly of the construction of a new hall, the Expo foyer) is not an integral part of the Zuidas plan. The situation here thus differs from that in the Hudson Yards project, where the redevelopment of the Javits Convention Center was regarded as one of the main projects (see Section 6.3).

38,000 sq. m (409,000 sq. ft.) of other facilities.
The Vivaldi project focuses on more intensive use of the area near the RAI railway station, where an appreciable number of office buildings had already been constructed. The Dutch branch of Sotheby's auction house is also already present in the area. The development is undertaken in cooperation with existing users of the area.

Noordzone (North zone)
The Noordzone project is a complex because it consists of 5 subprojects, one of which, the Forum office centre (15,700 sq. m/169,000 sq. ft.) has already been completed. The redevelopment of the Rietveld Academie (a prestigious art school), including the construction of a new building, has also been completed. Other projects include more intensive development of *Fred Roeskelaan*[10], where many educational facilities are located, and of a Roman Catholic cemetery. A final decision on this last-mentioned project was expected in 2008.

Redevelopment of *Strawinskylaan* will be concretised after the plans for the Dock have been finalised.

The plans for the redevelopment of the Atrium office centre (owned by Tishman Speyer, a company that we also encountered in Hudson Yards, see Section 6.1.3) and the Court of Justice had not been concretised at the time of writing (October 2008).

Ravel
110,000 sq. m (1.2 million sq. ft.) of residential space (880 units)
80,000 sq. m (861,000 sq. ft.) of office space
40,000 sq. m (430,000 sq. ft.) of other facilities.
Ravel will create a new shopping street as well as a new park (*Amalia Park*) and a new canal (*Boelegracht*). It will therefore be one of the livelier areas in the Zuidas.

Kop Zuidas (Head of the Zuidas)
50,000 sq. m (538,000 sq. ft.) of office space
50,000 sq. m (538,000 sq. ft.) of residential space
70,000sq. m (753,000 sq. ft.) of other facilities.
Kop Zuidas will be the nightlife centre of the project. The project includes a musical theatre, restaurants and bars.

Beethoven
30,000 sq. m (323,000 sq. ft.) of office space
30,000 sq. m (323,000 sq. ft.) of residential space

10 *Laan* is a common Dutch name for a street.

27,000 sq. m (290,000 sq. ft.) of other facilities.
The Beethoven project will be constructed in low densities, and focus on smaller office buildings (with an average of 5,000 sq. m of floor space per building). It will also include a new Design centre (larger than the existing centre, Platform 21) that aims to attract artists and designers.

VU Quarter (project centred on the campus of VU University Amsterdam)
102,000 sq. m (1.1 million sq. ft.) of residential space
143,000 sq. m (1.5 million sq. ft.) of office space
201,800 sq. m (2.2 million sq. ft.) of other facilities (including the new campus of *VU University Amsterdam*)
Goldstar Tennis park and Buitenveldert sports park.
VU University Amsterdam became gradually involved in the project; in March 2008 it decided to replace its 40-year old main building and become a more integral partner in the project by integrating its campus into a plan that includes cultural facilities, bars, restaurants and (student) housing and is meant to contribute to the liveliness of the area (VU, 2008).

WTC and Zuidplein (South Square)
60,000 sq. m (646,000 sq. ft.) of office space (2 towers)
This project consisted of refurbishment of the square in front of the Amsterdam Zuid rail station and redevelopment of the existing World Trade Center (WTC), including the development of 20,000 sq. m of office space in the existing tower and construction of a new tower with a floor space of 40,000 sq. m. The project was completed in 2004.

7.1.4 Momentum

In 1994 the largest Dutch bank at that time, ABN AMRO, decided to move its head offices to the Zuidas. It confronted the city with this decision, stating that if the city did not approve the move it would move its head offices abroad. The city permitted the bank to build its new head offices right next to the Amsterdam Zuid railway station. The decision by ABN AMRO created momentum for the whole area, which from then on became the focus for the creation of a new business district instead of the one that the city had intended to build in the heart of Amsterdam near the central railway station (see Section 7.1.6). The IT boom of the mid-1990s also contributed to the demand for more office space in Amsterdam.

A decision that helped to boost the project's momentum was that taken by the City of Amsterdam in 1997 to support the idea of a major infrastructure project in the Zuidas. One of the key advantages of this the area is its excellent communications: the Amsterdam ring road (the A10 motorway, constructed between the mid 1960s and the mid 1990s) passes through it, and it

also contains the Amsterdam Zuid rail station that links the area to Schiphol (with a journey time of about 6 minutes), the light-rail ring line that connects the Zuidas to other business areas and tram line 5 that provides a fast service to Amsterdam city centre and the commuter town of Amstelveen.

The focus on infrastructure turned out to be of key importance for attracting the national government as a major investor in the project (Majoor, 2008). The minister of Finance had been reluctant to provide subsidy for the project, but was overruled by the national government's approval of a major country-wide infrastructure programme that focused on the upgrading of key station areas (see Section 7.1.14).

During the past three years, most large Dutch banks and law firms have moved their head offices to the Zuidas. The project has been less successful in its aim to attract international head offices. Not much can be said yet on the future success of the area in its aim to become both a successful neighbourhood for living in and a major business district, but academics are sceptical (Salet & Majoor, 2006; Majoor, 2008).

7.1.5 Time frame

After the decision by ABN AMRO to move its head offices to the Zuidas area, the city decided in 1994 to draw up an integrated plan for the whole area (Dijkmeester, 2002). The first Master plan was presented in 1998. The city presented its first vision on the Zuidas in 1999 (Gemeente Amsterdam, 1999). This was updated in 2001 (Gemeente Amsterdam, 2001), and yet again in 2004 (Gemeente Amsterdam, 2004).

It makes sense to name 1998, the year in which the Master plan was presented, as the starting date of the project. The planning foresees completion of the project in 2030.

7.1.6 History and background

Amsterdam has long felt the lack of a unified business district like Wall Street in New York, the City and latterly Docklands in London and La Défense in Paris. Head offices of companies were scattered all over town. In the early 1990s the City of Amsterdam decided to develop a new financial centre in the old harbour, the IJ, around the central railway station. The project was called the Amsterdam Waterfront (AWF), and a public-private partnership, the *Amsterdam Waterfront Financieringsmaatschappij*, was set up between the City of Amsterdam and two private parties: Nationale Nederlanden, the country's largest insurance company, and NMB-Postbank, a merger of two major banks. The two private parties later merged in 1990 and became the Internationale Nederlanden Groep (ING). The world-famous architect Rem Koolhaas made a plan for the area envisaging a kind of 'Manhattan on the IJ'. But the AWF

failed to take off – at least to the extent originally envisaged – when ING decided to withdraw in the spring of 1993 (Majoor, 2008).

The main reasons for the failure of the project as initially planned may however have been the economic downturn of the early 1990s, and the fact that after the fusion between NMB-Postbank and Nationale Nederlanden only one private party was left to carry the risks of a very large project (Majoor, 2008). It then turned out that the private sector preferred the Zuidas area to the location around the Central Station, because of its excellent communications and the fact that it was, by comparison, more or less virgin territory (see Section 7.1.2).

In the meantime, the Amsterdam Waterfront project has changed from a single grandiose plan to a number of little projects with a strong emphasis on housing and cultural facilities and little or none on business (Gemeente Amsterdam, 2003). In this revised form, it is generally regarded as a successful urban development project.

7.1.7 Project management

The Zuidas project is managed by the Amsterdam City Council, which replaced *Stadsdeel Zuideramstel* as planning authority because of the importance of this project.[11] It manages the project from its Project Office, which also manages other municipal projects. The more specific issues are managed from the Zuidas project office, which became the Zuidas Corporation in 2007.

We may differentiate between three roles of the city: administrator, developer and project initiator or broker (entrepreneurial role). The first role includes the enforcement of the plans. It is undertaken by (various departments of) the municipal administration and the city's Project Office. The second role, involving the development of the various sites and including responsibility for the public infrastructure and most public spaces, is undertaken by various city departments working together with developers, the Project Office and the Zuidas Corporation. Finally, the city's desire to make the project successful and to attract high quality end users (its entrepreneurial role) is undertaken by the Zuidas Corporation.

In Amsterdam, the city administration has the right to reject design proposals from a developer when they do not suit the area for which they are proposed. This task is performed by a project supervisor appointed by the city for the whole Zuidas area. He advises the city with regard to issues that concern design quality, from both a cluster specific and a Zuidas point of view.

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11 The city is divided in smaller boroughs, each with its own civil servants and council. *Stadsdeel Zuideramstel* (the Southern Amstel district) is one of these.

Zuidas Corporation

At the time of writing the public Zuidas Corporation had been set up, but not the public-private Zuidas NV, the limited company that will manage the project. The Zuidas Corporation is established to manage the development of the Zuidas Dock. It is planned to consist of both public and private parties whereby the private parties (the banks) will own the majority of the shares (see also Section 7.1.8). The public parties involved are the national government (represented by the ministry of Housing, Spatial Planning and the Environment (which we will call the ministry of Housing for short) and the ministry of Transport, Public Works and Water Management (which we will call the ministry of Transport for short), the City of Amsterdam, the Regional Organ Amsterdam (ROA)[12], and the province of Noord-Holland (the Dutch province within which Amsterdam is situated). We have seen that the banks involved might withdraw now that ABN AMRO no longer exists in its previous form (see Section 7.1.8) and Fortis is suffering severely from the worsened economic climate (Section 7.1.3; Het Parool, 2008a; 2008c). The structure of the corporation is complex because the Dutch government did not originally intend to invest in the project (Majoor, 2008; het Parool, 2008a). After a negative advice from the bank Credit Suisse to the government, stating that the latter had to assume some of the risks originally intended to be borne by the corporation and give the private parties more control, it seems doubtful whether Zuidas NV will ever come into existence at all.

7.1.8 Project finance

The private sector and various layers of the Dutch government finance the project. The finance structure of the flank projects is not very complicated. The city owns the land and finances its part of the project by leasing plots to private parties. The city has committed itself to investing the profits from the Zuidas in the same area and not in other projects.

Zuidas NV

The Zuidas NV – if it ever comes into existence (see Section 7.1.7) – will consist of the private parties that won the auction for its shares (60%) and public parties (40%). It will develop the Zuidas Dock and the remaining parcels in the rest of the area.

The private parties that were pre-selected are ABN AMRO Bank, Bank Nederlandse Gemeenten (BNG), Fortis Bank, Bank of Scotland (HBOS), ING, Rabobank and the pension fund ABP. We already saw that in 2007 one of the

12 The Regional Organ Amsterdam (ROA) involves the co-operation of 16 municipalities in the Amsterdam region that (aim to) streamline their transport, spatial planning, housing, childcare and economic policies.

main private initiators of the project, ABN AMRO, was sold to a consortium formed by Fortis Bank, Bank of Scotland and the Spanish bank Santander. ABN AMRO no longer exists as a major bank since it has been divided in three parts, one belonging to each of the three purchasers. The Dutch part of that new concern was nationalised in 2008.

Dutch Railways and the local and national governments will own the infrastructure. The most notable agreement made during the setting up of the Zuidas Corporation – which will also apply to Zuidas NV – is that the private parties may limit their risks to the sum of € 300 million. If the project were to lose more than this amount, they may withdraw from Zuidas NV, leaving control vested in to the public parties which will bear the residual risks.

The public investments in the corporation, as agreed in the 2006 contract (2003 price levels), are:

- The national Government will acquire a maximum of 50% of zero coupon bonds of which the total value is estimated at € 130 million.
- In addition, the Ministry of Housing will invest € 105 million and the Ministry of Transport will invest € 420 million. The investments of the ministry of Transport involve the infrastructure, while those of the ministry of Housing are linked to the development of infrastructure but involve the whole Amsterdam Zuid station area (not including the infrastructure).
- City of Amsterdam: € 345 million + 50% of the income from the flank projects above € 345 million. The city will try to generate an extra income of € 100 million from these projects, which would result in an extra investment of € 50 million in the corporation.
- Province of Noord Holland: € 75 million. (The Province of Noord-Holland is one of the twelve Dutch provinces, and is the one in which Amsterdam is situated. It has 2.5 million inhabitants. The provinces have some powers with regard to policies that concern the whole province.)
- Regional Organ Amsterdam (ROA): € 50 million (mentioned as an intention in the contract).

7.1.9 Ownership

The project land is owned by the city, which leases it to the developers. The national government owns the national infrastructure (motorways and railways).

7.1.10 Affordable housing

The City of Amsterdam has a policy that obliges developers to reserve 30% of all newly developed residential space for affordable housing. In the Zuidas, the city implements that obligation by demanding that the development consortia include a housing corporation and by providing a discount on the lease price for the construction of affordable housing.

7.1.11 Environmental sustainability

The plans set high standards for environmental sustainability, but the city has to rely on the willingness of private parties to realise its most ambitious aims (see Section 7.3.11 for an example concerning Mahler4). One of the (realised) ambitions includes a climate management system for the buildings whereby cold and warm water is stored underground to save energy. A system has been developed whereby the water from the nearby lake is used to heat and cool the space within the office buildings.

7.1.12 Other public facilities

Various public facilities will be developed in the area, for example an extension of the Beatrix Park and the new Amalia Park, various schools, a musical theatre, several museums, restaurants, bars and a new shopping street.

The city hopes that public facilities will help in creating an integrated neighbourhood. So far (October 2008), this aim has not been realised and it is too early to judge whether it will be achieved in the long run or not.

Finally, The Zuidas plan (2004) includes provisions for a so-called '*stedelijke plint*' ('urban façade') which means that the first ten metres of the buildings should consist of publicly accessible facilities such as shops or restaurants. The city states that the parties aim to find a balance between commercial and non-commercial facilities.

7.1.13 Involvement of the general public

The influence of the public on the Zuidas project has so far been kept to a minimum. Dutch administrative law is generous in allowing individuals and organisations a say in urban development plans that could affect them, and Amsterdam is no exception to this rule. But apart from the procedures required under administrative law, the city has not done much to involve the public in the Zuidas project.

Some community groups have been involved in the projects, most notably the group *Vrienden van het Beatrixpark* (Friends of Beatrix Park) that has successfully lobbied for the extension of the park and low-density development in the surrounding projects. In addition, environmental organisations have successfully proceeded against the Mahler4 and Gershwin projects (see Section 7.2.15). Various stakeholders have been heard with regard to smaller projects, such as the function and theme of a museum in one of the Symphony towers.

But, generally speaking, the local population has not been involved in the project beyond the minimum requirements that laws and regulations set and has not shown much interest in the project either. The main reason for the absence of public interest is arguably that the Zuidas is not an integrated part

of the city and only known for the presence of the new office towers.

The situation could change if the project were to become too costly for the city, as might happen if the other public parties (which means basically the national government) were to decide to go ahead with Zuidas Dock without the involvement of private parties (Het Parool, 2008a; 2008b). Residents of Amsterdam might then start to complain that too much of their municipal taxes were being spent on a costly white elephant.

7.1.14 Goals of the project

The goal of the Zuidas project is to create a prestigious new business centre in Amsterdam as well as a residential neighbourhood that is characterised by its mixed-use buildings, its liveability and high standards of design and its compliance with environmental standards. It should be a safe neighbourhood, and when the offices close in the evenings and at the weekend, it should still be a lively area. As a business location, it should be able to compete with prime business centres in other European cities. It should make a major contribution to the economy of the city and to the Dutch national economy.

Majoor (2008) discerns three ways in which the project is framed. His overview provides an insight into the goals and interests associated with the development of the area. The Zuidas is framed (1) as a new competitive business location for Amsterdam, (2) as an intensively urbanised mixed-use area and (3) as a major infrastructure project.

The economic competitiveness of the location is enhanced by the fact that some strategic institutions are already situated in the area. These included the Insurance Stock Exchange, the World Trade Centre and the RAI exhibition and congress centre.

The framing of the project as an intensively urbanised mixed-use area has strong rhetorical overtones for Amsterdam, which has a tradition of mixing functions in the city. In addition, it shapes the project as a new city centre and thereby makes the city polycentric. Still, at the time of writing the area consists mostly of office building and the image of a new, innovative, urban space exists mostly in the heads of those involved in the projects. The Zuidas is not known as a lively urban centre by the wider population of the city. I have already mentioned that the development of the campus of VU University Amsterdam might change this situation in the near future (see Section 7.1.3). In addition, the first apartment buildings will open in late 2008. In other words, if all goes well, the area may change within a couple of years into the lively urban neighbourhood that has long been aimed at.

The framing of the Zuidas as an infrastructure project is helped by its superb location (see Section 7.1.2). The relevance of the Zuidas as a national project was mostly framed in infrastructural terms, as the Amsterdam Zuid railway station was regarded as a possible stop for the high speed train (HST)

that will connect the Netherlands to Belgium and Germany. This development resulted in an award of national funds, since the Zuidas was recognised as one of the six key national projects in this field, which aim to create top-quality public infrastructure nodes. Majoor (2008) mentions that for a long time, the aim of creating a high-quality station area at Amsterdam Zuid was unrelated to the other two aims of the Zuidas project.

He thus points at differences between national goals on the one hand and local and regional goals on the other. But since the city needed investments from the national government, it reframed the project as one of national importance in which the Zuidas Dock played a pivotal role.

7.1.15 Delays

Financial insecurities have delayed the Zuidas Dock project (see Section 7.1.7). At the level of the subprojects, administrative legal procedures resulted in delays of one and a half years for the Mahler4 project and two years for the Gershwin project. The city lost all court cases on the grounds that it could not guarantee a sufficient quality of the air in the area, due to high levels of fine particulate matter. I will provide more details on these court proceedings and the delays they caused in Section 7.2.15.

7.1.16 Role of private actors in the project

Unlike other projects in Amsterdam, private actors started the Zuidas project. We have seen that the decisive moment was when ABN AMRO decided to build its head offices in the area (Section 7.1.6). The influence of private parties in the project is therefore strong. The private parties have become supporters of the model whereby the Zuidas was to be developed as an integrated urban quarter. Not in the last place because investing in the housing market in Amsterdam has over the years been a more secure investment than an investment in the office market. We have seen that the Zuidas Dock is supposed to be financed by a consortium of private and public parties in which the private parties take the lead (Section 7.1.3).

The way in which the cooperation between the public and private parties takes place depends on the existing ownership situations of the various plots. In Mahler4 and Gershwin, most lease rights were owned by the city that used a selection procedure to attract developers for the Gershwin project (see Section 7.4.5). In the other projects the city cooperates with the landowners who were already present.

In addition, semi-privatised parties and non-profit parties such as VU University Amsterdam, several art institutions and housing corporations develop specific projects within the subproject areas.

7.1.17 Public actors

The most important public actors involved in the project are:
National Government:

- Ministry of Housing, Spatial Planning and the Environment (VROM): subsidises some funds in the project but is not the planning authority in the area.
- Ministry of Transport, Public Works and Water Management (VWS): involved in the infrastructure parts of the project and subsidises the development of the area around the Zuid-WTC station.
- Province of Noord-Holland: has some controlling powers in the area and invests in Zuidas NV.
- Regional Organ Amsterdam (ROA): has mostly soft (non-binding) powers to coordinate actions between 16 government bodies. Intends to invest in Zuidas NV.

City of Amsterdam:

- Project Office: manages the various subprojects.
- Zuidas Corporation (formerly Zuidas project office): manages the Zuidas Dock and is intended to be a private-public company.
- *Vrienden van het Beatrixpark* (Friends of Beatrix Park): community action group that was (and is) involved in the plans for the redevelopment of Beatrix Park.

7.1.18 Critique

So far (as of October 2008), the Zuidas has not been subject of a broad public debate despite some recent efforts to stimulate such discussion. Criticisms thus mostly focus on the high (financial) risks involved in the Zuidas Dock project, and the high risks to be borne by the city within the context of Zuidas NV (Oudenampsen & Uitermark, 2008). A collection of scientific articles was published in 2006 under the title *Amsterdam South Axis: New European Space* (Salet & Majoor, 2006) that took a very critical approach to the project. Many authors argued that the Zuidas had not been successful in its aim to create one of Europe's most noteworthy projects.

7.1.19 Conflicts of power: State and City interests

We have seen that the state defines its interests in the Zuidas project mostly from a perspective of infrastructure whereas, for the city, that is only one of the three main goals. The city and the state have managed to reach an agreement in which they defined the project as one of mutual interest and brought their land into the Zuidas Corporation. We will have to wait and see how strong this mutual interest is if that construction falls apart. So far, the state

and the city continue to declare that they have faith in the project and are confident that private parties will participate in it (Het Parool, 2008b; 2008c). Recent developments whereby the Dutch national government is now the owner of Fortis-ABN AMRO might result in new conflicts of interest.

7.2 Focal project: (1) The Zuidschans project within the Gershwin project area

7.2.1 Introduction

The Gershwin project is a subproject in the flank of the Zuidas area. It is the first project that focuses on the development of residential space. The Zuidschans project is one of four projects within the Gershwin area. I studied the agreement for that project in depth, as it was the only one of the four Gershwin contracts that I could get hold of. Case interviews for the project were conducted in 2006 and 2007 (see Appendix B). I studied the Zuidschans project within the context of the other projects in the area and am confident to say that, with the exception of Symphony, the other projects are mostly similar to the Zuidschans project since the city took a standardised approach and the various subprojects often involved (partly) the same private parties.

The Symphony towers will provide a new dimension to the project when they open: they offer cultural facilities that are now mostly absent in the project and that might attract a new public. One aspect of the project that attracted considerable public and media interest is the fact that the Symphony towers were one of the real estate projects that were sold as part of a major fraud scheme involving a former director of Bouwfonds Real Estate and an employee of the Philips pension fund. These individuals seem only to have defrauded their own companies. At the time of writing neither the city, the civil servants involved in the deal, nor the companies have been prosecuted and the fraud does not seem to have caused any direct financial disadvantage for the city.

7.2.2 Positioning (area)

Gershwin is located on the south of the Zuidas area (behind Mahler4, see Section 7.3.2). It is bordered by *Boelelaan, Buitenveldertselaan, Gustav Mahlerlaan* and *Beethovenstraat* (see Figure 7.1). Some apartment buildings will be constructed along a new 25-metre-wide canal, the *Boelegracht*. Until recently, the area was mostly known for the presence of a BP petrol station that has now been removed (see Section 7.2.8).

7.2.3 Description of the project

Gershwin consists of two subprojects. The first subproject involves the two Symphony towers, the second project consists of three projects that focus on residential space. Zuidschans is one of the three consortia that are working on a project in this area.

- Symphony
  - 15,000 sq. m (161,000 sq. ft.) of residential space (100 units),
  - 10,000 sq. m (108,000 sq. ft.) of office space and
  - 19,600 sq. m (211,000 sq. ft.) of other facilities, including a museum (3000 sq. m/32,000 sq. ft.) and a hotel (12,600 sq. m/136,000 sq. ft.).
- Other projects

  The other subprojects occupy an area of 136,000 sq. m (1,46 million sq. ft.), the greater part of which will be developed as residential space (1,090 units, 113,000 sq. m/1.2 million sq. ft.). A limited amount of office space (10,000 sq. m/108,000 sq. ft.) and other facilities (12,900 sq. m/139,000 sq. ft.) will also be provided.

  The plan draws a distinction between 'water blocks and city blocks'. The former will be placed along the new canal, and the latter along *Gustav Mahlerlaan*. The height of the buildings will vary between 35 and 75 metres (115-246 feet).
  - Zuidschans

    One of the three projects in the Gershwin area, the other two being *De Complete Stad* and *Royaal Zuid*. Zuidschans consists of 48,750 sq. m (525,000 sq. ft.) of residential space (390 units). In addition, 1,700 sq. m (18,000 sq. ft.) are reserved for commercial facilities, and 1,700 sq. m (18,000 sq. ft.) for non-commercial facilities. Use of air rights allows the creation of another 1,600 sq. m (17,000 square feet) of floor space. Every 250 sq. m (2,700 sq. ft.) of office space or 100 sq. m (1,100 sq. ft.) used for any other function generates entitlement for the creation of one parking place. The total maximum floor space that can be realised is 68,700 sq. m (735,000 sq. ft.).

    As in the other subprojects, a consortium of three parties (see Section 7.2.7) is responsible for the realisation of the programme.

Air rights

The local government and the private parties have agreed to make use of an air rights system in this project, in line with official Amsterdam policy of applying a *bouwenvelop* ('building envelope') to limit the proliferation of very high buildings in the cityscape (Gemeente Amsterdam, 2005). The air rights system reflects the mixed position of the local government as lawmaker and landowner. As a lawmaker the local government can set rules for the area, as a landowner it has extra powers to specify rules and impose terms. These

powers however, are restricted. As a general rule, the local government may not impose conditions by private law that it cannot impose by public law. It may, however use private law to specify conditions (Van der Veen, 2006).

The land use plan for the project states that developers can build a certain amount of square metres as-of-right. Relief can be granted from these rules, allowing the developer to build more square metres. The 'real deal' is found in the contract between the local government and the consortium. The contract points out that the mayor and his aldermen will only give the consortium permission to realise more square metres when they use them to provide amenities. An example of such an amenity is a more spacious entrance hall. If the consortium is permitted to create more square metres it will have to pay more rent to the local government (landowner). The local government will keep this extra rent apart in an air rights fund. The consortium now can use this fund to add more quality to the plan. An example of increased plan quality is the construction of the same quality of facades for social and commercial housing. The air rights system thus boils down to a sophisticated density bonus system.

In theory, the air rights system leaves room for creative solutions from the market players and allows local government to play a facilitating rather than a regulatory role. In practice, however, the developers find the system very complex and local government often has to intervene and explain to the developers which plans allow them to make use of the air rights fund and which do not. From the perspective of the developers, therefore, the air rights system only seems to give local government more discretionary powers and get it even more involved in actual designs of the plans than it already was. This may however also be caused by the fact that the system is new.

Responsibilities of contracting parties

The Zuidschans contract (art. 10) specifically determines that the development of the site – the erection of the buildings and the furnishing of the parcels – will be at the costs and risks of the consortium.

The city will furnish the land. This means that the city will build the streets, will harden the squares, will construct parking strips and car parks, along with roads, pavements, cycle and pedestrian paths, including street furnishing, sewerage and drainage systems.

The city is also responsible for creating public green areas, playing fields and other public facilities, ponds (and pilings to reinforce the edges of these ponds). Finally, the city is responsible for street lighting and the provision of road signs and markings and street name signs.

7.2.4 Momentum

The signing of the contracts in 2002 created momentum for the project. Many private parties had put in bids (see Section 7.2.5). They were eager to show

that they were not only willing to participate in the Gershwin project, but also willing and able to take part in the broader Zuidas project. However, a number of court rulings concerning compliance with environmental regulations which were delivered soon after the contracts were signed caused the Gershwin project to lose some of its momentum (see Section 7.2.15).

7.2.5 Pre-contractual procedure

As part of the bidding procedure, interested parties were invited to put their views for the future of the project down on paper. The bids and these vision statements formed the basis for the selection procedure.

Negotiations took longer than expected after the successful candidates had been chosen by the mayor and aldermen: the city's aim had been to use a standard contract for all projects, but specific projects turned out to have specific needs (case interview GER 03-06-A4). While the use of standard contracts was retained, it is understandable that this did not speed up the negotiation process.

7.2.6 Time frame

The contract was signed on December 12th, 2002. Due to delays (see Section 7.2.15) construction did not start till the spring of 2008 and is expected to be finished in May 2011. Construction of the Symphony towers started in 2006; completion is expected in late 2008 or early 2009.

7.2.7 The contracting parties

The Zuidschans contract was signed between the City and the Zuidschans C.V. consortium, consisting of the three parties AM, Bouwfonds and Amvest.

- AM is a Dutch development company that specialises in the development of residential and commercial space and also in land development in the Netherlands. It has a staff of about 250 employees. ING and BAM group own the majority of the shares. In 2006, its own capital was about € 221 million. In 2006, AM possessed 1,176 ha (2,905 acres) of land (AM, 2007).
- Bouwfonds is a Dutch development company that specialises in real estate development and property investment. The company is owned by Rabobank, a Dutch bank. Bouwfonds focuses on residential units, office space and shopping centres and also finances and invests in real estate. It operates in Europe, the United States and Canada. In 2006, the company's payroll amounted to 1,372 FTE (full-time equivalents) and it made a net profit of € 189 million (Bouwfonds, 2007).
- Amvest is a Dutch development company and investor that specialises in residential space. It has a staff of about 65 FTE and developed 1,450 resi-

dential units in 2006 (Amvest, 2007). Amvest's strategy aims to develop residential units that it wants to own to guarantee a long-term profit. It owns both affordable and commercial units but aims to own only commercial residential space. It made a net profit of € 120 million in 2006.

In the Zuidschans consortium in particular, the parties in the consortium are really too big compared to the size of the project. The interviewee from Amvest stated that this was because, at the time the consortium was set up, it believed that it could bid for the whole Gershwin project and not just for a quarter of it (case interview GER 02-06-A1).

7.2.8a Other share- and stakeholders

BP (formerly known as British Petroleum) owned a petrol station in the area that had to be removed. More importantly, the soil on this site was heavily polluted and had to be cleaned. It may further be noted that the city was criticised in a subsequent court ruling for failing to take BP's interests adequately into account (see Section 7.2.15).

7.2.8b Involvement of the public

In line with standard procedures, the city organised a hearing and appended the outcomes to the draft land use plan. No specific influence of the public or public action groups on the plans was reported (cf. Section 7.1.13).

7.2.9 Payments

The consortium will buy the lease rights from the city. These lease rights will be issued in phases. They are transferred when construction work starts. The contract states that the lease rights will be issued no later than one year and six weeks after the corresponding building permit was issued, unless the building permit was subject to a request for a stay of execution. In that case, the lease rights will be issued no later than one year after this request was rejected.

The city was not willing to disclose the amount for which it agreed to sell the lease rights to the consortium.

7.2.10a Which conflicts arose with respect to the project?

After the court decisions that delayed the project (see Section 7.2.15), it proved to be very hard to get the consortia to finalise their plans. The city bears the risk of delays when the lease rights have not been transferred (see Section 7.2.9). The consortium waited until the parties were certain that they could

start building. In the negotiation phase, parties differed on the amount of affordable housing that had to be built (see Section 7.2.11).

7.2.10b How do parties deal with future conflicts?

The contract states that when the consortium refuses to cooperate with the issue of the land it will lose its deposit of one and a half years of indexed ground rent (art. 17.6 to 17.4).

There is no specific arbitration clause, the article on arbitration only states that legal disputes must be heard by the Court of Justice in Amsterdam (art. 30).

7.2.11 Affordable housing

Of the 390 units in the Zuidschans project, 129 will be social rental units and 15% of the total amount of space (with a minimum of 48,750 sq. m/525,000 sq. ft.) is reserved for the middle segment (affordable housing).

The affordable housing goals are implemented by providing a discount on the lease price and by demanding that the members of the consortia include a housing corporation. Still, conflicts arose with regard to the costs of creating affordable housing and the private parties were allowed to re-interpret the requirement. This provided the option to create small units, such as studios for students.

7.2.12 Environmental sustainability

The contract emphasises that energy reduction and environmental quality are of key importance. The goals concerning energy reduction and environmental sustainability are mentioned in art. 13.1 of the contract that states that the consortium has to demonstrate that it will reach those goals in its provisional design for the project. The goals are also mentioned in art. 13.3 that deals with the definitive design of the project. The goals are implied in other parts of the contract, but Dutch law does not allow the government to set strict requirements in a contract that are not laid down in laws and regulations. The further environmental aims of the project are part of the (ambitious) goals for Zuidas as a whole (see Section 7.1.11).

7.2.13 Other public facilities

All four projects within the Gershwin area chose a different theme for their facilities: Symphony puts the emphasis on culture, Royaal Zuid will create facilities for small children, *de Complete Stad* will include a branch of the Hotel School of The Hague and Zuidschans will create some medical facilities.

1,700 sq. m (18,000 square feet) are reserved for non-commercial facilities,

but no specific facilities are mentioned in the contract. The air rights system, which aims to add quality to the project, may result in the creation of some public facilities, but no definite undertakings have been made in this context so far.

7.2.14 Goals of the project

The contract states that the development strategy for Gershwin aims to create a mixed-use area in a high-quality urban environment, and that this strategy is part of the overall development strategy for the Zuidas.

The specific goal of the contract is to provide a framework within which plans can be drawn up to build and furnish the Gershwin area, and records can be kept of financial and operational data concerning the development, land issue and realisation of the project. The final goal is to reach an agreement for the issue (lease) of the land in question.

7.2.15 Delays

The Gershwin project has experienced severe delays that were caused by various court rulings. After the rulings, the city offered the consortia the option of rescinding the contracts but they decided to honour them. This gave rise to problems for the city, since it was the city and not the developers that would financially suffer the most because of the delays. These losses were estimated to be about € 6 million per year (case interview OGA, GER 03-06-A5).

As long as there were no building permits, the city could not force the consortia to buy the lease rights (see Section 7.2.9). At the beginning of 2007, two of the three consortia worked in line with a new planning that aimed to start building at the end of 2007 or early 2008.

One consortium (Royaal Zuid) in the area was not willing or able to speed the process up. One of its investors had left, making it even harder to finance the project. The city organised workshops in 2006 to identify the key problems within the consortium.

In addition, many options were discussed with all parties. One option was not to phase the issue of lease rights but to sell them all at once to the parties, but the consortium who proposed that (according to the city) had no memory of this proposal when the city wanted to discuss it. According to an interviewee representing the city, this misunderstanding was due to a change of personnel within the consortium (case interview GER 02-07-A6).

Court rulings

All the cases discussed below were heard before the *Raad van State (RvS)* (Council of State).

- December 2002 (RvS, 11 december 2002, 200105817/1): the Mahler4 land use

plan was voided by the RvS. The city thought that it did not have to produce an environmental effect report (*Milieueffectreapportage*, MER, in Dutch) because that is only required when 4000 or more housing units are constructed in one area or when more than 2000 housing units are planned within city borders. Since Mahler4 was only supposed to include 240 apartments, no MER was prepared. However, the city had not prepared a MER for the Zuidas area as a whole either. The RvS held that the Zuidas had to be regarded as a single area and since the plans, at that time, provided for the creation of at least 2500 housing units within part of the city, a MER should have been prepared for the whole area.
Delays for both Gershwin and Mahler4 estimated at a year.

- June 2005 (RvS, 22 juni 2005, 200406192/1): The results of the air quality study should have led the Province to withhold approval for the land use plan, notwithstanding a later report that favoured the arguments of the City of Amsterdam, since the RvS assesses the situation *ex tunc* and could therefore not take the results of the later report into consideration.
  Delays 4-6 months.
- June 2005 (RvS, 22 juni 2005, 200406190/1): The same ruling for the Gershwin project.
  Delays 4-6 months.
- March 2008 (RvS, 12 maart 2008, 200604662/1): The Provincial administration of Noord-Holland should have withheld approval of the Mahler4 land use plan since it was not properly prepared. This time the court reviewed an air quality report the results of which were favourable for the city, but concluded that the air quality data in the report may have included errors. In addition, the city could not guarantee that air-borne pollution would remain within permissible limits. The rulings had no effect because the construction of Mahler4 was almost finished.
  Delays were estimated at 4-6 months.
- Gershwin (RvS, 12 maart 2008, 200607251/1): The Province of Noord-Holland should have withheld its approval of the land use plan for the Gershwin area on the same grounds as it should have withheld its approval of the Mahler4 land use plan.
  An additional ground was that the city had not investigated whether the BP petrol station could be relocated within the plan area. This petrol station had been located in the area for forty years, and though the city was allowed to give more weight to the interests of the new development, it should have looked for another location for BP since the plans did provide for a petrol station in the area.
  Delays were estimated at 4-6 months.

7.3 Focal project: (2) Mahler4

7.3.1 Introduction

The Mahler4 project consists of nine tower blocks. The project is not only important because of its size but also because it provides the Zuidas with a signature skyline. Unlike the Gershwin project, Mahler4 is being developed by a single consortium consisting of three parties. Case interviews for the project were conducted in 2004 (see Appendix B).

7.3.2 Positioning (area)

Mahler4 is situated in the centre of the Zuidas area, next to the ABN AMRO head offices. It is surrounded by *Buitenveldertselaan*, *Gustav Mahlerlaan*, *Mahlerplein* (Mahler Square) and the ring road (A10 motorway). The other focal project, Gershwin (see Section 7.2) is located behind Mahler4 (on *Buitenveldertselaan*).

7.3.3 Description of the project

Mahler4 consists of eight office towers and one residential tower (see Figure 7.1). When completed, the project will comprise 166,500 sq. m (1.8 million sq. ft./6,000 worksites) of office space, 41,900 sq. m (451,000 sq. ft./194 units) of residential space, 10,000 sq. m of facilities and a parking garage with a maximum capacity of 1,912 places.[13] The project was divided into three phases. The first phase started in 2002 and resulted in the construction of three office towers that were completed in 2005 and were called Viñoly, SOM and Ito after the eminent architects who designed them.[14]

The second phase started in 2004 and consists of the construction of the Graves office tower and the Mahler apartment tower with 193 apartments. The third phase will result in the completion of the parking garage on top of which four other office towers will be built. The cooperation contract was signed on June 21st, 2001, at that time the project was planned to be finished in 2008 but due to delays (see Section 7.2.15) that date was postponed to 2010.

The apartment tower is prestigious since it offers literally the top apartment in the city: 100 metres high. It was sold to a well-known businessman in 2008.

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13 The contract speaks of a maximum of 160,000 sq. m of office space, 30,000 sq. m of condominiums and 10,000 sq. m of facilities. The last two figures are minimum values. In addition it speaks of a parking garage of maximum 2,100 places.

14 Rafael Viñoly Architects PC (New York), Toyo Ito & Associates (Tokyo), Nicholas Jacobs, Skidmore Owings & Merrill (London) and Michael Graves & Associates (Princeton).

