



The
University
Of
Sheffield.

The pursuit of unconditionality: property-led development, land assembly
and a network of contractual arrangements

By:

Edward Mitchell

A thesis submitted in partial fulfilment of the requirements for the degree of
Doctor of Philosophy

The University of Sheffield
Faculty of Social Sciences
School of Law

June 2018

Table of Contents

Abstract.....	2
Acknowledgements.....	3
List of Tables and Figures.....	4
Table of Cases.....	5
Table of Legislation.....	6
Chapter 1 Introduction.....	7
Chapter 2 Property-led development, Actor-Network Theory and Time.....	31
Chapter 3 Methods and Methodology.....	67
Chapter 4 Pitches, projects, processes and performances.....	93
Chapter 5 The journey from Exclusivity Agreement to Development Agreement.....	123
Chapter 6 A 'conditional phase'.....	153
Chapter 7 A 'passing phase'.....	183
Chapter 8 An instinct to extend and to amend: rewriting a Development Agreement	215
Chapter 9 Viability appraisals and property-led development.....	243
Chapter 10 Legal 'action' as a strategy of property-led development.....	273
Chapter 11 Conclusions.....	309
Appendix A Accessing copies of the Winchester Development Agreement.....	329
Appendix B List of Winchester City Council committee meeting minutes and reports, other Winchester City Council documents and Compulsory Order documents referred to in this thesis.....	331
Appendix C Plan illustrating the approximate footprint of the Winchester Development site and showing significant landholdings.....	341
Appendix D List of interviewees consulted during this research.....	343
Bibliography.....	345

Abstract

Property-led development and the relations between local authorities and private sector developers are topics that have formed the subject of much theoretical analysis in socio-legal studies, town planning literature and urban studies. However, there has been little examination of the network of contractual arrangements that underpin a property-led development project. These contractual underpinnings are important because they can facilitate the assembly of a development site. In addition, this network of contractual arrangements commonly stipulates both the terms on which a local authority transfers land it owns or has acquired to a private sector developer and a series of conditions to be discharged before a developer becomes obliged to commence construction of a development project.

This research, therefore, offers an original contribution to knowledge through a detailed study of this network of contractual arrangements. It does so by asking research questions that are specific to a property-led development project in a small city called Winchester, situated in the southeast of England. Alongside these specific questions, the research considers broader questions designed to provide insights into property-led development and legal practices beyond the confines of the case study. The research particularly examines the use of contractual arrangements as an instrument of land assembly, and analyses the role of law and legal technologies in property-led development. By drawing upon recent scholarship in socio-legal studies, the research also questions the extent to which 'time' functions as an ordering device in the contractual arrangements commonly deployed in property-led development practice, and considers the extent to which this network of contractual arrangements produces and sustains a sense of movement along a defined development trajectory.

Acknowledgements

This thesis would not have been possible without the guidance of my supervisors. Sarah Blandy has been my main supervisor throughout this project and her help, reassurance, advice and suggestions have been crucial in enabling me to submit this thesis. I was very fortunate to have had the support of such a committed supervisor. Similarly, Richard Kirkham, Ruth Stirton and Andreas Rühmkorf have each had stints as my second supervisor and were all ready and willing to read and discuss parts of this thesis. Andreas took on that role for the last two and a half years of my PhD and I am particularly grateful for his advice on getting from a first draft to thesis submission.

I also owe thanks to the anonymous property development professionals who agreed to give up their time to be interviewed for this project.

I am thankful for the support of my family. In particular, my parents, Deirdre and Jeremy, have tolerated periods of limited contact over the months leading up to submission but I knew that they would always be willing to provide a sounding board, a venue for a writing retreat or almost anything else that I needed. Finally, I am most thankful for the support of my wife, Louise, for her encouragement, her patience, and her love. I can't imagine having done this without her.

List of Tables and Figures

Table 1.1 Timeline illustrating the key events between the publication of the Urban Design Report and the expiry of the CPO intended to enable the Winchester Development to take place.....	22
Table 4.1 Timeline showing the actions through which Winchester City Council and Thornfield Properties plc identified a development site and initiated the land assembly process.....	100
Table 5.1 Timeline showing key actions between WCC and Thornfield’s ‘agreement in principle’ up to the date of their Development Agreement.....	128
Table 6.1 Timeline illustrating some of the key events following the signing of the Winchester DA and the administration of Thornfield Properties plc.....	154
Table 6.2 Sequence of conditions, Long Stop Dates and termination events set out in the DA dated 22 December 2004 made between Winchester City Council and Thornfield Properties (Winchester) Limited.....	162
Table 7.1 Timeline illustrating some of the key events between Thornfield’s application for planning permission and the grant of planning permission.....	189
Table 7.2 Timeline illustrating some of the key events between the grant of planning permission and the confirmation of the CPO.....	198
Table 8.1 Timeline illustrating some of the key events following confirmation of the CPO.....	218
Table 10.1 Legal ‘events’ during the Winchester Development between 2008 and 2016.....	275
Table A.1 List of webpages providing copies of the Winchester DA, two deeds of variation and a supplemental deed.....	330
Table B.1 Winchester City Council committee meeting minutes and reports.....	331
Table B.2 Other Winchester City Council documents and miscellaneous documents.....	336
Table B.3 Documents produced in conjunction with the Winchester Compulsory Purchase Order.....	337
Figure C.1 Plan of Winchester Development Site.....	342

Table of Cases

European Court of Justice

Auroux v Commune de Roanne (C-220/05) [2007] ECR I-385

Presstext Nachrichtenagentur GmbH v Austria (C-454/06) [2008] ECR I-4401

Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben (C-451/08) [2010] ECR I-2707

Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08) [2010] PTSR 1377

UK Cases

London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government [2013] EWHC 4207 (Admin)

MA Holdings Ltd v George Wimpey UK Ltd [2008] EWCA Civ 12, [2008] 1 WLR 1649

R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd [1982] AC 617 (HL)

R (Faraday Development Limited) v West Berkshire Council [2016] EWHC 2166 (Admin), 168 Con LR 131

R (Gottlieb) v Winchester City Council [2015] EWHC 231 (Admin), [2015] ACD 74

R (Midlands Co-Operative Society Ltd v Birmingham City Council [2012] EWHC 620 (Admin), [2012] All ER (D) 181

R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2010] UKSC 20, [2011] 1 AC 437

R (Wylde) v Waverley Borough Council [2017] EWHC 466 (Admin), [2017] ACD 57

Sharma v Browne-Antoine [2006] UKPC 57, [2007] 1 WLR 780

Walford v Miles [1992] 2 WLR 174 (HL)

Table of Legislation

European Union legislation

Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts OJ [1993] L199/54

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ [2004] L134/114

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ [2014] L94/1

Statutes

Acquisition of Land Act 1981

Compulsory Purchase Act 1965

Compulsory Purchase (Vesting Declarations) Act 1981

Freedom of Information Act 2000

Gender Recognition Act 2004

General Vesting Declaration Act 1981

Highways Act 1980

Human Rights Act 1998

Land Registration Act 2002

Local Government Act 1972

Local Government Act 2000

Senior Courts Act 1981

Town and Country Planning Act 1990

Statutory Instruments

Community Infrastructure Levy Regulations 2010, SI 2010/948

Concession Contracts Regulations 2016, SI 2016/273

Environmental Information Regulations 2000, SI 2004/3391

Local Government (Access to Information) (Variation) Order, 2006 SI 2006/88

Public Works Contracts Regulations 1991, SI 1991/2680

Public Contracts Regulations 2006, SI 2006/5

Public Contracts Regulations 2015, SI 2015/152

Chapter 1

Introduction

Property-led development¹ has performed a significant role in reordering landownership in many British towns and cities since the mid-1980s, beginning with initiatives to regenerate large tracts of industrial land on the edge of central urban areas.² Since the mid-1990s the focus of much property-led development has shifted towards central urban locations³ and recent academic studies have noted an ongoing dependence on public sector bodies to create a property market and to induce private sector developers and investors to participate in that market.⁴ Property-led development remains highly topical and notable recent case studies include Doak and Karadimitriou's work on property-led development in Paddington Basin,⁵ Layard's analysis of a similar project in Bristol⁶ and Henderson's study of property-led development in Wolverhampton.⁷ These projects have generally involved a form of 'retail-led regeneration'⁸ of apparently under-utilised commercial buildings through the construction of new shops and connected entertainment and leisure facilities.⁹

The idea of 'retail-led' town and city centre property development is not new, as Turok's work shows,¹⁰ and two assumptions underpin this type of project. The first is a belief

¹ I will explain what I understand by the term, 'property-led development,' in this chapter.

² See, for example, Patsy Healey, 'Urban Regeneration and the Development Industry' (1991) 25 *Regional Studies* 97; Rob Imrie and Huw Thomas, 'The limits of property-led regeneration' (1993) 11 *Environment and Planning C-Government and Policy* 87; Mike Raco, Steven Henderson and Sophie Bowby, 'Changing times, changing places: urban development and the politics of space - time' (2008) 40 *Environment and Planning A* 2652.

³ Anna Minton, *Ground control: fear and happiness in the twenty-first-century city* (Penguin Books 2009), 15-17.

⁴ Raco, Henderson and Bowby, 'Changing times, changing places: urban development and the politics of space - time', 2660.

⁵ Joe Doak and Nikos Karadimitriou, '(Re)development, complexity and networks: A framework for research' (2007) 44 *Urban Studies* 209. Raco and Henderson also discuss the Paddington Basin development in Mike Raco and Steven Henderson, 'Flagship Regeneration in a Global City: The Re-making of Paddington Basin' (2009) 27 *Urban Policy and Research* 301 and Steven Henderson, 'Developer collaboration in urban land development: partnership working in Paddington, London' (2010) 28 *Environment and Planning C-Government and Policy* 165.

⁶ Antonia Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37 *Journal of Law and Society* 412.

⁷ Steven R. Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes' (2011) 42 *Geoforum* 592.

⁸ Layard, 'Shopping in the Public Realm: A Law of Place', uses the term 'retail-led regeneration' in her case study of land assembly for the purposes of the Cabot Circus development in Bristol.

⁹ Alastair Adair, Jim Berry and Stanley McGreal, 'Financing property's contribution to regeneration' (2003) 40 *Urban Studies* 1065, 1069.