Responsibilities of parties

The land is owned by the City of Amsterdam that sells the lease rights to the private parties. G&S Vastgoed (G&S Real Estate) already owned 25% of the lease rights before the project started. Section E of the contract mentions that G&S Vastgoed will develop 42,500 sq. m (480,000 sq. ft.) of office space at its own risk, but the consortium will represent the whole project in dealings with the city (see also Section 7.3.7).

The contract specifically states that the development, the building-on and the furnishing of the parcels leased by the consortium will be at the costs and risks of the consortium.

As in the Gershwin project, it is the city's responsibility to make the land ready for building and for occupation (see Section 7.2.3). This means that the city will build the streets, will harden the squares, will construct parking strips and car parks along with roads, pavements, cycle and pedestrian paths, including street furnishing, sewerage and draining systems.

The city is also responsible for the creation of public green areas, playing fields and other public facilities, ponds (and pilings to reinforce the edges of these ponds). The city is also responsible for the system of street lighting and the provision of road signs and markings and street name signs.

7.3.4 Momentum

The project gained and lost momentum over the years. When the contract was signed parties were very optimistic, but it took some time before the market became really interested in the office space. Like the Gershwin project, Mahler4 lost some of its momentum when the project was delayed by court rulings (see Section 7.2.15).

7.3.5 Pre-contractual procedure

There was no bidding procedure. Parties wrote a contract of intent and then a cooperation contract. The City of Amsterdam was confronted with the fact the G&S Vastgoed already owned 25% of the lease rights in the area. The city however wanted the land to be developed by a consortium of at least three parties, to avoid risks (case interview ING, MAH 10-4-A3). It took a leading role in finding private parties that were willing to invest in the project. This consortium initially consisted of four parties. However, the German company CGI couldn't participate in the consortium because a rule of German law prohibited it from participation in the project as a risk-taker. It will however buy the part of the project developed by G&S Vastgoed (see Sections 7.3.3 and 7.3.7). Negotiations took two years after the contract had been signed, which was longer than expected (case interview ING, MAH 10-4-A3).

7.3.6 Time frame

Mahler4 started in 2002 and expectations are that it will be completed in 2010. The rights owned by G&S Vastgoed (see Section 7.3.7) will be transferred as soon as the definite building permits are issued by the local government or when the consortium decides to start building on permits that have not yet become unappealable (art. 10.1a of Mahler4 contract). The city delivers the lease rights in phases: every time a subproject of Mahler4 starts up, it delivers the land in a furnished state (art. 11 of Mahler4 contract).

7.3.7 The contracting parties

The contract was closed between the city and a consortium of three parties. This consortium is named VOF Mahler4[15] and consists of ING Real Estate, Fortis Real Estate and G&S Vastgoed.

This consortium initially consisted of four parties. However, as mentioned in Section 7.3.5 above the German company CGI could not participate in the consortium because its status as a German speculator prohibited it under German law from participation in the project as a developer. It will however buy the part of the project (described in Section 7.3.3) that is developed by G&S Vastgoed.

ING Real Estate is an integrated real estate group that is engaged in the development, financing and investment management of real estate in all major global markets. The company has offices in 21 countries and a staff of about 2,500.

It owns a portfolio of about € 100 billion and is part of ING, the largest Dutch bank and insurance company (see also Section 7.1.5).

Fortis Real Estate is engaged in the development of real estate, property management and public parking garages. The company has offices in seven countries and a staff of about 1,800. It has developed more than 2 million sq. m of office, residential, shopping and mixed-use space. It is part of the Belgian-Dutch bank Fortis, the Dutch part of which was nationalised in 2008 as a result of the continuing global credit crisis.

G&S Vastgoed is a Dutch company that specialises in office building construction. In 25 years, it has developed over 130 office buildings in the Netherlands. G&S Vastgoed is the smallest partner in the project. The main reason why it participated in the consortium is that it already owned a quarter of the lease rights in the area.

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15 VOF '*vennootschap onder firma*', is a legal partnership (not a legal person) in Dutch law in which the partners (vennoten) accept full liability for their mutual obligations. The VOF will be replaced by a new system that will only recognise public and non-public legal persons in Dutch legislation late 2009. Because of their openness, the use of VOFs as a development partnership has often been regarded as a sign of trust and trustworthiness (MAH 10-04-A1).

Dutch law holds that, after a change of the destination of a specified area of land, the land in question cannot be expropriated as long as the developer who owns the land (or the lease rights to it) is capable of realising the new destination (articles 4 and 79 *Onteigeningswet* [Expropriation Act]). The rule was of importance for the project because G&S Vastgoed had speculated on development of the area and acquired 25% of the lease rights that were at that time owned by a squash centre and other sports and leisure companies (*Tennisvereniging Chandelle, Nieuw Tenniscentrum,* Dicky Squash, and Amsterdam International Sauna).

7.3.8a Other share- and stakeholders

Involvement of other share- and stakeholders was not reported; as mentioned in the previous section, when the project started up G&S Vastgoed had already acquired the lease rights to an appreciable proportion of the land from existing landowners in the area.

7.3.8b Involvement of the public

The public was involved in the same way as in the Gershwin project: normal procedures were followed but no extra initiatives were undertaken to stimulate public debate (see also Sections 7.2.8b and 7.1.13).

7.3.9 Payments

The consortium buys the lease rights from the city for a fixed sum (it will not pay a ground rent). According to the contract, the consortium pays:

- *ƒ* 2,200 (€ 990) per sq. m of office space
- *ƒ* 1,266.67 (€ 570) per sq. m of residential space
- *ƒ* 500 (€ 225) per sq. m of facilities
- *ƒ* 2,380 (€ 1071) per parking space.

7.3.10 Conflicts

7.3.10a Which conflicts rose with regard to the project?

The contract was closed in the expectation that the consortium would be able to develop 2,100 parking places. Realisation of this number depended on the move of a bend in a tram line. The parties subsequently concluded that this move would take too long, because of the many legal procedures involved in implementing it, and decided to drop it from the plans. This decision means that there would only be a maximum of 1912 parking places, and the plans had to be fine-tuned to take this into account. One of the interviewees stated

that he regretted it that the consortium had not considered going to court on this issue (case interview MAH 04-04-A1). One could argue that because of the minimum-maximum formulation in the contract, this change had little practical impact on the project. The need for the parties to adjust their expectations did however lead to an appreciable delay in starting building work, which can have adverse financial consequences for the city (see Section 7.2.10a).

The consortium experienced some internal conflicts during the setting up of the project organisation, which were resolved by changing the director (case interview MAH 04-04-A1 and A5).

7.3.10b How do parties deal with future conflicts?

The contract states that in case of any future conflicts, parties will try to solve them by consultation and look for a solution in their mutual interest. If such consultation is unsuccessful, the parties are regarded as being in conflict. The contract states that in that case they must initially continue consultation. If the conflict has not been resolved within three months, each party has the right to start proceedings at the Court of Amsterdam. The contract does not explicitly mention arbitration as an option, but the 3-month cooling-off period seems to point in this direction.

7.3.11 Affordable housing

Unlike the other projects in the Zuidas area, the Mahler4 project only consists of housing rented on the open market. The apartment tower of 194 units consists of top end apartments and offers its residents a swimming pool, a fitness centre and sauna. Rents start at € 2,000 per month (www.vesteda.com).

7.3.12 Environmental sustainability

Environmental sustainability is explicitly mentioned as a goal of the project. The contract only contains agreements of intent on sustainability but the city, when it presented the contract to the council, spoke of 'good agreements' on construction techniques (flexible and sustainable), green zones and ecology (saving rain water using roof gardens and waterproof parking garages). The energy study carried out for Mahler4 has resulted in an energy-saving concept based on storage of heat and cold. This concept, together with some other measures, has resulted in a reduction in CO_2 emission of 58% compared with a standard energy system for office towers (City of Amsterdam, 2001).

The contract states that the parties should make joint efforts to find a third party who will pay the costs of the energy infrastructure up to the border of the parcel of the private parties. If this infrastructure were to result in extra costs, then the parties should look for a solution (for example, a contribution from

the city to meet the extra costs). The environmental programme produced by the city's Environment Department together with the above-mentioned energy study for Mahler4 (which was carried out by an independent company) resulted in a document titled *Afspraken en uitgangspunten voor energievoorziening en energiebesparing Mahler4* (*Agreements and points of departure for power supply and energy savings in Mahler4*). These agreements concentrated on unconventional ways of saving more energy. The consortium stated in the contract that it intended to follow these agreements as long as the unconventional techniques proposed were not more expensive than more conventional techniques.

Reports from the city state that all these intentions have been realised (Zuidas, 2008).

7.3.13 Other public facilities

We have seen that the project provides for a parking garage with 1912 places. The project further provides for bars, restaurants and shops that are mostly situated around *Claude Debussylaan* (see Figure 7.1). The facilities include a gymnasium, use of which is mainly restricted to the people working in the office buildings. In a different field, a debating centre that aims to attract people from all over Amsterdam will open in 2008.

In addition, the plan provides for the construction of public terraces on *Gustav Mahlerplein*. The city has done its best to be strict in enforcing the 'urban façade' requirement here (see Section 7.1.12).

7.3.14 Goals of the project

Generally speaking, the goal of the Mahler4 project is to create a successful top-end development that will yield profits for the city as well as the developers and will boost the prestige of the Zuidas project as a whole.

The contract names as its goal the realisation of the project within the conditions laid down in the urban design plan (*stedenbouwkundig ontwerp*) and those mentioned in the contract. It must be noted, however, that the statement of the conditions in the contract is incomplete. The contract states explicitly that the parties' aim is to create a framework within which plans can be drawn up for the construction and lay-out of the project area, but fails to state that this framework should also facilitate the recording of financial, operational and other data concerning the development, the issue of the land and the realisation of the lease agreement.

7.3.15 Delays

The project was delayed for about two years, mostly as a result of various court rulings (see Section 7.2.15).

7.4 Common contract norms in the Gershwin (Zuidschans) contract

7.4.1a Introduction: general sketch of the agreements

In this part of the chapter we assess the contracts in the Gershwin and Mahler4 projects from the perspective of relational contract theory. First, however, we will first provide an overview of the characteristics of both contracts. This is followed by a discussion of each of the common contract norms in turn for each contract. Section 7.4 focuses on the Gershwin contract after the present general introduction, and Section 7.5 on Mahler4.

General characteristics of the Mahler4 and Gershwin contracts

The Mahler4 and Gershwin contracts were closed at a time when many details of the project had not been worked out. The contracts exist within a context of ongoing negotiations; some of those negotiations are based on common practice, while some practices were created specifically for the Zuidas project. For example, air rights (see Section 7.2.3) were never used in the Netherlands before the Gershwin project.

The goal of the agreements is twofold: the contracts confirm that parties will work together to realise the projects within their terms. The contracts are not leases and can be regarded as contracts that define the terms and conditions under which the city is willing to sell and the private parties are willing to buy the lease rights in the future.

The Mahler4 contract is less specific than the Gershwin contracts but all these contracts can be described as establishing a framework of consultation platforms in which the parties meet to discuss certain aspects of the project. The city takes a leading role in most of these platforms. The contracts do not provide a full overview of the project. Many specifics are found in public documents or in specific agreements made during one of the many meetings.

The Mahler4 contract was closed in 2001, and construction started in 2004. The Gershwin contracts were closed in 2002, and construction started in late 2007. These facts alone (apart from the delays caused mostly by legal procedures that were concerned with administrative law – see Section 7.2.15) tell us that the contracts can never provide a full overview of the details of the project.

Cooperation and consultation

The Mahler4 and Gershwin contracts state that the parties will write a communication plan together with the other parties in the area. The Gershwin consortia are thus obliged to work together. The Mahler4 project is developed by only one consortium and co-operation here takes place between the consortium and the city.

The Gershwin contracts also state that the consortium (and the city) will

meet to discuss issues that relate to planning, logistics, and other issues that concern more than one cluster. In these meetings, decisions are taken by unanimity. The contracts thus create a discussion and decision platform.

The contracts for both these projects state that parties will work together in a project organisation during the preparation and realisation phase of the project. They name a project director, appointed by the consortium, who will communicate with the city. A typical agreement is that the city will draft a building protocol and that the parties will discuss whether this protocol will become part of the agreement as soon as it is finished. Such an agreement is thus kept deliberately vague. Another typical agreement is that the city will formulate the plan for the public space in accordance with the Zuidas public space plan, the specific planning requirements for the area (*Stedelijk Programma van Eisen – SPvE*) and the (pre-)design land use plan after it has discussed it in the Gershwin ground-level design team.

These kinds of agreements are typical for contracts in Amsterdam; public and private parties are used to work together and to give each other a say in the way they perform their duties. Thus, the city hears the private parties on the public space and the private parties confer with the city about the lay-out of the privately owned public space.

In the case interviews, all parties stressed the importance of good relations to realise the project. Employees of the city and the consortia had contact on a daily basis. Parties generally agreed that their aim was not to reach an agreement on all issues before the work started; their normal practice was to deal with issues when they came up and to look for solutions that served the interests of both parties. They considered this approach to be the most efficient.

7.4.1b The common contract norms on a discrete-relational scale

Inspection of Table 7.1 shows that in this case, the common contract norms all lean over to the relational side.

7.4.2 Role integrity: more relational than discrete

The role integrity norm is of a relational nature in the Gershwin project. Most notably because the city acts as a regulator, a landowner and a developer in the project and does not strictly separate these roles. Its relation with the consortium can be described as intertwined and is despite some discrete elements mostly relational. This means first and foremost that all details, even the moment when the lease rights are transferred, depend on how the contractual relations evolve.

Table 7.1 Discrete/relational matrix for common contract norms in the Zuidschans project

Norm	More discrete than relational	Equally discrete and relational	More relational than discrete
Role integrity			×
Mutuality			×
Implementation of planning		×	
Effectuation of consent		×	
Flexibility			×
Contractual solidarity			×
Linking norms		×	
Creation and restraint of power			×
Propriety of means		×	
Harmonisation with the social matrix			×

Complexity

The role of the local government is complex. It is at the same time landowner, developer of the public infrastructure, monitor of the project and legislator.

In the Gershwin project, the local government aimed to reduce the complexity of its role. Conflicting roles of the city led, in some cases, to solutions that none of the parties thought of as preferable. The contract between the city and the consortium was signed in 2002, in the middle of an operation known as the *grote vereenvoudig ing* ('great simplification') of the city's planning organisation, which included the introduction of the planning tool known as the *bouwenvelop* ('building envelope') (see Section 7.2.3). The contract was intended to be coherent with the new system (City of Amsterdam, 2006).

The new local government approach did not result in more distance between it and the developers, as had been feared. It decided to leave more room for flexibility and creativity of the market players (see below). However, the aim to find new ways for cooperation with market parties led to even more complexity in this case. It was hinted that the reason was that the city was not used yet to its own new policies (case interviews GER 02-06-A2 and GER 03-06-A5).

Another source of complexity is the rotation system adopted by the city, whereby civil servants change projects every two years. As a result the city constantly has to assign new people to existing projects. This system may also lead to a more professional working relation between the city and the private parties, since the relations of their employees are not too close or intertwined. Private parties however complained of this rotation system and stated that it resulted in a less efficient way of cooperation because the new civil servants had no knowledge of the history of the project (case interview GER 02-06-A1). The same system was used in the Mahler4 project (Section 7.5.2).

The composition of the consortium is complex as three parties have to work together in a relatively small project that each could have developed alone. This led to a complex structure of co-operation that was designed to avoid the risk that one of the 'mother companies' tried to dominate the project. This problem

was also mentioned in the Mahler4 interviews (see Section 7.5.2).

In addition, one of the parties involved is also the only developer of the Symphony project. This may result in potential competition between (parts of) the two projects.

Conflicts

One type of conflict was due to the principle of equality, an administrative principle that is also incorporated in the Dutch civil code: it also applies when the government acts in a private law capacity. This means that the city, whenever it agrees to change a provision in a standard contract for a case-specific solution, has to ask itself whether it also needs to apply this change to the two other consortia in the project area in order to guarantee equal treatment of all consortia. Whereas the consortia would naturally demand such a change if it would favour their interests (see also Section 7.3.6).

Another source of conflict existed within the consortium when one of the parties wanted to develop commercial residential units, whereas the other parties prefer to sell the apartment units. Parties therefore met every month during the initial stage of the project as directors of the (Zuidschans) consortium. This led to unnecessary discussions. They decided to meet every three months, to let the various project leaders do their job and hired an external project manager (Section GER 02-06-A1 and 03-06-A3).

7.4.3 Mutuality and reciprocity: more relational than discrete

The mutuality norm in the contract is mostly of a relational nature. To realise the project parties have to work together and grant each other what we may call 'soft rights': the right to be heard, to attend conferences, to streamline work (see Section 9.2.3).

The quid pro quo in the lease is first and foremost found in the price that the consortia will pay for the lease rights on the land. From that perspective, the contract sets out the conditions under which a forthcoming lease will be signed. The quid pro quo thus also includes the costs that the consortium will incur for the preparation of a detailed development plan. As soon as the land is delivered, the consortium has to start work on the project.

The city not only delivers the land but also furnishes it and develops the public infrastructure (see Section 7.2.3).

7.4.4 Implementation of planning: equally relational and discrete

The contract implements a planning that can best be described as a framework of cooperation wherein the project will have to be realised. This purpose

is explicitly mentioned in the second section of the contract. It uses a system of phasing. The decisive moments are when the building permits are issued and when the lease rights are issued. The phases that are mentioned in the contract are the pre-design phase and the definitive design phase. After the definitive design is approved, the consortium must apply for a building permit.

The planning in the contract has both relational and discrete elements. The discrete elements consist mostly of the phasing after the building permit has been issued. After that moment, the consortium is under a duty to obtain the lease rights and carry out the programme. The other elements can be described as relational; they were not fixed at the time the contract was closed and depended on cooperation.

The city has to make an offer to the consortium for the sale of the lease rights as soon as it has approved the definitive designs (see Section 7.2.5). The lease rights will then be issued in phases. The start dates of the lease rights are the dates when construction starts in the various parcels.

The contract stipulates the dates when the first and last part of the lease rights are supposed to be issued but also mentions that when the planning is changed, these dates also have to be changed. Those dates should not be regarded as binding requirements but rather as dates that the parties did their best to reach. The parties acknowledged in advance that numerous causes – which were left unspecified – could give rise to changes.

At the moment when the contract was signed there was no land use plan, but the parties expected that a land use plan would be available at the moment when the building permits were issued. In addition, a more precise planning was appended to the contract.

It was also agreed that the dates in the (forthcoming) leases would, unlike the dates in the cooperation agreement, represent binding deadlines for the consortium.

7.4.5 Effectuation of consent: equally discrete and relational

The effectuation of consent norm has both discrete and relational elements. Generally speaking, the parties knew what they had consented to when they signed the contract. This included an agreement on the price that the consortium would pay for the lease rights.

But they were not aware of all obligations arising from that consent. There was no land use plan, there were no definitive designs, so the parties only knew within a certain range what they had consented to. Security on most details would not be reached before the leases were signed (expected in 2008). Parties had to rely on each other's cooperative attitude (case interview GER 02-06-A1).

The contract effectuates the intention of parties to provide a framework for the sale and purchase of the lease rights and for development of the project by providing a planning and development framework.

In the agreement, the parties consent both to the 'what' and the 'how' of the project. To be more precise: they consent to the how of the cooperation process, whereas the how of the actual construction process will not be decided on until later. The 'what' of the project is the programme that is incorporated in the agreement without specifying the details.

7.4.6 Flexibility: more relational than discrete

The contract incorporates the flexibility norm, which makes this norm more relational than discrete. The contract explicitly mentions that the parties will work together to elaborate unconventional solutions to realise the plan.[16] The contract aims to leave as much room for flexibility as possible, which is not the same as leaving as much freedom as possible for the developer. The contract lays down binding stipulations concerning the framework and the procedures that have to be followed, and concerning the programme of operations, but is flexible about the ways of achieving these ends. It only mentions maximum and minimum values of the square metres that may be developed. It explicitly states that the planning can be adapted to the actual circumstances.

There also proved to be room for change in the operational programme. The consortium succeeded in its aim of converting some space from residential to office use since it convinced the city that it would be impossible, without excessive costs, to build apartments that complied with all relevant nuisance regulations (in particular as regards noise) for apartments (GER 02-06-A1, GER 03-07-A6).

Flexibility was also one of the city's goals when it started trying to attract developers for the project. It tried to be play a less dominant role and to leave room for flexibility and creativity on the part of the market players. It did not however fully succeed in its aim of giving the market players more freedom.

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16 Section 16.1 reads: "The parties realise that the erection of buildings on and the furnishing of the public space and the plots represent a special challenge, among other things as a result of the overall building programme for the Gershwin area, the quality aimed at and the parties' ambitions, the planning, the limited space and the special characteristics of the plan area and its surroundings. They mutually undertake to do their best to achieve the necessary coordination, cooperation with the other parties involved in the construction process in the Gershwin area and the search for and cooperation in solutions (if necessary unconventional solutions) required for achievement of balanced, logical, cost-effective and optimal working methods and execution."

7.4.7 Contractual solidarity: more relational than discrete

Contractual solidarity is incorporated in this contract, which makes the contractual solidarity norm a relational element in this context (see Section 3.4.7).

The breaking point, at which considerations of contractual solidarity could result either in rescission of the agreement or in a decision to continue the relationship, emerged soon after the contracts were signed and all plans were blocked by the rulings of the *Raad van State* (Council of State) (see Section 7.2.15). Because of the delays (which imposed the highest financial risk on the city, as explained at the beginning of Section 7.2.15), the city offered all four consortia (including Zuidschans) the option of withdrawing from the projects but they all decided to honour the contract. To win time, the city proposed that the work should be carried out in parallel, which meant that the public infrastructure would be finished at the same time as the buildings. Another proposal was that the private parties would not have to pay rent on the working areas (GER 03-07-A6). The private parties honoured the contracts but they were not very willing to fast-track the building process.

All these examples illustrate however the parties' determination to stay within the contractual relation. They discussed their individual problems and interests, and each party tried to get the best deal. But the main attitude was one of contractual solidarity. The parties did not plan to stop the process and start legal procedures when (serious) difficulties arose, but meant to develop the projects they had signed for. This makes contractual solidarity an integral part of the agreement.

7.4.8 The linking norms: restitution, reliance and expectation interests: more relational than discrete

The linking norms are relational in the sense that they leave the expectations of parties deliberately vague. The contract does not mention expected incomes, nor does it spell out other expectations of the market players. But there are some discrete elements, with regard to the expectations of the city.

The city expects that the consortium will buy the lease rights and cooperate with the procedures that will result in transfer of the lease rights. If the consortium refuses to cooperate with the lease contract, it will lose its deposit of one and a half years of ground rent.

The parties signed the contract in the expectation that the project would be developed in a profitable way that also complied with the public goals of the city. Other expectations were the construction of the Zuidas Dock (explicitly mentioned as the model on which the parties based their calculations).

These expectations are mentioned in the contract but they are not concretised in the sense that there are fines to link the expectations to numbers.

7.4.9 Creation and restraint of power: more relational than discrete

The creation and restraint of power norm is used to create intertwined relations, and can thus be regarded as relational.

Within the context of the Gershwin contracts, this norm reflects the provisions of the contract that require the parties to work together in a project organisation in which they all have some say on all aspects of the project. Parties have agreed to give each other a say in all aspects of the project where this is possible. One restriction on the city is that it cannot give the consortia any (official) say in the political process, and this is explicitly stated in the contract. Note that a say does not always mean a right of veto, it often means that parties agree to try to work things out together. In the negotiation phase, the city had a say in the composition of the consortium (which must include a housing association).

The consortium has contractually subordinated itself to the project supervisor, whose task is to advise the city on issues that concern design quality from both a cluster-specific and a Zuidas perspective.

Parties will work together in a project organisation during the preparation and realisation phase of the project. There will be a director of the project, appointed by the consortium, who will communicate with the city.

Parties will draw up a communication plan together with the other parties in the Gershwin plan area.

Parties will meet to discuss issues that relate to planning, logistics, building space, access and other issues that concern more than one cluster. In those meetings, binding decisions can be taken by unanimity.

These examples show that the creation and restraint of power norm is used in the Gershwin agreements to create a project organisation in which the parties work together and try to avoid formal discussions about authority issues.

7.4.10 Propriety of means: equally relational and discrete

The city demands firm financial guarantees from the parties in the consortium, which must be regarded as a discrete element. But the propriety of means norm also has relational elements in this case. Means are mostly meant to be adequate means. Parties had to draw up a vision statement as part of the bidding procedure, to show that they knew what they and the city wanted for the area. The project needs land, money, knowledge, and organisation for its development.

In addition to the parts of the contract relating to land and payments, the agreement also focuses on knowledge and organisation. It refers to the need

to gather more knowledge of building techniques and presupposes that the parties know what they are doing and are capable of organising their work. It does not however mention any specific requirements on contractors.

7.4.11 Harmonisation with the social matrix: more relational than discrete

The contractual relation is embedded in practices that parties are used to and their past relations. All parties had worked with the city before and (at least as importantly) expect to work with the city in the future.

According to the lawyer who drafted the contract, the unusual aspect of the agreement was the fact that it tried to implement the planning in greater detail than is common in Amsterdam (case interview Thunissen, GER 03-07-A3).

The contract mentions cooperation and open-mindedness explicitly as important requirements. By the latter it means that parties should be willing to implement unconventional building techniques.

7.4.12 Balance of discrete and relational norms in the Gershwin contract

The prevalence of discrete and relational elements in the common contract norms for these projects has already been surveyed in Table 7.2. We will now look at things from a slightly different perspective, by indicating the relative importance of the various norms.

It may be concluded that the Gershwin contract has more relational than discrete elements, though it does attempt to introduce binding requirements on issues that can be specified. In Section 7.5.12, I will comment on the problem of consistency in role integrity, which I regard as of crucial importance for these two cases.

7.5 Common contract norms in the Mahler4 contract

7.5.1 Introduction

The general characteristics of the Mahler4 and Gershwin contracts were given in Section 7.4.1. It may be noted here, however, that unlike the Gershwin contracts which tried to apply a new model to the specific case (cf. Section 7.4.11), the Mahler4 contract was drafted by an in-house lawyer from ING Real Estate (see Section 7.3.7a) in a more or less standard manner. After this brief introductory comment, we will now assess the Mahler4 contract from the perspective of relational contract theory.

Table 7.2 Importance of discrete and relational norms in the Zuidschans project

1. Discrete norms		
Enhanced importance of:	Yes	No
Discreteness		×
Presentiation		×
Implementation of planning*	×	
Effectuation of consent		×
2. Relational norms		
Enhanced importance of:	Yes	No
Role integrity	×	
Preservation of the relation	×	
Resolution of relational conflict	×	
Propriety of means	×	
Supra-contract norms	×	

* When the norms of discreteness and presentiation are not of enhanced importance, it makes more sense to view the implementation of planning norm as a relational norm. In other words, the importance of planning in such projects then follows from the nature of the observed relation between the parties rather than from the wording of the agreements.

Inspection of Table 7.3 shows that, like the Gershwin contract, the Mahler4 contract is characterised by common contract norms that are predominantly relational.

We will now discuss the individual common contract norms in turn.

7.5.2 Role integrity: more relational than discrete

In the Mahler4 contract, the role integrity norm has more relational than discrete elements. Parties do not strictly contract in one capacity. The government adopts different roles in a single contract: it is regulator, landowner and developer and does not strictly separate these roles. Even the private parties do not strictly confine themselves to their roles of developers but accept more responsibilities.

The problems local government experienced in implementing role integrity in relation to the Gershwin contract (see Section 7.4.2) clearly illustrate the importance of consistency in this connection.

The cooperation contract for Mahler4 states that the City of Amsterdam (mayor and aldermen) cannot guarantee that the city council will approve the regulations that are necessary to create the project. It thereby explicitly draws a line between its role as a legislator and its role as a landowner (public law and private law capacities).

In the interviews, the private parties mentioned the problem caused by the fact that G&S Vastgoed already possessed 25% of the leasehold rights in the

Table 7.3 Discrete/relational matrix for common contract norms in the Mahler4 contract

Norm	More discrete than relational	Equally discrete and relational	More relational than discrete
Role integrity			×
Mutuality		×	
Implementation of planning			×
Effectuation of consent		×	
Flexibility			×
Contractual solidarity			×
Linking norms		×	
Creation and restraint of power		×	
Propriety of means		×	
Harmonisation with the social matrix			×

project (case interview Fortis and ING, MAH 10-04-A1 and A2). The other parties were afraid that G&S Vastgoed would use its position to profit first from its own projects. This can be defined as a problem of trust. G&S Vastgoed itself declined to be interviewed for this study.

Some of the parties were also involved in possibly competing projects in the Zuidas or in other parts of Amsterdam. Parties were afraid that one of the others might want to try to attract a possible buyer or lessee of office space to a location where it did not have to share the profits (case interviews Fortis and ING, MAH 10-04-A1 and A2).

Another problem arose because of the fact that all parties were capable of developing the project on their own. In other words, the only reason why they worked together was because the city had a policy not to grant projects to one party but preferred consortia. The Mahler4 contract states that the company MHG couldn't combine its role as an investor with one as developer. To avoid conflicts, the parties set up a project office. This approach did not work well initially, as the first project manager was fired. One of the reasons for these initial problems was that the frequent heated discussions in the project meetings, where the parties would blame each other and the project manager for the lack of progress. In the end, although the project office was expensive, it worked well.

Complexity

The local government is at the same time the landowner, the developer of the public infrastructure (and also prepares the land for building), the monitor of the project and the legislator. A tension exists between these different roles, in particular those as landowner and legislator.

The main reason for the complexity of the city's roles is its desire to realise public goals. In Mahler4 the most important ones are sustainability and the quality of the design. The contract, as we saw, creates a duty of effort to look for 'green' solutions that are less harmful to the environment.

We have already commented on that tension between short-term and

long-term interests within the consortium. Another factor that could also be regarded as a tension is the general unwillingness of the private parties to go to court when the local government doesn't perform its obligations, because they regard this as contrary to their long-term interests.

The position of G&S Vastgoed was even more complex. Being the owner of 25% of the lease rights it could, in principle, be a competitor of the project organisation of which it was a part.

7.5.3 Mutuality and reciprocity: equally relational and discrete

The contract has discrete elements: for example, it mentions a fixed price for the lease rights. However, other elements are more relational; as in the Gershwin project, soft rights like the right to be heard are also granted.

The *quid pro quo* in the contract is that the consortium promises it will buy the right to lease the land from the government for a period of fifty years. In return, the city delivers the land in a furnished state and develops the infrastructure. The city does not guarantee in the contract that all permits will be issued or that the binding land use plan approved by the city council will make the development possible.

The consortium guarantees that it will develop the project in line with the requirements found in the contract and in the documents mentioned in it.

7.5.4 Implementation of planning: more relational than discrete

The implementation of planning norm is more relational than discrete, as it does not mention deadlines and creates an interdependent planning process: parties have to work together to concretise the planning.

The cooperation contract highlights important phases and elements of the planning and defers decision moments to committee meetings mentioned in the contract. It thus contains a framework for implementation of the planning. For example, the contract states that 10,000 sq. m of the project are reserved for various facilities but does not specify the nature of these facilities. Instead it refers to the advisory committee on facilities in the Zuidas area.

The contract mentions many duties of endeavour, but is almost reluctant to go into detail about them. It states for example that the consortium will endeavour to develop more square metres of residential space than specified in the description of the contract, without explaining how it will do so. It also states that the parties will endeavour to comply with the time schedule that is based on the insights that existed during the closing of the contract.

Pre-building phase
The contract does not mention a time schedule or any date. The decisive moment is when the definitive building permit is issued. This means a permit that is no longer subject to administrative revision procedures (six weeks after the permit was issued).

When the building permit is definitive, G&S Vastgoed will deliver its lease rights to the city so that the city can make the land ready for building and build the infrastructure. The consortium can choose to start its work before the permit becomes unappealable. The city delivers the lease rights (the land) in phases. Every time a subproject starts, the city delivers the land in a ready for building condition.

The consortium will present proposals to the advisory committee on facilities in the Zuidas area. If it is unable to reach an agreement with the committee, then the Mahler4 steering group will take the final decision. All plans have to be discussed with the project supervisor (see Section 7.1.7).

Building phase
The consortium set up to implement the Mahler4 project is called VOF Mahler4 (see Section 7.3.7).

There is a *uitvoeringsoverleg* (realisation committee) where the consortium and the city discuss the progress of the project and draft plans for all sub-projects. All other issues concerning the project schedules are discussed in this platform, which is mentioned at various places in the contract (it is stated for example that the parties will discuss issues concerning the lay-out of the public space and will conclude agreements on the underground infrastructure in this platform). The realisation committee is thus the central platform for concrete planning and discussion of operational details. This form of cooperation depends on a good working relation between the parties, since there are no plans they can fall back on in case of disagreement. The contract thus presupposes that the parties trust each other enough to work together intensively.

The contract determines that parties will draw up a construction schedule for each sub-project, paying special attention to building logistics in order to limit nuisance to people living in the neighbourhood as much as possible.

The contract states that it is probable that the consortium will draw up (part of) the *inrichtingsplan* (layout plan) for the public space and/or actually realise the public space within the area. The parties will reach further agreements on these points at the appropriate phase in the project.

Post-building phase
There is a users committee within the city administration that vets possible users of the office space. The consortium proposes candidate users to this committee, which will then judge each candidates with reference to the following criteria:

- Their reputation: users should be well-known and contribute to the international reputation of the Zuidas.
- Their entrepreneurial activity: the users should in general wish to move their international headquarters to the Zuidas.
- Their previous location: candidate users currently located in the centre of Amsterdam can only apply for space in the Zuidas if it is clear that the city centre does not offer them the facilities they need.

The contract also states that the parties aim to conclude a maintenance agreement once the layout plans for the private and public spaces have been completed. This agreement will determine how the public and private spaces in the project area are to be maintained.

The contract thus identifies the many issues that need to be dealt with, but does not specify in detail how this shall be done. The planning given in the contract is vague and contains many loose ends. It basically states: "Yes, we will realise the project and will discuss all issues when they come up." It thus relies very much on the willingness of all parties to cooperate.

7.5.5 Effectuation of consent: equally relational and discrete

The contract spells out under which conditions the city is willing to sell and the consortium is willing to buy the lease rights to the Mahler4 area.

The discrete part of the contract is that parties have agreed what will be built for what price. However, the contract only gives maximum and minimum values and as mentioned in the Section 7.5.4 it also includes an obligation on the parties to endeavour to create more residential space than the minimum values specified. In other words, the parties did not have complete knowledge of what would be constructed and for what price at the time they signed the contract.

7.5.6 Flexibility: more relational than discrete

The text of the contract leaves much room for ad hoc solutions since nothing is fixed apart from the maximum and minimum number of square metres to be devoted to commercial space, residential space and other facilities. At the time of closure, the contract left room for all kinds of designs and did not specify the deadlines for completion of the building work. The basic idea of the contract is that matters of detail should be dealt with when they arise and not in advance, since that only costs unnecessary time.

Both the private parties and the civil servants agreed with this approach. One of the interviewees from the consortium stated that it preferred to start working on a plan that was as undetermined as possible (case interview MAH 10-04-A3).

7.5.7 Contractual solidarity: more relational than discrete

Contractual solidarity is incorporated in the Mahler4 contract. All parties stated that they understood and respected the position of their contraparty. The contract does not mention the duty of good faith specifically but it uses the term 'reasonable' to indicate that the parties should take each other's interests into account.

The contract is called a 'cooperation contract', which implies that parties knew they had to work together to realise the project. The contract was drafted by an in-house lawyer from ING Real Estate (case interview MAH 10-04-A3) without interference from other lawyers. This shows that the parties trust one another and are willing to work together, not caring too much about legal particularities.

The infrastructure was not finished on time by the city. Another problem arose when the planned move of a bend in a tram line could did not go ahead (see Section 7.3.10a). The contract determined that the parties will discuss the financial consequences for the consortium of such changes to the planning, but it did not provide any specific guidelines (see Section 7.3.15).

One party complained that the general attitude of all parties was not to start any arbitration or litigation procedure because they all valued a good long-term relation with the city more highly than the damages they might be awarded as a result of such procedures. However, that did not mean that they abstained from negotiating with the city for the best possible deal.

The overall duty to behave according to the rules of good faith was mentioned as a way of ensuring that all parties would behave reasonably, even by interviewees with no legal training (MAH 10-04-A4 and MAH 10-04-A5).

The opening article of the contract states that all parties are obligated to do everything that can be reasonably expected from them to ensure that the goal of the cooperation contract can be achieved.

The consortium will provide the city with all information concerning the progress of the project, so that the city can keep the public and people living in the vicinity of the project area adequately informed.

The phasing of the project whereby the city only receives money when the building permits have become definitive and when it has performed its side of the obligations laid down in the contract means that the city has an interest in quick realisation of the project. Parties work together to make a marketing plan for the project. The parties do not share risks, however. When the lease rights have been purchased, the city has made its money and there is no percentage rent or any other provision that subsequently binds the parties financially.

7.5.8 The linking norms: restitution, reliance and expectation interests: equally relational and discrete

As far as restitution is concerned, the contract states that G&S Vastgoed will have its lease rights reimbursed if the project is not realised for any reason. It does not speak of any pre-investments or similar matters.

The expectation interest embodied in the contract is a little hard to define. The contract states that the parties presuppose that the development of the Zuidas will include the planned work on Zuidas Dock and that the bend in the tram line will be moved (as required for the planned completion of the parking garage; see Section 7.3.10). They also expect to make a profit, and that they will be able to develop the project as laid down in the contract. They expect one another to be reasonable. The contract never quantifies any of these expectations.

7.5.9 Creation and restraint of power: more relational than discrete

As in the Zuidschans contract, the creation and restraint of power norm is used to create intertwined relations between the consortium and the local government whereby all parties have a right to a say on all aspects of the project. This say is sometimes loosely defined as a right to discuss, but in some cases it is mentioned as a right to exercise a certain power. The city has the right to decide whether the consortium may sign a contract with a candidate user of some of the office space. The contractual relation vests powers in the local government and the private parties that they would not otherwise have. Basically, for example, it empowers the consortium to require that the city shall not sell its lease rights to another party and that it will not change the prices and conditions of the project from those mentioned in the contract.

The city on the other hand has the right to require the private parties to buy the lease rights for the agreed price when it has performed its side of the agreement, and to require that the consortium will construct the project according to the rules laid down in the contract.

Finally, the consortium can block start-up of the Goldstar project (which might possibly compete with the present project).

7.5.10 Propriety of means: equally relational and discrete

The city asked for financial guarantees when it granted the project to the consortium, which can be regarded as a discrete element of the contract. Other elements are more relational and concern the adequacy of the means em-

ployed: the parties, for example, must work together to ensure that the design of the buildings matches the plans for the broader area. The city owns the land and the means needed to make the land ready for building, and it also has the means needed to realise the infrastructure.

The consortium owns the means (including financial resources) needed to realise the project. In other words, the city and the consortium need each other.

The city has the obligations that stem from its position as a landowner. Since the city also has legislative powers, it could in theory tailor the applicable regulations to ensure that the project meets all legal requirements. This would however constitute improper use of its powers, and is therefore explicitly excluded from the contractual relation.

The developers have funds to develop the project and take the risk. The contract also tries to bring together different perspectives in the sense that the city looks at the project as a subproject within Zuidas as a whole. The developers therefore have to cooperate with the Zuidas project supervisor to make sure that their designs fit in the big picture. This is another aspect of the enhanced importance of the propriety of means: the party with specific knowledge should contribute it.

7.5.11 Harmonisation with the social matrix

The case interviews revealed that all parties knew what was expected of them. They referred to usages and norms of good faith, though the developers also complained about the dual standards of the city. The complaints came down to the view that the city wants the consortium to act as a business partner, while the consortium itself constantly had to bear in mind that the city was the local government and could not be held to its word like a normal business partner.

Supra-contract norms are of enhanced importance. All interviewees emphasised that they wanted the contract to be not so much a legal document as one that was accessible for the people in the field. It should have some characteristics of a set of working guidelines, and not impose a legal reality on the reality of the project.

This is why the project objectives are specifically mentioned in it.

7.5.12 Balance of discrete and relational norms in the Mahler4 contract

The prevalence of discrete and relational elements in the common contract norms for these projects has already been surveyed in Table 7.4. We will now look at things from a slightly different perspective, by indicating the relative importance of the various norms.

The Mahler4 contract turns out to have far more relational norms than discrete ones. This does not mean that implementation of planning and effectuation of consent are unimportant. It means that these norms take shape during the process of drafting and implementation of the contract.

I would like to end this chapter with a brief discussion of the problem of consistency in connection with role integrity, which came up in both focal projects.

Consistency in role integrity

The approach whereby many details are not dealt with at the time the contract is closed results in some insecurity for the private parties and the general public.

A specific problem that is related to role integrity is that of consistency. The private parties mentioned this problem in relation to political changes that are intrinsic to the system of elections. In Amsterdam however this problem is not of enhanced importance because the social democrats (PvdA) have governed the city for decades, therefore the city is known for its relative stability. In the Dutch system a party almost never has an absolute majority in a municipal council (or parliament), the partners with whom the largest party chooses to govern will therefore change from time to time, which may cause some instability.

More frequently the city's rotation system of the city whereby civil servants only stay on the same project for two years was named as a source of insecurity. The private parties complained that they constantly had to deal with civil servants who were not familiar with the history of the project (MAH 10-04-A1) or even with different municipal departments with conflicting policies or that were not familiar with one another's policies.

Still, although the rotation system may cause some inconsistencies (most notably with regard to issues that were not written down), it can also enhance integrity. It should be stressed that we are not talking here about role integrity, the ability to stick to a consistent role in dealings with others, but about integrity – adherence to high ethical standards in dealings with others. The public wants civil servants to keep their distance from the developers for reasons that relate to the wish to prevent corruption and all types of nepotism and clientelism. Integrity is then associated with a type of conduct that abstracts from personal relationships with private parties.

Private parties understood the interests of local government but they objected to the rotation system whereby city officers only stays on the same project for two years. However, the system may guarantee a certain distance between the government and the private parties, which is necessary to separate the legislative and administrative roles of local government from its position as a landowner.

We have seen that the city is bound by the principles of good government

Table 7.4 Importance of discrete and relational norms in the Mahler4 contract

1. Discrete norms		
Enhanced importance of:	Yes	No
Discreteness		×
Presentiation		×
Implementation of planning*	×	
Effectuation of consent		×
2. Relational norms		
Enhanced importance of:	Yes	No
Role integrity	×	
Preservation of the relation	×	
Resolution of relational conflict	×	
Propriety of means	×	
Supra-contract norms	×	

* When the norms of discreteness and presentiation are not of enhanced importance, it makes more sense to view the implementation of planning norm as a relational norm. In other words, the importance of planning in such projects then follows from the nature of the observed relation between the parties rather than from the wording of the agreements.

when it makes use of private law. This includes a duty of consistency: it cannot arbitrarily impose one condition on party A and another on party B. This principle was of importance in the Gershwin project where three similar contracts were signed.

For the private parties, the problem of consistency was dealt with by joining forces in a specific consortium (VOF Mahler4, Zuidschans C.V.) and by setting up a project bureau that was responsible for discussing issues with the city. This construction appreciably reduced the risk that the three parties would convey conflicting messages to local government.

The contracts specifically state that the city is not liable for the consequences of any changes in regulations or statutes made by itself in its role as legislator or by the national government; this provision limits the scope for conflicts, as did the setting up of a separate project organisation by the consortium.

Because of the openness of the contracts and the duty to discuss many issues further at a later stage, a risk exists that when parties disagree on one issue, the conflict may spread because it determines their behaviour in other meetings and could finally lead to major conflicts that threaten the very existence of the project or at least give rise to delays. This has often happened in the past.

It would be preferable for the contract to be more specific about the duty to discuss outstanding issues, so that small conflicts can remain small.

8 King's Cross Regent Quarter, London

The Main Site

8.1 The urban development project: King's Cross Regent Quarter, London

8.1.1 Introduction

King's Cross is one of the largest and most prestigious regeneration projects underway in London. It is one of the six opportunity areas that are described in the London Plan (GLA, 2004), the plan that provides an overview of the city's objectives and strategies for the next 15-20 years. King's Cross Opportunity Area is superbly located in the northwest part of the centre of London, near the city's most important transport hub that includes the new St. Pancras station, where the trains from and to the European continent stop (see Sections 8.1.2 and 8.1.3). The project aims to find a balance between the interests of the local residents who are in urgent need of affordable housing and jobs and the interests of the private sector that needs new office space and wants to develop housing units for the market sector.

The context of this chapter differs from the other case studies in one important manner. Unlike the cases in Amsterdam and New York, in London the S106 agreements[17], one of which forms the heart of Sections 8.2 and 8.3, is not a strictly private law document but is also meant to implement public policies. The English planning system is commonly described as a negotiation model (Cullingworth & Nadin, 2006) and it uses specific agreements to concretise planning goals for a specific project. As a result this chapter may intro-

17 S106 means an agreement pursuant to section 106 of the 1990 Town and Country Planning Act. This section deals with 'agreements regulating development or use of land'. It holds that:

(1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement.

(2) Any such agreement may contain such incidental and consequential provisions (including financial ones) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.

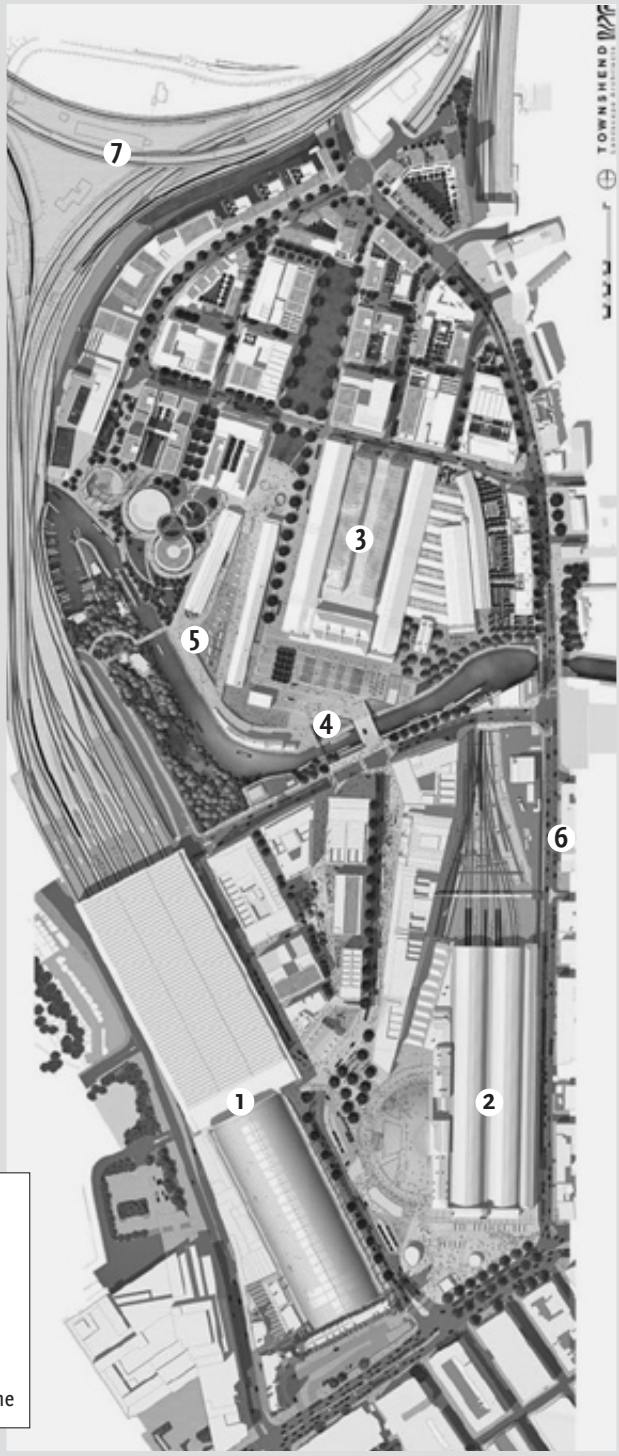
(3) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

(4) Nothing in this section or in any agreement made under it shall be construed

(a) as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan, or in accordance with any directions which may have been given by the Secretary of State as to the provisions to be included in such a plan; or

(b) as requiring the exercise of any such powers otherwise than as mentioned in section (a).

Figure 8.1 King's Cross Regent Quarter



1. St. Pancras Station
2. King's Cross Station
3. Former Depot Station
4. Granary Square
5. Eastern Goods Yard
6. York Way
7. North Londen railway line

Source: courtesy of London Borough of Camden

1

2

1 **King's Cross Regent Quarter at the start of the project**
Source: courtesy of Argent Group

2 **King's Cross Regent Quarter, artist impression of the project as intended**
Source: courtesy of Argent Group

duce more planning terminology than previous chapters as the agreement we study here has to be understood in that context.

8.1.2 Description of the area

The wider King's Cross area measures 54 ha (134 acres) and is situated in the northwest part of Central London. The project is located in the boroughs of Camden (the larger part) and Islington. The deprived, but already gentrifying, area is situated near three railway stations: Euston, an 18-track railway station that opened in 1837, St Pancras and King's Cross.[18] King's Cross St. Pancras underground station is the busiest in London.

Landmark buildings in the area are King's Cross station and St. Pancras station, the monumental gasholders (that will be protected under the new plan) and some Victorian buildings in the neighbourhood, such as the St. Pancras Old Church, Camden Town Hall and the restored Great Northern Hotel near King's Cross station.

Of importance is also that the Opportunity Area is surrounded by the residential communities of Somers Town, Maiden Lane, King's Cross and Thornhill that are among the most deprived in the United Kingdom (Camden, 2004: 13.8). On the map we also find Elm Village, a richer neighbourhood that forms the exception to this general picture of deprivation.

8.1.3 Description of the project

The redevelopment of the area is closely linked to the redevelopment of St. Pancras and King's Cross. The project area is often referred to as King's Cross Central in many publications.

The regeneration project is divided into four main proposals. It started with the redevelopment and extension of King's Cross station and St. Pancras station. In December 2007, the London terminus for the Eurostar train services to and from Paris moved from Waterloo Station to St. Pancras Station. The Channel Tunnel Rail Link (CTRL) – also known as High Speed 1 – the new high-speed railway line between London and the British end of the Channel tunnel which made this move possible – is 109 km (68 miles) in length and took eleven years to finish after the enactment of the 1996 Channel Tunnel Rail Link Act. St. Pancras will also be the terminus station of the Olympic Javelin for the 2012 Olympic Games in London.

King's Cross railway station connects London to northern and eastern Eng-

18 Euston station will be redeveloped by Network Rail and British Land; it will be enlarged from 18 to 21 tracks and will probably be rebuilt but its redevelopment is not linked to King's Cross redevelopment dealt with in this chapter.

land as well as Scotland. King's Cross Station is an important transport hub that also services the underground network. Every year, 40 million people use the station.

The redevelopment will provide King's Cross with new ticket halls and plazas. The Thameslink railway line from Bedford in the north to Brighton in the south – the only railway line to pass through London – now has a stop at St. Pancras International, the old King's Cross Thameslink station having been closed permanently in December 2007 (see Figure 8.1). The vacant land between and to the north of King's Cross and St. Pancras stations is The Main Site for the redevelopment of the area.

King's Cross Station is owned by Network Rail, whereas St. Pancras is owned by London & Continental Stations and Property, the property development company of London and Continental Railways (LCR) that develops the stations of High Speed 1. LCR is also the main landowner of the site.

The other projects in the area are Kings Place and Regent Quarter, the latter being divided in two sub-projects (The Main Site and the Triangle, see below). The Main Site is the focal project of this study.

Kings Place

The Kings Place development includes a seven story office block and a 420 seat music venue as well as some bars and restaurants. Kings Place is designed by the well-known architects Dixon-Jones, who have designed major cultural locations in the city such as the National Opera House and (the redevelopment of) Covent Garden. Development of Kings Place started in 2005 and is expected to finish by the end of 2008. It is located on York Way, besides Regent's Canal and overlooking Battlebridge Basin (see map). The project is backed by the American developer Millican & Associates inc. The larger part of the new office space is let to the Guardian newspaper and Network Rail.

Regent Quarter

The Regent Quarter development forms the basis of the King's Cross project. It is situated between and to the north of King's Cross and St. Pancras stations (see Section 8.2.2). In 2007 outline planning permission was granted for approximately 743,000 sq. m (7.9 million sq. ft.) of mixed-use development. This permission included 455,000 sq. m (4.9 million sq. ft.) of office space, 1,900 new homes, 46,000 sq. m (495,000 sq. ft.) of retail space plus hotels, serviced apartments, student accommodation, leisure, health, cultural, community, education and other uses.

The development is being led by Argent, together with the landowners London and Continental Railways (LCR) and DHL-Exel Supply Chain (see Section 8.2.7).

Regent Quarter (27.2 ha/67.2 acres) is divided into two parts: The Main Site and the Triangle site. The planning applications for both sites were submitted

in May 2004. After public consultations, amended applications were submitted in May 2005. The Main Site (26.1 ha) is located in the Borough of Camden only, whereas the Triangle site is located in Camden and Islington (see map). This means that proposals have to be submitted to two borough councils.

I will not go further into The Main Site development in this section since it is the subject of Sections 7.2 and 7.3.

Proposal for the Triangle site

The Triangle site measures 1.1 ha (2.7 acres) and comprises railway embankments, disused railway sidings and vacant land. There are no existing buildings on the site. To the south of the site is York Way and Randell's Road. To the east are residential properties along Randell's Road and Rufford Street, all within the Borough of Islington (see Figure 8.1). To the north and northeast of the site the land uses are industrial, with the adjacent site being occupied by the Channel Tunnel Rail Link (CTRL, Gossop 2007). Further to the north are the CTRL and North London rail lines. To the west of the site, beyond York Way and within the Borough of Camden, are industrial uses. To the north of and adjacent to the Triangle Site, there are advanced plans for the CTRL London West Portal Muster Area. Consent for these works has or is being secured through normal planning procedures and under the CTRL Act 1996 planning procedures. This facility is due to be opened as part of the CTRL and will incorporate a variety of support activities including signalling, emergency services, maintenance and storage facilities and evacuation routes from the CTRL and Thameslink 2000 tunnels (Hobma *et al.*, 2008).

The revised Triangle site applications (2005) reflect an increase in total floor space proposed to 26,600 sq. m (286,000 sq. ft.) and an increase in the proposed residential floor space to 21,100 sq. m (227,000 sq. ft.), with a range of affordable housing units (see Section 8.1.10) to be provided. Argent proposes to meet 'Lifetime Homes' standards and also prioritises the provision of up to 10% wheelchair accessible/easily adaptable social rented homes. The Triangle will also accommodate leisure and health facilities and new open spaces. Islington and Camden worked together in one project team for the development of the Triangle but in 2007 it turned out that Camden Council approved the S106 for the Triangle site but the Islington Council did not. In spring 2008 new public consultations started. The main objection stated was that the proposal did not meet the 50% affordable housing target but only provided for 34% of affordable housing.

8.1.4 Momentum

After almost two decades of failed planning initiatives (see Section 8.1.6), the King's Cross project regained momentum when in 1996 the Act that facilitated the regeneration of St. Pancras International Station, the Channel Tun-

nel Rail Link Act (CTRL Act) received Royal Assent. The bid for the project was won by London and Continental Railways (LCR) that constructed the new station and the CTRL.

LCR also received most of the lease rights in the wider area and hence the opportunity to kick-start the King's Cross project.

At the same time the English economy experienced a boom during the past decade, which was felt mainly in London since most of the economic improvement stems from the financial sector (the financial sector was responsible for 30% of the economic growth, 20% of London's workforce is employed in the financial sector). This left London with a need for housing and office space. Despite the fact that King's Cross is known as a deprived area, it is also superbly located. We already saw that the area is situated on the edge of central London near the railway and underground stations of St Pancras, King's Cross and Euston. Leicester Square is only five minutes away by underground.

Finally, London will organise the 2012 Olympic Games, and all foreign travellers who travel to London by train for this event will arrive at St. Pancras International. This provides extra momentum for the redevelopment of the area.

At the time when most of the research for this study took place (2006-2007), it was planned for within the context of a booming English economy that was mostly caused by the growth of the financial sector in London. During the credit crisis, the picture has changed and we will have to wait and see how these changed economic circumstances will affect the project. This, to a lesser extent, is also true of the political climate: in 2008 the London Mayor Ken Livingston, a member of the Labour Party, who had been in office since 2000 was replaced by the Conservative Boris Johnson.

8.1.5 Time frame

The project in its current form started in 2002 (see Section 8.1.6) when Argent took the first initiatives by publishing the parameters for regeneration (Argent, 2002) for the area. The project is expected to reach completion in 2025.

8.1.6 History and background

The King's Cross area has been in need of regeneration for decades and several initiatives have been taken since 1975. Planning history reflects the conflicts that arose between (some of) the present residents and landowners and local councils. The main point of conflict was, and still is, the amount of affordable housing, community facilities and local jobs that the redevelopment would provide. On the one hand, plans have been submitted that take the new international railway station as their point of departure, whereas the plans that were submitted by local action groups started with the needs of the residents. A tension existed and still exists between the strong commu-

nity action groups (mainly combined in the King's Cross Railway Lands Group, often known by its abbreviation KXRLG; see Section 8.1.13), that took a more local focus and the national/ citywide character of the plan. The project is of national importance because of the Channel Tunnel Rail Link (CTRL). In addition, the City of London was in need of more office space, because of its booming economy (cf. Section 2.1.1). On the other hand the city and the boroughs (Camden and in particular Islington are among the poorest boroughs of London) are in need of local jobs, community facilities, strong environmental standards and affordable housing. The tension between a focus on local jobs and the need for affordable housing on the one hand and a more 'commercial' focus was overcome by the S106 agreement (see Section 8.1.1) in which the developer undertook some obligations that had a local focus. However, the fact that the community benefit groups started legal actions against the planning permission proves that the gap was never completely filled (Edwards, 2006; see also Section 8.1.18b).

A short overview of the planning history (see Table 8.1), based mostly on an overview written by Camden council (Camden Council, 2006), shows that initiatives for redevelopment started as early as 1978, when the Greater London Council (GLC) started work on a redevelopment plan that was left uncompleted when the Thatcher government dismantled the GLC and virtually left the City of London without a central government until the establishment of the Greater London Authority (GLA) in 1997 (Cullingworth & Nadin, 2006; see Section 8.1.17). Another decisive moment was 1993 when a previous economic downturn forced British Rail and the London Regeneration Consortium to withdraw their plans, which had become unrealistic.

8.1.7 Project management

Camden Council, the planning authority for the larger part of the project, has found its interests somewhere in the middle between the community benefit groups and the developer. The boroughs of Camden and Islington have established a project team that is concerned with daily practice of the project. The interviewees were enthusiastic about this team (case interview LCR and Argent, KCX 04-06-A2 and A3).

Note that in London, in planning terms, the Boroughs are unitary. This means that they are responsible for setting and implementing planning policy. From 1999 on the Boroughs must have due regard the London Plan, the strategic framework for London drafted by the Mayor of London. This strategy provides a context within which individual development decisions are reached in each of the 33 London Boroughs. The planning authorities at London Borough level are required to consult the Mayor extensively; his office may 'call in' applications to be determined at the metropolitan level if the significance of the project is such that it cannot be determined at the local level. Robust

Table 8.1 Planning history

1974	Regents Canal designated as Conservation Area (extended in 1983 and 1986)
1978-1985	GLC works on Action Area Plan (left uncompleted)
1987	King's Cross identified as terminus for high speed trains
1988	Community planning brief published by Camden Council
1989	British Rail/ London Regeneration Consortium submit planning application for comprehensive development. Application later withdrawn
1989	Second application proposes mixed-use development led by offices and housing
1992	Council's Environment Committee says that it is minded to grant outline planning permission (if conditions are fulfilled)
1993	Government announces preference for CTRL terminus at St. Pancras and halts the progress of the plan. Decision coincides with major economic downturn. BR/LRC plans become unrealistic.
1994	Applications are withdrawn
1991/1994	Local architect and local community group submit alternative applications. The plans had no provision for rail infrastructure
1996	CTRL Act receives Royal Assent
2001	Main construction work on new railway infrastructure and St Pancras station starts
2004	Nine applications submitted by Argent (3 identical applications covering The Main Site and the Triangle) and indicative highway proposals for Pancras Road, Goods Way and York Way (p.7^{ms}r/p37)
2005	Revised planning applications are submitted
2006	S106 signed for main site in Regent Quarter
2008	Construction work on Regent Quarter expected to begin

and wide-ranging consultation would normally mitigate the potential for the planning applications to be called in by the Mayor. Still, because of the focus on the boroughs, one interviewee stated that he often had to deal with inexperienced civil servants, as even in a borough like Camden a project with the size of King's Cross is a 'once in a lifetime' event for most employees (case interview KCX 04-06-A2).

8.1.8 Project finance

The King's Cross project is mostly financed by private parties. We will see in Section 8.2 that an agreement has been negotiated that defines a wide range of planning obligations (the S106 agreement for The Main Site). This agreement deals with the public facilities that have to be constructed and stipulates that every time a certain threshold is reached (concerning for example construction of office space or commercial housing) the developer has to meet certain obligations.

In this project, the developer has secured the performance of its obligations with the aid of facility bonds (bonds that ensure the performance of the

obligation in the event of default by the developer). The agreement sums up the amounts of these bonds. The bicycle storage facility, for example, is secured for £26,150 and the two-form entry primary school for £2,680,000 (see Section 8.2.3).

The project is phased and requires no major public investment from the planning authority. Camden Council can however not force the developer to start construction; thus a risk exists that the project will remain undeveloped in case of a recession.

8.1.9 Ownership

Except for the rights of LCR and Exel (see Section 8.2.7), existing railway lands (and the buildings on them) are owned by Network Rail, Transco (British Gas), British Waterways and the Borough of Camden (Camden Council, 2006: MSR-4). The status of some of the existing buildings as listed monuments (or listed industrial monuments) was of importance. The No. 8 Gasholder will have to be replaced (instead of demolished) and the Triplet Gasholder will be re-erected. Some other buildings had to be restored and made fit for new uses instead of being demolished.

The relevant rights to the land that was to be used for the project were already in possession of the private landowners. LCR possesses the rights to the land (in a perpetual lease) because it won the bidding procedure for the development of the Channel Tunnel Rail Link (see Section 8.1.3). The lease that gives it the right to construct the rail link also gives it the rights to the land. Argent, a developer owned by the pension fund of British Telecom, was invited by LCR (and NCL) to develop the land.

The fact that some of the land was owned by the Crown influenced the project because a different procedure had to be followed. The fact that the Council owned land was not material to the agreement. (Camden Council, 2006: 50).

8.1.10 Affordable housing

The English planning system uses affordable housing as a key term and then draws a distinction between social rented housing and intermediate housing.

The national planning policy statement 3 (PPS3) on housing (2006) defines affordable housing as social rented housing, and intermediate housing as housing that is provided to specified eligible households whose needs are not met by the market. Affordable housing should meet the needs of eligible households including availability at a cost low enough for them to afford, determined with regard to local incomes and local house prices. Another requirement is that it must include provision for the home to remain at an affordable price for future eligible households or, if these restrictions are lifted, for the subsidy to be recycled to ensure the provision of alternative affordable housing.

PPS 3 defines *social rented housing* as rented housing owned and managed by local authorities and registered social landlords – or another landlord who received that right from a housing corporation or a local authority – for which guideline target rents are determined through the national rent regime. It defines *intermediate affordable housing* as housing at prices and rents above those of social rent, but below market price or rents. This type of housing can include shared equity products and other low-cost homes for sale and or to let at intermediate rents.

In new developments, as a general rule, affordable housing is financed by developers. To receive planning permission from a planning authority they must meet the affordable housing targets of local plans or show why these targets cannot be met. The various forms of intermediate housing reflect mostly various ownership constructions. The exception is provided by the 84 'key worker units' that are let for a sub-market rent of 20% below the market price. A 'key worker' is an invention of former mayor Ken Livingston, aimed at providing housing for people with a job that is vital to the city such as teachers and doctors in order to prevent them from moving to a city where housing is cheaper. It is generally accepted that before the credit crunch, house prices in London were so high as to make it almost impossible for first-time buyers to get on the housing ladder. One of the effects of the credit crunch has been to freeze the housing market throughout most of the UK; it is impossible to predict at present how the housing market will develop in the coming years.

Camden Council's revised unitary development plan (RUDP, 2006) sets two targets for affordable housing. The first is that 50% of all new housing development should be affordable. The second target is that 70% of the affordable housing units should be let for a social rent. These targets are in line with the London Plan and with the PPS3, which demands that the targets set should meet the needs of the local population.

The RUDP lays out the conditions under which the Council is willing to sell its planning permission and the conditions under which the developer is willing to buy that permission. This makes the negotiations associated with a given urban development project a game of offer and acceptance. The abovementioned target of 50% means that in the case of the King's Cross project, the council states that it intends not to grant planning permission to a developer who does not meet this target. But a target and an intention are not the same as a rule as we will see in the discussion of the court cases brought in connection with the grant of planning permission (see Section 8.2.8b). In respect of The Main Site agreement, the planning authority accepted proof provided by the developer that only 42% of the new housing could be affordable (see Section 8.2.11).

In a very critical statement on the S106 agreement for the Triangle project, Michael Edwards (2007) comments that 88% of the population of Islington cannot afford so-called 'affordable' housing. He adds that a right-to-buy unit

is not truly affordable housing because it is only available for first-time buyers, who receive a 15-20% discount on the market price of specified units; in other words, the affordability is not sustainable. The fact that the S106 agreement only provides for 34% of affordable housing was a reason for the borough of Islington to withhold planning permission (see Section 8.1.3, cf. Section 2.1.2).

8.1.11 Environmental sustainability

Environmental sustainability is named as an important goal in all planning documents. The King's Cross project as such aims to achieve landmark environmental sustainability. The plans speak of low energy buildings, minimal car use and enhancement of biodiversity (Camden, 2004: 13). The developer must provide an environmental impact assessment for his development, in accordance with the Town and Country Planning regulations of 1999 (LBC & LBI, 2004). The developer, Argent, has done so. The environmental statement that it submitted for the Triangle site was however deemed insufficient by the General Inspectorate. Pursuant to article 19 of the regulations, Argent had to submit further information concerning wind turbulence and noise pending its appeal to the Secretary of State against the refusal of planning permission (see Section 8.1.3).

In 2008, it turned out that (at least some of) the good intentions were being realised when the design of development zones L and G in the Eastern Goods Yard (see Figure 8.1), which includes a new university campus for Central Saint Martins College of Art and Design (University of the Arts London), retail facilities and a civic square, was praised by the Commission for Architecture and the Built Environment (CABE) in an otherwise critical report (The Guardian, 2008; www.cabe.org.uk).

8.1.12 Other public facilities

The King's Cross project is in many respects creating a new neighbourhood, and therefore includes many new public facilities such as ten new public spaces and twenty new streets, as well as the construction of a concert hall at Kings Place, art galleries and restaurants. In addition, a new university campus will be developed in an old granary at the site of the Eastern Goods Yard. This has led to the proposal of the name Granary Square for the redeveloped site, which will be one of the key features of the whole King's Cross Central development (see Figure 8.1; see also Section 8.2.13).

8.1.13 Involvement of the general public

The general public is involved in various ways. Community benefit groups in the King's Cross-area are well organised (see Section 8.1.4). The local popula-

tion is involved in the King's Cross Railway Lands Group (KXRLG) and the Cally Rail Group, a small community group based in Islington that has worked together with KXRLG to oppose elements of the Triangle proposal. The project has also gone through extensive consultation programmes, parts of which were led by the developer that had published a number of consultation documents itself (see for example Section 8.1.14). The developer, for example, organised a road show in which it presented the framework of its plans and it had made nine *vox pop* videos based on interviews with local residents (Borough of Camden, 2006c).

8.1.14 Goals of the project

Goals, targets and objectives are important keywords within the English planning context. Several plans define targets that parties strive to meet. Targets however are not strict requirements and the process of negotiation with the developer and the community shows that targets and objectives are flexible are often not met in a strict sense (see Section 8.1.10). This can be somewhat misleading since the description of the objectives and targets usually names precise numbers.

Project goals have to be understood within the context of these targets that trickle down from the national level to the level of the boroughs. The national goals influence the plans on various topics such as sustainability and affordable housing. These strategies of the government (named planning policy statements[19]) influence the plans in the lower layers.

The London Plan (2004), which lays down the mayor's 15-20 year strategy, provides guidelines for the planning authorities at the borough level. The Uniform Development Plan of the Borough of Camden (2004), the Revised Uniform Development Plan (2006) and the Joint Development brief of the boroughs of Camden and Islington (2004) are key documents.

The planning authorities (the boroughs) use their strategic documents to decide whether they will grant planning permission. The higher authorities (Mayor of London and Secretary of State) use their plans to refuse planning permission after the borough has granted it, or even to 'call in' an application. The latter means that the Secretary of State will decide on the planning application and not the borough (Cullingworth & Nadin, 2006; Section 77 Town and Country Planning Act 1990). This does not happen often.

In addition to the goals of the city and the boroughs, Argent has also published its goals. These goals can be understood as a form of pro-active involvement in the design of the new neighbourhood, but also as an attempt to influence later plans (Hobma *et al*., 2008; case interview LCR, KCX 04-06-A3).

19 Older strategies are named planning policy guidances (PPGs).

In 2001 Argent published a consultation document *Principles for a human city* in which it defined ten principles that can also be regarded as goals of the King's Cross project. These principles are:

- a robust urban framework
- a lasting new place
- promotion of accessibility
- a vibrant mix of uses
- harnessing the value of heritage
- work for King's Cross, work for London
- commitment to long-term success
- engagement and inspiration
- secure delivery
- clear, open communication.

The London plan speaks of the aim to turn the King's Cross area into a sustainable business and residential community with minimal use of cars (Section 5.37). The overall strategy of the London Plan, where the opportunity areas are named, is to:

- seek to exceed the minimum guidelines for housing;
- have regard to indicative estimates for employment;
- maximise access by public transport;
- promote social inclusion and relate development to any nearby Areas for Regeneration;
- take account of the community, environmental and other distinctive local characteristics of each area.

Within this framework, King's Cross wants to create 50% of social and affordable housing in the new development (see Section 8.1.10), promote local jobs and minimise environmental impact. We have already seen in previous sections (8.1.10-8.1.12) and will see in the remainder of this chapter that these goals are neither meaningless nor strict requirements but that they have become part of the negotiations.

The Camden UDP states that the Council seeks the sustainable development of the King's Cross Opportunity Area by achievement of the following aims:

- to support and develop London's role as a world business, commercial and cultural centre;
- to achieve economic, social, and physical integration with surrounding communities;
- to contribute positively to meeting the full range of housing, social and healthcare needs in Camden and thus to contribute to meeting London's needs;
- to maximise opportunities for walking and cycling and the use of existing

and proposed public transport facilities, thereby minimising dependence on private car use and traffic generation;
- to enhance opportunities for biodiversity and;
- to promote community regeneration through innovative processes of community involvement in the planning, design and management of the new development and services (Camden, 2004: 13.11)

These goals should result in a mixed-used development that is well integrated with surrounding areas, is characterise by a very high standard of design and implemented in a comprehensive, integrated and phased development.

So many other goals and targets are mentioned that it makes more sense to summarise them. It is fair to say that the goal in the King's Cross opportunity area is to create a new commercial district that also meets the needs of the local population. In addition, the project aims to adopt high standards of environmental quality and design.

8.1.15 Delays

The Triangle project was delayed when, in 2007, the Islington Council refused planning permission for the Triangle site. Further delays may occur if the demand for office and residential space slows down (see Sections 8.1.4 and 8.2.4). The planning authorities cannot force the developer to start construction. They can only force him to start construction of public facilities when a certain threshold demand is reached.

8.1.16 Role of private actors in the project

Private actors play a key role in the project. We already encountered the developer Argent (see Section 8.2), which has taken the lead in most aspects of the project.

Planning authorities in England hardly own any land. There are no (binding) land use plans. Planning authorities therefore have to wait for developers to draw up plans before development can actually take place.

We have seen that negotiation plays a key role in the English planning model (Section 8.1.14). As a result, the precise content of a development project depends on the negotiations between the planning authorities and the private developers. From a public perspective, as a general rule, the result will be better when development takes place in a profitable area. Still, it is hard for planning authorities to take a leading role in the process since they have to rely on the proposals of developers to concretise their plans.

8.1.17 Public actors

The public actors that are involved in the project are:

- Secretary of State – holds the freehold to the Excel lands, has the right to 'call the plan in' (via the government office for London). Every ministry in the British government has a Secretary of State, who is the senior minister for the department in question, and usually a number of other (more junior) ministers too. In this chapter, we use the term Secretary of State to refer to the Secretary of State for Transport.
- DfT (Department for Transport) – manages the integrated transport infrastructure.
- English Heritage – the planning permission for listed buildings is subject to referral to the Secretary of State and English Heritage.
- Traffic for London (TfL) – the traffic authority for the whole of London.
- London Borough of Camden – one of the two planning authorities at the local level which has jurisdiction over the major part of the King's Cross site;
- London Borough of Islington – the other planning authority at the local level which has jurisdiction over the minor part of the King's Cross site.
- The Mayor of London's office – has strategic responsibility for the implementation of the spatial strategy for London through the London Plan.
- The London Development Agency – works to deliver the Mayor's vision for London to be a sustainable world city with strong, long-term economic growth, social inclusion and active environmental improvement. It produces the Mayor's Economic Development Strategy for London, which focuses on places and infrastructure, supporting people, encouraging business and promoting London.
- The London Assembly – the elected regional assembly for London and ensures that the Mayor is accountable to the people.
- The Greater London Authority – comprises the London Assembly and Mayor and contains the directorate responsible for spatial and economic development.
- The former railway lands are owned by the Secretary of State for Transport – The Secretary of State possesses the absolute freehold title to some of the land, and the freehold interest to other parts. The difference is that in the former case the land is registered (by the Land Registry) in the name of the current Secretary of State, while in the latter case it is registered in the name of a previous Secretary of State and the rights have been transferred to the present incumbent. The Secretary of State has also taken possession of some small parts of the land that were previously owned by other parties.
- King's Cross Railway Lands Group (KXRLG) – A group of mainly local people supported by some relatively influential barristers and lawyers seeking to improve the quality of the development at King's Cross.

- Cally Rail Land Group – A local community benefit group from the Borough of Islington.

8.1.18 Critique

The project has mostly been criticised for a lack of focus on the interests and needs of the present local population (affordable housing, local jobs). Though planning targets were not met, the planning authorities mostly showed themselves satisfied with the deal they received (see also Section 8.1.10).

In 2007, a claim for Judicial Review[20] was lodged against Camden Council by King's Cross Railway Lands Group (KXRLG). The group challenged the decision-making process in relation to the King's Cross Central planning application, and the resolution to grant conditional planning permission, listed building consents and conservation area consents. We will discuss this case in more detail in Section 8.2.8b.

8.1.19 Conflicts of power: State interests and city interests; city interests and borough interests

No major gap of interest exists between the various layers of government although, as we will see, government-sponsored public bodies such as English Heritage sometimes have different interests than the developers and planning authorities (see Section 8.3.1).