¹⁰ Ivan Turok, 'Property-led urban regeneration - panacea or placebo' (1992) 24 *Environment and Planning A* 361, 374. Turok's work refers to out-of-town retail and leisure developments at Meadowhall in Sheffield and MetroCentre in Gateshead, among others. More recent studies have considered retail-led regeneration in more central urban areas.

that the construction of new retail areas will leverage the construction of other buildings, such as urban housing, as part of or alongside the proposed development. The second is predicated on the hope that retail property development will bring associated benefits to the town or city in question through the creation of jobs, an enhancement in land values and, consequently, financial investment in the area.¹¹ These assumptions mean, Henderson has argued, that many local authorities treat retail property development 'as a public interest objective' that takes priority over 'the interests of affected landowners, occupiers and consumers.'¹²

Property-led development occupies a contentious and often controversial place in academic literature. Various academics have described this type of development work as 'property-led' because the ostensible goal is the construction of new buildings on a 'preselected' site.¹³ Underlying this goal is a belief that the privately-funded construction of new buildings might enable local government bodies to address or at least to be seen to be addressing 'wide-ranging urban problems,'¹⁴ including a perception of urban decline and the inability of local authorities to fund initiatives designed to reverse that decline.¹⁵ Proponents of property-led development thus suggest that job creation from building-related activities will boost employment rates and spending power in the region in question and new buildings will accommodate the expansion of existing businesses and the arrival of new businesses.¹⁶ These outcomes, they suggest, will enhance the attractiveness and the 'investability' of a location and produce economic benefits that will 'trickle down' to the local populace.¹⁷

My research studies a property-led development project in a small city called Winchester, situated in the southeast of England. My study of this project begins with a report that Winchester City Council's¹⁸ planning officers commissioned in 1997 to evaluate development options in the area and traces that project through to its collapse in 2016. I seek

¹¹ See, for example, DTZ and BCSC, 'Retail-led Regeneration: Why it matters to our communities' <https://www.bitc.org.uk/system/files/retail-led_regeneration_study.pdf> accessed 17 September 2017). A development seems to be classed as 'retail-led' when a significant component of the buildings to be constructed as part of the development will be used for retail purposes.

¹² Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes', 599.

¹³ Nikos Karadimitriou, Claudio de Magalhães and Roelof Verhage, *Planning, risk, and property development: urban regeneration in the England, France, and the Netherlands* (Routledge 2013), 206. See also Layard, 'Shopping in the Public Realm: A Law of Place', 417. Allan Cochrane, *Understanding urban policy: a critical approach* (Blackwell 2007), 31 also refers to a predominant urban policy approach predicated on 'targeted' interventions in preselected areas.

¹⁴ Turok, 'Property-led urban regeneration - panacea or placebo', 363.

¹⁵ Adair, Berry and McGreal, 'Financing property's contribution to regeneration', 1072.

¹⁶ *ibid*, 1068.

¹⁷ *ibid*, 1068. See also Raco, Henderson and Bowby, 'Changing times, changing places: urban development and the politics of space - time', 2653; Minton, *Ground control: fear and happiness in the twenty-first-century city*, 26.

¹⁸ The local authority responsible for Winchester city centre and the surrounding area. I abbreviate the name of the Council to 'WCC' throughout this thesis.

to provide an understanding of the processes that WCC deployed in partnership with a private sector development company to facilitate that project. This research examines how WCC and its development partner sought to ‘assemble’ a multiplicity of landholdings and individual land interests into a unified whole that was ready for development.¹⁹ The role of WCC’s power to compulsorily purchase privately-held land will be analysed, as will the interplay between the array of contractual arrangements deployed to enable the use of those powers.

This chapter begins with a discussion of recent academic work on property-led development and introduces the strategies through which local authorities and developers have historically sought to prepare land for development. Having done so, I set out the statutory basis from which a local authority can exercise compulsory purchase powers to acquire land interests for the purposes of this type of project. I then present a chronology of the property-led development process that took place in Winchester²⁰ to illustrate how a Development Agreement²¹ facilitates the exercise of a local authority’s compulsory purchase powers. This equips me to explain why my examination of the Winchester DA contributes both to existing research into property-led development and to two recent theoretical developments in legal studies. After identifying the principal focuses of my research, I then conclude the chapter by summarising my research aims, setting out my research questions and providing an outline of my thesis.

Property-led development and retail-led regeneration

Academic research into property-led development has generally involved case studies of single developments. Imrie and Thomas’s examination of property-led development in part of Cardiff docks²² provides a notable example of a case study considering a project typical of the emphasis, from the mid-1980s to the mid-1990s, upon apparently under-utilised industrial land close to a city centre. Their work evaluated the policy choices made at a central UK government level that permeated property development decision-making at a local level. They analysed the relations between property developers and local authority officers and addressed a perception among practitioners that private sector developers and financial institutions drive property-led development in industrial areas. Notwithstanding that perception, they also

¹⁹ The concept of ‘land assembly’ is one that I take from Minton, *Ground control: fear and happiness in the twenty-first-century city* and Layard, ‘Shopping in the Public Realm: A Law of Place’.

²⁰ Throughout this thesis, I refer to that project as ‘the Winchester Development.’ Many of the WCC documents to which I refer in this thesis call the Winchester Development, ‘Silver Hill.’ This is because one of the roads crossing the development site, marked on the plan in Appendix C, is called Silver Hill. For the sake of simplicity, I use the term ‘the Winchester Development’ to signify the location in which the development took place.

²¹ I will use the acronym ‘DA’ each time I refer to a Development Agreement.

²² Imrie and Thomas, ‘The limits of property-led regeneration’.

revealed that these projects are often ‘highly dependent on the public sector’²³ acting in a ‘proactive, and consenting’ way.²⁴ The mechanisms through which local authorities have sought to do this have been varied and have included the formation of ‘enterprise zones,’²⁵ which offer incoming businesses tax incentives, or ‘streamlined’ planning approvals to repackage ‘unmarketable’ land as both developable and investable.²⁶

In addition, a significant focus of local authority efforts to stimulate property-led development in the mid-1980s to the mid-1990s addressed what Harding called ‘the ownership log-jam.’²⁷ This involved, she explained, local authorities using their compulsory purchase powers to develop and mobilise ‘coalitions’ with developers and investors against local individuals and companies with land interests on a site earmarked for development.²⁸ ‘Fragmentation’ in landholding was seen as an obstacle to property-led development and would arise if ownership of those land interests was spread across a disparate range of different owners.²⁹ State intervention proved ‘necessary’ to address this insofar as local authorities, developers and investors assumed that consolidating those interests into a single, unified whole ready for construction would be impossible without the capacity of local government bodies to take those land interests from their existing owners.

Addressing ‘fragmented’ landownership remained a focus of property-led development practice throughout the 1990s and has continued to be essential to projects in the twenty-first century.³⁰ A series of recurring themes seem to characterise this type of development. A local authority and a developer collaborating on a property-led development project will often seek to create a retail ‘destination,’³¹ preferably of a sufficient scale to ‘dominate’ pre-existing, neighbouring retail areas.³² The developer will attempt to identify and

²³ *ibid*, 88.

²⁴ *ibid*, 93.

²⁵ Both in relation to industrial sites and other central urban areas. For a discussion of this, consider Turok, ‘Property-led urban regeneration - panacea or placebo’, 368; Adair, Berry and McGreal, ‘Financing property’s contribution to regeneration’, 1069; David Adams, Alan Disberry and Norman Hutchison, ‘Still vacant after all these years - Evaluating the efficiency of property-led urban regeneration’ (2017) 32 *Local Economy* 505, 507.

²⁶ Imrie and Thomas, ‘The limits of property-led regeneration’, 89.

²⁷ Ann Harding, ‘The rise of urban-growth coalitions, UK- style’ (1991) 9 *Environment and Planning C - Government and Policy* 295, 314.

²⁸ *ibid*.

²⁹ Imrie and Thomas, ‘The limits of property-led regeneration’, 93; Henderson, ‘City centre retail development in England: Land assembly and business experiences of area change processes’, 594.

³⁰ Erwin Heurkens, David Adams and Fred Hobma, ‘Planners as market actors: the role of local planning authorities in the UK’s urban regeneration practice’ (2015) 86 *Town Planning Review* 625, 642.

³¹ Henderson, ‘City centre retail development in England: Land assembly and business experiences of area change processes’, 596. See also Mike Biddulph, ‘Urban design, regeneration and the entrepreneurial city’ (2011) 76 *Progress in Planning* 63, 75.

³² Henderson, ‘City centre retail development in England: Land assembly and business experiences of area change processes’, 593.

swiftly incorporate one or two department stores to 'anchor' the development and attract complementary retailers.³³ Those retailers, according to the predominant model described in the urban regeneration literature, would be multisite or chain retailers³⁴ with similar shops in neighbouring retail areas and in locations across the United Kingdom.

These features of retail-led regeneration and property-led development rely upon some form of public-private partnership based on a variety of contractual arrangements,³⁵ which require a local authority to use its compulsory purchase powers to make the land acquisitions deemed necessary for the assembly of a development site.³⁶ In return for the local authority's promise to exercise its compulsory purchase powers, the contractual arrangements will require a private sector developer to construct, own and maintain buildings on the site, enrol prospective retail tenants interested in taking units on the development site and recruit financial institutions equipped to fund land acquisition and construction. In that sense, contemporary retail-led regeneration practice is a continuation of the approach to redevelopment of industrial areas throughout the 1980s and 1990s. This approach has proven attractive to policy-makers, planners and developers because it enables a 'comprehensive' and 'coordinated' approach to property-led development deemed necessary to 'join up' policy, decision-making, landownership and schemes of development into a seemingly coherent and overarching whole.³⁷ As a result, it has been common in the past three decades for local authorities to enter into a variety of contractual arrangements with property development companies to facilitate this type of development.

The land earmarked as suitable for property-led development and retail-led regeneration will often include a plot to which the local authority owns the freehold title.³⁸ But the earmarked land will usually also cover freehold and leasehold estates held by private owners, which are thus outside the ownership and control of either the local authority or the local authority's chosen development partner. Although I have stated that local authorities have utilised compulsory purchase powers since the 1980s to assemble a development site out of previously developed industrial land, these 'land assembly' strategies were, Minton argues,

³³ *ibid*, 593. See also Heurkens, Adams and Hobma, 'Planners as market actors: the role of local planning authorities in the UK's urban regeneration practice', 641; Biddulph, 'Urban design, regeneration and the entrepreneurial city', 86.

³⁴ Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes', 593. See also Doak and Karadimitriou, '(Re)development, complexity and networks: A framework for research', 222.

³⁵ Clifford Guy, *Planning for retail development: a critical view of the British experience* (Routledge 2007), 216-8.

³⁶ Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes', 593.

³⁷ Cochrane, *Understanding urban policy: a critical approach*, 31-7.

³⁸ Layard, 'Shopping in the Public Realm: A Law of Place', 417-8.

initially 'something of a novelty.'³⁹ They have since, she suggests, become widely used to address the likelihood that a private owner with an interest in land earmarked for development might refuse to give up that interest.⁴⁰

In 2001, the UK government encouraged local authorities to use compulsory purchase powers to 'make things happen'⁴¹ in urban areas characterised by a downtrodden property market and a lack of 'investability.'⁴² To that end, Lord Falconer, the Minister for Housing and Planning, stated that '[I]and assembly, through compulsory purchase powers' had a particularly 'important part to play.'⁴³ The initial stages of the Winchester Development took place between 1997 and 2002 in the context of these central government efforts to nudge local authorities towards greater use of their compulsory purchase powers.