The first reason for the absence of major gaps of interest between various government levels is that the borough and not the city forms the nexus of the planning process. Unlike other projects that we studied, the city mostly has negative powers (it can refuse planning permission) but it may not act as the leading planning authority in the project. The national government does have that right but rarely uses it. As a result, huge battles over conflicting state, city and local interests did not emerge.

The second reason is that Camden (and to a lesser extent Islington) has taken a pro-business approach whereby it took notice of the national and regional importance of the project. In other words, it tried to think of the project as a part of London and not from the perspective of the local residents only, since it feared that if it would do so nothing would be built at all (case interview Camden Project team, KCX 04-06-A3). On the other hand, it was precisely this attitude that led to most of the criticism of the project from the public, as indicated in Section 8.1.18.

20 King's Cross Railway Lands Group v. London Borough of Camden, Interested Parties CO/1185/2007 (High Court of Justice Queen's Bench Division Administrative Court (2007 WL 1729812)).

8.2 Focal project: the Main Site, Regent Quarter

8.2.1 Introduction

The focal project of this study is the development of The Main Site in Regent Quarter. This 27.1 ha (67 acre) site of underused land between and to the north of the stations of St. Pancras and King's Cross comprises the heart of the King's Cross Central project.

The S106 agreement deals with the planning obligations that were imposed by the planning authorities on the developers. The legal background of the agreement is that development rights in England were nationalised by the Town and Country Planning Act of 1947 (Cullingworth & Nadin, 2006). This stipulates that a landowner only owns the existing uses of his property, not the future uses: the rights to future uses are owned by the government. The government may 'sell' these uses to the developer but not for a lump sum (cf. Section 8.1 on the public-private nature of the case). In other words, if a planning authority is confronted with a request for planning permission from a developer, it can make its permission subject to an agreement on planning obligations. These planning obligations should be related to the impact of the development. A planning authority can for example not ask for a lump sum payment of £100,000 for its permission but it may ask for £25,000 for a bus line, £25,000 for a local school, £25,000 for a day-care facility and £25,000 for a construction training centre. Instead of financial contributions, a planning authority may also ask for in-kind deliveries, whereby the developer does not pay for provision of a facility but provides the facility itself (Cullingworth & Nadin, 2006).

The Main Site agreement contains a general provision stating that all parties shall use reasonable endeavours to ensure that the planning purpose underlying their respective obligations under the agreement is achieved and carried out in accordance with good industry practice at time of performance. This article illustrates once again the administrative nature of the S106 agreement: it is a private law contract drafted to achieve certain planning goals, and hence the goals underlying the obligations are of key importance (cf. Section 8.1.14). The project was visited in 2006. Case interviews were conducted with representatives of the private and the public parties and experts (see Appendix B).

8.2.2 Positioning (area)

Regent Quarter lies between King's Cross Station and St Pancras International Station stretching north beyond Regent's Canal as far as the North London Railway Line (see Figure 8.1). The Main Site is the larger part of Regent Quarter, situated wholly in the Borough of Camden. The smaller part, the Triangle, is situated in both Camden and Islington (see Sections 8.1.2 and 8.1.3).

8.2.3 Description of the project

The Main Site is a 26.1 ha (64 acre) brownfield site owned by LCR and Exel. Some buildings on the land are owned by Network Rail, Transco (British Gas), British Waterways and the Borough of Camden. For the main agreement (the S106) this was not of importance.

A general article in the S106 agreement (Section (A), opening section) states that: "…the proposed development, the subject of the Agreement involves a comprehensive, phased, mixed use development of former railway lands within the King's Cross Opportunity Area."

The Main Site will consist of 713,000 sq. m (7.67 million sq. ft.) of development, including 1700 residential units. The largest part of the development consists of office space (455,000 sq. m/4.9 million sq. ft.).

In addition, up to 650 student flats (150 studio flats and 500 cluster flats) will be constructed. The student flats will be owned by the company NIDO that specialises in commercial student accommodation. NIDO's website states that they will house 1,045 persons (see www.nidokingscross.com). The rent of the apartments will be about 200 pounds a week.

The S106 further provides details on all facilities and buildings that will be constructed, except for the commercial parts because they are not subject to planning obligations. The maximum permissible amounts of floor space are mentioned in the planning consent.

The facilities and other projects that are mentioned in the agreement are:

(i) bicycle storage facility
(ii) Camley Street natural park centre
(iii) community meeting facilities
(iv) construction training centre
(v) indoor sports hall
(vi) leisure facility
(vii) police office
(viii) primary health care centre
(xi) primary health care walk-in centre
(x) skills and recruitment centre
(xi) 'Sure start' childcare centre
(xii) two-form entry primary school

And:

(xiii) multi-use games area (MUGA)
(xiv) small business space
(xv) highways.

We will discuss some of these facilities in more detail in Section 8.2.13.

8.2.4 Momentum

The opening of the Channel Tunnel Rail Link (CTRL) in 2007 created momentum for the project. The land is now cleared and the construction work on St. Pancras station is finished. However, as we already mentioned, the credit crisis has led to a strong downturn in both the housing market and the office market in England (The Guardian, 2008a). At the time of writing (October 2008), it is not clear how this will influence the developments on The Main Site (see Section 8.1.6).

8.2.5 Pre-contractual procedure

The relevant rights to the land were already in possession of the private landowners. LCR possesses the rights to the land because it won the bidding procedure that gave it the right to develop the CTRL. The lease that gives it the right to construct the building also gives it the rights to the land. Argent was invited by LCR (and NCL) to develop the land.

The land was not owned by the council and therefore the council could not initiate a bidding procedure. LCR that owns most of the land in a leasehold construction (see 8.2.7) attracted the developer (case interview LCR, KCX 04-06-A1).

Argent took a pro-active approach and published its first consultation document in 2001.

In 2004 the developer (Argent Ltd, see Section 8.2.7) submitted the planning applications. After public consultation, the applications were modified and re-submitted in September 2005. Public consultation can be regarded as an important part of the negotiation process: since the council, which has to approve the planning applications and the S106 agreement, is made up of elected members, it is a material consideration for these members that the developer takes the public interest into account.

As compared to the 2004 applications, the 2005 applications included:

- more public open space
- new designs for streets and squares
- new health, education, sports and other community facilities
- changes to the road layout and the introduction of 'home zones'
- renewable energy initiatives, including use of wind turbines
- more native plant species
- more detail on new housing including the number of affordable homes.

Planning permission was received (after amendments) in March 2006. The negotiations on the S106 agreement and the planning permission took place in parallel. It took about two years to negotiate the agreement.

8.2.6 Time frame

Two hundred detailed planning applications are expected within the next twelve years. Building started in 2008, after LCR had cleared the site. The project is expected to take about twenty years to complete but it uses phases rather than a calendar for its implementation. The agreement ends when all obligations have been fulfilled.

Twenty-five years after the implementation date, the developer can apply to the council for written confirmation of the termination of the obligations that do not have an end date. It can also make this application five years after 75% of the total permitted floor space of the development has been practically completed. The agreement states that the council shall give such written approval when the developer has fulfilled all its material obligations, the planning purpose underlying the obligation can be reasonably said to have been met and the costs to the developer of continuing to comply with the obligation do not justify the obligation continuing in effect.

8.2.7 The contracting parties

The parties that signed the S106 agreement are the Mayor and Burgesses of the London Borough of Camden (the Council), The Secretary of State for Transport, London & Continental Railways Limited (LCR), National Carriers Limited (NCL), Argent (King's Cross) Limited (the Developer), and Transport for London (TfL).

Transport for London signed the agreement in its capacity as planning authority for the parts of the project that deal with citywide traffic issues. The Secretary of State signed in his capacity as the fee owner (lessor) of the railway lands that are in the possession of LCR. Exel PLC is the parent company of NCL. Argent, the developer, leads the process. It signed an agreement with LCR and DHL-Exel (which have pooled their land), based on which it will be in possession of at least 50% of the project in a joint venture after it has performed its part of the agreement.

Profile of private parties

- *Argent Group Plc.* – a 25 year old company, that will manage, partly own and develop about 10 million square feet of property in King's Cross by 2010 with a value of about £3.5 billion. The company is based in London and specialises in city centre regeneration in the UK. The net asset value of the company is about £160 million. Argent is owned by British Telecom Investment Scheme that is part of the British Telecom Group (one of the world's largest providers of communication and internet services).
- *LCR* – a railway company that won the bid to build and run the Channel Tunnel Rail Link ending at St. Pancras International. Due to that agreement

it became the long term lessee of most of the land (71 percent) in the area. The company consists of a number of shareholders that include National Express Group, EDF Energy, Rail Link Engineering, UBS investment bank and the French railway company SNCF.

- *DHL-Exel Supply Chain* – an international logistics company that acquired the rights to the land that is not in the possession of LCR. The company is owned by Deutsche Post World Net.

8.2.8a Other share- and stakeholders

The contract names various project organisations for the subprojects (facilities). There is a King's Cross Development Forum in which local business entities are organised. There is a construction impact group that is an existing forum adapted to allow for liaison with local residents and other interest groups regarding potential construction impacts and mitigation. In addition, there is a contractors forum described as follows (see S106 agreement, part 2, Section A, Definitions): "A forum to enable the Developer, the Developer's contractors and principal sub-contractors, the Council and occupiers of the Development using construction contractors to co-ordinate the delivery of construction employment and training initiatives within the Development with a view inter alia to improve employment and training opportunities for local people across both LB Camden and LB Islington."

Finally, there is a King's Cross Business Forum described as follows (see S106 agreement, part 1, Definitions): "The existing forum administered by the Council's Culture and Environment Directorate, aimed at businesses in King's Cross and providing networking opportunities, a strong business identity, a hub for information and discussion and access to business opportunities."

8.2.8b Involvement of the public

We have seen that both the developer and the council have undertaken public consultations. However, KXRLG (see Section 8.1.17) was not happy with the outcome of the negotiations, mostly because of the limited amount of affordable housing included in this development.

In 2007, it lodged an appeal for a Judicial Review[21] against Camden Council, arguing that it was unlawful of the Council to grant planning permission to developers in the King's Cross Central project.

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21 King's Cross Railway Lands Group v. London Borough of Camden, Interested Parties CO/1185/2007 (High Court of Justice Queen's Bench Division Administrative Court (2007 WL 1729812)).

Court procedure

KXRLG challenged the decision-making process in relation to the King's Cross Central planning application and the resolution to grant conditional planning permission, listed building consents and conservation area consents.

Most importantly, the group held that the council committee had not been free to consider whether the percentage of affordable housing in the S106 agreement was high enough. This is a complex argument that may be summarised as follows: the S106 was preceded by a Head of Terms agreement that consisted of general conditions on which the council and the developer agreed. The terms in the S106 on affordable housing did not differ from those in the Head of Terms agreement. KXRLG argued that lawyers who were involved in the negotiation of the S106 had stated to the committee that they could not reconsider the percentage of affordable housing as it did not differ from the agreement that had received their consent. Without any change in the material circumstances, the committee could only review whether the S106 was in line with the Head of Terms.

KXRLG held that if the committee had been properly advised it would have reached a different conclusion with regard to the percentage of affordable housing even when there was no material change in the planning conditions.

This line of reasoning was based on earlier cases that ruled that there is reason for review when the advice to members fettered their discretion or unduly boxed them in.[22] In deciding whether this was the case, the court should look at the whole of the advice (written and oral). Mr. Justice Sullivan, who heard this case, concluded however that the committee was not fettered in their discretion, notwithstanding the letter from a member of the Committee in a local newspaper in which she stated that the committee was under the impression that it could only review whether the S106 agreement was consistent with the Head of Terms, unless there was a material change in circumstances.

As a result the planning permission was upheld even though it was not in line with Camden's revised unitary development plan (RUDP) that included a target of 50% of affordable housing (later reduced to 42% after representations from the developer; see Section 8.1.10) of which 70% for a social rent (later reduced to 66%).

The other point in the case was that the demolition of two Victorian buildings, Stanley Buildings North and Culross Building, was not justified by wider planning benefits. The court held however that the arguments in favour of demolition of those buildings presented by the interested party and the defendant were on balance justified.

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22 Justice Sullivan cites R. v Vale Of Glamorgan District Council ex parte Adams (Journal of Planning Law, 2001, 93) and the unreported case Oxton Farms v Selby District Council (High Court of Justice, 18th April 1997, both citations under number 34).

8.2.9 Payments

The obligations of the developer are mostly in kind which means that it provides facilities. We could therefore say that the payments in the lease consist of the obligations that the developer has to perform. For a period of fourteen years the developer has to pay an (indexed) amount of £7,500 per annum to the council, to allow the latter to monitor whether he has fulfilled his obligations.

The general part of the lease mentions the duty of the developer to secure the performance of its obligations by facility bonds (see also Section 8.1.8). A facility bond secures the performance of the obligation in the event of default by the developer. The agreement sums up the amounts of these bonds. The bicycle storage facility, for example, is secured for £26,150 and the two-form entry primary school for £2,680,000.

8.2.10a Which conflicts arose with respect to the project?

There were no major conflicts between the council and the developer with regard to project. Negotiations were however tough with respect to the percentage of affordable housing that the developer would deliver (case interview with Argent and King's Cross Project Team, KCX 04-06-A3, KCX 04-06-A2 and A4).

8.2.10b How do parties deal with future conflicts?

The agreement includes a detailed procedure that parties have to follow in case disputes rise (article 16). All parties obviously want to keep their conflicts out of the courts.

When a dispute rises, a party must write a notice of dispute – a brief description of the disagreement involved – within ten days after which a settlement meeting must take place. If that meeting is unsuccessful, then five days later, mediation starts (unless the parties agree that mediation is not appropriate) in accordance with the CEDR model[23]. If the parties cannot agree on a mediator, CEDR will appoint one. If mediation is not successful, any party may write a further notice of dispute that will lead to the appointment of an expert. The expert's decision is final and binding (his costs will be divided in equal shares between the parties) but he is not an arbitrator since he will act as an expert. He is either an experienced solicitor, chartered civil engineer, leading landlord or tenant counsel or a chartered surveyor. If the parties are unable to agree on an expert, the president of the Law Society will appoint

23 CEDR stands for Centre for Effective Dispute Resolution, a large non-profit organisation supported by private and public sector organisations that specialises in mediation.

one. The expert will work as quickly as possible and will not take more than twenty working days to produce a decision.

8.2.11 Affordable housing

The S106 agreement, in line with *Planning Policy Statement 3* of the national government, distinguishes between social rented units and intermediate housing. It then names the categories of shared ownership units, key worker units, home-buy units and right-to-buy units (see also Section 8.1.11).

We have seen that the targets initially set by Camden Council (50% affordable housing of which 70% for a social rent) were not met in the final agreement: 44% will be affordable housing units (or 42% if we don't count the units that replace existing units) and 66% of these will be let for a social rent. To understand this outcome we have to bear in mind that an S106 agreement is negotiable: as pointed out in Section 8.1.10, the council accepted evidence provided by the developer that its initial targets had been unachievable.

The agreement includes detailed specifications of the social and affordable housing (in Section NN). It states that there shall be a minimum of 53,670 sq. m (577,000 sq. ft.) of affordable housing floor space (43,936 sq. m/472,000 sq. ft. of net internal floor area), sufficient for the provision of 750 units. It draws a distinction between social rented units and various types of intermediate housing. A maximum of 500 units will be let for a social rent. Of those 500, 88 will be specialists social rented units, i.e. units suitable for elderly people who require on-site attendance for their everyday needs.

This leaves 250 units of intermediate housing. These are divided into 30 shared ownership units; 84 key worker sub-market rented units (20% below market price, see Section 8.1.10); 40 shared equity units; 50 home-buy units and 46 right-to-buy units[24]. These forms – with the exception of the key worker units – reflect various ownership constructions. The realisation of these units is linked to the schedule for the building of the market housing units. For example, the first affordable housing units need to be realised when the first 125 market housing units have been completed. This means that if an economic downturn causes the project to be undeveloped, fewer affordable housing units will also be constructed.

The developer will not manage the affordable housing units itself but it will select an affordable housing provider (AHP) to which it will transfer the social rent and shared ownership units.

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24 *Shared equity* means that the developer provides funding for the house and in return receives a share of any price appreciation. *Home-buy* means that a first time buyer receives a 35% discount on the price. When he sells the house, 35% of the price he receives is re-invested in affordable housing. *Right to buy* means that the purchaser has the right to buy his house in phases.

8.2.12 Environmental sustainability

The plans set ambitious sustainability goals (see also Section 8.1.11) and the developer has expressed commitment to them. The documents specifying the environmental sustainability strategy take up no fewer than five volumes (LBC, 2006: MSR p. 9). Various sections in the S106 agreement reflect these goals: Section W deals with environmental sustainability in general, Section X with energy, Section Y with construction materials and construction waste, Section Z with waste in general, Section AA with water, Section BB with a carbon fund, and Section FF with green travel initiatives.

However, although these sections set ambitious goals for the future, all obligations are formulated as reasonable endeavours. This means that they cannot easily be enforced by the planning authority.

8.2.13 Other public facilities

Other public facilities that are mentioned in the agreement are:

- a small business space (Section D);
- community meeting facilities (accommodation of not less than 370 sq. m GEA for the local community, Section H);
- facilities for the support of local schools (Section K);
- a police office will be constructed by the developer and leased to the Metropolitan Police (Section I);
- there are agreements for Children's Centres, a two-form entry primary school and a multi-use games area (MUGA), see Section J. With the exception of the MUGA these facilities will be constructed by the developer and leased for a peppercorn rent to the Council;
- there will be a floating classroom (a vessel comprising a floating classroom using moorings in the vicinity of the Development, Section K definitions) that is meant to encourage direct input into the curriculum from occupiers within the development (in such areas as financial literacy and the development industry);
- Section L (leisure) mentions an indoor sports hall (1500 sq. m GIA), a LAP ("a high quality local area for play of no less than 100 sq. m to include no less than four (4) features that enable children to identify the space as their own domain, for example a footprint trail, a mushroom style seat or a model of an animal or insect and some individual seats for parents or carers"), a LEAP ("a high-quality local equipped area for play of no less than 400 sq m to include no less than six pieces of play equipment") and a leisure facility (public health and fitness facility of no less than 3,000 sq. m GIA).

8.2.14 Goals of the project

The agreement mentions as its goal the development of "…a comprehensive, phased, mixed use development of former railway lands within the King's Cross Opportunity Area" (Section A).

As we discussed in the first section, the English planning system sets many goals, targets and objectives (Section 8.1.14) which trickle down to the project level. The goals of the various sub-projects (facilities) are mentioned in the second part of the agreement, which deals with specific obligations. I give one example of the formulation of these goals: Section A of Part 2 of the agreement deals with employment and construction training. Its definition section names the following three 'agreed targets':

1. 7.5% of the person-weeks of employment used in the on-site construction of the development should be provided by trainees recruited via the Construction Training Centre or other facilities and programmes targeting training;
2. of that 7.5%, two-thirds should be trainees "working towards an NVQ (national vocational qualification), the balance to include trainees following specialist and customised short-course training leading to industry-recognised qualifications and training under the Construction Skills Certification Scheme, the split between these various components to be agreed between the Developer and the Council on a rolling basis, every two years"; and
3. these trainee workers should receive appropriate supervision and support wherever possible from a qualified trade assessor, to be provided by construction employers on the development site.

8.2.15 Delays

Delays have not been reported yet, but the implementation of the plans will be delayed if the economic downturn continues. Argent's obligations depend on its own phasing of the commercial development; it will only start construction of the office and residential space if there is a market for it (case interview KCX 04-07-A4).

8.3 Common contract norms in King's Cross, Regent Quarter (The Main Site)

After the above general description of the King's Cross project, we will once again examine the significance of the ten common contract norms (see Section 3.4) in the context of the development agreements in this case study.

8.3.1 Introduction: general sketch of the agreement

The contract that was studied for this case is the S106 agreement for The Main Site of Regent Quarter, which was drafted in the form of a deed. One of the advantages of a deed compared with a contract is that not every promise in it needs to be backed by a consideration (see Section 2.7.2.3).

Camden Council made its planning consents subject to a legal agreement; it follows that the goal of the S106 agreement is to make provision for the planning obligations that are material to the planning consents.

The S106 agreement in question, dated 22 December 2006, states that it was closed pursuant to Section 106 of the 1990 Town and Country Planning Act.[25]

The council and the developer have worked closely together; on some issues they were on the same side of the table when they negotiated with other public authorities such as English Heritage and TfL. But on other issues, most notably on affordable housing, they took an adversarial approach (case interview King's Cross project team, KCX 04-07-A4). The execution of the agreement requires a partnership-like approach: the council and the developer will have to reach consensus in many issues and organise regular meetings to discuss them. Therefore, after the parties have signed the agreement, they will try to let their relationship be defined by cooperation. In an interview with the Times (2006) Argent's director emphasised that he had never met any of the sixteen council members during the time when they had to decide whether to grant planning permission or not. However, although the S106 is a constitutive part of the planning permission, it is in itself a negotiated agreement. And the parties (with Camden Council's King's Cross project team acting on behalf of the council) had to negotiate for two years to discuss specifics.

As in previous case studies, we will start our analysis of The Main Site agreement with a tabular display of all ten common contract norms on a discrete/relational scale. This will be followed by a discussion of each of the common contract norms in turn, and the chapter will end with a general assessment of the relative importance of the discrete and relational norms.

In Table 8.2 we see that the common contract norms are quite well balanced between discrete and relational.

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25 It also mentions section 16 of the Greater London Council (General Powers) Act 1974, Section 111 of the Local Government Act 1972, section 156 and schedules 10 and 11 of the Greater London Authority Act 1999 (art. 2.1) that are of less importance to us.

Table 8.2 Discrete/relational matrix for common contract norms in King's Cross Regent Quarter (The Main Site)

Norm	More discrete than relational	Equally discrete and relational	More relational than discrete
Role integrity	×		
Mutuality		×	
Implementation of planning		×	
Effectuation of consent	×		
Flexibility		×	
Contractual solidarity			×
Linking norms	×		
Creation and restraint of power			×
Propriety of means		×	
Harmonisation with the social matrix			×

8.3.2 Role integrity: more discrete than relational

The S106 agreement makes a strict distinction between the various capacities in which the parties have signed the deed and will perform their obligations. This is the main reason to conclude that the discrete elements are more noticeable than the relational elements in the agreement. The absence of the council members from the negotiation process supports this argument.

Capacities

The deed spells out in which capacity the (many) parties are involved in the agreement. Governmental entities at the local, city and national level have co-signed the agreement and the capacity in which they signed has to be specified to make sure that no conflict of authority arises. The Secretary of State thus only signs the agreement in his capacity as a landowner, not as a legislator or as an authority controlling the local planning authorities.

Examples are:

- Article 7.2 states that approval or consent by Transport for London (TfL) for any modification or variation is only required when it concerns obligations relating directly to TfL.
- The lease states in article 9 that nothing in the lease shall fetter the statutory rights, powers or duties of the Council or require it to act inconsistently with them. And it repeats that provision for the Secretary of State and TfL.

We saw that the parties that signed the lease are the Secretary of State, Transport for London, the Council of the London Borough of Camden, and the private companies of London & Continental Railways Limited, National Carriers Limited and Argent (King's Cross) Limited (see Section 8.2.7).

Transport for London (TfL) signed the deed in its capacity as statutory public transport services provider and as the highway authority responsible for cer-

tain roads in the vicinity of the project area.

The planning authority is the London Borough of Camden that has signed the deed because of its interest in the proper planning of the area and because it is the local highway authority for the area. It has issued the Planning Permission, the Listed Buildings Consents and Conservation Area Consents subject to the agreement. And it states that in its capacity as highway authority it considers that the subjects of the agreement are of public benefit.

Relation between private parties

The developer (Argent), LCR and NCL have confirmed that they are jointly liable for all obligations. Argent will own at least 50% of the area when it has performed its obligations under a contract it has closed with LCR and NCL.

8.3.3 Mutuality and reciprocity: equally discrete and relational

The mutuality norm has both discrete and relational elements. The discrete elements are found in the specific contributions and facilities the developer has to deliver. The relational elements are found in the parts of the agreement in which the obligations are more intertwined. Argent, for example, pays the Council to enable the latter to perform its monitoring obligations (see Section 7.2.7). This can be easily framed as a *quid pro quo*.

Another relational element is that notwithstanding the specific formulation of all obligations, the contract also states specifically that the underlying planning goals are the reason why these obligations exist.

The main *quid pro quo* of the agreement is however found in the granting by the planning authorities of planning permission for development of the site in return for the fulfilling of certain obligations by the developer. The Secretary of State first closed an agreement with LCR in which LCR received the right to build and operate the CRTL, and the right to develop the railway lands in the area.

Above all, the contract spells out the agreements between the developer and Camden Council. It thus tells us under which conditions Camden Council (and Transport for London) was willing to allow the development in the area. This permission is based on a mixture of in-kind deliveries of facilities by the developer and payments for services to be realised by (or on behalf of) the Council for the most part or TfL for the lesser part (see Section 8.2.1).

The developer and the council need to work together to realise the facilities mentioned in the lease. But they do not share the financial risks of the construction. These risks are all for the private parties.

Still, although it may not share the specific financial risks, the council needs the project as much as the private parties do and thus had to accept compromises. As a result, another quid pro quo is found in the relaxing of

some requirements. The required percentage of affordable housing was for example lowered from 50 to 44% on the basis of evidence provided by the developer that the 50%-target was not achievable (see Section 8.1.10). Parties spoke of a give and take process (case interviews KXC 04-06-A1 and KXC 04-06-A4).

8.3.4 Implementation of planning: discrete and relational elements

The agreement implements a detailed planning that works with phases (not dates). Obligations of the developer are due when certain phases are reached. For example, when a certain number of residential units or a certain total number of buildings has been constructed or a certain number of square metres has been realised for a specific use, the developer has to fulfil certain stated obligations.

The discrete elements of the planning come into existence when a phase starts. The agreement provides for example a detailed planning for the construction of affordable housing. It also provides very specific rules for dealing with conflicts. But the council and the developer will have to meet in many cases before a phase can start. The details and precise moments of the construction are not yet determined.

The planning is fairly detailed but the council cannot force the developer to start building (there are no dates) and the contract urges it to set a new timescale when the developer does not meet (a specific part of) the planning.

We saw that the contract ends when all obligations are fulfilled. It does however state that when the developer has created 75% of the project it can ask the council for a written approval that its obligations are terminated. It can also do that twenty-five years after the implementation date (the date when the development started). Since all parties expect the project to be completed in 12-15 years' time (Borough of Camden, 2006b), this is merely a technical legal obligation (see Section 8.2.5).

8.3.5 Effectuation of consent: more discrete than relational

Within a certain range, the agreement offers much security for the developer. He knows what he has consented to and what it will cost. Although not all details are clear, as long as the planning goals are not changed, he knows what he will have to pay for. For the council, the agreement is not as clear since some of its planning goals, most notably the environmental norms, are only obligations of endeavour and it will thus have to wait and see what will come of them.

The agreement is fairly detailed and most implications of the consent are

clear. Although the agreement leaves room for flexibility (see Section 8.3.6), the facilities that are to be created are spelled out in detail in the agreement. Although the detail is less than the council was used to (Borough of Camden, 2006b), this agreement strikes the non-English reader as being highly specific.

Still, the second part of the S106 agreement, dealing with the specific obligations on the parties, uses what we may call a framework consent. Parties have agreed which features the facilities should have but still need to agree on the concretisation of these facilities.

Examples are agreements on public art and public spaces where children can play. In both cases, the parties have agreed on the kind of facilities to be constructed, but they have not agreed on the choice of specific artwork or a specific design for the local play area yet.

It is thus not possible to know exactly to which physical realisation parties have consented.

8.3.6 Flexibility: equally discrete and relational

The flexibility norm has both discrete and relational elements; the aim is to provide flexibility within the framework of a strict contract.

Achievement of the right balance between precision and flexibility is seen as an important aspect of the agreement (Camden Council, 2006b, case interview KXC 04-06-A1). The project will take 12-15 years to develop, it may thus be necessary to adapt it to market circumstances, whereas on the other hand facilities made for the public (affordable housing, training programmes) should not be allowed to become the victims of such flexibility. The facilities however are part of the phasing of the project, they are only realised when a certain project target has been met. While at the same time, the developer is not under a duty to start building when there is no market for the properties he develops (the council cannot force him to start building).

We saw that the agreement introduces a system of maxima. For example, it spells out the maximum number of square metres for the whole project, and the compulsory percentage of affordable housing to be built (see Section 8.2.11). The maxima laid down for all parts of the project are compulsory, e.g. the maximum area to be devoted to commercial space, but the minima are not. It is thus possible to trade some functions within the project (e.g. more 3-bedroom apartments and fewer 2-bedroom apartments, more commercial space and less commercial housing). This is meant to provide some flexibility for the project.

In addition, some of the obligations (mostly those related to environmental sustainability) are only obligations of reasonable endeavour. The overall goal of the project is to achieve a high level of sustainability, but the S106 agreement leaves the developer plenty of flexibility to look for the best ways to achieve these goals. It even allows the developer to conclude, after some ef-

fort, that it cannot reasonably be expected to implement the measures mentioned in the agreement.

8.3.7 Contractual solidarity: more relational than discrete

The contractual solidarity norm has more relational than discrete elements. The developer and the council 'team up' to make sure that both parties are able to perform their duties. The above-mentioned fact that the developer pays for the monitoring costs of the council (see Section 8.2.7) may be seen as an example of this.

All parties have an interest in the realisation in the project. Most notably, the private parties and the borough of Camden are actively working to realise the project. Of the private parties, Argent Ltd, the developer, is the most active. The project is unique for Camden and parties need one another to realise it: there are few – if any – options for achieving their goals outside the agreement.

Still, not all parties are equally dependent on the realisation of the project. The project is essential for the future of the borough of Camden. Argent also depends on the realisation of the project, since this is the only way it can become a landowner in this area and/ or recoup its investments.

For LCR, on the other hand, the project is less important than the realisation of the Channel Tunnel Rail Link. Of course, it would like to see a high quality environment for its international transport hub at St Pancras International but this is less vital than the creation of the rail link.

For Exel, the project is mostly an investment. It cooperates with the planning but does not undertake any activity itself.

The governmental entities involved mostly take a passive approach: they review the plans and see whether they are consistent with their own objectives, but they do not actively shape the project.

Camden and the developer work closely together and try to be soft where possible and hard where necessary (case interview King's Cross Project Team, KXC 04-06-A1 and A2). When problems arise, their aim is to find a solution that serves their mutual interests and not to insist on their legal rights.

The agreement specifies an extensive mediation and arbitration procedure, the aim of which is to try to work out a solution by consultation or by submitting to the judgment of an expert instead of a lawyer (Section 8.2.10b). We may consider this agreement as an example of contractual solidarity; it emphasises the parties' willingness to work together, to confer when things go wrong, and to put their faith in experts.

Another example of contractual solidarity is the phasing of the project, which motivates parties to work together to realise the project because they have no power to force one another to start certain activities such as con-

struction work. The party most in need of such powers would be the Borough of Camden.

Finally, an article in the S106 agreement states that the council covenants with the Secretary of State, LCR, NCL and the Developer that it will upon reasonable request certify compliance or partial compliance with the provisions of the agreement and will at the cost of the developer execute a Deed of release or Partial Release (no more than once in any twelve month period). This is also an example of contractual solidarity because the article is meant to make sure that the council will take the interests of the developer into account if the latter needs a certification of compliance.

8.3.8 The linking norms: restitution, reliance and expectation interests: more discrete than relational

Restitution interests are specifically mentioned in the agreement. Sums paid by the developer will be reimbursed (after ten years unless otherwise stipulated) if the planning authorities do not use them for the agreed purpose.

Another article determines that when a planning gain supplement is issued for the same purpose as mentioned in the agreement, the council will try to convert the obligations so that the developer does not finally have to pay more than he had to pay when he signed the agreement (this is an example of a reliance interest).

All parties expect that the project referred to in the S106 agreement will be realised. For the Borough of Camden, which needs the project the most, this expectation interest is of enhanced importance. By that I mean that it would probably be less of a problem for Argent to wait for a better economic climate if the development of (parts of) the project turned out not to be profitable. Whereas the people in need of affordable housing will not disappear and their number will more likely grow in case of an economic downturn.

8.3.9 Creation and restraint of power: more relational than discrete

The creation and restraint of power norm is more relational than discrete; it exists within a context of phasing. In the end, the developer is only bound to fulfil his obligations if the scheme as a whole is profitable to him. The agreement does not give the developer much power over the council but it does provide it with soft powers: the council is bound to the plans on which the agreement is based, otherwise nothing will be constructed at all.

The agreement creates the power for the developer to construct the project, without the agreement it could not start since planning permission was made subject to it.

The agreement also vests powers in the borough of Camden. It can monitor the project and, more importantly, has the right to enforce the obligations of the developer to develop the stated facilities when he constructs the buildings.

The agreement provides some (indirect) rights for third parties, since it is not the intention to grant third parties the right to litigate for performance of the obligations laid down in the agreement.

Examples of rights for third parties and for parties to the agreement:

- Third-party rights: Section I of the S106 agreement determines that the developer shall construct a police station and lease it to the Metropolitan Police.
- Rights for parties to the agreement: Section J states that the developer shall construct a two-form entry primary school and child care centre and lease them to the Council at a peppercorn rent.

8.3.10 Propriety of means: discrete and relational elements

The propriety of means norm is of enhanced importance in the agreement because of the many parties involved in it. The agreement spells out specifically which party has which means and how they relate to the project.

It not only states who possesses which means but also, in detail, under which conditions it can exercise rights or has to use its means. The propriety of means norm is thus also an adequate means norm. An example of adequate means is:

- Section Q which states that the developer shall undertake the commissioning and programming of public art within the Public Realm Areas: (a) in an open and collaborative manner; (b) in consultation with the council and other appropriate third parties identified by the council (…)."

8.3.11 Harmonisation with the social matrix: more relational than discrete

The supra-contract norms that are most emphasised in the agreement are trust and co-operation. The project takes a long time to complete in a crowded area where many different parties have interests. It is therefore of the utmost importance that the various parties should be able to trust and understand one another. This explains why so much emphasis is placed on the value of cooperation. Argent organised workshops to which it invited the council's project team. LCR usually attended the workshops; the project team did not attend all of them, since it felt that it was obliged to maintain a certain distance from the other parties. Still, these workshops gave the parties the opportunity to understand one another better. They tried for example to

Table 8.3 Relative importance of discrete and relational norms in King's Cross Regent Quarter (The Main Site)

1. Discrete norms		
Enhanced importance of:	Yes	No
Discreteness	×	
Presentiation	×	
Implementation of planning*	×	
Effectuation of consent	×	
2. Relational norms		
Enhanced importance of:	Yes	No
Role integrity	×	
Preservation of the relation	×	
Resolution of relational conflict	×	
Propriety of means		×
Supra-contract norms		×

* When the norms of discreteness and presentiation are not of enhanced importance, it makes more sense to view the implementation of planning norm as a relational norm. In other words, the importance of planning in such projects then follows from the nature of the observed relation between the parties rather than from the wording of the agreements.

use the same definition and points of reference when they spoke of sustainability (case interviews, KCX 04-06-A1, A2, A4). Other examples of harmonisation with the social matrix are the facts that the council and the developer agreed on principles of large-scale mixed-use development (Borough of Camden, 2006b) and that the agreement includes a construction practice code (S106 agreement, Section DD).

As described in Section 8.1.13, Argent helped to promote public participation, for example by organising a road show in which it presented the framework of its plans. It also made nine *vox pop* videos including quotes from local residents. It further worked to create an atmosphere in which its plans would be received readily by the council (case interview Argent, KXC 04-06-A2).

All parties have the power to delay the project, but since they all believe that they will profit from quick realisation of the project, there is considerable motivation for them to work together.

8.3.12 Assessment of the agreements on a discrete-relational scale

I start this final section with an overview of the importance of the various norms. Inspection of Table 8.3 shows that all discrete norms, and most relational norms, are of enhanced importance. Similarly, Table 8.2 above indicated that the common contract norms are well balanced between discrete and relational. The overall result of our analysis of the King's Cross agreement

would thus seem to be that there is an even balance between relational and discrete elements. The reason for that would seem to be that the agreement is complex and speaks of many subjects, whereas it also tries to find a balance between defining strict obligations for the developer and leaving room for more flexible and cooperative approaches. As a result it almost reads like two different stories: one based on numbers and obligations, the other dealing with the attempts to build a relationship between the neighbourhood and the developer that will last more than a decade. Since that is ultimately what will probably be needed for sustainable development.

9 Comparative analysis of the cases on the basis of relational contract theory

9.1 Introduction

In the Chapters 5-8, we have used the common contract norms introduced in Section 3.4 to analyse contractual relations in five focal projects within the context of strategic urban renewal projects. In this chapter we will draw comparative conclusions. We will use the same approach as was used in the case studies themselves (see Section 3.10), which involves examining all common contract norms in turn to see how they apply to the case in question. This detailed, case-specific treatment now allows us to compare the different cases, identifying differences and similarities between them. We will do this for each of the ten common contract norms in turn, ending the discussion of each norm with suggestions on how some of the agreements could be improved with respect to the norm in question. The aim of these suggestions is not to change existing contracts, but rather to lay down principles for the drafting of development agreements of the type considered here in general. The proposals however are mostly meant as concretised conclusions. They provide a direction for development agreements but we are not claiming that they could be incorporated into every contract in the formulation given here.

Three further premises inform this chapter. The first premise is that an agreement that gives a more specific account of the relations in which it is embedded is better than an agreement that fails to do so. The second premise is that such an agreement will be able to solve more of the problems that occur in these relations than an agreement that fails to do so. The third premise is that it follows from the nature of the cases that relational norms are of key importance for a development agreement to function optimally.

Sections 9.2.1-9.2.10 all have the same structure, starting with a discrete/relational matrix for the common contract norm in question for all project studied. Suggestions for improvement are given at the end of each section. After an indication of the recommended timing – or more correctly the phasing – of measures taken to solve the problems arising in connection with the various common contract norms (Section 9.3), this chapter ends with some general conclusions.

9.2 Comparative analysis of the role played by the various common contract norms

9.2.1 Role integrity

Considered as a discrete norm, the role integrity norm is not complex since parties enter a transaction in their capacity as utility maximiser and their relation is limited to the context of the transaction: any aspect of the relation

Table 9.1 Discrete/relational matrix for the role integrity norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City		×	
Hudson Yards			×
Gershwin			×
Mahler4			×
King's Cross	×		

not relevant to the transaction is not taken into account. When considered as a relational norm, role integrity is a very complex norm that includes many different roles.

If we look at Table 9.1, we find that the role integrity norm is more relational in Hudson Yards, Mahler4 and Gershwin and more discrete in King's Cross. In Battery Park City, it has both discrete and relational aspects. Differences are found mostly in the approach to the contract and the project. Although representatives of the King's Cross project team emphasised that they worked together with the developer, the roles of the developer and the regulator were clearly separated (case interview King's Cross Project Team, KXC 03-06-A3 and 04-06-A4). In addition, the S106 agreement used in this case tried to ensure that the planning authorities always acted in one specific role and left the other relations out when they dealt with a specific project. It seems to have been successful in achieving this aim.

In Hudson Yards, Mahler4 and Gershwin we saw that the separation between the roles of the public parties was less strict since they acted both as developers and regulators. Role integrity here became a very complex norm. Although parties in Hudson Yards could always fall back on a stricter separation of roles, the contracts in Amsterdam did not include that option.

As mentioned above, the role integrity norm in Battery Park City had both discrete and relational elements whereby the financial terms of the lease were formulated in a very discrete manner (landlord-lessee relationship) but the role of the Battery Park City Authority in the development process clearly also had relational aspects.

Similarities and differences

Role integrity turned out to be of key importance in the focal projects in Zuidas, Hudson Yards and to a lesser extent in Battery Park City and King's Cross. In Battery Park City, role integrity was a key issue in 1968 when the first master plan was drafted and was perhaps the main reason why the BPCA was established as a public benefit corporation (see Section 5.1.5). In Hudson Yards, role integrity was mostly at issue in the relationship between the developers and the public parties: the role of the MTA as a subway developer and that of the HYDC which covered the project as a whole were a source of conflict and complexity. In King's Cross, role integrity was of key importance during the negotiations on the project as the different planning authorities worked out their stance on the agreement. But in the agreement itself, the roles are clearly separated and we may conclude that the enhanced importance of role

Table 9.2 Problems associated with role integrity

Role integrity problems most visible	In relation between public parties	In public-private relations	In relation between private parties
Battery Park City	×		
Hudson Yards	×	×	
Gershwin		×	×
Mahler4		×	×
King's Cross	×		

integrity in the negotiation phase is better understood as a struggle for power between the different authorities. Once the negotiations are over, role integrity issues lose much of their complexity as we saw in Battery Park City and King's Cross.

Phasing

Problems associated with role integrity may arise in the conceptual phase of the project, during the negotiations and after the contracts are signed (see Table 9.2).

In Battery Park City, the role of the BPCA as a public benefit corporation sometimes led to tensions that emerged from the conflicting goals of closing the best business deal and implementing the environmental guidelines and design guidelines (case interview BPCA, BPC 02-07-A1). In the focal projects considered here, however, the role of the BPCA seemed very clear to both the developers and the BPCA itself. The question of role integrity did play a minor role when the BPCA had to choose between various proposals and had to balance between profit maximisation and environmental considerations.

In Hudson Yards, the problem of role integrity also emerged during the negotiation phase. The developers wanted to work simultaneously with the MTA to construct the grid for their future buildings. As a result the role of the HYDC with its pro-development approach conflicted at times with that of the MTA, which mainly wanted to build the subway extension. The leases dealt with this problem.

In the Zuidas case, the City of Amsterdam was the only contracting party on the side of the government in the Mahler4 and Gershwin projects. Problems of role integrity mostly emerged after the contracts were signed. It was then that the tension between the roles of the city as landowner and regulator came to the surface. The land use plans had not been drafted by the time the contracts were signed. And although the city took a cooperative attitude towards the developers, its goal of creating a lively neighbourhood conflicted at some points with its role as a landowner wishing to strike a profitable deal.

Role integrity was a key issue during the negotiation phase of the King's Cross project. Not only the Borough of Camden but also Traffic for London, the Mayor of London and the Secretary of State for Transport had interests in Regent Quarter (the part of the King's Cross project we were interested in). These different roles were recognised and dealt with extensively in the S106 agreement.

Phases where problems are most often found are summarised in Table 9.3.

Table 9.3 Phasing of problems associated with role integrity

Phase where problem is most often found	Negotiation	Post-contract
Battery Park City	×	
Hudson yards	×	
Gershwin		×
Mahler4		×
King's Cross	×	

Thus, in King's Cross, Battery Park City and Hudson Yards, role integrity was mostly an issue during the negotiation phase whereas in Zuidas it was mostly an issue after the contracts were signed. We may discern three explanations for these differences: (1) the type of legal agreements involved; (2) the approach taken to the legal agreements; and (3) the role of the public actors in the development process. These three explanations will be discussed in greater detail below.

The type of legal agreements involved

The contracts in Amsterdam were closed at an earlier phase of the project than the leases in Battery Park City and Hudson Yards. The contracts in Amsterdam lay out the conditions under which the leases will be closed in the future. This offers an explanation for the differences between those cases but it does not explain the differences between the contracts in Amsterdam and the S106 agreement that was closed in King's Cross. The S106 agreement advances more detailed plans and was closed at the same phase of the project as the contracts in Amsterdam. But the S106 agreement is of a different nature since it does not specify the conditions under which land is leased but the conditions under which the planning authorities are willing to grant planning permission. It had to deal with issues of role integrity at the time it was drafted, since there would be no other moment to do so later. In Amsterdam, these issues could be postponed to a later stage, between the time when the land use plans were made and the designs reviewed up to the time when the leases were closed. In other words, in Amsterdam the city signed the contracts in its private law (or proprietary) capacity, leaving it the opportunity of making use of its public law (regulatory) capacity at a later stage. In London, the S106 agreement is a private law contract signed by the planning authority in its public law (regulatory) capacity and therefore offering almost the only opportunity to decide on the project. It is thus a final document from both a public and a private law perspective (cf. Section 7.1.1).

The approach taken to the legal agreements

The parties in the New York and London projects took an on-off approach to their legal agreements. They wanted to reach an agreement on as many issues as possible before development started. Either there was a signed legal agreement on all issues, or there was no agreement at all.

In Amsterdam, the contracts were part of an ongoing negotiation process and were left deliberately vague. This approach seems in line with the differences we discussed in Section 2.7, where we mentioned the existence of an objective principle of good faith in the civil law system of the Netherlands, and the principle of consideration in the common law system of England and the

United States. The differences between these principles, may – in combination with a different mindset that may characterise the actors in the systems – explain why the parties in Amsterdam aimed to keep their agreements open and wanted them merely to highlight the main principles of their cooperation process whereas the parties in New York and London accepted that their agreements had to function like statutes (case interview Amvest GER 02-06-A1; case interview Sheldrake, BPC 11-05-A3). These differences provide another reason why the role integrity norm had to be dealt with extensively in the negotiation phase. This argument holds not only for the role integrity norm but also for the implementation of the planning norm (see Section 9.2.3 below).

The role of the public actors in the development process
Generally speaking, developers in long-term projects prefer open contracts to very precise contracts (e.g. Frieden & Sagalyn, 1989). It provides them with the opportunity to deal with problems when they arise and look for flexible solutions. The interviewees in Amsterdam named this as a reason why they opted for open contracts. The City of Amsterdam has a long tradition of playing an active role in development processes (see Sections 7.3.5 and 7.4.5). In London, the Council of Camden had to be convinced that an agreement that leaves issues open had advantages for it as well as being profitable for the developer (case interview with Argent, KCX 04-06-A2). These considerations do not however explain the difference between the cases in New York and Amsterdam.

Complexity
Complexity is a relational feature of the role integrity norm. While the discrete form of this norm confines the role of the parties to that of utility maximiser, the roles involved become very complex in a relational context.

We encountered two sorts of problems that arise in connection with this norm. The first is that of complexity, and the other is the lack of complementarity between the contracting parties or within a consortium of private parties. The latter issue is discussed below later on in this section.

In the relation between the public and the private parties, the problem of complexity is most visible on the side of the public parties. It is the result of the different tasks that public parties fulfil in the development of urban development projects. This often leads to conflicting roles. In addition, in all cases more than one tier of government was involved in the project and often different departments from a given tier had some authority over the project. These different departments (and/or agencies) have different goals. The goal of a transport authority like Traffic for London (TfL) to promote the quality of the infrastructure may conflict with the goals of English Heritage, which exists for the protection of cultural relics from the past. It is not easy for government – understood here as the amalgam of all those tiers, departments and agencies – to speak with one mouth.

And even if all those different tiers would more or less underwrite the same goals with regard to the project (as was most notably the case in the Zuidas project in Amsterdam and in Battery Park City), various tiers will have to fulfil different tasks that imply different roles.

Here two tensions are most noteworthy: the first is that between the roles of landowner and regulator, while the second is that between the roles of contracting party and democratic government.

The tension between the roles of landowner and regulator was most visible in Amsterdam where the gap was never bridged and resulted in one of the most complex agreements of the case studies (in particular the provisions concerning air rights in the Gershwin project, see Section 7.2.5). In the Zuidas cases, the local government used its position as a landowner to strengthen its position as a regulator. The contracts showed a complex interplay between those two roles that was the source of most frustrations and conflicts. An example of this kind of frustration is that felt by the developers when faced on the one hand by the city's requirement that they should write a vision statement as part of the bidding procedure for the Gershwin project and on the other by the city's desire, as a landowner, to get the best price for its land (see Section 7.2.5).

The tension between the roles of landowner and regulator was solved in the New York cases by the establishment of special public corporations that played specific roles at some distance from the (democratic) local government. In Battery Park City this resulted in the establishment of the (state-owned) Battery Park City Authority (BPCA), which serves the project and has no interests outside Battery Park City. Similarly, the (city-owned) Hudson Yards Development Corporation (HYDC) only manages the land and air rights owned by the state but is not a landowner itself (see Section 6.2.3). Like the BPCA, it only serves the interests of the Hudson Yards project and can defend these interests against other city policies.

In London, the fact that the King's Cross lands were ultimately state owned only resulted in the co-signing of the deeds by the responsible Secretary of State (see Section 8.2.7a). A few parcels were owned by the borough of Camden, the tension between those positions was overcome by making the contracting process a part of the legislative process and by strictly separating the government's role as landowner from its legislative role.

In Amsterdam, some of the complexities that arose from these conflicting roles could probably have been avoided if the city had adopted the London or the New York approach. But then again, if it had done so, the city would have lost some of its influence. The establishment of the Battery Park City Authority was criticised for its lack of democratic procedures. And the English approach suffers from the lack of a powerful regulatory instrument.

Still, the role of the government in Amsterdam is at some points over-complex and results in more uncertainty than we encountered in New York and

London. However, given the mindset of Dutch administrators it is difficult to imagine that they could have acted much otherwise.

Tension between contracting party and democratic government

As mentioned above, the second tension leading to complexity in the role integrity norm is that between the roles of contracting party and democratic government. This tension was most visible in London where the borough of Camden issued planning permission under the condition that a contract would be signed between the developer and the borough whereas the agreement also mentions planning permission as a condition for its existence. The contracting process then becomes intertwined with the regulatory process. This results in tensions due to the conflicting roles of the council negotiators who have to work within the limits the council sets for them and at the same time have to convince the council of the quality of the agreement they reached with the developers. In the smaller part of King's Cross' Regent Quarter, the Triangle, this process failed when Islington Council refused planning permission because it found the amount of affordable housing proposed in the S106 agreement too small (see Section 8.1.3).

In New York, the tension was (partly) overcome by the establishment of separate corporations (the HYDC and the BPCA) that managed the project but had no legislative power: as a result these corporations are as much on the side of the developers as they are on the side of the different departments of government when they deal with regulatory issues. It is true that in Battery Park City, the BPCA did also impose its own regulations in the leases. These regulations are however standardised and are not commonly subject to discussion by any representative organ, thus developers know in advance which requirements they will have to deal with. There is no question of any democratic process as a source of tensions here.

In Amsterdam, as in the whole of the Netherlands, the tension was solved by a separation of powers between the municipal council on the one hand and the mayor and aldermen (the city board) on the other. The council provided the board with the principles within which the board may use its contractual authority. It does not interfere with the actual contracting process. The selling of the leasehold rights and the democratic regulatory process are (on paper) two strictly separate procedures.

The tension between contracting party and democratic government was most visible in London. The kind of problems that can arise from such tensions tend to involve a situation where the negotiators appointed by the planning authority to act on its behalf reach an agreement with the developers that both parties consider to be fair (Hobma *et al.*, 2008), but the council or another regulatory body fails to approve this agreement (see Sections 8.1.3 and 8.1.10, and also Section 8.2.8b for an important court case that hinges on a similar issue). Council members may also find themselves forced to ac-

cept an agreement that they do not really back (see Sections 8.1.3 and 8.1.10). Although the public parties try to separate their contracting and regulatory roles, in practice a 100% separation is impossible.

Finally, parties in London and New York defined their roles in terms of utility. The BPCA for example enhances its utility if a building is sustainable. This allows it to define the best bid in terms of both the price and the quality of the design. The considerations in the Hudson Yards leases show the same line of reasoning: the city wants to lower transaction costs by leasing the land from the developers instead of condemning it. (It should be noted that in American legal parlance, 'condemnation' in this context means compulsory purchase, not as in the UK stating that something is unfit for use.) The planning authorities in King's Cross enhanced their utility by fostering the goals of their development briefs or other policy documents. The point is not that this line of reasoning could not be followed for the Zuidas contracts in Amsterdam, but that it is not so evident that it has been followed there as in the other cases. The contracts struggle between a way of drafting whereby roles are strictly separated and an approach whereby parties undertake a project together. Interviewees in this case hinted that it was not always clear to the developers why something was expected from them – in the sense that they did not understand how the city maximised its utility by setting certain demands, such as those relating to the air rights system (case interview Amvest, 02-06-A3, see also Section 7.2.3). The city would be well advised to explain how it aims to enhance its utility – in other words, to devote more effort to making it clear what its goals in the agreements are and to put less emphasis on shared goals.

Are the parties complementary?

One question related to the issue of role integrity is whether the various parties to an agreement are complementary – in particular, whether one partner in a consortium has a capacity that another partner does not have. In other words, do the parties depend on each other to realise the project?

The first question that arises from this is whether the parties are competitors outside the consortium or not. A consortium that consists of a bank and a developer would be complementary. Whereas one that consists of two developers might not be – though it could be complementary if the two developers have different expertises (e.g. an affordable housing provider and a commercial developer) or when both companies are too small to develop the projects on their own. But in other situations, they will probably be competitors who are forced to work together. In our cases, this was true for the private consortia in the cases in Amsterdam. This problem was encountered in both the Mahler4 and the Gershwin projects where the parties in the consortia were mostly competitors and in addition each party would have been able – with the exception of the housing corporation involved in Zuidschans (see Section

7.2.7a) to develop the project on its own.

In Amsterdam, the projects were too small to be top priority for the developers; problems also emerged due to the fact that each party was accustomed to taking a slightly different approach to the development process (e.g. case interviews with ING Real Estate MAH 10-04-A3 and Amvest GER 02-06-A1).

The parties in Amsterdam solved this problem by establishing separate project organisations that worked at some distance from the mother companies to prevent continuous and endless discussions.

These problems did not arise in New York and in London. The consortium in the King's Cross project did not consist of competitors and neither did the consortia in New York.

The complementarity problem may also rise within government, when different tiers of government all have some authority in the case in question, but are not complementary. A problem arose in King's Cross where the smaller part of the project (the Triangle) fell within the authority of two boroughs (Islington and Camden). This led to a conflict of policies and political visions on the project and did not result in complementary actions (Hobma *et al.*, 2008).

Here again, a line of reasoning that focuses on utility is helpful. The private parties in London and New York were not forced to work together but needed each other to carry out the project because they were either landowners (King's Cross), developers or financed the project. These parties entered a consortium to maximise their utility. The consortia in Gershwin and Mahler4 were more complex: here, the parties complained that the composition of their consortia did not maximise their utility.

Suggestions for the improvement of contracts

The problem of role integrity should be dealt with as early as possible since it may otherwise harm development and impede flexibility; if the roles of the actors conflict, this may easily lead to an adversarial atmosphere and poor compromises instead of flexible solutions.

In the King's Cross case, role integrity was a problematic issue during the negotiation phase. The public-private nature of the S106 agreement enhances that problem and leaves the public parties with a consistency problem in case of any legal procedures. The agreement itself is drafted so as to solve most of these problems. In the New York cases, the problems also arose during the negotiation phase and were mostly rooted in the different interests of the public parties.

In Amsterdam the role of the public authorities is over-complex. To avoid problems, the contract should define the role of the local government better and spell out the expectations of the private parties to prevent problems in the future. In that respect, a model in which a separate agency such as the proposed Zuidas Corporation that only acts as a landowner/developer and not as a regulator is promising.

We saw that role integrity turned out to be problem after the contracts had been signed, mostly in the cases in Amsterdam. The City of Amsterdam had to play so many different roles that problems of complexity and conflict arose.

The development agreement in the Amsterdam cases could solve this problem in three ways:

a. It should be more specific about the capacities in which the city signs the agreement.
b. It should avoid situations where the administration plays different roles at the same time.
c. It should recognise the problem of role integrity and be more specific about the expectations of all parties.

The problem of defining the capacities (a) should not be solved by inclusion of a standard term in the agreement. A case-specific term should be used instead, explaining the (private law) role of the city in this particular case, what can be expected of the city and what cannot be expected.

The possibility of different simultaneous roles (b) can be avoided by a similar approach. The city should define its position in advance and negotiate with the staff of its own administrative departments and the city council about their roles and how they will be applied in the specific case. The outcome of these negotiations could, in complex cases, form part of the contract with the developers.

The acknowledgment of the problem of role integrity (c) will help to fulfil the first two requirements but will also result in greater acknowledgment of the goals and roles of the private parties.

A development agreement should emphasise that the developers aim to make a profit, but should also be more specific. It should for example state whether their preferred company policy is to own and rent the building (or units) to be developed or to sell them. The agreement could also explain some of the decision-making procedures used by complex consortia. Dealing specifically with the problem of role integrity in the agreement will save the parties time and money in later stages of the negotiations.

In terms of relational contract theory, this means that expectation interest (one of the linking norms, see Section 9.2.7) should be combined with the role integrity norm.

9.2.2 Mutuality and reciprocity

In discrete transactions the mutuality norm only plays a role in the negotiation phase, after which it drops out and becomes part of the effectuation of consent norm. It resembles the common law requirement that every promise should be backed by a consideration. Since consent is not the leading aspect of a relational contract, mutuality, as a relational norm, is an ongoing requirement.

Table 9.4 Discrete/relational matrix for the mutuality norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City	×		
Hudson Yards	×		
Gershwin			×
Mahler4		×	
King's Cross		×	

The critical issue with regard to mutuality in the negotiation phase turned out to be whether affordable housing played a role in the project or not. In the cases where affordable housing was not an issue, negotiations were relatively easy. Whereas in the other cases the combination of high land prices and the aim of building affordable housing often gave rise to problems. In the focal projects in Hudson Yards and Battery Park City, affordable housing was not an issue. The 1979 master plan for Battery Park City no longer provides for affordable housing but instead the profits of the Battery Park City Authority are supposed to be used to pay for affordable housing in other parts of the City of New York (at the time of writing, they have only been used for a project in the Bronx). It was not an issue in the Mahler4 project either. But in the King's Cross and Gershwin focal projects, it was. In King's Cross, the community groups lodged an appeal for judicial review of Camden Council's approval of the S106 agreement when the developer was unwilling to meet the target of 50% of affordable housing set by the planning authority – or rather, as explained in Section 8.1.10, when the developer produced evidence that it was unable to meet this target and the council accepted this evidence.

The mutuality norm was found to be more discrete in the focal projects in Hudson Yards and Battery Park City. It had discrete and relational elements in Mahler4 and King's Cross Regent Quarter, and was more relational in Gershwin (see Table 9.4).

The difference here is partly found in the nature of the documents used. In both the Hudson Yards and Battery Park City cases, the parties used leases to lay down their agreements. The financial terms of these agreements are defined very precisely in standard documents. Gershwin and Mahler4 are pre-lease contracts: they specify the conditions under which the parties are willing to buy and sell the lease rights for a certain price that may change if circumstances change. These contracts involve more insecurity with regard to the future. The Regent Quarter agreement is laid down in a deed. We saw have seen that some sections of this deed are very precise but that other sections leave things more open; the quid pro quo then depends on the market situation (on the basis of a phasing system, as explained in Section 8.3.3) and to a lesser extent on negotiations on details with third parties and the planning authority at later stages of the project.

Differences and similarities

Mutuality, the quid pro quo approach, is central to the English way of planning that is best described as a negotiation model. Mutuality is certainly not

absent from the cases in Amsterdam and New York, but in King's Cross it defines the planning system in which the agreement is made.

Many aspects of the project that were not subjects of negotiation in New York and Amsterdam are central to the agreement in King's Cross. Examples of such aspects are children's playgrounds, schools, and (funding for) bus lines and police stations. In the final analysis, the planning authority sells the right to develop the land to the developer. And the developer does not pay a lump sum for that right but pays for a variety of specific services and facilities that it either delivers or finances. This results in as many sub-agreements as there are services and facilities mentioned in the deed (see Section 9.3.1).

The *quid pro quo* in the cases in Amsterdam and New York primarily consisted of the money paid for the right to lease the land and the quality requirements laid down in the proposed development. In Battery Park City, this quality has to be understood mostly in terms of (sustainable) design of the building. In Amsterdam, quality is defined in terms not only of the individual buildings but also of the Zuidas project as a whole. In Hudson Yards, the *quid pro quo* is the money paid by the City of New York to lease the land from the developers to permit realisation of the subway extension. Mutuality also relates to the cooperative approach adopted by the subway builders in allowing the developers to realise the grids for their future buildings.

The difference between the discrete and relational aspects helps to explain some of the differences between the cases in Amsterdam and those in London and Battery Park City. In Amsterdam, the relational interpretation of reciprocity as a quid pro quo in an ongoing relation was obvious. The approach became most visible when the plans were delayed by court rulings and in the negotiations on the Mahler4 parking garage. The need for reciprocity was also visible in the Hudson Yards case where the parties had to adopt a cooperative attitude to working simultaneously on the subway extension and on the grid for the building. In Battery Park City and King's Cross, the parties took a more discrete attitude towards the mutuality requirement. This means that the need for mutuality more or less disappeared after the negotiations were completed. When the offer was accepted, mutuality became part of the consent. The agreement in King's Cross does provide some room for a more relational approach at a later stage, but not with regard to key terms.

Suggestions for improvement

The agreements in Amsterdam could be improved if the contract were made more specific on the *quid pro quo* – apart from the payments for the lease rights – of the agreement, whereas it might be appropriate to make the S106 agreement in London less specific. In the contracts in Battery Park City the quid pro quo provisions are easy to understand and very specific. However the open nature of the contracts in the Zuidas and Hudson Yards allows for an ongoing kind of mutuality that does not imply any modification of the

Table 9.5 Discrete/relational matrix for the implementation of planning norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City		×	
Hudson Yards			×
Gershwin		×	
Mahler4			×
King's Cross		×	

contract. This could be improved in Battery Park City, where the leases do not provide for such an open structure.

9.2.3 Implementation of planning

Implementation of planning is one of the core discrete norms, whereas in relational situations it depends on the nature of the agreement whether implementation of planning is of enhanced importance. It follows from the nature of the cases studied in this thesis – all of which are development projects – that implementation of planning is of enhanced importance here.

The implementation of planning norm in the focal projects in Battery Park City, Gershwin and Regent Quarter has both discrete and relational elements. In Hudson Yards and Mahler4, the norm had more relational than discrete elements. The difference was that the latter contracts recognised that it was impossible to plan the whole project in advance. The other projects (King's Cross and Battery Park City) implemented a more detailed planning (see Table 9.5).

Differences and similarities

In urban development projects, planning is a very important aspect. This may result, somewhat paradoxically, in a written agreement that states that because the planning of the project is so important it will be left to the professionals to work out the details. Or it can result in the implementation of more precise planning as was the case in Battery Park City and King's Cross.

Thus, agreements can be divided into two groups: one group implements a detailed planning, while the other leaves the details of the planning to be worked out later. The agreements in Battery Park City and, arguably, in King's Cross fall into the first group, and the agreements for the Mahler4 project and Hudson Yards into the second. The Gershwin contracts occupy an intermediate position.

Unlike the leases in Battery Park City, the Hudson Yards leases do not include extensive provisions to deal with default situations or other departures from planning.

None of the agreements implements a planning that is 100% discrete. The planning in the agreements lies somewhere between the neo-classical and the relational ends of the spectrum. The exception to this rule is found in the terms (if any) on payments. The written agreements in London and New York are discrete in the provisions they include on the amounts to be paid and the

timing of the payments. The leases in Battery Park City provide examples of, at least on paper, a 100% planning of payments until 2069. Changes to that planning require re-negotiation of the leases. This is also true for most aspects of the planning of the work on the project.

In Hudson Yards and Mahler4, a change in the project planning does not result in re-negotiation of the lease. The Gershwin contracts include a specific section that states that the parties will decide every year if the planning is still accurate; this is a good example of a framework approach that does away with the need for re-negotiation of the lease (see Section 7.4.4).

Phasing

All agreements introduce a framework wherein phases are discerned and in which parts of the projects have to be completed for payments to become due. Differences exist mostly between the agreements in Amsterdam Zuidas on the one hand and those in King's Cross and Battery Park City on the other. The leases in Battery Park City spell out the responsibilities of the Landlord (the BPCA) and the developer. Theoretically, the parties are under no obligation to meet after the contract is signed. The BPCA only has to approve the definitive plans and the environmental programmes of its lessees. The situation is different in Hudson Yards, where the leases speak of forthcoming cooperation contracts since the parties have to work simultaneously on certain parts of the project. In King's Cross, the developer assumes almost all financial and organisational responsibilities. And because of the many public facilities he has to deliver, the developer has to meet executives of the planning authority very frequently; he also has some responsibilities to coordinate his actions with specific organisations and the public.

Still, all agreements introduce some kind of phasing of the project, and the contracts in Amsterdam are no exception to this rule. The phasing (and planning) is most elaborate in King's Cross where the decisive moments are the realisation of a certain percentage of the project or of the housing part of it after which facilities have to be created, payments have to be made or services have to be delivered. As soon as such a moment is reached, the planning in the agreement becomes very precise. But the authorities have no instrument to force the developer to start construction.

The leases in Battery Park City mention a date when the project has to be completed and a timeframe within which construction has to take place. Here the phasing mostly involves interplay between the BPCA that has to review all plans and designs and the developer who has to submit them.

The leases in Hudson Yards are less precise due to the complexity of the projects. The leases only contain end dates that are enforced by fines for not finishing the work on time. The complex plans are not incorporated in the leases.

The Zuidas contracts take the issue of building permits as the decisive

moment in the phasing. Six weeks after the building permits are issued, the developers have to buy the lease rights from the city. The agreements specify an end date by which the project has to be finished. This end date is not strictly enforced, however. If a developer fails to realise the project on time but made a serious effort to do so, the city will not impose penalties. The interplay between the developers and the planning authorities is complex here because the city plays an active role in the development by coordinating the work of the various developers, monitoring the quality of the Zuidas area as a whole and developing the public infrastructure. The phasing in the contract is not very precise because many issues are postponed for discussion in specific forums where the parties will meet to deal with issues in detail. A general conclusion is that the contract in Amsterdam is a less decisive document than the agreements in London and New York. In the latter two cities the agreements were signed when most of the specificities of the project had been dealt with. This is not the case in Amsterdam, where the contracts were closed at a moment when there was not even a land use plan for the area. The signing of the agreement is only one of the moments in the project, but not the decisive moment.

In addition, we find two forms of planning in the Zuidas contracts: the planning of the project and the planning of the issue of the lease rights. These two forms of planning are interdependent. This is probably the main reason why the contracts are sometimes vague on issues where they would have been more precise if they had dealt only with project planning or the sale of the lease rights.

Suggestions for improvement

The planning in the contracts in Mahler4 and Gershwin was never met, and provided no guidance for dealing with delays. The planning in Battery Park City turned out to be the most realistic. Its phased approach is easy to understand and provides sufficient guidance in case of delays. The provision that a developer may opt for fast-tracking of the procedures included in the Battery Park City contract would also have been convenient for the other projects.

Proposal 1 The developer may ask the planning authority to fast-track certain procedures. The planning authority will use reasonable endeavours to fulfil this request.

Proposal 2 Unless otherwise agreed and with the exception of the financial terms of this agreement, efficient realisation of the planning goals named in this agreement is more important than strict implementation of the planning.

9.2.4 Effectuation of consent

Although it also has relational elements, effectuation of consent is of key importance as a discrete norm. The discrete norms of discreteness and presentiation are enlargements of the implementation of planning and effectuation of consent norms. Full implementation of planning and full effectuation of consent are required if an agreement is to be 100% discrete.

The effectuation of consent norm may or may not be of intensified importance in a relational situation, depending on the nature of the relation.

Effectuation of consent was found to be either 'more discrete' or 'both discrete and relational' in the projects we studied (see Table 9.6). The leases in Battery Park City spelled out virtually all elements of what the parties had consented to. In both cases, the developers knew what their duties would be during the period of the lease. In the other projects investigated in this thesis, the parties also knew what they had consented to and what the financial implications of that consent would be but some issues were left open to be dealt with at a later stage. Thus, the parties to the Hudson Yards and Zuidas agreements cannot be fully sure what their consent will imply. In Hudson Yards, for example, the consent might imply that the landowner will undertake some of the developer's work. It follows from the relational nature of the agreement, however, that the landowner can be sure that his obligations stem from his cooperative relation with the developer: the vagueness in the formulation of the agreement does not put either party at risk of exploitation.

Differences and similarities

The effectuation of consent norm turned out to be of enhanced importance in King's Cross and Battery Park City. In the written agreements of those cases, the consent is broken down into many pieces and becomes very specific. This does not mean that the effectuation of consent is not of importance in Amsterdam Zuidas but with the exception of the financial terms of an agreement, it is common practice in Amsterdam to specify what the parties are consenting to at a later stage (after the contracts have been signed). The consent to a specific design or other element of the plan is derived from the original consent and further insights and/or negotiations. The most specific effectuation of consent is found in King's Cross where the main agreement results in various sub-contracts on services, payments and facilities. The Battery Park City lease also makes it perfectly clear to which obligations the developer has consented. This consent can be so detailed as to mention the placing of a sign intended to make the public aware of the non-discriminatory rental policy that the developer had pledged himself to uphold.

It may further be noted that all agreements often formulate the duties of effort expected from the parties in such terms as 'reasonable endeavours', 'best efforts', 'efforts made in good faith' or 'commercial best efforts'. The le-

Table 9.6 Discrete/relational matrix for the effectuation of consent norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City	×		
Hudson Yards		×	
Gershwin		×	
Mahler4		×	
King's Cross	×		

gal status of such formulations (i.e. the extent to which they are enforceable) is not always clear, but they may result in obligations on the developers that are partly unforeseeable at the moment of signing the agreement.

Suggestions for improvement

The Amsterdam contracts do not make it sufficiently clear what precisely the parties have agreed to. They would be improved by making them more specific about the costs the parties are willing to accept for new solutions, and what the parties have in mind when they speak of the goals of the project. In other words, the parties should work out what the effectuation of consent norm means for a specific part of the project, and put this vision in the contract. It is also instructive to look at the effectuation of consent in connection with the linking norms – in particular, the expectation interest. As different parties will have different expectations of the meaning of their consent, it would make sense to formulate the agreements carefully in an attempt to avoid this possible source of conflict.

The S106 agreement in King's Cross mirrors this discussion: it is at some points over-precise and specifies issues, such as the nature of the furniture of a children's playground, when they are better left open.

The leases in Battery Park City and the King's Cross agreement sometimes define the meaning of 'reasonable' or 'commercially best endeavours' both in general and with reference to specific obligations. It might be a good idea to include such definitions in the Amsterdam contracts, where similar obligations are found.

Proposal (based on the King's Cross agreement) All parties shall use reasonable endeavours to ensure that the planning purpose underlying their respective obligations under the agreement are achieved and carried out in accordance with good industry practice at the time of performance, as long as this would not constitute an additional obligation on the parties. When the party in question cannot fulfil the obligation after reasonable endeavour, it must on request provide an explanation of the reasonable endeavours it has undertaken.

9.2.5 Flexibility

In discrete transactions, flexibility exists outside of the agreement. Since discrete agreements must embody full planning, the requirement of flexibility may make it necessary to re-negotiate the agreement. In relational transac-

Table 9.7 Discrete/relational matrix for the flexibility norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City		×	
Hudson Yards			×
Gershwin			×
Mahler4			×
King's Cross		×	

tions, flexibility is a crucial internal requirement. Relations cannot be harmonised or preserved if they do not pay appropriate attention to the demands of change.

The agreements in Hudson Yards and in Zuidas explicitly mentioned flexibility as an important aspect of the agreement. The leases in Battery Park City and the S106 agreement for Regent Quarter can best be described as trying not to be too rigid. Differences may be caused by the fact that the BPC leases were signed at a later stage than the contracts in Zuidas, whereas the S106 agreement in King's Cross provided the only opportunity for the planning authorities to bargain for facilities (see Table 9.7). It is understandable that such an agreement cannot put too much emphasis on flexibility, as the councils want hard guarantees that they will get what they want in return for their planning approval.

Differences and similarities

In all interviews, flexibility was mentioned as an important aspect of the relation but it only stands out in the Amsterdam contracts and the Hudson Yards leases.

We may say that although flexibility is not absent from the leases in Battery Park City it exists mostly outside the agreement. The general terms of the King's Cross agreement state that the planning goal is more important than the planning obligation. In other words, if the planning goal were no longer to exist, the planning obligation should also disappear. But this provision only applies to exceptional situations.

The contracts in Amsterdam explicitly mention that the city has to take an open attitude towards unconventional, creative solutions that arise during the development process. The Hudson Yards leases also acknowledge that not all aspects of the plans can be written down in advance. This approach is uncommon, however. The leases in Battery Park City and the King's Cross agreement only allow for flexibility when they explicitly refer to it. For example, when it turned out after the bidding procedure in the King's Cross case that the developer could not find an affordable housing provider that accepted his terms, the King's Cross' agreement then determines that the developer shall negotiate with the planning authority to reach a solution that sticks as close as possible to the original requirements.

In Battery Park City, the plans were as precise as possible when the leases were signed, and these leases were intended to provide an inclusive view of the whole project. Flexibility is however provided by the fact that the ways in

which the goals of the leases are met are not determined. This leaves some room for ad hoc solutions. In Amsterdam, we encountered examples whereby a building was converted into an office tower at the last moment because there was no (profitable) way in which the original destination of the building (apartment units) could be realised. These changes are not uncommon and are due to the fact that agreements were signed at an earlier stage in Amsterdam than in London and New York. The contracts in Amsterdam leave many aspects of the project undetermined. All parties accept that the project evolves in this way.

This approach can be explained (at least partly) by the existence of an objective good faith principle and the absence of a requirement of a consideration in a contract in (Dutch) civil law (see Section 2.7). In Anglo-American legal culture, a particular aspect of an agreement is either dealt with explicitly in the written contract or is not mentioned in the contract at all. There are not many intermediate constructions. This is different in Dutch legal culture where it is common to name an aspect of an agreement and then postpone its detailed implementation, refer it to a forum or committee or even leave it at that.

Still, although these differences between the agreements were observable and can be explained from both a legal and a cultural perspective, they should not be exaggerated. The City of Amsterdam plays a very active role in development, in a way that has no counterpart in New York and London. It owns most of the land within the city boundaries, and is willing to invest in it. It is thus an active party in the development, not just a planning authority and not just a landowner. This difference must lead to a different approach because, as an active developing party, the city will also prefer flexibility to security.

In other words, in King's Cross and Battery Park City, the planning authorities have reasons to prefer security to flexibility even if there are some serious downsides to this approach. In Hudson Yards, however, where a government agency wishes to construct a subway extension the agreements put more emphasis on flexibility. And the only agreement that does not mention any kind of flexibility is the storage lease in Hudson Yards (see Section 6.2.1) where the lessor is not a developer but only leases his land to the City of New York for storage purposes, and his sole aim is to make sure that he receives due payment on the lease.

If we take a step backwards, we may thus conclude that the agreements in King's Cross and Battery Park City are mostly in line with the ideals of discrete (neoclassical) contracts and start from the point of view that they only care about the 'what' and not about the 'how'. This approach makes it possible to combine rigidity (what) with flexibility (how).

But then the agreements introduce non-binding duties of endeavour. This results in a mixture of discrete and relational elements for both agreements.

There are also some intermediate duties, such as those required to meet the affordable housing targets in King's Cross. Finally, the agreements do contain some requirements with regard to the 'how' as they implement affirmative action programmes (in Battery Park City) and mandatory meetings (in all agreements) or rules aimed at ensuring role integrity (in Hudson Yards).

The difference is that the agreements in Amsterdam start from a flexible, 'wait and see' approach, whereas the contracts in King's Cross and New York start from a much more rigid construction but add some flexibility along the way. The Hudson Yards agreements adopt a position intermediate between these two extremes.