Since 1997, many local authorities have used these compulsory purchase powers in conjunction with other legal mechanisms and the consequences of this central government nudge have been studied in the urban regeneration and socio-legal studies literature. That process has continued up to the present, as exemplified in Layard's study of the privatisation of space in Bristol city centre as part of the Cabot Circus retail-led regeneration project.⁴⁴ The land assembly process for that project began, according to Layard's analysis, with a planning permission, a Compulsory Purchase Order⁴⁵ and a consent permitting the stopping up of highways.⁴⁶ The process reached its culmination, she argues, in the grant of a long leasehold title of the development site from the local authority to its chosen development partner.⁴⁷ But her examination of the legal mechanisms operative in this process did not extend to an investigation of all the contractual arrangements between the local authority and its development partner. The contractual arrangements that I analyse in this thesis preceded and facilitated the grant of a long leasehold estate that was similar in form and effect to that which Layard analyses, as well as enabling a planning permission, the making of a CPO and the award

³⁹ Minton, *Ground control: fear and happiness in the twenty-first-century city*, 11.

⁴⁰ *ibid.*, 11. See also Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes', 594.

⁴¹ Lord Falconer of Thoroton (Minister of State for Housing and Planning), '2001 Speech to the British Retail Consortium. 27 November 2001' <<http://www.ukpol.co.uk/lord-falconer-2001-speech-to-the-british-retail-consortium/>> accessed 24 July 2017.

⁴² Adair, Berry and McGreal, 'Financing property's contribution to regeneration', 1068.

⁴³ Lord Falconer of Thoroton (Minister of State for Housing and Planning), '2001 Speech to the British Retail Consortium. 27 November 2001'.

⁴⁴ Layard, 'Shopping in the Public Realm: A Law of Place'.

⁴⁵ Hereafter referred to as a 'CPO'.

⁴⁶ Stopping up is a technical term that refers to the practice of closing existing public highways to enable development to occur (as discussed, in relation to the Winchester Development, in Christine Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 6.1-6.5. For a critical discussion of this process, see Layard, 'Shopping in the Public Realm: A Law of Place', 424.

⁴⁷ Layard, 'Shopping in the Public Realm: A Law of Place', 416.

of an order allowing the stopping up of highways. My research aims, therefore, to address a lack of research in this area and examines a wide array of contractual arrangements and the role that those arrangements perform in property-led development.

Although the principal focus of my research is on the Winchester Development, I draw findings from that project that are pertinent to wider property-led development. I do so through archival research and analysis of documents produced in conjunction with the Winchester Development. Alongside this, I examine the transcripts of 18 semi-structured interviews⁴⁸ that I carried out with property development professionals.⁴⁹ Although the discussion in these interviews did not pertain directly to the Winchester Development, the data that the interviews generated does enable me to provide an examination of the complex, interlocking processes underpinning property-led development.

This combination of methods equips me to examine both the extent to which the form, content and effect of contractual arrangements deployed in Winchester were a product of and shaped connections and networks in the area, and the extent to which the arrangements were a product of prevailing property-led development practice. I ask what those contractual arrangements, the connections that produced those arrangements and the associations produced by them tell us about property-led development. The issues that this research investigates thus encompass an interdisciplinary enquiry into how law is performed, the 'legal technologies'⁵⁰ that materialise in a property-led development process and what those legal technologies become and do as a property-led development project progresses.

Land assembly: making, confirming and exercising a Compulsory Purchase Order

One of the most important legal technologies that this research considers is the operation of a CPO. A local authority can utilise its compulsory purchase powers by making and exercising a CPO if it deems that the 'development, redevelopment or improvement' of land to be acquired would be 'likely to contribute to' social, economic or environmental benefits to the local authority's area.⁵¹ The procedures for the making and exercise of a CPO are set out in a range of statutes, cases, circulars and guidance documents.⁵² Only a body, such as a local

⁴⁸ I explain this term in chapter three.

⁴⁹ Appendix D to this thesis contains some limited biographical details explaining who these interviewees are and when I met them.

⁵⁰ I explain that I mean by 'legal technologies' in chapter two.

⁵¹ As set out in sections 226(1)(a) and 226(1A) of the Town and Country Planning Act 1990.

⁵² I refer in the next section of this chapter to two circulars that provide central government guidance for local authorities on the exercise of compulsory purchase powers. Of particular importance to this research is the central government Circular 06/2004, published on 31 October 2004 (The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Crichel Down Rules* (2004)).

authority, granted compulsory purchase powers by statute, may make a CPO, and this type of body cannot exercise those powers purely in the interests of a third party, although it can make a CPO with the intention that a private developer will carry out a development.⁵³ As a consequence, a local authority can acquire land using a CPO and then transfer an interest in it to a private sector developer to enable that developer to construct and market a property-led development project.⁵⁴

Before transferring land acquired through a CPO, a local authority seeking to exercise compulsory purchase powers must first identify the plots of land to be acquired and then make a CPO. It should publicise the CPO, the extent of the land to be acquired and the purpose for the acquisition in a local newspaper⁵⁵ and serve notice of the making of the CPO on all ascertained owners, lessees and occupiers of the land to be acquired,⁵⁶ inviting objections from those individuals or organisations to the making of it.⁵⁷ In the event that objectors challenge the making of the order, the local authority should seek confirmation from the Secretary of State for Communities and Local Government of the validity of the CPO.⁵⁸ To enable the local authority to justify its making of a CPO and to enable objectors to challenge this justification, the Secretary of State will 'cause a public inquiry to be held.'⁵⁹ If the Secretary of State then confirms the CPO a local authority does not automatically acquire the land but must exercise its confirmed powers within three years of the confirmation date.⁶⁰ I refer to this statutorily-imposed deadline as the 'CPO Exercise Date' and the time pressure flowing from this deadline is an important topic in my analysis of the Winchester Development.

Exercise of a CPO occurs through service of a 'notice to treat' on affected owners, lessees or occupiers of the land or on the making of a 'general vesting declaration.'⁶¹ On serving a notice to treat or making a general vesting declaration, a local authority exercising a

⁵³ Section 233 of the Town and Country Planning Act 1990 makes it clear that a local authority that exercises compulsory purchase powers need not be the party that carries out the actions that lead to development, redevelopment or improvement.

⁵⁴ As discussed in, for example, J. Cameron Blackhall, *Planning law and practice* (3rd edn, Cavendish 2003), 368.

⁵⁵ Acquisition of Land Act 1981, s11.

⁵⁶ Acquisition of Land Act 1981, s12.

⁵⁷ Acquisition of Land Act 1981, s12(2)(d).

⁵⁸ Acquisition of Land Act 1981, s2(2).

⁵⁹ Acquisition of Land Act 1981, s13(2).

⁶⁰ See section 4 of the Compulsory Purchase Act 1965. For a further discussion of this point, see Barry Denyer-Green, *Compulsory purchase and compensation* (10th edn, Routledge 2014), 75.

⁶¹ The law related to the exercise of compulsory purchase powers is highly technical and generally set out in the Compulsory Purchase Act 1965 and the Compulsory Purchase (Vesting Declarations) Act 1981. I do not propose to analyse this area of law because WCC made a CPO that the Secretary of State confirmed but the Council did not exercise its confirmed powers.

CPO must start negotiating and paying compensation to dispossessed owners.⁶² This illustrates the important distinction between a CPO that a local authority has made, a CPO that the Secretary of State has confirmed and a CPO that has been or is being exercised.⁶³ In essence, a local authority cannot take land through the exercise of compulsory purchase powers until the Secretary of State has confirmed the justification for the making of a CPO.

Following the local authority's acquisition of the earmarked plots, the local authority will allow the developer to access the land to commence construction. Once construction has reached a stage close to completion, the local authority will usually then transfer the assembled site to the developer. This can take place through one of two mechanisms. The local authority will package the acquired interests together with any land already held by the local authority and then either transfer to the developer the freehold title to the entire site or grant the developer a long leasehold estate of the entire site.⁶⁴

Both of these mechanisms effect a privatisation of and impress a 'developer-led' sense of place upon land acquired through the exercise of compulsory purchase powers.⁶⁵ Layard describes this as a use of 'legal mechanisms to subdue multiple, heterogeneous, and diverse senses of place.'⁶⁶ Other recent research into the exercise of compulsory purchase powers for property-led development focuses on the experiences of these heterogeneous private landowners dispossessed during the process.⁶⁷ Similar work has also recently considered the justificatory strategies that local authorities employ to legitimise the exercise of a CPO in these circumstances.⁶⁸ These analytical accounts inform my work by illuminating some of the

⁶² If the acquiring authority cannot reach agreement with a dispossessed owner, any dispute as to the value of the compensation can be referred to the Upper Tribunal of the Lands Chamber pursuant to section 6 of the Compulsory Purchase Act 1965.

⁶³ I will revisit the distinction between making, confirming and exercising a CPO in chapter 10 when I discuss the CPO that WCC made for the purposes of the Winchester Development.

⁶⁴ WCC intended to utilise the leasehold mechanism for the Winchester Development (see Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 15). I discuss the leasehold arrangements operative in the Winchester Development throughout this thesis and note that WCC also considered the sub-division of the development site into separate plots with the grant of a lease to the developer on the completion of construction of each plot (Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 15).

⁶⁵ Layard, 'Shopping in the Public Realm: A Law of Place', 415. As also discussed by, among others, Minton, *Ground control: fear and happiness in the twenty-first-century city*, 42.

⁶⁶ Layard, 'Shopping in the Public Realm: A Law of Place', 415.

⁶⁷ See, for example, Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes'; Debbie Becher, *Private property and public power: eminent domain in Philadelphia* (OUP 2014) and Neil Gray and Libby Porter, 'By Any Means Necessary: Urban Regeneration and the "State of Exception" in Glasgow's Commonwealth Games 2014' (2015) 47 *Antipode* 380.

⁶⁸ Brett Christophers, 'Geographical knowledges and neoliberal tensions: compulsory land purchase in the context of contemporary urban redevelopment' (2010) 42 *Environment and Planning A* 856.

tensions running through property-led development and inviting questions about the extent to which the contractual arrangements deployed in these circumstances might address, exacerbate or side-line these concerns. My research aims to answer these questions and I detail my specific research questions later in this chapter.

From initial negotiations to a DA and a CPO: An overview of the Winchester Development

I now provide some background to the Winchester Development and a basic chronology of some key events related to the DA and the CPO deployed there. I have drawn this background information from WCC documents, public records and press reports. I catalogue my sources in chapter three and provide more detailed and fully referenced accounts of the events in the Winchester Development in later chapters where those events are relevant to my analysis.

WCC has a published constitution that explains how the Council implements its functions and discharges its powers. The Council's principal decision-making body, or 'executive,' is the Cabinet,⁶⁹ consisting of the Leader⁷⁰ and no more than nine other councillors who the leader has appointed.⁷¹ The Cabinet is, therefore, responsible for the day-to-day discharge of the Council's functions,⁷² although the constitution permits the Council to employ officers to enable the Council to fulfil its various functions.⁷³ Those officers are organised according to a hierarchy consisting of various specialist officers, led by the Chief Executive, who is the Council's most senior officer.⁷⁴

In terms of the decisions that were necessary to enable the Winchester Development to take place, this meant that the councillors who sat on the Council's Cabinet had to pass a formal resolution approving both the making of a CPO and the signing of the associated contractual arrangements. However, those councillors made resolutions in response to recommendations presented to them by the Council's Chief Estates Officer or the Head of

⁶⁹ Winchester City Council, *Constitution of the City Council - Part 2 - Articles of the Constitution (Appendix B, Document 2.10)*, Article 7.0. Section 13(2) of the Local Government Act 2000 requires a local authority to establish 'executive arrangements' for the discharge of the local authority's function.

⁷⁰ The Leader is the individual appointed by the full Council, which consists of the 45 individuals elected to serve as councillors (see *ibid*, Article 7.02). See also, Winchester City Council, *Constitution of the City Council - Part 1 - Summary and Explanation (Appendix B, Document 2.09)*, 2. The leader will, therefore, usually be a councillor from the political party with a majority of representatives elected to the Council.

⁷¹ Winchester City Council, *Constitution of the City Council - Part 2 - Articles of the Constitution (Appendix B, Document 2.10)*, Article 7.02.

⁷² Winchester City Council, *Constitution of the City Council - Part 3A - Responsibility for Functions (Appendix B, Document 2.11)*, section 2.

⁷³ Winchester City Council, *Constitution of the City Council - Part 2 - Articles of the Constitution (Appendix B, Document 2.10)*, Article 12.01.

⁷⁴ Winchester City Council, *Constitution of the City Council - Part 7 - Management Structure (Appendix B, Document 2.14)*, 1.

Estates,⁷⁵ the Council's Director of Development Services⁷⁶ and the Council's Corporate Director (Service Delivery). The Corporate Director (Service Delivery) is, alongside the Chief Executive and the Corporate Director (Professional Services), a member of the three-person senior management team and the officer responsible for management of 'major projects' such as the Winchester Development.⁷⁷

The Council's current constitution states that the 'Assistant Director (Estates and Regeneration)' is the individual responsible for 'maximising the return of the [Council's] estate and seeking to implement regeneration opportunities in the District.'⁷⁸ It appears that this is the job title for the individual previously labelled either the Chief Estates Officer or the Head of Estates. This role is different from the role of the 'Assistant Director (Built Environment),' who is the Council's Chief Planning Officer and the individual responsible for administering decisions on planning applications.⁷⁹ This distinction reflects the way in which many local authorities treat the exercise of compulsory purchase powers as one of their landholding and estate management functions. The performance of local authority planning officers as 'development actors' has been considered in case studies of property-led development⁸⁰ but there is a relative paucity of research into the role of local authority estates officers as active participants in the preparation of land for development. Harding has, however, noted that local authorities, consisting of councillor-led committees and officer-managed project teams, are 'fragmented.'⁸¹ This means, Adams *et al* suggest, that analytical accounts of a local authority's activities cannot sensibly treat a local authority as a 'single, undifferentiated actor.'⁸² For this reason, I examine interactions between WCC councillors and officers in relation to the Winchester Development.

The district under the control of WCC is an area of around 250 square miles in the southeast of England, consisting of Winchester itself, as well as three smaller towns.⁸³ The population of the district as a whole was, in 2013, approximately 118,000, with the population

⁷⁵ These titles appear to have been different labels used at different times to define the same role.

⁷⁶ The post of Director of Development Services seems to be a job title that the Council no longer uses, although it appears that this was the label given to the officer responsible for managing the Council's planning, design and project management team.

⁷⁷ Winchester City Council, *Constitution of the City Council - Part 7 - Management Structure (Appendix B, Document 2.14)*, 4.

⁷⁸ *ibid*, 1.

⁷⁹ *ibid*, 5.

⁸⁰ Heurkens, Adams and Hobma, 'Planners as market actors: the role of local planning authorities in the UK's urban regeneration practice', 630.

⁸¹ Harding, 'The rise of urban-growth coalitions, UK- style', 296.

⁸² David Adams, Robert Croudace and Steve Tiesdell, 'Exploring the 'Notional Property Developer' as a Policy Construct' (2012) 49 *Urban Studies* 2577, 2587.

⁸³ Winchester City Council, 'Summary district figures' <<http://www.winchester.gov.uk/data/facts-and-figures-about-the-winchester-district>> accessed 20 November 2017.

of Winchester amounting to approximately 39,000.⁸⁴ As such, Winchester is a relatively small city but it is also one of the wealthiest cities in England, with exceedingly low levels of unemployment, high average house prices and low levels of deprivation.⁸⁵ Nonetheless, in 1997, WCC's officers commissioned Llewelyn-Davies, a property development consultancy, to evaluate development options in the area and the consultancy's report identified parts of the city centre that it viewed as under-developed.⁸⁶

That report, which I call 'the Llewelyn-Davies Report,' focused on a site centred on a bus station in Winchester city centre and incorporating land that the Council owned and land that a property developer called John De Stefano⁸⁷ owned through various holding companies. The Llewelyn-Davies Report assumed that the redevelopment of the area would be 'dominated by the provision of a large retail store on the site of the bus station,'⁸⁸ with additional retail development on parts of the De Stefano land,⁸⁹ a car park on the Council's land⁹⁰ and residential development adjacent to the bus station site.⁹¹ Appendix C to this thesis is a plan illustrating the earmarked development site and pinpointing the bus station, the Council's landholdings on the development site, and De Stefano's landholdings.

After publication of the Llewelyn-Davies Report, a property developer called Tony Marcus⁹² formed a company, called Thornfield Properties plc, which his family and Lehman Brothers, the well-known bank, jointly owned.⁹³ Soon after incorporation, Thornfield

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Llewelyn-Davies, *Central Winchester Study. Final Report. November 1997 (Appendix B, Document 2.01)*, paragraph 10.1.7.

⁸⁷ According to the compilers of The Sunday Times Rich List, John De Stefano was, at one point, the 879th richest person in the United Kingdom. His property company held property assets estimated, in 2008, to be worth around £79million (see Philip Beresford and Stephen Boyd, 'Rich List 2008. Rankings 841-915' *The Sunday Times* (27 April 2008)).

⁸⁸ Llewelyn-Davies, *Central Winchester Study. Final Report. November 1997 (Appendix B, Document 2.01)*, paragraph 7.3.1.

⁸⁹ *ibid.*, paragraph 7.3.7.

⁹⁰ *ibid.*, paragraph 7.4.

⁹¹ *ibid.*, paragraph 7.5.1.

⁹² Tony Marcus was another person who featured on The Sunday Times Rich List. He was a property developer whose family, in 2004, owned an estimated 28% stake in Thornfield Properties and had an approximate net worth of £70million (see Ian Coxon, 'The Sunday Times Rich List 2004. Rankings 568-' *The Sunday Times* (18 April 2004)).

⁹³ For details of the incorporation of Thornfield Properties, please see the Companies House online overview (available at <https://beta.companieshouse.gov.uk/company/03516056> [last accessed 1 October 2017]). Various documents refer to the ownership of Thornfield Properties. The footer on Thornfield Properties' stationery between 1998 and 2002 confirms that the company was a joint venture with Lehman Brothers (see Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to John De Stefano (26 August 1998) (Appendix B, Document 3.10.02)*). By May 2002, Thornfield Properties had entered into some form of debenture with Bank of Scotland, which meant that Bank of Scotland had become a participant in the joint venture arrangement (as noted in the footer to correspondence disclosed as part of the Winchester Development. See, for example, Matthew Bodley,

Properties appears to have entered into a joint venture⁹⁴ with Stagecoach (South) Limited,⁹⁵ the owner of the Bus Station in Winchester city centre. Thornfield Properties' directors then attempted to acquire some of the land interests adjacent to the Bus Station and approached WCC's Director of Development Services to pitch a proposal for a development project centred on the Bus Station site.⁹⁶ While WCC's director indicated that the Council was receptive to Thornfield Properties' proposals, he encouraged the company's directors to make further efforts to acquire land interests in the vicinity of the bus station.⁹⁷

As negotiations related to land acquisitions progressed, Tony Marcus established a special purpose company, Thornfield Properties (Winchester) Limited, in August 2000, to enter into land acquisition agreements with third party landowners and to carry out the Winchester Development.⁹⁸ However, the negotiations did not enable Thornfield to acquire De Stefano's land or all of the other land interests deemed necessary to create a suitable development site.

Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to John De Stefano (9 May 2002) (Appendix B, Document 3.10.08A). At some point between 2002 and 2006, Lehman Brothers appears to have withdrawn from the joint venture arrangement (as demonstrated in the footer to Thornfield Properties correspondence. See, for example, Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letters from Michael Capocci to Nigel Wright (11 January 2006, 8 February 2006 and 13 April 2006) (Appendix B, Document 3.10.16).*

⁹⁴ A 'joint venture' is a mechanism in which two or more organisations agree to co-operate in a shared enterprise by pooling resources such as land, capital and, in the case of property-led development, land. For a discussion, see, for example Lexis PSL Property, 'Joint ventures in property transactions - overview' <<https://www.lexisnexis.com/uk/lexispsl/property/document/393788/5B3H-CJP1-F18C-43M7-00000-00/Joint%20ventures%20in%20property%20transactions%E2%80%9494overview>> accessed 5 September 2017.

⁹⁵ Hereafter referred to as 'Stagecoach.' Stagecoach (South) Limited is a subsidiary of Stagecoach Group, a multi-national public transport company (see <http://www.stagecoach.com/about/our-companies/overview.aspx> accessed 12 February 2018).

⁹⁶ As recorded in a letter from Karen Hawes, one of Thornfield Properties' development directors, to John De Stefano, one of the landowners who held interests on the land adjacent to the Bus Station. See, Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to John De Stefano (26 August 1998) (Appendix B, Document 3.10.02).*

⁹⁷ As reported in Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 43.

⁹⁸ Hereafter referred to as 'Thornfield'. The use of a special purpose vehicle for property-led development purposes is closely linked to the joint venture mechanism. In summary, a special purpose vehicle is a company or partnership created to carry out a specific function. Conventional property-led development practice deems that a special purpose vehicle, established to acquire land and construct and manage a project, is desirable because the structure of the company or partnership can shelter the parent company or shareholders from the financial risks of the project failing. For a practitioner perspective on the utility of special purpose vehicles, see PwC Consulting, 'The next chapter: Creating an understanding of Special Purpose Vehicles' 2011) <<https://www.pwc.com/gx/en/banking-capital-markets/publications/assets/pdf/next-chapter-creating-understanding-of-spvs.pdf>> accessed 5 September 2017 and Forsters LLP, 'Buying and selling a property SPV: An overview of the key considerations for property investors' (2015) <http://www.forsters.co.uk/sites/default/files/What%20to%20consider%20when%20buying%20and%20selling%20a%20property%20SPV,%202016_0.pdf> accessed 5 September 2017.