Suggestions for improvement

The agreements in Battery Park City and King's Cross would be improved if flexibility was more explicitly recognised as an important aspect of the relationship. The King's Cross agreement does recognise the importance of flexibility but more as an exception, not as a norm that should dominate the contractual relation. Only the construction leases in Hudson Yards acknowledge flexibility in a way that is specifically drafted for the project. The other agreements would be improved if they were to provide a framework for a flexible approach to situations they cannot foresee. The contracts in Amsterdam provide some inspiring examples of this in their provisions concerning the installation of specific consultation platforms and in their general provisions.

9.2.6 Contractual solidarity

Contractual solidarity in discrete transactions is imposed by general rules of law and not by the contract. Contractual solidarity as a relational norm is interpreted as preservation of the relation, and then becomes one of the most important norms of the relational contract. All the agreements we studied stress the role of partnership, with the exception of Battery Park City (see Table 9.8). The Battery Park City leases emphasise the landlord-lessee relationship and the approach to partnership the BPCA tends to take can best be interpreted as an extension of that relationship. In the other agreements, contractual solidarity is rather present as a value in itself.

Differences and similarities

Contractual solidarity was of enhanced importance in all cases. Parties need to work together to realise their projects. Only in Battery Park City is it conceivable that the BPCA might get rid of a lessee who defaulted on the agreement and find another party to finish the project. But even there, after a proposal is accepted it is the BPCA's aim to work together with its developers and assist them in the performance of their obligations.

The mere existence of public benefit corporations such as the BPCA and

Table 9.8 Discrete/relational matrix for the contractual solidarity norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City		×	
Hudson Yards			×
Gershwin			×
Mahler4			×
King's Cross			×

the HYDC can be regarded as an example of contractual solidarity in a broader sense: by establishing those corporations, the public authorities show their willingness to cooperate with private parties and invest extra time and budget in the success of the project.

The Zuidas project office in Amsterdam and the King's Cross project team in the borough of Camden are further examples of the same trend. We should not forget here that contractual solidarity is not altruism. It exists because all parties recognise it as a necessary condition for successful realisation of the project.

The agreements we studied show many examples of contractual solidarity, although it can be argued that contractual solidarity is reflected more in the 'spirit of the document' than in isolated provisions in the Zuidas case whereas the agreements in New York and London do provide specific examples of compliance with this norm. One good example is the option for the developer to fast-track the procedures in the BPC leases. This is more specific than the obligation of endeavour frequently used by Dutch planning authorities to promote land use plans and building permits that are in line with the development agreements. The many obligations to act in good faith included in the Amsterdam agreements can also be interpreted as signs of contractual solidarity.

In addition, parties to all the agreements we studied emphasised that they did not intend to leave the contractual relation even when circumstances arose that could justify this – such as the 9/11 attacks in New York and the series of court rulings based on European directives concerning permissible levels of fine particulate matter in the air that appreciably delayed the progress of the Zuidas projects in Amsterdam (see Section 7.1.15).

Finally, whereas the contracts in Amsterdam and the S106 agreement in King's Cross stipulate a mandatory meeting between the parties as the first step to deal with any conflicts that may arise, the Battery Park City leases do not presuppose that the parties will work out things together. We may conclude that the agreements in Amsterdam and in King's Cross put more emphasis on preservation of the relation and resolution of relational conflict.

Suggestions for improvement

The agreements in New York and London could be improved by acknowledgement of a general aim of contractual solidarity. Although all cases provide examples of this approach, the written agreements do not always specify how it can be achieved. Provisions to this end are therefore found in specific sections

wherever they seem to be appropriate. But since contractual solidarity is, by definition, a general aim it should be acknowledged in the general part of the agreement and can be specified there to the extent that the parties deem necessary. The contracts in Amsterdam provide good examples of this. Still, the Amsterdam agreements could be improved by more detailed specification of the meaning of contractual solidarity.

Proposal (based on Gershwin contract) The development strategy is aimed at the creation of a mixed-use area in a high-quality urban environment. The planning authority will assist in the realisation of the Plan area wherever possible. The developer will implement the goals of the planning authority in its plans. Parties confirm that they will work together in the most efficient and flexible manner to realise the plans.

9.2.7 The linking norms: restitution, reliance and expectation interests

In discrete situations, the linking norms boil down to the expectation interest that is protected by the external source of contractual solidarity. This is not the case for relational situations, where the restitution, reliance and expectation interests may conflict.

The linking norms have discrete and relational elements in the Zuidas project but in the other projects they tend towards the discrete side of the spectrum (see Table 9.9). The difference is that the agreements in Hudson Yards, BPC and King's Cross all quantify the expectations. Fines have to be paid or restitution made when the expectations are not met. Softer approaches aimed at preserving the relation are found not in the agreement but in the actions of the parties. Such quantified provisions are absent from the Zuidas contracts.

Differences and similarities

All private parties entered the various projects studied here in the expectation of making a profit, while all planning authorities entered the projects in the expectation of creating a new high-quality urban area. The Battery Park City Authority and the City of Amsterdam also aimed to make a profit.

However, the range of expectations actually encountered, and the problems that they produced, were much wider than this simple picture would indicate. This was most notably so in Amsterdam and to a lesser extent in London.

In the King's Cross project, it was mostly the stakeholders whose expectations differed from those of the developer. The developer tried to overcome this problem by organising workshops where the parties that were directly involved (landowners and Camden Council) could discuss these expectations.

Table 9.9 Discrete/relational matrix for the linking norms

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City	×		
Hudson Yards	×		
Gershwin		×	
Mahler4		×	
King's Cross	×		

In the end, an elaborate agreement was drawn up in which most expectations were specified – right down to the kind of equipment to be installed in children's playgrounds.

The contracts in Amsterdam leave more details open and do not often spell out the expectations – or the steps to be taken if the expectations are not met. The Mahler4 and Gershwin contracts state for example that the parties expect that the Zuidas project will include the development of Zuidas Dock, which will have the effect of ending the current division of the Zuidas area into two by the ring road (see Section 7.1.3). It is not clear what will happen if the planned development of Zuidas Dock does not go ahead. In other words, the expectation is clear but the expectation interest is not. The general impression gained from the projects in Amsterdam is that all parties expected to work together to develop the project but that they often had discussions on specific issues relating to the tension between project quality and profitability.

The reliance interest is not mentioned in the agreements but is visible in the relation, most notably when private parties expect that the government knows that they rely on policy documents or promises from city officers even when they know them not to be legally binding. This kind of reliance interest was encountered in all projects with the exception of Battery Park City, where a so-called 'entire agreement'- clause was devoted to explicitly ruling this out.

Suggestions for improvement

All agreements would be improved by greater specificity concerning the expectations of the parties, either in a linking construction (party A relies on party B to use his discretionary powers to ensure that …) or in separate sections. The upshot is that if parties enter a contractual relation in the expectation of making a profit, the agreement should make that clear. If they rely on the other party acting in a certain manner, that should also be included in the agreement. If this is not done, differences between the expectations of the various parties may lead to conflicts.

Proposal The developer has invested money and effort in the project. His aim is to recoup his investments within X years. The public party is aware of this goal and understands its implications. It will use reasonable endeavours, within the context of this agreement and other existing and future regulations, not to hinder the developer in this aim. However the aim of the developer should not interfere with the realisation of the other goals of this agreement.

9.2.8 Creation and restraint of power

In a discrete transaction, the creation and restraint of power norm is confined to the enforcement of consent. It has to stay within these limits. In a relational transaction, the creation and restraint of power norm becomes more complex. The starting point is the acknowledgment that a relation cannot survive without the creation and restraint of power. But since these two aspects may (and often will) conflict, the relational norms of preservation of the relation and resolution of relational conflict tend to dominate the transaction. To make things even more complicated, they function in conjunction with the supra-contract norms. The creation and restraint of power norm was more relational in the Gershwin and Regent Quarter agreements, and had both discrete and relational elements in the other projects (see Table 9.10). In both the Gershwin and the Regent Quarter projects, the parties transferred and created powers that would not otherwise have existed and did not necessarily follow from the (legal) relation. Whereas in the other projects the powers created (and restrained) were an extension of the landowner-lessee relation.

Differences and similarities

In a description of the differences, it makes sense to distinguish between hard and soft powers (cf. Williamson, 1995). Hard powers are related to the quid pro quo of the agreement: money for land, payments or services in return for planning permission. In such cases the developer can no longer dispose freely of his resources and the government can no longer decide freely over the (destination of the) land.

Soft powers involve one party granting the other a say in his actions and his disposal of his resources, but do not provide the latter with any rights he could use if he disagreed with the decision taken.

Some hard powers are key elements of the transaction, others could equally well have been soft. An example is the provision in the BPC leases that a developer must choose a qualified architect, where no specific penalties are laid down for the case where he opts not to do so.

In London and New York I encountered more hard powers and fewer soft powers than in Amsterdam. The New York and London agreements were drafted from a more adversarial perspective whereby the parties undertake specified obligations and, if necessary, review and monitor the fulfilment of the obligations by the other party.

In the agreements in Amsterdam, the hard powers were not as specified as they were in London and New York. In addition the contracts contained many soft rights. The parties tended to give each other a say in their actions without specifying what this meant in terms of remedies. The contracts may state, for example, that the parties will meet in various committees to discuss specific issues, such as the layout of public and private infrastructure. The re-

Table 9.10 Discrete/relational matrix for the creation and restraint of power norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City		×	
Hudson Yards		×	
Gershwin			×
Mahler4		×	
King's Cross			×

lational norm of preservation of the relation plays an important role here.

The equivalent of these provisions, if any, in New York and London would be a stipulation that when party A drafts his plans for the public infrastructure of site X, he will (in good faith, to a reasonable extent) take the interests of party B into account. This is not just a difference in contracting style, but also reflects a different way of thinking that pays more attention to the question: "And if A does not take B's interests into account, will B start litigation and what will his chances of success be?" instead of: "How can we best resolve this real-life problem?" The first approach reflects the Anglo-American style of contract drafting, the second the Dutch style. Note that this does not mean that the possibility of litigation is absent from Dutch contracts or that the idea of negotiating to deal with real life problems (as opposed to seeking a solution through the courts) is absent from Anglo-American thinking. The negotiations on the percentage of affordable housing to be built as part of the King's Cross project (see Section 8.1.10) is a good example of this.

Still, we did encounter the creation and restraint of soft powers in New York and London. In London, the mandatory meetings with local interest groups on specific issues could be regarded as restraints on the powers of the developer intended to resolve relational conflicts by implementing more socially acceptable measures, resulting in a better relation with both the community and the planning authority.

Suggestions for improvement

The creation and restraint of power norm could be improved in all agreements. The problems that arise here are caused by the fact that in all agreements, a public authority is involved: these parties are somewhat limited in their freedom to create and restraint powers, since they are democratically accountable. This problem does not exist to the same extent in Battery Park City as in the other cases, but it is certainly not absent from its agreements (see the parts of Section 5.3 dealing with the Goldman Sachs lease).

More detailed specification of the duties of endeavour would improve the agreements. It would also be helpful if the agreements were to provide more insight into the extent to which parties can (or are willing to) exercise their powers, for example by specifying the underlying norm. The stipulation in Anglo-American contracts that actions should be performed 'in good faith' is meant to provide a minimum legal standard of performance, but does not provide a full insight into the meaning of this qualification. The best exam-

ples are probably found in the BPC leases where they deal with the rights the BPCA has when its developers are in default.

9.2.9 Propriety of means

For a discrete transaction, the propriety of means norm is almost meaningless. The contract focuses on the obligations of parties, not on the means they use to fulfil them. The only exception to this rule is when parties explicitly consent to use certain means. But then we could say that the propriety of means norm becomes an extension of the effectuation of consent norm. In a relational transaction, on the other hand, the propriety of means norm can become very complex. Every social relation entails a whole range of implications about how ends may be achieved, and how they may not. The more complex the relation, the more complex the propriety of means norm becomes. In fact, it then tends to turn into a norm of 'adequate means' (see Table 9.11).

Differences and similarities

All the agreements we studied contained sections where the parties guarantee that they possess the means needed to perform their obligations. Private parties guaranteed that they could carry the risks of the development. The public parties agreed that they would review submitted proposals within a certain time frame. The leases in Battery Park City contain many pages referring to situations of default and bankruptcy, and are very precise about the kind of payments that the lessees will have to make and the financial guarantees that are needed.

Still, in all cases, the question as to whether a developer was capable of doing the job was most important in the selection procedure or during the pre-contractual negotiations: in the agreement itself, this capacity was more or less assumed.

All of the contracts contained stipulations concerning the way by which the ends were to be reached. The Hudson Yards leases demanded a procedure that would enable the parties to work simultaneously on stated parts of the project. Stipulations relating to the implementation of social goals (local jobs, job trainee programmes) were to be found in the Battery Park City and King's Cross agreements, and goals of sustainability were mentioned in all projects except Hudson Yards.

Examples of situations where the propriety of means played an important role were found in Mahler4 and Hudson Yards. In the former case, the city did not want G&S Vastgoed to develop the project on its own because it did not believe that the developer either had the necessary means or was willing to meet the city's requirements (the highest architectural and urban quality, compliance with the most stringent environmental standards). It therefore demanded that G&S Vastgoed should form part of a consortium that involved

Table 9.11 Discrete/relational matrix for the propriety of means norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City	×		
Hudson Yards	×		
Gershwin		×	
Mahler4		×	
King's Cross		×	

two other parties.

In the Hudson Yards case, the private parties did not believe that the developer of the subway, the Metropolitan Transportation Authority (MTA), knew enough about the building techniques used for the construction of (high-rise) office and residential buildings to build the subway extension (and the platform above it) in such a way that they (the private parties) could later construct their high-rise buildings on top of that. They claimed that the MTA only knew (or cared) about the construction of infrastructure, which made them decide to start work on the foundations at the same time as construction of the infrastructure started.

In other projects, possession of the necessary economic resources and know-how was not the only relevant element of the propriety of means requirement. Another element was a clear vision of the overall objectives; this played a role in all projects except for Hudson Yards. The BPCA, the City of Amsterdam and the borough of Camden (and the landowners in King's Cross who selected the developer) named vision as an important element of the selection procedure and were willing to accept a lower bid in return for higher quality of the plan submitted.

An example of how propriety of means was presupposed and thus deemed to be of less importance than vision was provided by the procedure used to attract developers in the Gershwin case. In the preliminary rounds, developers (consortia) were asked to submit only their visions on the project and not their bids.

The provision concerning affirmative action in the BPC leases may be seen as an example of a specific propriety of means norm. These leases included specific requirements on the percentage of women- or minority-based enterprises the developer has to use as contractors for the work.

Suggestions for improvement

The propriety of means norm is central to the agreements, but was perhaps not sufficiently emphasised in the present documents. Most notably, the means that the parties expect each other to use could have been more clearly specified in Amsterdam and in the general part of the agreement in New York and London.

Proposal The means used by the developer to fulfil his contractual obligations should be not only as dictated by the legal requirements and the specific provisions of this agreement, but should also reflect the spirit of this agreement.

9.2.10 Harmonisation with the social matrix

In discrete transactions, harmonisation with the social matrix boils down to the (social) acceptability of the contract. The decisive factor here is whether society will enforce the agreement or not. In relational contracts, on the other hand harmonisation with the social matrix is a crucial aspect that is related to the supra-contract norms that govern both the internal and external aspects of the relation. This is explained in greater detail in Section 3.4.11. At this point, I would like to point out that my views on what constitute the key social norms differ from those expounded by Macneil. As stated in Section 3.4.11, he sees such matters as distributive justice, liberty, human dignity, social equality and inequality, and procedural justice as essential. Without wishing to disparage the importance of such values, I believe that when dealing with complex agreements of the type studied in this thesis, values such as flexibility, cooperation and good faith which are also subcontract norms.

All agreements are subject to specific laws, with which they have to comply or which enable the drafting of agreement. It follows that the agreements have to be interpreted with reference to these laws. We may regard this interpretation as an external norm that is particularly applicable to discrete agreements (see Table 9.12).

Differences and similarities

The harmonisation with the social matrix norms proved to be the hardest one to study. The reason is that, although it is obvious that the supra-contract norms play an important role in every contractual relation, they are not always visible. Supra-contract norms enable or hinder; they enable contracts to come into existence and provide the language and understandings that the contracting parties use to make the transaction. The only moment when the social matrix really comes to the forefront of the contractual relation is when the different parties have different opinions on what these supra-contract norms consist of or when a certain provision turns out to be unacceptable. But when they do not, the content of the norm requires a different kind of research, one that focuses more on cultural, sociological and anthropological aspects. This does not mean that nothing can be said about the social matrix.

In Amsterdam, the rich content of the social matrix was more visible in the agreements than in London and New York. The private parties and the local government were used to working with each other. Various (internal) norms had developed over the years.

In the Netherlands there are a limited number of developers that are capable of handling projects of the size and ambitions encountered in our case studies. In addition, unlike London, Amsterdam has a centralised local government that is the planning authority. Thus, the officials acting for the City of Amsterdam and the parties who developed the Mahler4 and Gershwin

Table 9.12 Discrete/relational matrix for the harmonisation with the social matrix norm

Projects	More discrete	Equally discrete and relational	More relational
Battery Park City	×		
Hudson Yards		×	
Gershwin			×
Mahler4			×
King's Cross			×

projects had known one another for years. Despite the city's aim to develop the Zuidas according to a radically new model, the Mahler4 and Gershwin projects were in fact developed in a way that for the most part was what all parties had been used to for decades. This was not the case in London and New York. In London, the borough of Camden had no experience in dealing with huge projects like the renovation of the King's Cross area. The developer was much more experienced with projects of this type. In New York, private parties had to deal with specific authorities (special purpose corporations) with whom they had little or no previous experience. The private parties in New York and London were less concerned with the supra-contract norms that shaped their contractual relations. This however was not the case for the Albanese Organization in Battery Park City (see Section 4.2.5). The BPCA emphasised that it liked working with Albanese because it was committed to the aims of the BPCA, but interviewees did not mention any specific supra-contract norms that guided that cooperation. Another reason for the differences between Amsterdam on the one hand and London and New York on the other is that the lawyers in London and New York were involved at an earlier stage of the project than in Amsterdam, which resulted in a more case-specific relationship that was more extensively written down in the agreements.

The parties to the Zuidas projects put their unwillingness to enter into litigation in the perspective of a long-term relationship. They always opted for resolution of relational conflicts because they knew they would have to deal again with one another in the future. Interviewees from the private parties emphasised that they were generally unwilling to adopt an intransigent attitude towards the city because they expected to work together with it in the future. When asked, none of them could remember an example of litigation over an agreement in the Dutch situation.

We may conclude that the relation between the City of Amsterdam and the developers was not confined to one specific project. The behavioural norms associated with this relation had emerged over time in various projects. This was not the case in the other projects where the norms governing the relation were, with a few exceptions, a product of that particular project.

The interviewees representing private parties in New York and London when speaking of their unwillingness to enter into litigation framed their reasons more in terms of costs. They could not easily imagine a situation where they would gain more from suing the government than from trying to work things out. In any case, an expectation of a long-term relation with the gov-

ernment was not their prime consideration in this context. It should be noted that these answers only involved issues of contract law and not procedures of administrative law such as the refusal of planning permission.

Thus, although the result was the same (unwillingness to litigate), the supra-contract norms seemed different in the two cases. The private parties in Amsterdam put more emphasis on the preservation of the relation and less on the time and costs involved in legal procedures, while in London it was just the other way round.

We have already discussed the importance of the principle of good faith in Dutch law (see Section 2.7.2). The present analysis seems to indicate that good faith is not only a legal concept but also a supra-contract norm. Interviewees in Amsterdam mentioned good faith as the most important reason why they had to take each other's interest into account and act reasonably. Interviewees in London and New York never volunteered ideas of good faith as a motivation for their actions, although it was mentioned frequently in the London and New York agreements.

I have no reason to assume that the parties in the Netherlands encounter fewer frustrations when working with one another than their English or American colleagues, but they definitely use a different approach which can be described as consensus-seeking as opposed to the adversarial approach common in London and New York.

In brief, the consensus-seeking supra-contract norms appear to play a more visible role in Amsterdam than in London and New York.

Suggestions for improvement

Greater acknowledgment of supra-contract norms would improve the agreements in London and New York. These agreements consist of standard provisions that tend to be formulated in an adversarial manner. The agreements as such fail to recognise the consensus-seeking aspects of the social matrix.

Explicit mention of these elements would in my opinion enhance the value of the agreements. This should be done not only by referring to commercial good practice and principles of good faith and fair dealing, but also by specifying the implications of these norms for example by requiring a flexible attitude from the parties to the agreement. The agreement could also specify that parties intend to enter into a long relationship and acknowledge that their relations should be understood in this light.

Proposal This agreement has been drawn up within the context of social norms, of which flexibility, cooperation and a businesslike attitude are the most important.

Proposal By signing this agreement, parties are aware that they enter into a 15-year relationship. They acknowledge that this relation will engender behavioural norms that may influence the agreement and agree that the agreement should be interpreted in the light of these norms unless such interpretation is explicitly excluded.

9.3 When to deal with issues related to the common contract norms

In this section I provide a scheme that specifies at which stage parties should deal with problems arising in connection with the various common contract norms (see Table 9.13). Note that the pre-contracting phase is not necessarily the negotiation phase. Role integrity, for example, plays a role before the negotiations on the development agreement start.

What becomes clear from this overview is that the implementation of planning norm, the flexibility norm and the supra-contract norms (harmonisation with the social matrix) should dominate the whole process since they are the only ones that demand intervention at all stages. Planning and flexibility are key factors in urban development projects (Chen, 2007; Trip, 2007; Van der Veen & Korthals Altes, 2009). The supra-contract norms are, by definition, always present. The scheme however indicates that the norms should not be imposed on the contracts but be a part of them.

Role integrity is best dealt with before the contracts are closed: parties should be aware of the role in which they enter a contractual agreement. We saw that in King's Cross and in the New York cases the relation between the various layers of the government had to be worked out in various preliminary agreements before the main agreements were closed. This approach is also taken in the Zuidas Corporation (see Section 7.1.7). The role of private parties as well as public parties may also have to be determined before they enter the agreement. We found a good illustration of the importance of this in the Mahler4 case, where the status of G&S Vastgoed initially gave rise to some problems (see Section 7.3.5).

Mutuality is an ongoing norm that should be dealt with in the pre-contractual and the post-contractual phase; in the contractual phase, it becomes part of the effectuation of consent norm. The latter, on the other hand, should be dealt with in the agreement. It becomes part of the mutuality norm in the other phases. In the post-contractual phase the leading question should not be "What did the contract say?" but rather, "How should the consent of party A be interpreted at this moment?" Insofar as this differs from the contractual

Table 9.13 When issues related to common contract norms should be dealt with

When should issues be dealt with?	Pre-contractual phase	In written agreement	Post-contractual phase
Role integrity	×		
Mutuality	×		×
Implementation of planning	×	×	×
Effectuation of consent		×	×
Flexibility	×	×	×
Contractual solidarity		×	×
Linking norms	×	×	
Creation and restraint of power		×	
Propriety of means	×	×	
Harmonisation with social matrix	×	×	×

consent, it becomes part of the mutuality norm that evolves when relations evolve.

Propriety of means and the linking norms should be dealt with in the pre-contractual and contractual phases. For the linking norms this is a matter of definition; they link the common contract norms to other legal norms. The expectation, restitution and reliance interest should be specified and dealt with in the agreement. The linking norms may matter after the agreement is closed, and since they link other norms to legal categories may be decisive for the legal strategy a party chooses. But they should only be of concern when the agreement is drafted. When the agreement is closed the linking norms disappear into other norms such as mutuality or contractual solidarity and only come alive again as independent norms when parties have an insoluble conflict.

Propriety of means should be dealt with in the pre-contractual and the contractual phase. In the contractual phase more emphasis may be put on the kind of means that parties will use (adequate means), whereas in the pre-contractual phase more emphasis may be put on the question whether a party has access to the means to realise the goals of the contract. When the agreement is signed, propriety of means should be presupposed and post-contract discussions should focus on how the means will be used. In other words, in the post-contract phase the means norm becomes part of the planning norm.

Contractual solidarity, finally, is a post-contractual norm since it means that parties should be willing (to some extent) to help each other to perform their obligations and put some effort in staying in the relation. The contract can however help in providing some guidelines for contractual solidarity; this could even be done by making provisions for fines or other penalties to enforce the norm.

9.4 Conclusion

In this chapter, I have provided an overview of the differences and the similarities that were encountered between the various cases studied, with reference to each of the common contract norms in turn. I have suggested explanations for these differences and similarities in line with the characteristics of the discrete and relational norms. Finally, I have made some suggestions for improvement of agreements of the type considered here. In the next chapter I want to provide more general conclusions on the function of agreements in the cases and suggest a general approach to development agreements. I will also provide some methodological reflections on the theory.

We will end this chapter by revisiting the three premises given in the introduction (Section 9.1).

The first premise was that a contract that gives a more specific account of the relations in which it is embedded is better than one that fails to do so. The second premise was that such a contract will be able to solve more of the problems that occur in these relations than one that fails to do so. The third premise held that it follows from the nature of the cases that relational norms are of key importance for the success of urban renewal projects.

As to the first premise, it turned out that none of the written agreements gave a complete account of the relations in which it was embedded. The contract that came closest to this ideal was the S106 agreement in King's Cross. The contracts in Hudson Yards and Zuidas mentioned the importance of the relations and put them up front, but they failed to provide a specific insight into the relations. The leases in Battery Park City were standard documents and did not provide a specific insight into the underlying relations.

Since the first premise was not fulfilled it is not easy to say much about the second. But we may conclude that the contract in King's Cross, with its very detailed mediation and arbitration procedures, offered the most specific way of solving any forthcoming problems.

Despite their failure to give a specific account of the relations in which the contracts were embedded, the Zuidas contracts were the most suited to facilitation of the underlying relations.

The cases provided sufficient support for the third premise. But one of the most interesting outcomes of the study is that some contracts would profit from a more discrete approach to some norms. Most notably in the Zuidas case, problems could have been prevented if role integrity had been approached from a more discrete angle.

Another significant conclusion from this chapter is that a difference exists between the interests of the project and the interests of the relation between the parties undertaking the project. Although the relation between the parties tends to be highlighted as the project progresses, and a good relationship is certainly necessary for proper development of the project, we may still

conclude that a certain tension sometimes exists between the interests of the project and those of the relation. We will return to this point in Chapter 10.

10 Conclusion: reflections on development agreements

10.1 Introduction

In this chapter we will answer the main question of this thesis: *How do development agreements function in the context of urban development projects?*

We will evaluate the four functions of the development agreement that were discussed in Chapter 4. These functions are the exchange function (Section 10.2), the statutory function (Section 10.3), the planning function (Section 10.4) and the instrumental function (Section 10.5). After that we will provide rules of thumb for actors involved in the negotiation of development agreements and then assess the agreements from a normative perspective (Section 10.6). We will end that Section by drawing conclusions on the differences between the quality of the various contracts. In the final sections of this chapter we will reflect on the usefulness of the methodology (Section 10.7), revisit the research questions of this thesis (Section 10.8) and provide suggestions for further research (Section 10.9).

Two premises need to be stated before we start the evaluation of the development agreements. The first is that a development agreement that specifies – preferably in writing – the functions it aims to perform is better than one that doesn't. The second is that such a development agreement will be able to solve more of the problems that occur during the process of development than an agreement that fails to do so.

10.2 Exchange function

The exchange function is dominantly present in all agreements. Exchange is an important, but not a distinctive function of the development agreement (see Section 4.5.1). It cannot be a distinctive function, as exchange is part of the general definition of contracts we adopted in Chapter 3. In line with the first premise given above, we hold that all agreements should be specific about what will be exchanged.

The leases in Battery Park City bring about immediate exchange of the lease rights of the various plots. Possession of the land is transferred when the leases are signed, the payments to be made in return and other obligations are spelled out for the period extending up to 2069. The most important part of the exchange consists of the payments for the right to construct and own a building on the land (see Section 5.2.7 and 5.3.3). The leases in Hudson Yards also effectuate transfer of the lease rights but only for a limited period (seven years) and the lease only provides the right to build the tunnels and entrances for the subway extension, it does not include the right to build anything on top of the land (see Sections 6.2.7 and 6.3.3). The contracts in Mahler4 and Gershwin are projected-exchange documents. They contain the

conditions that have to be fulfilled before lease rights can be transferred and payments can be made at a later stage.

In the S106 Agreement (drafted in the form of a deed) for the King's Cross redevelopment project, planning permission is granted in exchange for the promise to provide a wide range of different facilities (see Sections 8.2.3 and 8.3.3).

Since exchange is the core reason for their existence, all agreements perform that function well. We have seen in Chapter 7 that the agreements in Amsterdam fall a little short in providing clarity on the impacts of the consent given by the various parties (see also Section 9.2.4). But generally speaking, all development agreements make clear what is exchanged in the sense that the financial risks involved are made clear to all parties.

10.3 Statutory function

The statutory function of the development agreement is embodied in the procedures that the various parties have to obey. Like the exchange function, the statutory function is not distinctive for development agreements. The various agreements we studied differed in the way they dealt with this function. An agreement may or may not put much weight on its statutory role. It may also choose to put weight on only some aspects (such as the arbitration procedure). In our opinion, an agreement should put emphasis on those aspects that are likely to cause the most problems. It turned out that these aspects were often related to the different goals of the parties (see also Section 10.4).

We may have seen that the statutory function of the agreement boils down to specification of (1) the goals that the parties commit themselves to; (2) rules for cooperation; (3) rules for dealing with conflicts; and (4) rules for noncompliance (see Section 4.5.2).

Goals

All written agreements mentioned the goals of the project and the goals underlying them. The King's Cross agreement proved to be the most specific in this respect. Still, the differences between the goals of the various parties turned out to be a problematic issue in all cases. The most illustrative examples can be found in Hudson Yards (see Section 6.2.14).

Cooperation

With regard to cooperation, the most interesting conclusion may be that the projects that required the highest levels of cooperation were the least specific on this issue in their written agreements. The legal documents acknowledged the importance of cooperation and provided some general norms but did not go into great detail about the procedures to be followed by the parties. In situ-

ations that require a high level of cooperation, the parties prefer to work out their own rules for cooperation outside of the contract. In this respect, I prefer the Gershwin approach to that of Mahler4 and Hudson Yards as it provided some rules and principles for the cooperation and guidance for situations where the cooperation process did not work out (see Section 7.3.4).

Conflicts and non-compliance

The King's Cross agreement was also the most specific in its provisions for dealing with conflicts, while the BPC leases implemented the most specific procedure for dealing with default situations. In these cases, the enhanced specificity might favour efficient realisation of the project, but we also found some examples of situations where the specificity of the agreement was actually bad for the project: the provisions in the BPC leases concerning the display of notices informing the public of public policies on certain issues were not taken seriously; one interviewee commented that if the authority really took these policies seriously it should have left the parties more freedom in the way they implemented the rules (case interview Carl Jafee, BPC 02-07-A1). The description of the non-discrimination policies in the Battery Park City leases was so detailed that the parties could not see the wood for the trees. We also found examples of over-specificity in the storage lease in Hudson Yards and the provisions aimed at ensuring role integrity in the construction leases for the same project (see Section 6.3.2).

10.4 Planning function

Development agreements put emphasis on the planning function. The importance of planning follows from the nature of urban development projects that provide the context of the agreements. Since the present investigation was undertaken within the field of planning studies, it is hardly surprising that planning is of enhanced importance in all agreements (see Section 2.5). A distinction should be drawn, however, between the planning function of contracts and the planning of a project. The planning function of contracts was discussed in Section 3.4.4; since a contract is a projection of exchange into the future, it must plan for the intended exchange. If a contract plans for all aspects of the exchange, the implementation of planning norm is discrete (see Section 3.6.1). But the planning function of a development agreement is not confined to the planning of the legal relation, it also concerns the planning of the project (cf. Section 4.5.3). In a subsequent part of this section (under the heading 'Planning and non-planning') we will combine these two parts when we use Macneil's (1975/2001) vision on contract planning as a framework within which further details on the planning function may be given.

The planning function should provide guidance but at the same time leave

room for flexibility (Trip, 2007; Van der Veen & Korthals Altes, 2009). All agreements recognised this tension, and it was often mentioned in the case interviews. Two projects, Hudson Yards and Mahler4, which required much and complex planning did not include a detailed planning of the project in the contracts and leases but referred to other documents.

We distinguished two different kinds of planning in the agreements (Section 4.5.3). The first kind is planning for the performance of obligations, while the second kind introduces a framework within which such planning can be performed. In addition, we saw that a development agreement may perform a coordinating function between various other contracts.

The agreements in Battery Park City and King's Cross were more precise, whereby the King's Cross agreement left more issues open than the BPC leases. The difference can be explained by the fact that the development covered by the BPC leases was expected to be completed in less than two years whereas the King's Cross agreement planned for a project lasting 15-25 years.

The contracts for the development of the Zuidas (Chapter 7) all introduced a planning framework, and referred to other existing and forthcoming documents and meetings where the planning would be further specified.

The Hudson Yards leases did not introduce a planning framework, but also referred to underlying (and forthcoming) documents for the planning of the project. The leases only provided some key principles for this planning.

The Mahler4 and the King's Cross agreements also had the function of coordinating between the various subprojects. The Mahler4 cooperation contract introduced phases in the planning process but further referred to underlying and forthcoming plans. The King's Cross agreement introduced not only a phased planning framework but also plans for the various subprojects aimed at the provision of public facilities. (All these elements were included in the S106 agreement.) Unlike the other agreements studied, the S106 agreement did not refer at all to the commercial parts of the King's Cross redevelopment project.

The outcomes of the case studies impel us to take a closer look at the issues associated with planning that arise in legal agreements. We may discern three aspects of such problems (cf. Macneil, 1975): (1) determining goals and ascertaining costs; (2) planning and non-planning; and (3) performance and risk planning. Macneil focuses on contract planning and not on project planning, but he also acknowledges that the two cannot be separated if one wishes to provide a framework within which the planning function of the development agreement can flourish.

Table 10.1 contains the aspects of the planning function.

Determining goals and ascertaining costs

The processes of determining goals and ascertaining costs are intertwined since parties want the value of the goals they achieve to be higher than the

costs of achieving them. The goals of the contract therefore find their natural endings when there is no longer any exchange surplus for (one of) the parties. This does not necessarily means that the agreement ends at that point, but the situation becomes totally different when one of the parties can no longer gain anything by staying in the relation.

More importantly, what one party considers a goal often represents a cost for the other party. This argument is in line with the finding from the case studies that the hardest parts of the pre-contractual negotiations were those dealing with the costs for extra facilities (most notably in King's Cross, see Section 7.2) and with the moment when the private parties had to pay them (upfront or when a certain project milestone was reached).

One way of dealing with the problem of the tension between goals and costs is to keep some of the goals vague. This practice was encountered in the Zuidas where the contracts sometimes mentioned vague goals (such as a high quality environment). In such situations the point is not so much to ascertain costs (at least not at this stage) but to emphasise that parties subscribe to each other's goals while avoiding the conflicts that may arise while specifying them.

Planning and non-planning

A second aspect of contract planning is the demarcation between the events that are foreseen by the agreement and the events that are not (planning and non-planning). The agreement may be vague and only consist of an anticipation of cooperation in the future, but it may also consist of a detailed schedule of that cooperation that provides for every step and everything in between. But even then, planning deals with the future and is therefore almost by definition never complete (Van der Veen & Korthals Altes, 2009). Macneil (1975/2001: 206) speaks of the planned and unplanned parts of the unexecuted portion of a contract: "Every contract is necessarily partially unplanned, not only because of the nature of planning, but also because of the nature of one of the major tools of planning: promises. Thus, generally speaking the unexecuted portion of every contract contains two parts: the planned and the unplanned."

Various factors complicate any description of the planned portion of the relationship. One party may plan the relationship differently than the counterparty. Another complication is that it is not always clear where the unplanned portion of a contract begins and the planned portion ends. A development agreement may establish a framework to deal with otherwise unplanned portions of the relationship. And, as Macneil (1975/2001: 207) puts it: "... this sort of planning itself may be so vague as to be little more than an expression of hope for future cooperation: "We'll worry about that later and work it out somehow."

The agreements in Amsterdam provide many examples of this kind of vague planning. They sometimes refer to specific committees in which par-

ties will meet and sometimes only state that an issue will be dealt with in the future.

In all addition, all planning involves tacit assumptions. As Macneil (1975/2001: 208) puts it: "Tacit assumptions are as important in contract planning as they are in any other human behaviour. Just as people constantly make tacit assumptions while they are eating, driving, playing football, operating a computer, or making love, so too they make tacit assumptions when they are planning contractual relationships."

One tacit assumption that may cause trouble is found when one party assumes that the other party is familiar with a custom of his trade, whereas in reality he is not. In the King's Cross case, the acknowledgment of these tacit assumptions led the developer to organise workshops to make sure that all parties had the same understanding of crucial terms such as sustainability which are open to different interpretations (case interview Argent, KCX 04-06-A2).

Risk planning and performance planning

A contract plans for the performance of obligations and deals with the risks of losses that may occur.

The distinction between performance planning and risk planning is that between the steps taken to reach the goals of the contract (performance planning) and the steps taken to deal with risks the possibility exists that certain losses may occur (risk planning). Risks are caused by the fact that not all costs are known when parties enter into a contract.

We may distinguish in this connection between 'goal facts' and 'mean facts'. Goal facts are information about the objectives of a contract whereas mean facts indicate what means can be used to reach these goals. Since contracts specify the goals and means of two or more parties, a fact can be both a mean fact and a goal fact (Macneil, 1975/2001: 211).