As a result, Thornfield's directors encouraged the Council's officers to seek Cabinet approval for a CPO. Instead of seeking immediate approval for the making of a CPO, however, WCC's officers sought and obtained approval for the formation of an Exclusivity Agreement⁹⁹ with Thornfield in March 2003. That EA functioned as a precursor to the DA, which was signed on 22 December 2004 and which was expected to facilitate the making of a CPO. I draw a number of conclusions by analysing the EA and the proposed land acquisition agreements between John De Stefano and Thornfield, focusing upon the role these preliminary agreements performed in stabilising an emerging 'development trajectory.'

The bulk of my analysis, however, examines the DA. WCC, Thornfield and Thornfield Properties¹⁰⁰ were all parties to this DA, which contained various baseline specifications, called 'required elements,' for the type of buildings to be constructed as part of the development. Between 2004 and 2009, WCC, Thornfield and Thornfield Properties made repeated attempts to rewrite the original agreement. These attempts stopped, in January 2010, when Thornfield Properties' principal lender, Halifax Bank of Scotland, placed the company into administration. This did not end the Winchester Development process because Henderson UK Property Fund acquired Thornfield, renamed it Silverhill Winchester No1 Limited,¹⁰¹ and WCC and Henderson used the pre-existing DA to facilitate the making of a CPO in November 2011.¹⁰²

The DA that WCC, Thornfield and Thornfield Properties had negotiated reflected aspects of central government guidance on making, obtaining confirmation for and exercising a CPO. The Department for Communities and Local Government issued new guidance in 2015¹⁰³ but that guidance consolidated an earlier circular, Circular 06/2004, published on 31 October 2004 and referred to in the previous section of this chapter.¹⁰⁴ Since WCC had entered into its DA with Thornfield and Thornfield Properties on 22 December 2004 and because WCC eventually made its CPO in November 2011, Circular 06/2004 is the relevant guidance for the purposes of this thesis. The circular stated:

⁹⁹ Hereafter referred to as an 'EA.'

¹⁰⁰ Thornfield Properties plc, as parent company to Thornfield, entered into the DA as guarantor of its subsidiary's obligations in the DA.

¹⁰¹ The 'developer' for the purposes of the DA thus remained the same legal entity although, to reflect the change in overall ownership, I refer to 'the developer' from June 2010 as onwards as 'Henderson.' Where it is necessary to distinguish between the Henderson entity acting as developer and the Henderson entity acting as guarantor, I make the distinction clear.

¹⁰² As discussed in Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03).*

¹⁰³ The current government guidance on the making, confirmation and exercise of a CPO is Department for Communities and Local Government, *Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land by, or under threat of, compulsion* (2015).

¹⁰⁴ The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Crichel Down Rules.*

If an acquiring authority does not have a clear idea of how it intends to use the land which it is proposing to acquire, and cannot show that all the necessary resources are likely to be available to achieve that end within a reasonable time-scale, it will be difficult to show conclusively that the compulsory acquisition of land included in the order is justified.¹⁰⁵

The reference in Circular 06/2004 to the 'resource' implications of making, confirming and exercising a CPO primarily concerned the compensation payable to dispossessed owners and the Circular made it clear that a local authority should be able to demonstrate that 'adequate funding would be available' for the land acquisitions.¹⁰⁶ Moreover, because the Circular stated that the making of a CPO should be a 'last resort' when other land assembly efforts had failed,¹⁰⁷ either a local authority seeking to make a CPO or the local authority's development partner needed also to have attempted to acquire that land by negotiation with the landowners. And while Circular 06/2004 did not specify that a development proposal had to be supported by a granted planning permission, it did point out that there should be no 'planning impediments' to the development of the land.¹⁰⁸

The Winchester DA had imposed a conditional obligation on Thornfield to construct a development in accordance with pre-agreed design specifications that would take effect if WCC made and obtained confirmation for a CPO. In return, the DA had envisaged that Thornfield would, within a time-frame specified in the DA, take the steps that would enable WCC to show that it had, through the actions of its development partner, achieved satisfaction of the requirements set out in Circular 06/2004. After Henderson replaced Thornfield and Thornfield Properties, they became obliged to satisfy these requirements. The actions that the DA required from first Thornfield and then Henderson included, among other things, negotiating the acquisition of land interests on the earmarked development site, securing agreements for lease with prospective retailers, entering into funding arrangements with financial institutions and obtaining planning permission for the development.

Land acquisitions and the commencement of construction in Winchester did not immediately follow the making of the CPO, however, because Henderson then sought to renegotiate the terms of the DA to make the development proposals 'viable.'¹⁰⁹ While WCC's Cabinet initially approved a rewriting of the DA, that decision formed the basis for a judicial review into the lawfulness of doing so.¹¹⁰ I analyse that judicial review in chapter 10 of this thesis because it compelled WCC's officers and Henderson's directors to abandon their

¹⁰⁵ *ibid*, paragraph 19.

¹⁰⁶ *ibid*, paragraph 21.

¹⁰⁷ *ibid*, paragraph 24.

¹⁰⁸ *ibid*, paragraphs 22-23.

¹⁰⁹ The question as to what constitutes a 'viable' development is one to which I return repeatedly throughout this thesis.

¹¹⁰ *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), [2015] ACD 74.

attempts to rewrite the DA in a way that both parties deemed necessary. This failure to renegotiate the DA in a manner acceptable to both parties led to the termination of the DA on 10 February 2016 and the expiry of the CPO by effluxion of time on 19 March 2016. Table 1.1 is a timeline showing the key events in the Winchester Development, accompanied by a signpost to the chapter in which the events are examined.

Table 1.1 Timeline illustrating the key events between the publication of the Urban Design Report and the expiry of the CPO intended to enable the Winchester Development to take place		
Date	Event	Chapter
November 1997	Publication of Urban Design Report	4
c. February 1998	Thornfield Properties plc formed enters into joint venture arrangement with Stagecoach (South) Limited. Thornfield Properties' representatives approach WCC officers with a property-led development pitch	4
August 2000	Thornfield Properties (Winchester) Limited incorporated to acquire land on the development site and carry out the Winchester Development	4
March 2003	WCC enters into Exclusivity Agreement with Thornfield	5
December 2004	WCC and Thornfield enter into Development Agreement	5
January 2010	Thornfield Properties plc placed into administration by Halifax Bank of Scotland	6
November 2010	WCC's Cabinet approves Henderson UK Property Fund's purchase of Thornfield Properties (Winchester) Limited and Henderson's replacement of Thornfield Properties plc as Guarantor	6
November 2011	WCC makes CPO	7
June-July 2012	Public inquiry leads to confirmation of the CPO in March 2013	7
January 2015	High Court hearing in <i>R (Gottlieb) v Winchester City Council</i> ¹¹¹	10
10 February 2016	Termination of the Development Agreement	10
19 March 2016	Expiry of the CPO	10

¹¹¹ *ibid.*

This case study is, therefore, a case study of failure because the DA did not lead directly to the construction of buildings on the development site. Nevertheless, the process did endure, in one form or another, from 1997 to 2016. The longevity of the development process enables me to draw out a number of key themes that emerged in the development. Investigating the content of a DA enables me to make an original contribution to knowledge in this field because this has not formed the subject of detailed analysis elsewhere. In addition, examining the actions that a local authority and a developer take to enable the making of a DA, their attempts to renegotiate a DA and the manner in which a DA facilitates the making of a CPO results in a novel approach to the study of property-led development.

The focus of the research: Time, trajectories, projectisation, law and the pursuit of unconditionality

My research analyses the contractual arrangements deployed in Winchester and asks if these arrangements were an outcome of prevailing assumptions about how a local authority and a developer should 'do' property-led development. I also examine how the Winchester DA functioned as a device designed to 'carry around'¹¹² the means for WCC and a developer to assemble a development site, side-line other developers and rival landowners and, through what they presented as a sequence of ratcheting motions,¹¹³ create the conditions for a profitable development. In particular, I investigate the extent to which the contractual arrangements deployed in Winchester facilitated transit from initial, somewhat open-ended, tri-partite negotiations between WCC, Thornfield and third party landowners through the land assembly process to the moment at which WCC would grant Henderson a lease of the assembled site.

One of the key themes of my discussion is this sense of travel along a clearly-defined development trajectory. As a corollary of this, I examine the role of the contractual arrangements in producing a sense of 'irreversible progression' along that path.¹¹⁴ But my focus in this thesis is also on the discrepancy between appearance and practice. I consider whether the DA and the other contractual arrangements operated as a 'carefully scripted'¹¹⁵ program for the actions that would carry WCC and its development partner to the culmination of the development process or a loosely-defined set of broad parameters designed to

¹¹² Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 181.

¹¹³ The idea of progression through 'ratcheting' is drawn from Bruno Latour, *We have never been modern* (Harvard University Press 1993), 72, which I discuss in chapter two.

¹¹⁴ Carol J. Greenhouse, *A moment's notice: time politics across cultures* (Cornell University Press 1996), 20.

¹¹⁵ Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 65.

accommodate an awareness that property-led development rarely involves straightforward progress through land assembly to the commencement of construction. Part of my contribution to knowledge thus comes from an exposition of what WCC, Thornfield Properties, Henderson and their respective subsidiaries did with their contractual arrangements as they moved through the phases of the land assembly process. I consider aspects of fluidity and fixity within that trajectory by, for example, examining changes to the contractual arrangements that WCC and its development partners entered into alongside the relative permanence of longstanding and deeply embedded landownership interests in the area.

My research provides, therefore, new insights into aspects of property-led development but I also offer a contribution to recent theoretical advances in legal studies. Approaches initially pursued in Actor-Network Theory¹¹⁶ and more recently applied in socio-legal studies¹¹⁷ emphasise the need for careful consideration of presumptions about the way in which legal texts perform in practice. Taking my lead from Cloatre's research into the implementation of legal texts and the operation of legal technologies in local settings,¹¹⁸ I ask how the individuals and groups involved in the Winchester Development engaged with the contractual arrangements deployed there. In doing so, I examine the extent to which those arrangements prescribed the way that WCC's officers and councillors, directors acting for Thornfield and Henderson, as well as consultants and legal advisors that those officers and developers engaged, performed their roles.

Observing the ways that human actors deployed, and the reasons for the deployment of, these legal technologies also necessitates some consideration of the ways in which this deployment has become 'routinized.'¹¹⁹ To that end, I ask why developers, local authority officers and property development consultants assume that the production of a sequence of contractual arrangements is the most appropriate way to 'do' property-led development. This prompts me to enquire into the extent that developers, local authority officers and property development consultants share the same expectations about the deployment of these contractual arrangements. Where there are divergences in expectations, I mine these for insights into the complexity of the relationships between these groups.

¹¹⁶ Referred to throughout this chapter as 'ANT.' I discuss my understanding of ANT and its theoretical and methodological relevance in chapter two.

¹¹⁷ See, in particular, Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*.

¹¹⁸ *ibid*, 6. The legal technologies that I discuss include land acquisition agreements, the EA, the DA, the planning permission granted for the development, the CPO designed to complete the land acquisition process and also such things as legal advice notes.