Note that profit is not necessarily financial profit. Profit may be defined differently when, as in the cases we studied, the government is involved. Profit may then also mean more green zones, jobs for the unemployed, a new school etc. Still, for the developers, the profit of the public party will at least in the short run be a cost. Over a longer period, developers of property may increase the return on their investments in the surrounding area because the quality represented by these non-financial profits adds to the value of their properties. The costs just referred to are thus also means, and furthermore involve risks (since the cost-profit calculus is not fully known). For private parties, financial profit is the ultimate but not necessarily the only goal. In the cases we have studied, many interviewees representing private parties emphasised that financial profit was their ultimate goal but they also named other goals such as sustainability and turning the development location into an attractive 'back yard' for their head offices. Thus, investing more money may be

profitable in helping to attract new customers, image-building, providing an opportunity to experiment with new construction techniques etc. A private party may also subscribe to goals like affirmative action. Thus, as one of the interviewees explained, the profit may be of a more long-term nature and not directly translatable into project value (case interview ING, MAH 10-04-A5).

Not all parts of the relationship are spelled out in the contract (Macneil, 1975/2001: 212). The specification may be too costly (in money or time), or it may jeopardise the prospective relationship between the parties. Parties may be unwilling to think about all future scenarios because they do not want to start an argument about an event that may never occur. The contracts in Amsterdam provide a good example of this. They do not deal extensively with situations of non-performance or with unwanted events that may lead to extra costs. One of the interviewees stated that to deal with them more extensively would be a waste of time and money since it would be impossible to plan for all events in any case (case interview Fortis, MAH 10-04-A2).

Standardisation

The use of standard forms or legal frameworks is convenient and efficient. But some forms are much better than others. More importantly, using any standard form involves a certain risk (Macneil, 2001). The framework chosen may not fit the relationship to be dealt with, or it may be outdated. The latter was the case in Battery Park City when, after a period of about ten years, market demand increased and the leases that were originally drafted in the 1980s had to be rewritten. Still, the use of standard documents that can be adapted to concrete cases seemed to work on the whole for Battery Park City. The leases are all drafted in the same way (case interview BPC 02-07-A1, see Section 4.2). The frameworks used for the 1980s leases were left untouched: the main changes concerned the evolution of legal language. The documents contained relatively standard legal language and were rewritten in a relatively standard way (case interviews NY 11-04-A4 and A5).

In the Gershwin project, standard contracts were drafted for three of the four plots (see Section 5.2). This was done to facilitate the drafting and negotiation process, but in the end it slowed the process down instead of making it quicker. In the interviews concerning this case, representatives of the city and the lawyer responsible for drafting hinted that they would have preferred to work without standardised contracts (case interviews GER 03-06-A4 and A5). Lawyers involved in other projects also stated that they preferred to work without standardised documents (case interviews KCX 04-06-A3, NY 03-07-A2 and NY 03-07-A3).

Planning for dispute resolution

Contracts can never prevent all disagreements: it therefore makes sense to plan for the resolution of disputes. The easiest instrument to use here is the

Table 10.1 Aspects of the planning function

1. Ascertaining goals and determining costs	Goal-cost tension: there has to be an (expected) exchange surplus.
3. Planning and non-planning	Complications that may arise are: 1. Difference between parties in planning of the relation. 2. Uncertainty about where the planned part of the contract begins. 3. Inability of the human mind to focus on all aspects of a problem. 4. Differences between the tacit assumptions of the various parties.
4. Performance and risk planning	A distinction exists between goal facts and mean facts. Mean facts concern the means used to reach a certain goal (for example, a payment to receive a product). A mean fact for one party may be a goal fact for the other.
6. Standardisation	Standard forms may be convenient and efficient, but they are also at risk of becoming outdated or not applicable to the specific situation.
7. Flexibility	A contractual relation is characterised by 'ongoingness' and should therefore include flexibility. This also requires planning for dispute resolution.

self-help remedy. The law often allows one party to suspend, refuse or stop his performance when the other party does not perform his side of the contract (Macneil, 2001: 234-235): "Good planning of the refraining-from-performance remedy always contains three elements: explicit conferring of rights on a party to stop his own performance; precise specifying of the events giving rise to those rights; and dealing with further remedies and other related matters."

Planning to keep ahead of the game involves dealing with security and forfeitures. An example is the pawning of goods to provide an extra assurance that the duty required will be performed.

Planning for the uncertain duty risk means taking steps in advance to deal with uncertainty about the duties of the parties. If such a situation arises, it makes sense to appoint an arbitrator who will decide the point or to agree on the procedure by which such an arbitrator can be selected.

There are various types of dispute resolution: one-sided dispute resolution, negotiation, mediation, arbitration and judicial procedures. Macneil (1975/2001: 243) argues that litigation is different from other forms of dispute resolution. When a case is brought to court, the court can only review the relationship through documents and witnesses. It also has a limited range of possible responses compared to the responses that are available in a viable relationship. The court can only order the specific performance of a previously established duty or award damages.

In the cases studied, interviewees seemed to acknowledge this. In general, they failed to see how litigation would fit their interest in a quick realisation of the project (e.g. case interview BPC 11-05-A3 and A4).

10.5 Instrumental function

The instrumental function is the function of a development agreement as a means to implement public goals. It is a distinguishing function of develop-

ment agreements but it is also a default function; we could imagine a situation where it does not apply. Public parties have the option to rely on legislation instead of private law agreements. We have seen that the City of Amsterdam intends to do that in the case of the forthcoming Zuidas Corporation (Section 7.2.7).

The public goals can be related to the project or offer a chance to realise longstanding policy goals. We defined project-related goals as goals intended to mitigate harmful effects of the project (Section 4.5.4). Longstanding public goals are not specifically related to the project. An example is the goal of creating apartments for middle incomes. A development agreement can also be used to attract new developers, for example by giving the first developers to invest in a project area some special incentives (cf. Section 6.1.7).

We encountered the instrumental function of the agreement in all the urban development projects we studied, and in all focal projects with the exception of the subway extension project in Hudson Yards. But even there, the Meushar lease facilitated the use of a profitable brownfield cleaning programme by the landowner (Section 6.2.3). We may conclude that although the Hudson Yards leases were closed to realise a public goal (subway extension), they did not include many other public goals with the exception of a standard role integrity policy (see Section 10.4).

For the S106 agreement in King's Cross, implementing public goals was the main function of the contract. King's Cross provided some examples of the implementation of public goals that were not project-bound, such as the realisation of a job trainee centre. The Gershwin project provides one example of such a goal, namely the building of houses for middle-income groups.

In the New York projects, the fiscal aspects of the project were also made the subject of agreement (see Section 6.1.7). The Goldman Sachs lease in Battery Park City provided an example of a flexible interpretation of the rules due to the fact that the City and State of New York did not want the bank to move to another state (see Section 5.3.1). The profit then lies not so much in a direct benefit, but in the fact (which may be open to dispute) that New York will benefit in the long term when banks and other high profile companies keep their head offices in the city.

10.6 Assessment of contracts

In this section I will first provide five rules of thumb for parties involved in the process of negotiating a development agreement. In the second part of the section we will transform these rules of thumb into principles for drafting the written part of such agreements and use those principles to assess the agreements examined in the various case studies.

Table 10.2 Comparison of functions of the various development agreements

	Projects	
Function	Mahler4 Whole project	Gershwin Zuidschans
Exchange function	It is clear what is exchanged	It is clear what is exchanged
Exchange procedure	Specific	Not very specific
Statutory function	Not very specific	Specific
Cooperation	Not very specific	Not very specific
Goals	Specific	Specific
Conflicts	Not very specific	Not very specific
Planning function	Not very specific	Specific
Plan	Framework	Framework
Coordination	Coordinating framework for various subprojects	No specific coordinating functions
Instrumental function	Specific	Specific
Project-bound?	Yes	Mixture of project bound goals and (other) public goals
Was project meant to attract development?	No	No

10.6.1 Rules of thumb

The five rules of thumb given below may help actors who are involved in the negotiation process leading up to the drafting of development agreements. Together they constitute a simplified model based on the outcomes of our case studies and the theoretical material of Chapters 3 and 4. For the reader of this study, their content will come as no surprise.

Focus on relations (cf. Section 3.1) – All development agreements are embedded in the relations between parties. Every development agreement should start by examining the nature of these relations. If there are too many conflicts or misunderstandings, they should be resolved in the pre-contractual phase. Are there expectations that cannot be reconciled?

Focus on the interest of the project (cf. Section 4.5.2) – Take a step back and ask yourself: What does the project need? In the cases we studied, the agreement is meant to provide the basis for an urban development project. What is the content of this project? Are there provisions that make sense from a relational perspective but are not in the interests of the project as such?

Specify the functions of the agreement (cf. Section 4.5) – Is it clear what is being exchanged? What rules and procedures are (or should be) imposed on the parties? Has a project plan been drawn up? Are there any public goals that should be implemented in the agreements?

Specify the goals of the agreement (cf. Section 10.3) – What goals does the agreement pursue? And what are the goals of the parties and of the project? Are they reconcilable?

Table 10.2 continued

Projects		
King's Cross The Main Site	Battery Park City Various leases	Hudson Yards No. 7 Subway extension
It is clear what is exchanged but very complex	It is clear what is exchanged	It is clear what is exchanged
Very specific	Very specific	Very specific
Very specific	Very specific	Specific
Specific	Specific	Not very specific
Very specific	Specific	Specific
Very specific	Specific	Not very specific
Very specific	Very specific	Specific
Specific plan	Specific plan	Mixture
Coordinates between various subprojects	No specific coordination functions	No specific coordination functions
Very specific	Very specific	Specific
Mixture of project bound goals and (other) public goals	Yes	Yes
No	No	Yes

Plan for flexibility (cf. Section 3.6.2) – Does the contract leave sufficient room for change? Does it include a method for revision of the planning? Does it provide the opportunity for moments of reflection on the method of cooperation used?

10.6.2 Principles for preparing the written parts of development agreements

Section 10.6.1 provided rules of thumb for the process of negotiating a development agreement. The present section has a narrower scope, as it only focuses on the written part of the agreement.

There are many similarities and differences between the development agreements in the various cases we studied. The similarities are mostly explained by the fact that all the agreements perform comparable functions at an abstract level.

Differences are found for example in the levels of specificity. We also saw that not all contracts perform a coordinating role between various projects, while only the King's Cross agreement had the implementation of public goals as its main function (see Section 10.5).

It is difficult to measure the quality of a written agreement. It may be claimed that the agreement is probably functioning well if nobody complains about it. Note however that the absence of complaints could be due to the fact that the legal agreement has disappeared into a drawer during the process and did not provide any guidance for further developments. In line with

Table 10.3 Quality norms for (the written part of) development agreements

A development agreement:
1. Specifies the functions it performs
2. Specifies the relations in which it is embedded
3. Introduces relational norms
4. Puts emphasis on flexibility
5. Puts emphasis on the importance of planning

the premises given in the Introduction to the present chapter, we consider such an agreement to be not as good as one that guides further developments.

On the basis of the three premises given in the Introduction to Chapter 9 (Section 9.1) and the two premises presented at the start of this chapter (Section 10.1), we may conclude that the best contracts provide a specific account of the relations in which they are embedded and of the functions they perform. These insights lead to the following five basic principles presented in Table 10.3.

We will now examine how these principles can be used to assess the various agreements we have studied in this thesis.

10.6.3 The BPC leases

The BPC leases specified the functions of the development agreement effectively. We saw however that some of the standard regulations included in the leases were so detailed as to obscure the meaning.

The leases did a good job in specifying the relations in which the lease was embedded: the various roles of the public parties and their implications for the relation with the developers are explained in considerable detail.

The leases did not devote much effort to the introduction of relational norms: they took a more adversarial approach.

The leases did not put much emphasis on the importance of flexibility either. We saw that they provide room for the developer to reach results in a manner that suits him best (the 'how') and that the time schedule is not as strict as it may seem (Section 4.3.7). But the spirit of the lease is to control the development process, using a procedure whereby the BPCA reviews all plans and proposals. One of the explanations for the emphasis on security rather than flexibility is that the development agreement is embedded in a lease that will last for more than 65 years.

The leases did place emphasis on the importance of planning: they introduced a framework and implemented an approach that worked for both the BPCA and the developers.

The overall conclusion is that the development part of the BPCA leases functions well but is somewhat too standardised and specific and puts too little emphasis on flexibility. In addition, the leases do not provide a framework that allows the relation between the parties to evolve. Modifications of the plans and proposals will have to be negotiated and will result in changes to the leases.

10.6.4 The Hudson Yards leases

The Hudson Yards leases could have specified their functions better. They hinted at the many aspects involved in the construction of the subway extension and the development of the plots but failed to take control over the development. We saw that the statutory function could have been improved in the storage lease, which implemented standard regulations that mostly failed to make sense in the specific context.

The leases could have done better in specifying the relations they were embedded in, most notably because they involved many public parties and were in that sense complex. In addition, the leases did not bring all private parties together which would have made sense.

The importance of flexibility was emphasised in the leases. A good balance was found between the security needed for the financial obligations and the flexibility necessary to have the project carried out in a proper manner.

The leases did moderately well in introducing relational norms; they put some emphasis on the importance of cooperation, but could have been more specific in stressing the importance of a cooperative and flexible approach to the work or in providing a framework wherein the relational norms could flourish.

Planning issues should have been more specifically dealt with, but the leases still did a good job of explaining the principles underlying the preparation and modification of the draft plans. Overall, the Hudson Yards leases did well but they could have taken more control over the development aspects of the project (as opposed to the financial terms): since the project required so much cooperation, it would have made sense to lay down some firm principles for that process.

10.6.5 The Gershwin contract

The Zuidschans contract gave a clear specification of the functions it aimed to perform. The relations in which the contract was embedded needed more specification, however. The rather vague description of these led to some problems related to role integrity and competing goals (see Sections 9.2.1 and 10.4).

On the other hand, the contract did introduce relational norms effectively: it not only emphasised the importance of good faith but also pointed out the merits of an 'unconventional' approach.

It also stressed the need for flexibility and seemed to have found the right balance between this requirement and the need for firm agreements. The stress on unconventionality may also be interpreted as promotion of a type of flexibility (see Section 7.4.6).

The contract emphasised the importance of proper planning: it introduced

a planning framework and obliged parties to modify this framework in response to changes in the situation.

The overall assessment is that the Gershwin contract provided the necessary guidance and did exactly what the Mahler4 contract failed to do (see Section 10.6.4), by taking control of contract-specific issues. This became most visible in the parts that dealt with planning. The main flaw of the Gershwin contract was that it did not provide a solution to role integrity problems, and even contributed to their complexity in the context of the introduction of the air rights system (see Section 7.2.3).

10.6.6 The Mahler4 contract

The Mahler4 contract did moderately well in specifying the functions it aimed to perform. It would have been preferable if the contract had been more specific in defining its relation to other documents (coordination function). It would also have been preferable if it had specified the goals of the separate functions it performed. In this respect, it performed best with regard to the environmental measures it wanted to implement as it did specify the goals of these measures.

The contract did moderately well in specifying the relations in which it was embedded. It explained how the various parties who had signed the contract of intent were now involved in the project. However, it only implicitly referred to the various roles of the public parties and did not explain how these various roles resulted in different relations with the consortium chosen to develop Mahler4.

The contract introduced the general norm of good faith as a dominating relational norm. It did well in emphasising the importance of relational norms but should have been more specific in explaining their meaning for various parts of the project.

The contract stressed the importance of flexibility, even though the word 'flexibility' never actually occurred anywhere in the document: it clearly stipulated that the agreements it referred to were to be further specified in subsequent meetings and documents. Some examples of how this approach left room for changes to the project were given in the case study (Section 7.5.6) and in Chapter 9.

The Mahler4 contract also emphasised the importance of planning and introduced a planning framework. It should however have provided more rules for the cases where the planning was not met. In general, the contract would have been improved by the provision of more guidance. It is clear from reading it that it forms part of a much larger body of plans and agreements, but it refuses to add anything to those documents with the exception of the parts that deal with exchange. But these other documents either refer to the Zuidas project as a whole or adopted a more general perspective. They lacked the

specific characteristics of a contract. As a general conclusion we may say that the Mahler4 contract should have taken more control over the project.

10.6.7 S106 agreement in King's Cross

The King's Cross agreement (drawn up in the form of a deed) did well in specifying its various functions. We have seen that the most dominant cause of its specificity is the public-private nature of this document (see Sections 8.1.1 and 8.3.1). As a result, the instrumental function is particularly well developed. The relation between the various parties was also clearly specified.

Flexibility was an important aspect of the agreement but more stress could have been placed on this requirement in the general part of the agreement.

The deed should have introduced (more) relational norms, given the fact that the parties concerned were entering into a relation that was expected to last at least 15-20 years.

It did a very good job in emphasising the importance of planning and introduced a refined system for dealing with situations in which planning requirements were not met.

Overall, the King's Cross agreement was very well crafted. Unlike the BPC leases, it specified all agreements made in a manner that was appropriate to the project and tried to find the proper balance between flexibility and security (see Section 7.3.6). It should however put more emphasis on relational norms, and we saw that the King's Cross approach leads to a construction in which most facilities are planned in advance. Although the contract did leave some room for modification, it would have been an improvement to leave even more and to omit some of the detail.

10.6.8 Conclusion

The survey given above shows clearly that different approaches to drafting lead to different legal documents: in particular, we may say that the ones providing the most specific account of the functions they performed and the relations in which they were embedded did worst on flexibility and implementation of relational norms. If we were trying to construct the ideal (written) agreement, we might like to pick specific provisions from all the contracts we have studied. If however I were to choose one document as a general model for the drafting of contracts of this type in future, I would opt for the S106 agreement used in King's Cross because of its specificity. The Gershwin contract is also very specific, but it would be more difficult to use as a model because it is relatively short and hence does not specify as many issues as the King's Cross agreement does.

The BPC leases and the Mahler4 contract were soon put away in drawers and forgotten after they had been signed. The BPC leases were standardised

documents that could have done more to help preserve the contractual relations in question and help them to evolve.

The Mahler4 contract more or less disappeared from the table when the circumstances governing the execution of the project changed. It should have provided more guidance for the parties on how to deal with these issues.

10.7 Methodological reflection

Methodology turned out to be a key issue in this study. The main question was whether to choose an investigative method that would be best for the description of the cases, or to go for a more normative approach. I decided that it would be best to start with a descriptive approach because the main research question considered in this thesis was of a descriptive nature: how do development agreements function in the context of urban development projects? The theoretical framework for the study was provided by a combination of relational contract theory (described in Chapter 3) and the concept of the development agreement (explained in Chapter 4). This gave me a basis for the comparison and critical assessment of the selected agreements and hence allowed me to draw normative conclusions. After the detailed case-by-case analysis given in Chapters 5-8 more general reflections were given in Chapter 9, leading up to the development of a general method for the assessment of new or existing contracts presented in the previous section (10.6). This methodology did not result in one-sided normative verdicts on the agreements. In the theoretical part of the study we discussed the problems that would have emerged if such an approach had been adopted: we would have had to narrow our focus to one or two aspects of the agreements before we knew which aspects were most interesting to consider (e.g. section 4.1.1).

The upshot was that I opted for a comparative study that focused on the way development agreements functioned and that would provide a basis for development of an approach that could be used in future studies and could also help (legal) practitioners for example in the drafting of new agreements. A more normative research question might be appropriate in future studies if the researcher wished to investigate a problem that could be easily confined to one or two questions.

10.7.1 Case studies

The case studies presented in Chapters 5-8 were based on an analysis of formal documents, case interviews, and consultation of relevant scientific publications. Articles from the media were used to provide insights into the background of the various projects and the discussions that arose around them.

Case interviews were undertaken with professionals who were directly in-

volved in the project, professionals with a knowledge of the field, and academics. New York was visited in November 2004 and February 2007. London was visited in April 2006 and an additional study was undertaken as part of a research project for the Dutch investment management and property development group Bouwfonds in cooperation with the University of Westminster in 2007-2008. Amsterdam is the home base of the author, therefore the study of the Zuidas project had a more continuous character than that of the other projects.

The case study approach worked well, it helped to collect the information necessary for the study and provided many details on the projects. The data I collected did not always make it into the pages of this thesis, but still often helped me to understand how the development agreements functioned within the project and guided my selection of which details were included and which were left out.

10.7.2 Applicability of relational contract theory

Relational contract theory was presented in Chapter 3. Key elements of this theory, discussed at length in that chapter, were the ten common contract norms and the differences between discrete and relational norms.

The biggest problem I faced when trying to apply this theory to the urban development agreements involved in my case studies was how to deal with the fact that no single real-life agreement transaction is 100% discrete or 100% relational.

The method that I finally worked out and which I believe to have been effective was as follows. I started the analysis of each case by describing the content of the ten common contract norms in turn and placing each of these norms on a three-point discrete-relational scale (more discrete, equally discrete and relational, and more relational). I then summarised these results in what I call a discrete/relational matrix for the case in question (see for example Table 5.1), with the ten common contract norms down the left-hand side and the three-point discrete-relational scale along the top. Secondly, I determined the relative importance of the typically discrete norms of presentiation, discreteness, implementation of planning and effectuation of consent, and of the typically relational norms (role integrity, preservation of the relation, resolution of relational conflict, propriety of means and supra-contract norms) for the case in question. I summarised these results in another table (see e.g. Table 5.2). This gave me two 'snap-shots' or 'X-ray photos' for each individual case, which provided a useful basis for further analysis, discussion and comparison of the individual cases.

There were two reasons for using the common contract norms as my point of departure. The first was that since real-life agreements will always have both discrete and relational aspects it makes no sense to choose between the

two sets of norms in advance. The second reason was that since the dominance of either the discrete or the relational elements will also influence the content of the common contract norms, the discrete or relational character of a given contract will be quite clearly reflected in the corresponding discrete-relational matrix.

This is backed up by the subsequent (less detailed) assessment of the relative importance of the typically discrete and relational norms.

Thus, my analysis of the King's Cross agreement led me to the conclusion that it had more discrete than relational elements. The key findings in this connection were that implementation of planning and effectuation of consent were of enhanced importance (see Table 8.2) and had more discrete than relational elements (Table 3.2).

In addition, role integrity was not a complex norm in the deed (although it was during the negotiation phase) and propriety of means and the supra-contract norms were not of enhanced importance. However, preservation of the relation and resolution of relational conflict were present in some parts of the agreement as was illustrated by the extensive arbitration procedure and the provisions on monitoring. Taking all these facts into consideration, I concluded that the King's Cross agreement, like all real life agreements, had both discrete and relational elements but that on balance it tended to the discrete side of the continuum.

The Mahler4 agreement, on the other hand, turned out to be more relational than discrete. Here implementation of planning and the effectuation of consent were not of enhanced importance and were not predominantly discrete. In addition, the supra-contract norms, propriety of means and role integrity were complex norms that (with the exception of propriety of means) turned out to be of enhanced importance. The propriety of means norm was predominantly relational: it focused not only on the 'what' but also on the 'how'. In balance, therefore, this agreement tended to the relational side of the spectrum.

I believe this approach is an effective means of describing the agreements – as accurately as possible – in their own context while at the same time providing a frame of reference for comparative evaluation. All the contracts were individually discussed and characterised in this way. Naturally, the assessment of the norms on a discrete-relational scale is a subjective matter, depending on the judgment of the investigator. It could be argued that this makes the outcomes of the present study debatable. But I believe this disadvantage is outweighed by the fact that the method is very transparent. The reader can easily follow the reasoning and decide whether he would draw the same conclusions. I regard this scientific transparency as one of the main assets of the method.

A more serious disadvantage of the method is that the conclusions that are drawn are highly case-specific. They have a descriptive value, but it is not

so certain that they can be used as a basis for appraisal of the practices we encountered in our case studies. Suppose that a norm turns out to be more discrete than relational. What does this really tell us about the agreement in question? In fact, experience shows that analysis of the norms in the way described here helps to find out where things went wrong in case of disputes, unnecessary delays or other problems that should not have arisen if the contractual relation between parties was functioning well. I believe that this advantage is often underestimated. The most important argument in favour of our method is that the theory can be used in a normative manner, as I have shown in the previous sections, and that it helps us to propose case-specific, not over-generalising, conclusions.

In the present study, we solved the comparability problem indicated above by making use of the premises stated in the introduction of Chapter 9 to provide a background against which the outcomes were compared.

Another disadvantage of our method is that when agreements are studied within their own context, they become incomparable, since every context is unique. This makes it hard to draw comparative conclusions that promote cross-case learning. And since this is true for cases in general, it must be even truer for cases situated within different countries. This is a point worth stressing. It is in line with the criticism of relational contract theory discussed in Chapter 3 that this theory puts too much emphasis on all the different aspects of a case, as a result of which it is unable to make meaningful pronouncements with regard to the enforceability of contracts. In the same manner, it can be argued that the overemphasis on all the different aspects of the case makes it hard to draw any generalising conclusions at all. But the emphasis relational contract theory puts on all aspects of the case also has an advantage, in that it helps us to rethink general opinions and notions on contracts and the law. General opinions are then replaced by more case-specific considerations.

In addition, the method used in the present study forces us to think about the relation between the specific rules of the contract and the law as it is applied in courts, and the possible sources of interference with this relation. But since it lacks a general opinion on what is just and what is not and replaces it with the notion that courts should do justice to the contractual relations as they stand, it only calls for broad categories and does not fill them in. I believe that both these viewpoints are sound, and that in fact the argument between them must probably remain undecided.

The question is whether the goal of a contract should be to ensure predictable enforcement, or whether the way in which it is enforced should depend on the way in which the relationship between the parties to the contract has evolved. I would say that this depends on the nature of the relation, but for the present purpose of studying development agreements it generally makes most sense to consider the enforcement of the agreements as they evolve

during the development process. Campbell *et al*. (2003) argue that the parties can always implement an 'entire agreement' clause as was done in Battery Park City, which means that they obviously wanted the contract to be central to their relation.

The upshot is that we may state that one of the main assets of relational contract theory is that it is reconcilable with other approaches. It is not necessarily a theory that favours relational approaches in preference to classical, discrete approaches. It could support a 100% discrete contract, but it would do so because it follows from the nature of the relation in which the contract is embedded that the contract is discrete, not because it holds that it is most efficient to treat any relation as if it were 100% discrete. It might then be asked how the theory would deal with a situation where the parties had specifically agreed that their relation should be treated as if it were 100% discrete, even when it was not. But that is by the way. The point here is that the theory worked well when applied to the analysis of our cases.

10.7.3 Applicability of the development agreement concept

In Chapter 4 we introduced the development agreement concept that was used to provide a general basis for the description of the cases in Chapters 5-8 and then in the present chapter as a basis for comparison and assessment of the various contracts studied.

The disadvantage of this concept may be that it is so precise that the reader gets the impression that the researcher found exactly what he had put into his definition. This would be a problem, since the purpose of introducing the concept was to provide open categories that allowed many different approaches to fit in.

The advantage of the development agreement concept as defined in Chapter 4 was that it helped us to structure the description of the case studies, while its focus on functions facilitated the description of the meaning and function of the various agreements, which was the main question posed in this study. The focus on functions also helped us to compare and assess the various contracts examined. Once again, we needed to introduce certain premises to allow us to draw more normative conclusions. We could also have chosen to define the various functions of the development agreement in terms of quality rather than of function. One of the main assets of the approach selected was that it provided an effective basis for assessment of the agreements and helped us to formulate the rules of thumb and drafting principles given at the end of Chapter 9.

10.8 Revisiting the research questions

In Chapter 9 and the preceding sections we have compared and analysed the case studies, using the theoretical background of Chapters 2 and 3. We have also discussed what a good contract should do and provided guidelines and principles for contracts and development agreements in the two final sections of the previous chapter.

In the final part of this chapter we will return to the questions we started this study with and provide some suggestions for further research.

1. *How do development agreements function in the context of urban development projects?*

This question was mostly answered in the case studies (Chapters 5-8) that focused on the 'how' parts of this question. The question was approached from a more theoretical perspective in Chapter 4. In Chapter 9 and the present chapter we revisited this question from a comparative perspective.

Development agreements work in various ways but it is possible to name some functions that they all perform: the exchange function, the statutory function, the planning function and the instrumental function. In addition they all put at least some emphasis on relational norms.

2. *What is the meaning of the ten common contract norms in the context of the development agreements in the case studies?*

The second question of the study was answered in the case studies and then in Chapter 9.

(1) The meaning of the common contract norms varies from case to case; but (2) Implementation of planning, flexibility and role integrity were found to be of enhanced importance in all cases. (3) All agreements at least emphasised the relational norms of resolution of relational conflict and preservation of the relation.

3. *Were the development agreements we studied on balance mainly discrete, or mainly relational?*

It was not easy to assess the discrete-relational balance in a given case. All the agreements studied had both discrete and relational aspects. An overall characterisation of the contracts turned out to be very difficult. We therefore used an analysis that summed up which of the discrete and relational norms were emphasised in the agreements.

By taking the analysis one step further (see Section 3.10 for a description of the methodology), we concluded that some agreements were more discrete on balance while others were more relational. The King's Cross and BPC agreements leaned over to the discretional side of the spectrum, the Mahler4 and Gershwin contracts to the relational side, while the Hudson Yards lease

occupied an intermediate position.

More importantly, the overall question turned out to be somewhat meaningless. One of the best qualities of relational contract theory is that it breaks agreements up in many pieces when it analyses them. The analysis of the individual norms and their position on the relational-discrete scale turned out to be of more importance than the position of the agreements as a whole on the same scale.

It might however be appropriate to use overall characterisation of the discrete-relational balance of agreements in future (comparative) studies aimed at testing hypotheses such as: English development agreements are more discrete than Dutch ones.

4. *Now that we have studied all development agreements from a common contract norm perspective and placed the norms on a discrete-relational scale, does this provide us with an effective basis for comparison and assessment of the agreements?*
We compared and assessed the written agreements from the perspective of relational contract theory in Chapter 9. The theory did indeed provide an effective basis for comparison of the various agreements, but we needed to introduce extra premises to take a more normative perspective. This was done at the beginning of Chapters 9 and 10.

5. *Can we finally say anything about the development agreements that could lead to their improvement?*
The outcomes of the case studies based on relational contract theory and our development agreement concept had to be transformed into a normative and comparative analysis. The normative basis of that analysis stemmed mainly from the case studies and the contracts themselves.

In Chapter 9 we assessed all contracts from the perspective of the common contract norms, and provided suggestions for their improvement. In Chapter 10 we did the same from the perspective of the development agreement concept. We also introduced rules of thumb and drafting principles aimed at improvement of the contracts.

10.9 Suggestions for further research

This study aimed to open up a field that has not been subject of much academic research: the functioning of development agreements in urban development projects. Our contribution has been twofold. (1) We have used a theoretical approach that emphasises the function of agreements drafted in the context of urban development projects. In other words, we took concepts derived from planning studies and used them with the aim of contributing to the creation of better urban environments. (2) By using specific case studies

as a basis for this investigation, I aimed to contribute to the current body of knowledge on urban development projects by researching the understudied topic of the function of development agreements. Now that we have presented our conclusions, we would like to propose some useful directions for further research in this field.

Research on development agreements

Further research could focus on the principles and guidelines presented in this and the previous chapter and use them as a critical framework for the study of other agreements in (urban development) projects. This research could use the outcomes of this study and take a more normative approach towards development agreements, using the principles and norms of Section 10.7.

Finally, further research could focus on a more inclusive model of development agreements. Urban development projects are not at the forefront of democratic and participatory processes. So far, urban development projects are the work of a few professionals acting on behalf of the public and private parties involved. Further research should focus on developing a model whereby a development agreement would include procedures for public participation. This is important, since these agreements involve decisions about many issues where major public interests are at stake. Representative bodies, such as city councils, often lack the time and expertise needed to be effective negotiation partners (with the exception of some individual council members). The public, which is still usually absent from the negotiations, should have its representatives sitting around the bargaining table too. Further research is needed to create a model that would facilitate this participation process (see also Janssen-Jansen, 2004, on puzzling and powering; Camacho, 2005a, 2005b; Trip, 2007; Majoor, 2008).

10.10 Back to the undercover lawyer

In the final section of the first Chapter 1 presented myself as an 'undercover lawyer', discussing urban development projects with various actors from all possible points of view, but most comfortable when hiding behind the pages of his newspaper. As an undercover lawyer, I made a difficult but interesting journey. The most complicated part was to find the right directions and then keep to the right track. But now that I've finished it, I'm most happy to say that I don't think of the point where we have arrived as a final destination, but rather as a further point of departure. I'm looking forward to continue my undercover work in the near future, picking up all kinds of clues, ever willing to learn more about the world – which is not all that different from learning more about the law.

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http://www.lcrhq.co.uk
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Appendix A Examples of questions put to interviewees in case studies

Project

In the planning literature it is common to distinguish between the following phases: (1) the initial phase, where parties consider whether they are willing to undertake the project; (2) The negotiation phase, where they reach agreement on details of the project; (3) The construction phase, where the planned work is performed on the project; and (4) The management phase, where the completed project is managed.

- Do you agree with this division?
- If you restrict your attention to the legal aspects of the project, which of these phases took the most time?
- What were the main disputes occurring during the negotiation phase, or the points – not necessarily disputes – that took longest to reach agreement on?
- Would you describe the negotiation process as smooth or the opposite?

The legal system

- Some people say that the common law approach forces parties to spend too much time dealing with possible liabilities. Do you think there is any truth in this claim?
- Did real estate law play any role during the negotiations, for instance with reference to the long leaseholds, or the choice between cooperative apartments and condominiums?

Specificities of project

- Can you name some of the specific legal features of the urban development project we are talking about here?

Relationships

- How would you define the relationship you have with the other parties. A special relationship? A relationship of trust? No relationship at all apart from the fact that you are carrying out this project together?
- How important is it to trust the developers? What steps do you take to ensure a sufficient basis of trust?
- How often do you contact the developers with reference to the project? In the Netherlands, it is not unusual for a developer to have contacts with the government agency he is dealing with on a day-to-day basis.
- Are there agreements between parties that are not enforceable in a court of law but that you would still regard as essential? Are there any agreements that are legally enforceable, but where the chance that you would actually go to court to enforce them is very low? There are many such agreements in the Netherlands.

- How do you make sure that the construction work will be finished on time?

Learning

- How does your organisation learn from this project? Are there formal meetings to evaluate modes of cooperation, the project organisation, etc.?

Example of questions put to a lawyer involved in the King's Cross project

King's Cross

1. Can you give me a general picture of the work you do for Camden Council?
2. Would you say that the King's Cross project had any special legal or non-legal features?
3. Would you say that the negotiations had been smooth or the opposite?
4. Were there any major disputes?

Contracting and negotiating practices

5. Dutch urban development contracts are often surprisingly short, even for major projects. For example, the contract for a project worth € 800 million will probably not be more than a few pages long. The main reason for this is that all parties put great trust in their Code of Civil Law *(Burgerlijk Wetboek*) – a detailed codification of all private law obligations and, even more importantly, in the principle of good faith which forms an integral part of civil law. They therefore usually only state in the contract that they will renegotiate their obligations if any problems arise. As a result, legal issues play a minor role during their negotiations, the price, and the way the parties will work together, tend to play a major role however. Can you compare this way of negotiating with the practice in London? What are the main differences?
6. In the Netherlands, major development companies will often abstain from suing the government, because they consider their long-term relationship with the government more important than winning a court case. Would you say that this is the case in London too?
7. The common law is said to be unwilling to oblige a party to take the position of the other party into account. Do you agree with this statement? Do you think this leads to longer negotiation?
8. Do you think that English contract and planning law imposes unnecessary impediments on the quick execution of major projects?

Appendix B Case interviews

Battery Park City
BPC 02-07-A1
BPC 11-04-A1
Carl D. Jaffee, in-house lawyer (senior development council), Battery Park City Authority (BPCA)

BPC 11-04-A2
Stephanie Gelb, project manager of BPCA

BPC 11-05-A3
Tim Henzy, executive vice president, Sheldrake Organization

BPC 11-05-A4
Jack Becker, executive vice president, Albanese Organization

BPC 11-04-A5
BPC 04-07-A5
Lawrence Lipson, partner, Proskauer & Rose LLP

BPC 11-04-A6
Maurice Roeser, city planner from the Manhattan office of the Department of City Planning

Hudson Yards
HY 07-02-A1
Mr. Dominick Answini, city planner, department of city planning New York

HY 03-07-A2
David Farber, general counsel, Hudson Yard Development Corporation (HYDC)

HY 03-07-A3
Aron Kirsch, vice president, Planning and Construction, HYDC

HY 03-07-A4
Tony Greenberg, associate vice president, Development, HYDC

HY 03-07-A5
Marya Cotten, vice president, acquisitions, HYDC

HY 03-07-A6
Oskar Brecher, director of development, the Moinian Group

HY 03-07-A7

Pamela Samuels, senior advice president for development, Extell

City of New York
NY 03-07-A2
David Alan Richards, partner, McCarter & English LLP

NY 03-07-A3
Mary Jane Augustine, partner, McCarter & English LLP

NY 11-04-A5
Ralph J. Kreitzman, partner, Hughes Hubbard & Reed LLP

NY 11-04-A6
Susan Fainstein, professor of Planning, Columbia University New York

NY 11-04-A7
Vicky Been, professor of Real Estate and Housing, Furman Hall of Real Estate, New York

King's Cross
KCX 04-06-A1
Ray Willis, vice executive president, London & Continental Railways Limited (LCR)

KCX 04-06A2
Mr. Robert Evans, one of the 12 board members of Argent Ltd.

KCX 04-06-A3
Richard Kirby, King's Cross Team Camden

KCX 03-06-A4
Robert West, e-mail interview, King's Cross Team Camden

KCX 04-06-A5
Stephen Ashworth, partner, Denton Wilde Sapte

Gershwin
GER 02-06-A1
Michiel Schaap, manager , project development, AMVEST

GER 03-06-A3
A. Lubberhuizen, project developer Zuidas, Bouwfonds

GER 03-06-A4
Frank Thunnissen, partner, Houthoff Buruma N.V.

GER O3-06-A5
Jaap Gadella, project manager, Ontwikkelingsbedrijf Gemeente Amsterdam (OGA)

GER 02-06-A6
Annegien Krugers Dagneaux, assistent project manager, ProjectManagement-Bureau, Amsterdam

GER 03-07-A7
Kristel-Anne Heijnen, assistent project manager, ProjectManagementBureau, Amsterdam

Mahler4
MAH 10-04-A1
Hans Diepenhorst, project manager, Mahler4

MAH 10-04-A3
Joris Kwakkelstein, in-house lawyer, ING Real Estate

MAH 10-04-A4
Richard Lokhorst, project developer, ING Real Estate

MAH 10-04-A5
Fred Schnoor, in-house lawyer, Fortis Real Estate

MAH 10-05-A6
Jeroen Messemaeckers, project developer, Fortis Real Estate

MAH 10-04-A7
Gijs Goossen, project manager, ProjectManagementBureau, Amsterdam

City of Amsterdam
AM 10-04-A1
Ivo de Rooij, in-house lawyer, Ontwikkelingsbedrijf Gemeente Amsterdam (OGA)

Appendix C Questions used as a basis for study of the written agreements

Parties

1. Who are the contracting parties?
2. When was the contract closed?
3. When will the contract end?

Ownership

4. Who possesses rights to the land?
5. Who owned the existing buildings, if any? Do they play a role in the contract?

Pre-contractual procedure

6. Which procedure was used to attract contracting parties?
7. Were there any specific requirements set by the city concerning the kind of parties that were invited for a bid?
8. How long did the negotiation process take?

Drafting the contract

9. Who wrote the contract?

The contract: transfer of rights

10. Which rights are transferred?
11. When are these rights transferred?
12. Can the consortium freely change its composition or sell its contractual position?

The contract: goals and core obligations

13. What are the core obligations of the parties?
14. Are the goals of the project mentioned in the contract?
15. Are the goals of the individual parties mentioned in the contract?
16. Are the goals of the contract described?
17. How is the project described?

Agreements on public goals

18. Are there agreements on job-trainee programmes?
19. Are there agreements on sustainability?
20. Are there any agreements on social and affordable housing?
21. Are there any agreements on other public facilities, such as schools, libraries etc.?

Duties of endeavours, duties of good faith, duties to inform, unforeseen circumstances, and duties to reach agreement in the future

22. Are any obligations of endeavour mentioned in the contract?

23. Are any duties of good faith mentioned, in such terms, in the contract?
24. Are any duties to inform other parties named in the contract?
25. Are any agreements postponed to a later stage?
26. Are there any duties to discuss, specified, issues further?
27. Is any procedure for response to unforeseen circumstances laid down?

Risks and responsibilities

28. Who will responsible for which parts of the project?
29. Are there any shared projects?
30. Are any risks shared?

Delays, non-compliance & financial guarantees

31. What happens if the planning is not met?
32. Who bears the risk of delays?
33. Are there any financial guarantees?
34. Are there any penalties for non-compliance?

Monitoring and project organisation

35. Are there agreements about the monitoring of the project?
36. Is a project organisation mentioned in the contract?
37. Are consultation platforms mentioned or created in the contact?

Third parties and competition

38. Are any rights relating to competition with third parties created?
39. Are rights or duties of third parties mentioned?
40. Are rights or duties of third parties created?

Instruments

41. Are any specific policy instruments mentioned or created in the contract?

Arbitration, changes

42. Is there an arbitration clause?

Summary

Contracting for better places

A relational analysis of development agreement in urban projects

Menno van der Veen

Starting point
Governments and developers need each other to realise (large-scale) urban development projects. In the simplest of all models, the government sets the rules after which developers start developing. But often the developers have a say in the rules that are being set, whereas the government may take some risk in the project. The upshot is that developers and governments work together in various ways, sometimes because they want to and sometimes because they need to.

The starting point of this study is how governments and developers work together. That question is studied from the perspective of the agreements that they close. The question then becomes: *Which written and unwritten rules determine the contractual relations between developers and governments?* This general starting point receives its focus by confining the study to an in-depth analysis of some contractual relations in some projects.

The title
The title of this study is *Contracting for better places: a relational analysis of development agreements in urban development projects*. What a 'better place' is, is not defined in the study, however the title presupposes that parties that close an agreement for the development of a certain area, aim to make that area a better place than it was before. This 'better' can be an economic, cultural, social or ecological 'better'. But it will, in the perception of the parties, at least be a better place than it was before the agreement was closed.

The projects
Four large-scale urban renewal projects in three cities where chosen to study those contractual relations. These were projects that were characterised by their mixed use approach: the projects combine working, living, cultural facilities, and bars, hotels and restaurants.

These projects were Battery Park City and Hudson Yards in New York City, the Zuidas in Amsterdam and King's Cross in London. Battery Park City is a more or less independent district in Manhattan (New York) behind the WTC-area. The neighbourhood is best known for the towers of the World Financial Center (WFC) and its esplanade along the Hudson river. Hudson Yards is a project situated around a 26-track railyards area, around 34th street in Manhattan near the Penn-railway station and a convention center (Javits). The project aims to transform the area that is now a desolated industrial area in a modern residential- and commercial center with numerous cultural and leasure facilities.

The Zuidas in Amsterdam is a project in the south area of Amsterdam, at both sides of the Amsterdam ringroad, around the Amsterdam South railway station and the World Trade Center. It is the largest urban renewal project in the Netherlands and aims to provide the Dutch capital with a business centre of international quality. At the same time, it is designated to be an area with residential units, university facilities and cultural facilities.

King's Cross, finally is an urban renewal project around St Pancras and King's Cross Station in northwest London. The project revitalises a deteriorated neighbourhood in a business- and residential center with some large cultural facilities.

Within these large-scale urban development projects, smaller projects (focal projects) where chosen that involved agreements between a government and developers. The focal projects are the core of the analyses. In the focal projects the agreements were studied and parties were interviewed.

The development agreement

The central points of focus of the study are the development agreements. The development agreements, of the focal projects (see below), are the central points of focus of the study. A development agreement contains the conditions under which parties are willing to cooperate for the realisation of a project. The definition is deliberately broad since it had to encompass the various legal documents that we encountered in the cases, which were the English deed, the American lease and the Dutch cooperation agreement.

The development agreements of this study perform four functions: the exchange function, the statutory function, the planning function and the instrumental function.

An agreement means that parties mutually accept duties and grant each other rights. In Dutch law, the unilateral agreement is an exception to that rule that is not of much relevance for this study. Secondly, it is a characteristic of agreements that parties, within the confinements of the law, write down their own (procedural) rules.

The planning function and instrumental function are distinctive traits of the development agreement. The planning function emphasises that every agreeement comes with some planning of the contractual relation. It also puts emphasis on the specific function of the develolopment agreement that performs a role in the planning of the project as well as a coordinating role between various subprojects. The instrumental function, finally, sees to the function that an agreement can perform to realise public goals such as affordable housing, or (often as a duty of endeavour) certain environmental goals.

The relational contract theory

The theoretical framework of the study is based on the relational contract theory developed by Ian Macneil. The relational contract theory offers a so-

ciological perspective on agreements. It holds that all contracts are embedded in specific relations. The theory defines an agreement (a contract) as a projection of exchange into the future; a contract is not a direct transfer of a good or a right. The relational contract theory distinguishes ten common contract norms that are features of all contracts. We will, in this summary, not discuss all norms but I will name them briefly so that the reader will understand the rest of this summary. I refer to Chapter 3 of the book for an extensive discussion of the norms.

The ten common contract norms are:

1. Role integrity: *promoting stability through expectations about recognized social roles*[1].
2. Mutuality/reciprocity: *the idea that exchange is a process of mutual benefit.*
3. Implementation of planning: *as a means of reducing uncertainty about the future.*
4. Effectuation of consent: *acquiescence of choice as a basis for obligation.*
5. Flexibility: *the recognition of the need to avoid rigidity in implementation and facilitate adaptation to changing conditions.*
6. Contractual solidarity: *involves the extension of reciprocity in social relations through time.*
7. The linking norms: *the restitution, reliance and expectancy interest.*
8. Creation and restraint of power: *to control relations of domination and subordination.*
9. Propriety of means: *placing constraints of the ways in which ends may legitimately be achieved.*
10. Harmonisation with the social matrix: *reflects the need for contract norms to be consistent with more general social norms.*

Next to the common contract norms, the theory distinguishes between discrete and relational contracts. Discrete contracts leave out every relation between the parties apart from the simple exchange of goods. Relational contracts on the other hand hold that all relations between parties are of importance for an agreement. The ultimate example of a discrete agreement is a credit card transaction at an automatic gas station-example. For that transaction, as it seems, no other relation between parties exists except of the transaction itself. The ultimate example of a relational contract is a marriage. If the reader objects to the idea of marriage being a contractual agreement, a transaction between a bakery and a regular customer in a small community can be named. In the case of the gas station, efficiency is a main concern and the driver and the station owner have no relation with the exception of the transaction. In the case of the regular customer and the bakery, we can eas-

1 Short definitions in italics are taken from Vincent-Jones (2006: 4-6).

ily imagine that the transaction is embedded in other relations. Maybe the customer only pays once a month, maybe he expects the baker to give him a discount if he doesn't have enough money on him because the baker should know that his customer 'will make it up' with him at some later point in time. These are relational norms that become part of the transaction. In addition, the customer might also know the baker from his football club, greet him at night when he walks his dog, and help him out in his garden. Their transaction is embedded in all these relations.

A discrete contract puts emphasis on four norms. *Discreteness* means that no other relation exists between the parties outside of the exchange itself, whereas *presentiation* is the ideal to bring the future into the present (to be in full control of the future). presentiation is a by-product of discreteness and is more precisely defined as the restriction of future effects through definition and stipulation of events in the present. In addition the discrete norm is a product of a magnified importance of the common norms of *implementation of planning* and *effectuation of consent*. Discreteness and presentiation merge the two (possibly conflicting) norms of consent and implementation of planning; for a transaction to be one hundred percent discrete, one hundred percent planning and one hundred percent consent is required.

Unlike discrete contracts, relational contracts put the relation between parties upfront and aim to preserve that relation. In addition, every relation produces its own norms. Three of the relational norms are common contract norms: *role integrity, propriety of means* and *supracontract norms*. The other two: *preservation of the relation* and *harmonisation of relational conflict* consist of the relational version (an intensifying and expansion) of contractual solidarity, whereby preservation of the relation is the background of harmonisation of relational conflict. The difference between the two norms is that the latter norm values peace in its own right.

How we do it

We used the common contract norms and the discrete-relational continuum to analyse the focal projects. We focused on the development agreements that we found in the focal projects of the large-scale urban development projects. The relational contract theory holds that the extremes are almost never encountered in real life. But agreements have discrete and relational elements and may tend to either side of the spectrum. This provided us with a scale that ranges from 100% discrete to 100% relational.

We then used the common contract norms to help us to understand how the various elements of the development agreements function, while the discrete-relational scale allowed us to characterise the various agreements or their sub-parts. Application of the same approach to all development agreements meant that we could compare the outcomes of the various analyses.

We thus assessed every norm on a discrete-relational scale and character-

ised the contracts, by asking which discrete or relational norms were of enhanced importance.

The research questions

We posed five research questions. These questions where of a more investigative than problematising character.

1. *How do development agreements function in the context of urban development projects?*

2. *What is the significance of the ten common contract norms in the context of the development agreements studied?*

3. *What are the relative positions of the different agreements studied on the discrete-relational scale?*

4. *Can we compare and assess the various development agreements?*

5. *Can we say anything about the development agreements that could lead to improvement of the contractual processes and their content in the future?*

Beforehand, we could not say which aspects of the development agreement were most suited for a comparative study. Therefore the first question was generally put. The formulation of the four functions of the development agreements were based on a pilot study. For all case studies interviews added to the information that was collected from the agreements and plans.

To answer the fourth and fifth question, it was necessary to develop five premises. The first premise was that a contract that gives a more specific account of the relations in which it is embedded, is better than a contract that fails to do so. The second premise held that such a contract will be able to solve more of the problems that occur in these relations than a contract that fails to do so. The third premise was that it follows from the nature of urban development projects that relational norms are of key-importance for a case to be successful. The fourth premise was that a development agreement that specifies – preferably in writing – the functions it aims to perform, is better than one that doesn't. The fifth premise was that such a development agreement will be able to solve more of the problems that occur during the process of development than an agreement that fails to do so.

The first three premises served as a basis for a comparison between the various agreements from the perspective of the relational contract theory. The final two served as a basis for a comparison from the perspective of the functions of the development agreement.

The outcomes

The results of the various comparisons we made between the development agreements (see Chapters 5-8, and the conclusions in Chapters 9 and 10) may be summarised as follows.

Different approaches to the drafting of legal agreements, led to different legal documents: in particular, we may say that the ones providing the most specific account of the functions failed in flexibility and implementation of relational norms. If we were trying to construct the ideal (written) agreement, we might like to pick specific provisions from all the contracts we have studied. The development agreement in King's Cross was attractive, but on the other hand it sometimes was over-specific when it would have been better to leave some room for flexibility.

In this summary we focus on the general starting points that were formulated in the concluding chapter. We developed two sets of starting points; the first set is for lawyers and practitioners that are involved in the process of drafting and negotiating a development agreement. These five rules result in five sortlike rules that can be used to quickly assess the quality of an agreement.

Rule 1. Focus on relations

Development agreements involve cooperation between public and private parties over a longer period of time. This means that over time their relationship (over time) will evolve and become more complex. Negotiators involved in the drafting of development agreements should recognise this at an early stage and become 'relation planners'. They should discuss the nature of their relation, mutual expectations and develop procedures that promote the values of trust, the preservation of the relation and the harmonisation of relational conflict. Relational values should also matter in the sense that parties should be limited in their one-sided exit-options (their options to leave the relation without consent of the other party).

Rule 2. Focus on the interest of the project

As the relation between parties has been specified and dealt with, it is the project that should become the central focus of the negotiations and not so much the interests of parties. Leading questions are: What does the project need to be developed? And: Are there provisions that make sense from a relational perspective but do not promote the construction of the project? An example of the latter problem is when parties have agreed to decide on specifics of the project at a later stage because they disagree on them, whereas the project needs these issues to be dealt with at an early stage.

Rule 3. Specify functions of the agreement

The four functions of the development agreement can be found in most (if

not all) agreements. But negotiators often forget to specify the functions and separate them, which results in vagueness that may harm the project.

Rule 4. Specify the goals of the agreement
The agreement should specify its goals, since goals (more than rules) offer both a focus and may leave room for flexibility. We may discern here between the goals of the agreement, the goals of the parties and the goals of the project. It is not self evident that goals are reconcilable. An example is when one party wants to develop rentals and another party wants condominiums. Or when the goal of a development project is defined as a mixed-use project and the private parties involved only care about the commercial parts of it.

Rule 5. Plan for flexibility
As the project takes some time to develop, unforeseen events are likely to take place and (market) circumstances are likely to change. The agreement should recognise this by leaving room for flexible solutions instead of introducing a strict regime. Questions that negotiators should ask are: Does the contract leave sufficient room for change? Does it include a method to revise the planning? Does it include moments to reflect on the method of cooperation?

Starting points for the assessment of the quality of a development agreement
The starting points for the assessment of the quality provide a short checklist that can be used to assess a development agreement. Unlike the starting points for the composition of the development agreement, these rules focus on the written document. These five rules are that a good development agreement:
1. specifies the functions it performs
2. specifies the relations in which it is embedded
3. introduces relational norms
4. puts emphasis on flexibility
5. puts emphasis on the importance of planning.

For the close readers of the study, as well as the summary, these rules will, at this point, come as no surprise. But that is not to say that there is not much to be gained in the quest for the best ways of contracting.

Samenvatting

Contracteren voor betere plekken

Een relationele analyse van ‘development agreements’ in grootstedelijke ontwikkelingsprojecten

Menno van der Veen

Het uitgangspunt

Of ze het nu leuk vinden of niet: overheden en ontwikkelaars zijn op elkaar aangewezen voor het verwezenlijken van grote projecten. In het eenvoudigste model stelt de overheid regels op waarop ontwikkelaars aan de slag kunnen. Maar vaak bemoeien de ontwikkelaars zich met die regels en draagt ook de overheid enig risico in het project. Met andere woorden, overheden en ontwikkelaars werken op veel verschillende manieren al dan wel niet gedwongen samen.

Dat gegeven levert het uitgangspunt voor een onderzoek dat zich de vraag stelt op welke manier de samenwerking tussen overheden en ontwikkelaars plaatsvindt. Het onderzoek stelt die vraag vanuit het perspectief van de overeenkomsten die overheden en ontwikkelaars sluiten. Welke geschreven en ongeschreven regels dicteren de contractuele relatie tussen ontwikkelaars en overheden? Dat algemene uitgangspunt wordt vernauwd door de studie te beperken tot een diepgravende analyse van enkele contractuele relaties, in enkele projecten.

De titel

De titel van het boek luidt: *Contracting for better places*. De lezer die de tijd vindt om dit proefschrift te lezen komt veel definities tegen maar zal vergeefs zoeken naar een definitie van een ‘betere plaats’. ‘Beter dan wat?’, zal hij zich wellicht afvragen. De titel beoogt dan ook niet zozeer die betere plek te definiëren; ze veronderstelt dat partijen die een overeenkomst sluiten voor de ontwikkeling van een bepaalde plaats, die plaats beter willen maken dan ze was. Dat kan een economisch, cultureel, sociaal, of ecologisch ‘beter’ zijn. Maar het is in de ogen van partijen ieder geval beter dan het was voordat de overeenkomst werd gesloten.

De projecten

Vier grootstedelijke vernieuwingsprojecten, in drie steden, werden gekozen om onderzoek te doen naar die contractuele relaties. Het betroffen projecten die zich kenmerkten door hun *mixed use* benadering: ze combineren werken, wonen, culturele voorzieningen en horeca.

Die projecten waren Battery Park City en Hudson Yards in New York City, de Zuidas in Amsterdam en King’s Cross in Londen. *Battery Park City* is een min of meer op zichzelf staande wijk in zuid-Manhattan (New York) achter het WTC-

gebied. De wijk is vooral bekend vanwege de torens van het World Financial Center en de boulevard die langs de rivier de Hudson loopt. *Hudson Yards* is een project rondom twee rangeerterreinen, gesitueerd rondom 34th Street in Manhattan, vlakbij het Penn-station en het Javits-conventiecentrum. Het project heeft tot doel het gebied dat zich nu laat aanzien als een verwaarloosd industrieel gebied, om te vormen tot een modern woon- en zakencentrum met tal van culturele en recreatieve voorzieningen. *De Zuidas* in Amsterdam is een project rondom station Zuid en het World Trade Center. Het is het grootste stedelijke vernieuwingsproject in Nederland en stelt zich tot doel Amsterdam een zakencentrum te verschaffen van internationale allure dat tegelijkertijd een woonwijk, een studentenwijk en een gebied met culturele voorzieningen is. *King's Cross* ten slotte is een stedelijk vernieuwingsproject rondom St. Pancras en King's Cross Station in noordwest-Londen. Het project revitaliseert een vervallen wijk in een zaken- en wooncentrum.

Binnen deze grote projecten zijn kleinere projecten (*focal projects*) gekozen, waarover door de overheid en partijen gecontracteerd werd. Die *focal projects*, vormen de kern van de analyses. Van de *focal projects* werden overeenkomsten bestudeerd en erbij betrokken partijen werden geïnterviewd.

Het 'development agreement'

Centraal in het onderzoek staan *development agreements*. We zouden wellicht die term kunnen vertalen met de term 'ontwikkelingsovereenkomst', zolang we daarbij voor ogen houden dat de inhoud van het gebruikte begrip *development agreement* breder is dan de ontwikkelingsovereenkomst die we in de Nederlandse ruimtelijke ordening tegenkomen. In die laatste overeenkomsten is de overheid veelal eigenaar van de grond waarop door de ontwikkelaar een project wordt gerealiseerd. De term *development agreement* in deze studie omvat, vertaald naar de Nederlandse praktijk, bijvoorbeeld ook de exploitatieovereenkomst. Het begrip *development agreement* is breder gedefinieerd dan deze overeenkomsten omdat het toepasbaar moest zijn op verschillende typen overeenkomsten in verschillende landen. Een *development agreement* kunnen we definiëren als de overeenkomst die voorwaarden bevat waaronder partijen bereid zijn samen te werken ten behoeve van de realisatie van een project. Daaronder kunnen dus verschillende (juridische) typen overeenkomst vallen. In dit onderzoek waren dat de Engelse *deed*, de Amerikaanse *lease* en de Nederlandse samenwerkingsovereenkomst.

De overeenkomsten van deze studie vervullen vier functies: een ruilfunctie, een statutaire functie, een planfunctie en een instrumentele functie. De ruilfunctie en de statutaire functie zijn niet onderscheidend voor het *development agreement*. Eigen aan een overeenkomst is dat partijen over en weer verplichtingen aangaan en elkaar rechten toekennen. De eenzijdige overeenkomst vormt daarop in het Nederlands recht een uitzondering die niet veel betekenis heeft. In de tweede plaats heeft een overeenkomst tot kenmerk dat

partijen, binnen de grenzen van de wet, hun eigen (procedure-)regels opstellen. Hierop vormt het *development agreement* geen uitzondering.
De planfunctie en de instrumentele functie zijn wel onderscheidend voor het *development agreement*. De planfunctie ziet niet alleen op het gegeven dat elke overeenkomst ook een vorm van relatieplanning met zich meebrengt, maar ook op de specifieke functie van het *development agreement* dat een onderdeel vormt van de planning van een project en er sturing aan kan geven. Goede *development agreement*s verdwijnen niet in een la maar blijven boven tafel omdat ze een sturende rol vervullen in het project. De instrumentele functie ten slotte ziet toe op de functie die de overeenkomst kan vervullen om publieke doelstellingen te verwezenlijken, zoals sociale woningbouw of (meestal als inspanningsverplichting) bepaalde milieudoeleinden.

De relationale contractentheorie
Het theoretisch kader van het onderzoek wordt in hoofdzaak gevormd door de relationele contractentheorie die is ontwikkeld door Ian Macneil. Deze theorie biedt een sociologische kijk op overeenkomsten, nu ze stelt dat alle contracten ingebed zijn in specifieke relaties. Een overeenkomst definieert de theorie als een projectie van een ruil in de toekomst; een overeenkomst behelst immers geen directe overdracht van een goed of recht.

De relationele contractentheorie onderscheidt tien gemeenschappelijke normen die eigen zijn aan alle contracten. Die normen zullen we in de samenvatting niet allemaal bespreken maar ik zal ze hier in het Engels, noemen zodat de lezer de onderstaande beschouwing kan plaatsen. De summiere toelichting ontleen ik aan Vincent-Jones (2006: 4-6). Voor een uitgebreide toelichting op de normen verwijs ik naar hoofdstuk 3 van het proefschrift. De tien *common contract norms* zijn:

1. Role integrity: *promoting stability through expectations about recognized social roles*[1].
2. Mutuality/reciprocity: *the idea that exchange is a process of mutual benefit.*
3. Implementation of planning: *as a means of reducing uncertainty about the future.*
4. Effectuation of consent: *acquiescence of choice as a basis for obligation.*
5. Flexibility: *the recognition of the need to avoid rigidity in implementation and facilitate adaptation to changing conditions.*
6. Contractual solidarity: *involves the extension of reciprocity in social relations through time.*
7. The linking norms: *the restitution, reliance and expectancy interest.*
8. Creation and restraint of power: *to control relations of domination and subordination.*

1 De cursieve definities zijn overgenomen uit Vincent-Jones (2006: 4-6).

9. Propriety of means: *placing constraints of the ways in which ends may legitimately be achieved*.
10. Harmonisation with the social matrix: *reflects the need for contract norms to be consistent with wider social norms*.

Naast de gemeenschappelijke normen maakt de theorie een onderscheid tussen discrete en relationele contracten. Discrete contracten gaan voorbij aan alle verhoudingen tussen de contractpartijen met uitzondering van die van de overeenkomst. Relationele overeenkomsten stellen juist dat alle relaties tussen partijen van belang zijn voor een overeenkomst, niet alleen de relaties die in de overeenkomst worden benoemd. De uiterste vorm van een discrete overeenkomst is een creditcardtransactie bij een onbemand tankstation. Voor die transactie geldt dat er geen andere relaties tussen partijen lijken te bestaan dan die enkele transactie. De uiterste variant van een relationeel contract is een huwelijk of, als het de lezer te ver gaat een huwelijk als een overeenkomst te zien, een transactie tussen een bakker en een vaste klant in een kleine gemeenschap. In het geval van de transactie bij het tankstation, speelt efficiëntie een grote rol en hebben de chauffeur en de pomphouder buiten de transactie niets met elkaar te maken. In het geval van de vaste klant en de bakker kunnen we ons goed voorstellen dat hun onderlinge verhoudingen een rol spelen in de overeenkomst. Misschien betaalt de vaste klant maar eens per maand, misschien verwacht hij van de bakker dat deze hem korting geeft als hij toevallig niet voldoende geld bij zich heeft omdat hij het 'wel weer goedmaakt'. Dat zijn relationele normen die onderdeel uitmaken van de transactie. Daar komt misschien nog bij dat hij de bakker ook kent van de voetbalclub, en hem 's avonds groet als hij zijn hond uitlaat en hem bovendien weleens helpt bij zware tuinierklussen. Hun transactie is ingebed in al die andere relaties.

Macneil noemt twee eigenschappen van de discrete overeenkomst die haar definiëren: *discreteness* en *presentiation*. *Discreteness* kunnen we als 'discreetheid' vertalen: er bestaat geen andere verhouding tussen partijen dan die van de overeenkomst. *Presentiation* kunnen we vertalen als 'het tegenwoordig maken'. De eigenschap ziet erop toe dat discrete overeenkomsten ervan uitgaan dat zij de toekomst volledig kunnen beheersen. Een discrete overeenkomst biedt nadat ze tot stand is gekomen voor elke situatie in de toekomst een oplossing en maakt die toekomst op die manier dus tegenwoordig. Twee andere normen die tevens gemeenschappelijk contractnormen zijn, zijn nog van bijzonder belang voor de discrete overeenkomst: *implementation of planning* en *effectuation of consent*. De eerste norm kunnen we vertalen als 'implementatie van een plan'; nu de discrete overeenkomst bestaat bij gratie van het feit dat zij de toekomst 'tegenwoordig maakt', moet zij wel een sterke nadruk leggen op planning. Ze beoogt immers een compleet plan voor de toekomst te leveren. *Effectuation of consent* kunnen we vertalen als de 'effectuatie van instemming'; een overeenkomst realiseert de wilsovereenstemming tussen partijen.

Het liberale ideaal, dat het overeenkomstenrecht sterk heeft beïnvloed, wil dat partijen niet aan meer gebonden zijn dan waar ze uitdrukkelijk mee hebben ingestemd. Een discrete overeenkomst moet op die instemming dus de nadruk leggen. Overigens zijn de laatste twee normen, nu het 'gemeenschappelijke normen zijn' ook van belang voor relationele overeenkomsten.

Relationele overeenkomsten hebben vijf kenmerkende eigenschappen: *harmonisation of relational conflict, preservation of the relation, role integrity, propriety of means, en supracontractual norms (harmonisation with the social matrix)*. De laatste drie normen zijn tevens gemeenschappelijke normen, maar hun belang wordt in relationele overeenkomsten benadrukt.

Nu relationele overeenkomsten de nadruk leggen op de relatie(s) tussen partijen moet het behoud van de goede verhouding (*preservation of the relation*) en het oplossen van conflicten wel voorop staan. *Role integrity* (rolintegriteit) ziet toe op de moeilijkheid voor een partij om zich te beperken tot de rol waarin hij de overeenkomst heeft getekend (bijvoorbeeld de rol van grondeigenaren). Dit probleem speelt sterk in relationele overeenkomsten, terwijl discrete overeenkomsten het probleem wegredeneren. *Propriety of means* ziet toe op de middelen waarmee een partij aan zijn verplichtingen mag of moet voldoen. We kunnen de norm vertalen als 'het beschikken over middelen'.

Discrete overeenkomsten beperken zich tot het 'wat' van de overeenkomst maar het 'hoe' laat hen koud. Dat geldt niet voor relationele overeenkomsten, juist omdat die ingebed zijn in de verhoudingen tussen partijen zullen niet alle middelen om een doel te bereiken geoorloofd zijn. Ten slotte werken de *supracontract norms* (bovencontractuele normen) door in de relationele overeenkomst. Bovencontractuele normen zijn maatschappelijke normen die de achtergrond vormen van een contract. In de discrete overeenkomst spelen zij geen rol, hooguit leiden ze ertoe dat sommige verplichtingen in strijd met het recht zijn. De normen werken rechtstreeks door in relationele overeenkomsten, in de zin dat ze vormgeven aan rechten en verplichtingen. Denk daarbij ook aan de *propriety of means* norm. Een vergelijking kan hier worden getrokken met de aanvullende werking van de redelijkheid en billijkheid.

Wat we ermee doen

Het onderscheid tussen relationele en discrete overeenkomsten diende als uitgangspunt voor een vergelijking tussen de ontwikkelingsovereenkomsten die onderzocht zijn in vier grootstedelijke ontwikkelingsprojecten in drie landen.

Eigen aan de relationele contracttheorie is dat volledig discrete of volledig relationele overeenkomsten in de werkelijkheid niet of nauwelijks voorkomen. Contracten hebben vrijwel altijd relationele en discrete kenmerken. Dat levert het beeld op van een schaal die loopt van discreet naar relationeel waarop die overeenkomsten gepositioneerd kunnen worden. Het onderzoek neemt die schaal als uitgangspunt alsmede het gegeven dat de uitersten niet bestaan. Aan de hand van een analyse van zowel de tien gemeenschappelijke

normen als de specifieke discrete en relationele normen, blijkt een overeenkomst vervolgens meer discreet dan relationeel, meer relationeel dan discreet of noch het een noch ander.

De onderzoeksvragen

Het onderzoek stelde zich vijf vragen die vooral een onderzoekend en in mindere mate een problematiserend karakter hadden.

De eerste vraag luidde: hoe functioneren *development agreement*s in de context van grootstedelijke ontwikkelingsprojecten?

De tweede vraag luidde: wat is het belang van de tien gemeenschappelijke contractnormen binnen de context van de *development agreement*s?

De derde vraag luidde: hoe kunnen we de verschillende overeenkomsten positioneren op een discreet-relationeel schaal?

De vierde vraag luidde: kunnen we de overeenkomsten beoordelen in een vergelijkende context?

De vijfde vraag luidde: kunnen we een uitspraak doen over *development agreement*s die zal leiden tot een verbetering van contractuele processen en de inhoud van overeenkomsten?

De eerste vraag was erg algemeen gesteld, omdat we op voorhand niet konden overzien welke aspecten van het *development agreement* zich het best leenden voor onderzoek. Op basis van een pilot study zijn de vier functies geformuleerd die als basis dienden voor het onderzoek. Interviews vulden de informatie uit de overeenkomsten en de plannen aan.

De tweede en de derde vraag vormden de basis van de analyse van de overeenkomsten. De overeenkomsten werden aan de hand van de tien gemeenschappelijke contractnormen geanalyseerd. Daarop gebruikten we de specifieke discrete en relationele normen om de overeenkomsten te karakteriseren.

Voor het beantwoorden van de vierde en de vijfde vraag bleek het nodig premissen te benoemen. Die premissen waren: (1) naarmate een overeenkomst een specifiekere weerslag geeft van de relaties waarin het is ingebed, wint ze aan kwaliteit. (2) Die overeenkomst zal beter in staat zijn om relationele problemen op te lossen. (3) Het volgt uit de aard van de casussen dat relationele normen van cruciaal belang zijn voor een *development agreement* om goed te kunnen functioneren. (4) Een *development agreement* dat de functies die het wil vervullen specificeert, is beter dan een *development agreement* die dat niet doet. (5) Een 'development' agreement dat die functies specificeert, zal meer problemen die rijzen gedurende het ontwikkelingsproces kunnen oplossen dan een *development agreement* die dat niet doet.

De eerste drie premissen dienden als basis voor een vergelijking tussen de overeenkomsten vanuit het perspectief van de relationele contractentheorie. De laatste twee voor een perspectief vanuit het perspectief van de functies van het *development agreement*.

De uitkomst

Het is niet eenvoudig om in een samenvatting uitgebreid in te gaan op de vergelijkingen tussen de diverse *development agreements*. Die vergelijking is op een sterk gedetailleerd niveau uitgevoerd en we kunnen niet stellen dat de ene overeenkomst het erg slecht en een andere het juist erg goed deed. De precisie van de overeenkomst die we in King's Cross in Londen bestudeerden sprak aan, maar die precisie leidde soms ook tot een overdreven specificatie van verplichtingen waar flexibiliteit of iets meer openheid de voorkeur hadden verdiend.

Voor een uitgebreide analyse van de overeenkomsten en de projecten verwijzen we de lezer dan ook naar de hoofdstukken 5-8 van het proefschrift. Vaak zal hij ook zijn eigen oordeel moeten vellen over de manier van aanpak. Een voordeel van de gekozen methode is dat ze hem daartoe in staat stelt, een nadeel is wellicht dat ze de lezer soms met veel details opzadelt.

Ter afsluiting van deze samenvatting willen we hier de vuistregels noemen die we in het concluderende hoofdstuk hebben geïntroduceerd. De eerste vijf regels zijn uitgangspunten voor degenen die betrokken zijn bij de totstandkoming van een *development agreement*. De laatste vijf regels vormen een handvat om snel de kwaliteit van *development agreements* te kunnen beoordelen.

Vuistregels voor het totstandbrengen van 'development agreements'

Deze vuistregels nemen het geschreven *development agreement* als uitgangspunt maar richten zich niet uitsluitend op de juristen die het document opstellen. Ze richten zich ook op de professionals die bij die totstandkoming betrokken zijn (de onderhandelaars van de diverse partijen).

Richt je op relaties

De verhoudingen tussen partijen moeten niet op de achtergrond maar ook in de overeenkomst een rol spelen. Arbitrageprocedures moeten bijvoorbeeld worden vormgegeven in overeenstemming met de aard van de verhouding tussen partijen. Maar ook moet het belang van specifieke relationele normen, zoals vertrouwen of samenwerking, specifiek worden benoemd in de totstandkomingsfase.

Richt je op het belang van het project

Als de specifieke kenmerken van de relaties tussen partijen zijn benoemd, dan hoort het project in de overeenkomst centraal te staan. Leidende vraag hoort niet meer te zijn: Wat willen partijen? Maar: Wat heeft het project nodig voor een optimale ontwikkeling en hoe verhoudt zich dat tot de relaties tussen partijen? In die volgorde.

Specificeer de functies van de overeenkomst

Een *development agreement* vervult verschillende functies, het betreft niet al-

leen een 'risicoallocatie' maar heeft bijvoorbeeld ook een planningfunctie en een instrumentele functie. Die functies moeten worden geëxpliciteerd, en niet een impliciet onderdeel uitmaken van de overeenkomst.

Specificeer de doelen van de overeenkomst
Hier gaat het erom de doelen van de overeenkomst expliciet te benoemen, ook de doelen van partijen en de doelen van het project. De vraag is vervolgens of die doelen elkaar niet tegenspreken.

Plan voor flexibiliteit
Een development agreement is een overeenkomst voor projecten die in regel complex zijn en langere tijd in beslag nemen. Beide feiten leiden ertoe dat niet alles valt te voorzien en dat er in de regel gedurende het project voor andere oplossingen moet worden gekozen dan was voorzien. Een *development agreement* hoort daarvoor ruimte te bieden, zodat het 'boven tafel blijft' en bovendien enige sturing voor die momenten kan bieden. *Een development agreement* mag oplossingen niet in de weg staan.

Uitgangspunten voor de beoordeling van de kwaliteit van development agreement
De uitgangspunten voor de beoordeling vormen vervolgens een korte checklist die ertoe dient om een overeenkomst te beoordelen. Het richt zich, anders dan de uitgangspunten voor de totstandkoming, volledig op het geschreven document. Een goed *development agreement*:
1. specificeert de functies die het vervult
2. specificeert de relaties waarin het is ingebed
3. introduceert relationele normen;
4. benadrukt het belang van flexibiliteit
5. benadrukt het belang van planning.

Deze vuistregels zullen na lezing van het bovenstaande geen verrassing meer zijn. Maar dat wil niet zeggen dat er niet nog een wereld te winnen valt in de zoektocht naar de beste wijze van contracteren.

Curriculum Vitae

Menno Van der Veen was born in Amsterdam, the Netherlands, in 1979. From 1996 until 2003 he studied law and philosophy at the University of Amsterdam. In 2002, he received his master title in Dutch law, and in 2003 he received his master title in what was called philosophy of a specific domain of science (*wijsbegeerte van een bepaald wetenschapsgebied*).

In 2004 he started his PhD research at the OTB Research institute for Housing, Urban and Mobility Studies of the Delft University of Technology, the result of which is this study. At the same time he also worked as a programme developer for the Balie, a centre for culture and politics in Amsterdam. He has been a weekly columnist for the Dutch newspaper nrc.next between August 2006 and October 2007. Until today he contributes on a regular basis to the opinion pages of several Dutch newspapers such as the Volkskrant, NRC Handelsblad and nrc.next. Together with two friends, he also owns a training and advice company, Taqt.

In 2009, he started working at the Amsterdam Institute for Metropolitan and International Development Studies of the University of Amsterdam, on a study of the relation between planning studies and private law. In the second half of 2009, he will start working for the Kluyver Centre for Genomics of Industrial Fermentation (Delft University of Technolgy) on a philosophical study of the relation between neo-colonialism and production of biofuels that is titled “Food vs Fuel”.

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In four interesting cases - Battery Park City and Hudson Yards (both in New York City), Zuidas (Amsterdam) and King's Cross Regent Quarter (London) - the contents, meaning and function of real-life development agreements of focal projects are studies and critisised. The conclusions have a case-specific as well as a more general character.
This book is of value for academics as well as practitioners as it conducts some pioneering work in a field that has not been subject of much research yet.

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