¹¹⁹ Emilie Cloatre, 'Fluid Legal Labels and the Circulation of Socio-technical Objects: the Multiple Lives of 'Fake' Medicines' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 97.

My reference here to property development consultants and legal advisors points to another underlying thread in this thesis, which also draws from ANT-inspired research. These consultants perform often unseen work to enact property development processes ‘in an image of projectness’¹²⁰ that contributes to a preoccupation with viability concerns and the ‘projectisation’¹²¹ of property development. Creating ‘a world fit for projects,’ Law suggests, involves a consolidation of action into ‘a singular time-space box defined by the ticking of the clock’¹²² and this concern with the temporality of a project world merges with another theoretical development in legal studies from which I draw inspiration and to which I contribute. Recent work on ‘legal temporalities’¹²³ overlaps with ANT-inspired socio-legal research and explores the complex relationship between law, time and, in Grabham’s research in particular, a range of different material ‘objects.’¹²⁴ I turn to this work to help me examine the extent to which the DA and the other contractual arrangements deployed in Winchester, as well as the contractual arrangements that my interviewees discussed, did interesting things with law and with time. By exploring the uses of time and temporal concepts in these contractual arrangements, I present findings that add to the theoretical insights that Grabham and others have recently offered.

My examination of ‘time’ as an ordering device focuses particularly on the manner in which the Winchester DA adopted the concept of an ‘Unconditional Date’ as the moment that the developer’s contractually-imposed obligation to commence construction would become unconditional. Alongside this analysis of the examination of the significance of an Unconditional Date, I explain why the DA contained ‘required elements’ that stipulated, among other things, the amount of retail floor-space, the number of residential units and the proportion of affordable and social housing to be incorporated into the development. This enables me to examine how Thornfield and Henderson both used the pursuit of unconditionality to encourage WCC’s officers to seek Cabinet approval for changes to the required elements.

Focusing on these required elements leads me to ask why some DAs set baseline specifications and why other DAs might not contain the same level of specificity. To understand how a developer and a local authority anticipate and address the need to change

¹²⁰ John Law, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002), 7-8.

¹²¹ I am grateful to the anonymous reviewer of an article I submitted to the *Journal of Law and Society* for using this term to describe property-led development processes.

¹²² Law, *Aircraft stories: decentering the object in technoscience*, 197.

¹²³ Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016), 14. Other examples, which I discuss in chapter two, include Mariana Valverde, *Chronotopes of law: jurisdiction, scale and governance* (2015) and Sarah Keenan, ‘Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration’ (2017) 28 *Law & Critique* 87.

¹²⁴ I discuss Grabham’s work in more detail in chapter two.

baseline specifications written into a DA, I analyse a variations clause written into the Winchester DA and refer to my interview data to explain how developers, local authority officers and property development consultants might deploy this type of clause. Analysing variations to the contractual arrangements also necessitates looking outside the Winchester Development to consider the implications of European Union procurement law on the operation of pre-agreed change mechanisms.¹²⁵ Although I make no recommendations about the shape of procurement law in the event that the United Kingdom exits the EU,¹²⁶ my research does demonstrate some of the ways in which EU legislation and jurisprudence impinges upon property-led development in the UK.

Investigating the Winchester Development leads me, therefore, to explore the ways in which WCC, Thornfield Properties, Henderson and their respective subsidiaries navigated procurement requirements in different ways at different stages of the Winchester Development in response to an emerging area of law. My discussion encompasses rewritings of the DA that culminated in the judicial review that I mentioned earlier in this chapter and that examined WCC's failure to comply with procurement requirements.¹²⁷ Analysing the outcome of this judicial review is an important part of this thesis. It provides a novel opportunity for me to examine what a local authority and a developer do when they face a challenge to the contractual basis for a mutually agreed property development trajectory while simultaneously continuing to pursue that trajectory towards unconditionality.

Research aims

My research aims, therefore, to offer a multi-disciplinary contribution to existing knowledge in legal studies and property-led development. It does so through an ANT-inspired research approach¹²⁸ and by asking research questions that are specific to the Winchester Development and that relate to the contractual arrangements that either supplemented or went into the formation of the Winchester DA, the content and operation of the DA and the making of the CPO. Alongside these specific questions, I consider broader questions designed

¹²⁵ See, for example, Case C-454/06 *Presstext Nachrichtenagentur GmbH v Austria* [2008] ECR I-4401. Regulation 72 of the Public Contracts Regulations 2015, SI 2015/152 (implementing Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (2014) OJ L94/65) states the current law in this area, partly replicating the *Presstext* principles on contract modification.

¹²⁶ For a discussion of the role of legal mechanisms in regulating the award of public contracts following Brexit, consider Sue Arrowsmith (Sue Arrowsmith, 'The implications of Brexit for public procurement law and policy in the United Kingdom' (2017) 26 *Public Procurement Law Review* 1) and, in the event that the United Kingdom leaves the EU without a trading agreement in place, Phil Wang (Phil Wang, 'Brexit and the WTO Agreement on Government Procurement ("GPA")' (2017) 26 *Public Procurement Law Review* 34).

¹²⁷ *R (Gottlieb) v Winchester City Council* (n110).

¹²⁸ I explain my understanding of ANT in chapter two and my research approach in chapter three.

to provide insights into property-led development and legal practices beyond the narrow confines of my case study. In chapter two, I explain my case study-based approach and how my approach enabled me to generate both findings specific to the Winchester Development and findings of more general importance.

My research questions are:

1. How did the contracting parties use the Winchester DA and the other contractual arrangements to assemble a development site, and what does this tell us about the role of law and legal technologies in property-led development?
2. Does 'time' function as an ordering device in property-led development and to what extent did the temporal framework set out in the Winchester DA and the other contractual arrangements shape the relations between the developer, the local authority and third parties involved in or affected by the development process?
3. Were there other ways in which the Winchester DA plotted a trajectory for or otherwise scripted actions in the development process, and what does this reveal about the approaches that developers, local authority officers, councillors and property development consultants take to property-led development?
4. How do developers, local authority officers, councillors and property development consultants regulate change within a property-led development project, and how did the development trajectory anticipated in the Winchester DA, and the temporal framework that the DA purported to impose, change during the development process?

In exploring these questions, I also ask why a developer and a local authority deploy a DA to assemble a development site, and why a development trajectory anticipated in a DA might change. These questions enable me to combine a detailed analysis of the dynamics underpinning the Winchester Development with a more general examination of what contracts do and what development directors, local authority officers and councillors do when their organisations are party to those agreements. The questions thus address issues pertinent to current urban regeneration research and socio-legal studies.

To answer these questions, I separate this thesis into eleven chapters.

Chapter Outline

The first two chapters expand upon the theoretical work I have discussed in this introduction and explain how I conducted my research. Chapter two situates my work within current research into property-led development, law and time and law and ANT. I discuss other writing on property-led development, note the merits of that research but explain how that work fails to address the contractual arrangements underpinning property-led development projects. I explain how recent theoretical literature addressing the complex

relationship between law and time can help address some of the gaps in our understanding of the role, operation and effects of the contractual arrangements that I have described. Having done so, I discuss theoretical insights developed in ANT and identify reasons why ANT invites an empirical analysis of the complex processes at work in property-led development.

I then use chapter three to explain why documentary analysis, coupled to interviews with participants in other property-led development projects, enables greater understanding of those contractual arrangements and property-led development more broadly. In addition, I set out both my reasons for choosing the Winchester Development as the object of my analysis and how I carried out this research. I present the documentary sources from which I drew my findings regarding the form, content and effect of the contractual arrangements deployed in Winchester and introduce my interviewees, explaining how I enrolled these individuals as participants. Having done so, I note the lessons I learned from the way I carried out my research and identify limitations in the research design.

Chapters four to 10 then answer my research questions and present the findings that my research generated. Chapter four asks how WCC and Thornfield Properties initiated the Winchester Development. It explains how WCC and Thornfield Properties established a 'development trajectory' before they had entered into any form of mutual contractual arrangements. A feature of this phase of the Winchester Development was the land assembly activity that took place prior to the formulation of contractual arrangements between WCC and Thornfield Properties so this chapter examines the way in which the latter produced draft or 'nearly legal' land acquisition agreements to induce WCC to enter into formal contractual arrangements.

An issue that overlaps chapter four and chapter five is the manner in which EU procurement law requirements affect the formation of property development contracts. Chapter four presents some initial commentary on the efforts local authority officers, developers and property development consultants make to place their contractual arrangements beyond the reach of procurement law and chapter five offers further analysis of these manoeuvrings. It does so in the context of a further examination of the formation of the Winchester DA and asks why developers and local authority officers insist on some progress with land assembly prior to entering into a DA. In analysing the efforts that WCC's officers and Thornfield Properties' representatives made to assemble a development site and avoid procurement law requirements, I point to stresses that became locked-in to the development process and that the DA then carried around.

Chapters six to 10 of this thesis then consider what I call the 'conditional phase' of the Winchester Development. Chapters six and seven focus on the period between the date that WCC, Thornfield and Thornfield Properties entered into the DA and the conclusion of the

public inquiry that followed WCC's making of the CPO that, its officers hoped, would enable them to complete the land assembly process. During this period, Henderson acquired and renamed Thornfield and replaced Thornfield Properties as guarantor of the latter's obligations in the DA.

Chapter six provides an exposition of the content of the DA that WCC, Thornfield and Thornfield Properties entered into, focusing specifically on the conditions and the required elements that I referred to earlier in this introduction. I probe the concept of conditionality as a phase to be passed through to enable progress along an agreed development trajectory. To complement this analysis, chapter six also examines the operation of temporal concepts such as a 'Long Stop Date' and an Unconditional Date and considers the circumstances in which the parties to a DA might change pre-agreed Long Stop Dates or otherwise rewrite the contents of an agreement. Of particular importance here is the manner in which WCC and Henderson sought to perpetuate the currency of the DA when Thornfield Properties' bank placed the company into administration. My discussion reveals the fluidity of both temporal parameters and required elements that had appeared to be fixed from the moment that WCC, Thornfield and Thornfield Properties entered into the DA and the ways in which a local authority and a developer might attempt to hold procurement law requirements at arm's length when changing a DA.

Chapter seven builds on this analysis, providing more detail about what happened in the conditional phase of the Winchester Development process. Using data obtained in my interviews, I explore the presumption that the pursuit of unconditionality is best achieved through the methodical discharge of conditions in a manner akin to the ratcheting that Latour has memorably described.¹²⁹ At this point, I explain that the majority of the conditions in the DA could only be discharged through the actions of the developer, although I also point out the function of a 'site assembly condition,' which WCC had to discharge by making a CPO and obtaining confirmation of the validity of that CPO by defending it in a public inquiry. I demonstrate that discharge of the site assembly condition occurred before Henderson had carried out the actions required to discharge the conditions for which it was responsible. The implications of discharge of the site assembly condition form the basis for much of the analysis in subsequent chapters.

The remaining chapters, therefore, examine the Winchester Development from the moment at which the Secretary of State for Communities and Local Government confirmed the validity of the CPO. I consider this phase in three chapters. In chapter eight, I consider the extent to which the acquisition of key land interests on the Winchester development site

¹²⁹ Latour, *We have never been modern*, 72.

functioned as a milestone or monumental event in the overarching development trajectory, marking progress along the 'journey' that WCC's officers and Henderson's directors presented. I complicate this analysis, however, by illustrating the continuities and discontinuities between the development proposition before confirmation of the CPO and the development proposition after the CPO. In particular, I examine the ways in which Henderson's directors obtained WCC Cabinet approval for significant changes to the Winchester DA after the CPO had been confirmed by informing WCC's officers that unconditionality could only occur if the Cabinet agreed to those changes.

While chapter eight focuses on changes to the DA, chapter nine involves a more detailed analysis of the question of 'viability' in property-led development. I examine how developers and property development consultants produce viability appraisals and the way that these appraisals guide action in a property-led development process. I analyse the extent to which viability appraisals are a product of poorly understood backroom deals while pointing out that a DA usually depends for its emergence as a legally binding agreement on a viability appraisal.

In chapter 10, I continue my examination of the way that 'law and legality emerge.'¹³⁰ I do so by conducting an analysis of legal 'action' in property-led development. This involves a study of actual or threatened court challenges to the Winchester development trajectory and the Winchester DA, the role of human 'legal' actors, such as barristers who provide legal advice, and the way that 'law' acts upon the parties through such things as the statutorily-imposed three-year deadline for the exercise of the Winchester CPO. By discussing the role of the 'CPO Exercise Date,' I explain why this legal and temporal construct had different implications to the Long Stop Date in the DA or the concept of an Unconditional Date. I also revisit some of the stresses locked-in to the DA by land acquisition and procurement decisions that WCC and Thornfield Properties had made at the time they entered into the DA. As an extension of this, I demonstrate how Councillor Kim Gottlieb, an elected member of WCC, turned the DA against the council in judicial review proceedings that quashed the council's decision to approve the viability-led changes to the DA.

My conclusion then draws my thesis together by answering the research questions directly, discussing the implications of my findings and explaining how my analysis of the DA and the other contractual arrangements deployed in Winchester contributes to understandings of property-led development.

¹³⁰ David Cowan, 'Housing and Property' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010), 332.

Chapter 2

Property-led development, Actor-Network Theory and Time

Analytic accounts considering property-led development discuss a concept that has reshaped urban space in the United Kingdom since the 1980s.¹ Through a case study approach² focusing upon a property-led development project, which I call the Winchester Development,³ I aim to address a lack of research in this area by examining the contractual arrangements deployed during that development and the role that those arrangements perform in property-led development. Addressing these concerns raises questions, as Cowan has put it, about ‘the way that law and legality emerge.’⁴ The answers to these questions are, however, complex and messy⁵ but understanding the emergence of law and legality in property-led development was an essential aim of this research.

To that end, I draw upon ideas that researchers working with Actor-Network Theory (ANT) have developed. The first half of this chapter addresses some of the central tenets of ANT, focussing on processes of network-building and the interplay between human and nonhuman actors.⁶ I discuss research that has examined the connections that enable those actors to perform or that provoke an adaptation in them, and explain how researchers have recently opened the ‘ANT toolbox’⁷ to find ideas and methods that equipped them to scrutinise law and legal technologies. I analyse research that investigates the connections that make legal and ‘quasi-legal’ technologies⁸ perform in different networks at specific moments and that reveals how that performance differs depending on, while simultaneously reshaping,

¹ I discussed these accounts in detail in chapter one.

² I discuss my methods and methodology in chapter three.

³ This development took place in Winchester, a small city in the southeast of England. I introduced the Winchester Development in chapter one. The local authority engaged in promoting the development was Winchester City Council, which I refer to in this chapter as ‘WCC.’

⁴ David Cowan, ‘Housing and Property’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010), 332.

⁵ Law and Singleton discuss ‘messiness’ in the context of diagnostic and treatment practices in UK hospitals (see John Law and Valerie Singleton, ‘Performing technology’s stories - On social constructivism, performance, and performativity’ (2000) 41 *Technology and Culture* 765). Like Law and Singleton, Mol also explains why hospital practices might look ‘messy’ but how practitioners develop techniques that do not resolve complexities in diagnosis, prevention and treatment but enable a sufficiently stable understanding of each incidence of a disease (see Annemarie Mol, *The body multiple: ontology in medical practice* (Duke University Press 2002)). I explore the idea of ‘messiness’ again later in this chapter.

⁶ As I explain in this chapter, ANT-inspired researchers have been keen to explore the performance of ‘things, objects, [and] beasts’ in network-building and social interactions (see Bruno Latour, *We have never been modern* (Harvard University Press 1993), 13).

⁷ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 2.

⁸ Bruno Latour, *The making of law: an ethnography of the Conseil d’Etat* (Polity 2010), 75.

the associations present. I conclude the first half of this chapter by noting the merits of alternative approaches but explain why ANT is particularly well-suited to an examination of instantiations of law that are precarious and fluid assemblages, depending for their effects on multiple connections.⁹ In the second half of this chapter, I explain why some recent legal research has scrutinised the interplay between 'time' and legal processes.¹⁰ I examine this research, explain what it tells us about legality and how it might help with an understanding of the contractual arrangements operative in property-led development.

An introduction to ANT

ANT-inspired research projects have generated findings in many fields. Seminal ANT texts include analyses of scallop fishing¹¹ and attempts to develop an electric vehicle,¹² fifteenth-century Portuguese maritime exploration and the problems of coordinated global navigation,¹³ the practices of laboratory science¹⁴ and the multifarious connections, associations and alliances that transformed the work of Louis Pasteur into a driver of major social change,¹⁵ methods of economic calculation and how they perform markets,¹⁶ the manner in which water pumping devices take shape and adapt as the networked effect of various users' everyday needs,¹⁷ the diagnosis and treatment of disease¹⁸ and the complicated

⁹ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 29.

¹⁰ Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016); Mariana Valverde, *Chronotopes of law: jurisdiction, scale and governance* (Routledge 2015); John Harrington, 'Time as a dimension of medical law' (2012) 20 *Medical Law Review* 491; Sarah Keenan, 'Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration' (2017) 28 *Law & Critique* 87; Davina Cooper, 'Time against time: Normative temporalities and the failure of community labour in Local Exchange Trading Schemes' (2013) 22 *Time & Society* 31.

¹¹ Michel Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay' in John Law (ed), *Power, action, and belief: a new sociology of knowledge? Sociological Review Monograph* (Routledge & Kegan Paul 1986).

¹² Michel Callon, 'The Sociology of an Actor-Network: The Case of the Electric Vehicle' in Michel Callon, John Law and Arie Rip (eds), *Mapping the dynamics of science and technology: sociology of science in the real world* (Macmillan 1986).

¹³ John Law, 'On the methods of long-distance control - vessels, navigation and Portuguese route to India' in John Law (ed), *Power Action and Belief: A New Sociology of Knowledge? A Sociological Review Monograph* (Routledge & Kegan Paul 1986).

¹⁴ Bruno Latour and Steve Woolgar, *Laboratory life: the social construction of scientific facts* (Sage Publications 1979).

¹⁵ Bruno Latour, *The Pasteurization of France* (Harvard University Press 1988).

¹⁶ Michel Callon, 'An Essay on Framing and Overflowing : Economic Externalities Revisited by Sociology' in Michel Callon (ed), *The laws of the markets* (Blackwell Publishers 1998).

¹⁷ Marianne de Laet and Annemarie Mol, 'The Zimbabwe Bush Pump: Mechanics of a fluid technology' (2000) 30 *Social Studies of Science* 225.

¹⁸ Mol, *The body multiple: ontology in medical practice*.

hybrid that veterinary surgeons, epidemiologists, farmers and politicians enacted as a Cumbrian sheep at the height of the UK's 'foot and mouth crisis'.¹⁹

These ANT studies show that social action rarely plays out within a settled configuration of structures or systems,²⁰ although this finding is not, of course, limited to ANT. Others working within the broad field of Science and Technology Studies²¹ also challenge the prevalence of terms such as context, circumstance, situation or setting as explanatory staples when analysing an event or a particular set of interactions.²² While ANT and other STS approaches note that 'invocations of context' are unavoidable,²³ they show that the origin and meaning of social action cannot adequately be explained by reference to these terms. According to Latour, diverse and multi-level associations produce agency, structure and power, as well as all other aspects of social life, with none of these things preceding those associations as some sort of raw material.²⁴ ANT theorists seek, therefore, to demonstrate that social action emerges from chains of association that form between human and nonhuman actors.²⁵ In doing so, they deploy a broad conception of nonhumans²⁶ that views the capacities of these things to perform in networked situations as an essential component of social action.

In common with other ANT scholars, Law and Mol characterise an actor as any entity that makes a difference to a state of affairs or an ordering of associations.²⁷ But they show that the capacity to exert influence that an actor possesses is neither permanent nor 'given in the order of things'²⁸ but an often temporary effect of a web of associations and connections with other actors that are repeatedly and continually made, remade, suspended or severed.²⁹

¹⁹ John Law and Annemarie Mol, 'The Actor-Enacted: Cumbrian Sheep in 2001' in Carl Knappett and Lambros Malafouris (eds), *Material agency: towards a non-anthropocentric approach* (Springer 2008).

²⁰ As discussed in detail in Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005).

²¹ Hereafter abbreviated to 'STS.'

²² Steve Woolgar and Javier Lezaun, 'The wrong bin bag: A turn to ontology in science and technology studies?' (2013) 43 *Social Studies of Science* 321.

²³ *ibid.*, 327.

²⁴ Latour, *Reassembling the social: an introduction to actor-network-theory*, 64.

²⁵ Bruno Latour, 'Technology is Society Made Durable' in John Law (ed), *A Sociology of monsters: essays on power, technology and domination* (Routledge 1991), 110.

²⁶ Encompassing the 'things, objects, [and] beasts' to which I have already referred (see Latour, *We have never been modern*, 13).

²⁷ Law and Mol, 'The Actor-Enacted: Cumbrian Sheep in 2001'; Annemarie Mol, 'Actor-network theory: Sensitive terms and enduring tensions' (2010) *Kölner Zeitschrift Für Soziologie Und Sozialpsychologie* 253.

²⁸ John Law, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002), 152; Mol, *The body multiple: ontology in medical practice*, 6.

²⁹ John Law, 'After ANT: complexity, naming and topology' in John Law and John Hassard (eds), *Actor network theory and after* (Blackwell 1999), 5; Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 29. Cloatre explains, for example, that 'actors are events that happen only once, and are constantly made up' (see Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 13).

Agency, in Latour's rendering of it, thus becomes a complicated fusion of distinct associations that gather together intentionally or inadvertently to produce different effects.³⁰

ANT, as Mol has put it, offers a 'repository of terms' for exploring these ideas.³¹ One of these terms is 'enactment,' and Law and Mol summarise this idea when they state that 'active entities' are not only relationally linked but 'make a difference to each other: they make each other *be*. ... [T]hey enact each other.'³² Their notion of enactment is crucial to much ANT-inspired research and suggests that actors come into being to the extent that other actors perform them into being. This means, therefore, that if any entity that is capable of making a difference is an actor, each actor must itself be exposed to the difference-making capacities of other actors.

A similarly influential idea is the concept of 'translation.' As Cloatre explains, '[t]he "translation" of multiple connections into a new actor with a sense or appearance of stability is at the core of much of this research.'³³ It is a concept originally developed in Callon's examination of a project established to address a decline in scallop population in northern France.³⁴ For Callon's purposes, the scallop conservation project was not interesting because it revealed important information about fishing techniques or conservation strategies. Rather, Callon examined processes of network-building by arguing that the project, and the identities of the marine biologists leading the project, were defined and redefined in a 'battle'³⁵ with other actors present in the network. These others included the wider scientific community, fisherpersons and the scallops themselves. The biologists sought to position themselves as persons equipped to 'say what the scallops want and need'³⁶ but attaining this position could only follow a process 'during which the identity of actors, the possibility of interaction and the margins of manoeuvre are negotiated and delimited.'³⁷

My interest in this thesis is in the 'time-in-between' the formation of an idea and the stabilisation of connections around that idea. For that reason, Callon's work is helpful because he suggests that this network-building activity involves four overlapping phases. First, he

³⁰ Latour, *Reassembling the social: an introduction to actor-network-theory*, 45. See also Bruno Latour, 'On recalling ANT' in John Law and John Hassard (eds), *Actor network theory and after* (Blackwell 1999).

³¹ Mol, 'Actor-network theory: Sensitive terms and enduring tensions', 262.

³² Law and Mol, 'The Actor-Enacted: Cumbrian Sheep in 2001', 58.

³³ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 14.

³⁴ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay'.

³⁵ *ibid*, 212.

³⁶ *ibid*, 224.

³⁷ *ibid*, 203.

suggests, the 'primum movens'³⁸ seeks to establish itself 'as an obligatory passage point'³⁹ for all interactions in the emerging network and to form 'alliances' with actors with shared interests⁴⁰ before attempting to lock those allies into place in the emerging network. This part of the process is fluid, Callon explains, as the interested actors define and redefine their identities and wants in a system of coproduction. The 'actual enrolment' of the various actors does not occur until after the 'multilateral negotiations, trials of strength and tricks' that stabilise these identities and desires.⁴¹

Various planning and urban studies academics have applied Callon's ideas, including Tait and Jensen, who explain that the process of stabilising the identity and roles of the actors to be enrolled in property-led development often occurs through the production of brochures, planning briefs and development plans.⁴² But while these documents carry a form of material agency, they explain that this enrolment also involves the slow disentanglement of existing landowners from their position within the network. The disentanglement of pre-existing property rights in a development site has been a longstanding focus of research into urban regeneration, as I mentioned in chapter one, and is an issue that I explore in detail here.⁴³

The documents that Tait and Jensen analyse drew various actors into specific forms of relationship with each other and guided action in a particular direction.⁴⁴ These observations invoke a sense of an emerging development trajectory as actors are drawn to network

³⁸ In Callon's work, the 'primum movens' were the marine biologists who instigated the network-building processes.

³⁹ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay', 205.

⁴⁰ *ibid*, 206.

⁴¹ *ibid*, 211.

⁴² Malcolm Tait and Ole B. Jensen, 'Travelling Ideas, Power and Place: The Cases of Urban Villages and Business Improvement Districts' (2007) 12 *International Planning Studies* 107. Other planning research using ideas developed in ANT includes Jonathan Murdoch, Simone Abram and Terry Marsden, 'Modalities of Planning: A Reflection on the Persuasive Powers of the Development Plan' (1999) 70 *The Town Planning Review* 191; Malcolm Tait, 'Room for Manoeuvre? An Actor-network study of Central-Local Relations in Development Plan Making' (2002) 3 *Planning Theory & Practice* 69; Laura E. Tate, 'Growth-management implementation in Metropolitan Vancouver: lessons from actor-network theory' (2013) 40 *Environment and Planning B - Planning & Design* 783; and Yvonne Rydin, 'Using Actor-Network Theory to understand planning practice: Exploring relationships between actants in regulating low-carbon commercial development' (2013) 12 *Planning Theory* 23.

⁴³ Ann Harding, 'The rise of urban-growth coalitions, UK- style' (1991) 9 *Environment and Planning C - Government and Policy* 295, 314; Rob Imrie and Huw Thomas, 'The limits of property-led regeneration' (1993) 11 *Environment and Planning C - Government and Policy* 87, 93; Rob Imrie and Huw Thomas, 'Law, legal struggles and urban regeneration: Rethinking the relationships' (1997) 34 *Urban Studies* 1401, 1408; Steven R. Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes' (2011) 42 *Geoforum* 592, 594; Barry Cullingworth and Vincent Nadin, *Town and country planning in the UK* (14th edn, Routledge 2006), 141.

⁴⁴ Tait and Jensen, 'Travelling Ideas, Power and Place: The Cases of Urban Villages and Business Improvement Districts', 124.

relationships and enrolled in property-led development. Raco *et al* offer a similar sense of strategic enrolment as a technique of property-led development when they state:

Regeneration, after all, is concerned not only with what is constructed but also *when* particular objectives should be prioritised and at what point(s) in the development process different groups and interests could and should have their needs and priorities addressed.⁴⁵

This observation implies that there is a moment in property-led development at which certain groups and interests should be drawn more closely into the network of relationships or held at arm's length. My research seeks to investigate these moments and the role that legal technologies perform in creating, stabilising or severing specific connections.

A focus on moments in property-led development suggests a temporal flow marked with significant events. Like Raco *et al*, Doak and Karadimitriou note the directional aspect of enrolment in property-led development networks and ask if these assemblages of people, organisations, documents and ideas 'have their own trajectories, negotiated and inscribed into the practices' of the actors engaged in a process.⁴⁶ This is a point that Johns emphasises too in her work on collaborations between public bodies and private sector companies on large-scale infrastructure projects. She explains why a public body comes to think like a 'deal-maker,' with the effect that:

Each deal tends, for those participants, to generate or lay claim to more or less its own sources of momentum, its own set of roles and means of inspiring loyalty, its own trajectories for change and paths for negotiation, and its own determination of limits.⁴⁷

Johns does not suggest that her work is part of any corpus of research that might be described as ANT-inspired but I mention it here because she explores network-building and the stabilisation of 'roles' in a development process. She argues that large-scale infrastructure projects move forward through 'a succession of deals' that provide a sense of progression towards pre-agreed goals while also forcing the participating actors to redefine their roles.⁴⁸ The sequence of deals simultaneously draws a public body and its private sector partner closer together and inspires ever greater 'loyalty' to the deal-making process.⁴⁹ Throughout this thesis, I link these ideas to the 'projectisation' of property-led development practices, and draw on the observation that most project management techniques treat fragmentation as 'a

⁴⁵ Mike Raco, Steven Henderson and Sophie Bowby, 'Changing times, changing places: urban development and the politics of space - time' (2008) 40 *Environment and Planning A* 2652, 2652. Emphasis in original.

⁴⁶ Joe Doak and Nikos Karadimitriou, '(Re)development, complexity and networks: A framework for research' (2007) 44 *Urban Studies* 209, 221.

⁴⁷ Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391, 398-9.

⁴⁸ *ibid*, 398.

⁴⁹ *ibid*, 402.

problem' that can be avoided as long as the participants sustain a 'coordinated perspective'⁵⁰ based on simplified processes and 'more or less unambiguous goals.'⁵¹ In addition, Riles' research into 'material and procedural knowledge practices' in Japanese investment banking provides a helpful example of documentary processes and institutional governance mechanisms that produce collaborations between market participants that follow 'carefully scripted routines.'⁵² Scripted and routinized action⁵³ characterises property-led development and is a theme of this thesis.

In chapters four to 10, I analyse how WCC and its property development partner enacted the Winchester Development as a sequence of overlapping and routinized processes marked by apparently specific goals and each involving different types of 'deal.' These processes involved the coproduction of a development trajectory, the enrolment and disembedding of various actors, the formation of contractual arrangements and other legal technologies, and adaptations to the actors' capacity to act. Ideas developed in ANT-inspired research provide a productive theoretical frame for this analysis because of ANT's focus both on complexity and fluidity and on the connections, associations and relations that produce a state of affairs.

Scripts, fluidity and technologies

A theme of ANT-inspired work is the idea that an actor gains the capacity to act as a product of connections and associations. So far in this chapter, I have considered Callon's analysis of the 'multilateral negotiations [and] trials of strength' that condition that capacity to act⁵⁴ but I have not considered the 'tricks'⁵⁵ that one entity might deploy to guide those negotiations and trials. Some early ANT-studies investigated, for example, the strategic manoeuvres through which the designer of a technological device might 'inscribe' onto the

⁵⁰ Law and Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity', 768.

⁵¹ Henriette Langstrup, 'Interpellating Patients as Users: Patient Associations and the Project-Ness of Stem Cell Research' (2011) 36 *Science Technology & Human Values* 573, 577.

⁵² Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 65.

⁵³ 'Routine' behaviours are also the subject of analysis in Cloatre's work on pharmaceutical markets and the movement of medication. She discusses, in particular, the routinized reliance of pharmacists on various patented drugs (see Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 103). See also Emilie Cloatre, 'Fluid Legal Labels and the Circulation of Socio-technical Objects: the Multiple Lives of 'Fake' Medicines' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 97 and Emilie Cloatre and Martyn Pickersgill, 'International law, public health, and the meanings of pharmaceuticalization' (2014) 33 *New Genetics and Society* 434, 440.

⁵⁴ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay', 211.

⁵⁵ *ibid*, 211.

device assumptions about the world in which the device will operate to 'prescribe' the actions of a user who takes up the device.⁵⁶ In doing so, Akrich suggests, the designer must not only make assumptions about the current predilections of the desired users but must also make predictions about the way that those or other actors will take up the device in the future. Akrich explains that these definitions, assumptions and predictions become inscribed on the device and the device transports these as a 'script.'⁵⁷

As Cloatre shows, the processes of inscription, prescription and take up of technologies are interesting because of the negotiations that take place between the designer's projected user and the actual individual actors who encounter the 'script.' The tension between designer, projected user and actual user also emerges in Callon's analysis of the tools that two companies used to define demand for their services, develop customer loyalty and condition the manner in which employees delivered those services.⁵⁸ Unlike the metaphorical rendering of written scripts that Akrich invoked, Callon refers to devices such as employee handbooks and customer questionnaires that are painstakingly written and rewritten and that inscribe and re-inscribe expectations about user behaviour.⁵⁹ Callon shows how these devices performed a valuable organisational role by enabling the organisations to refine their services, their employees' behaviour and their users' demands through 'a method of successive *adjustment*.'⁶⁰ These linked rewritings meant that the organisations, Callon argues, produced an adaptable type of employee, an adaptable service and a particular type of consumer. They did so by using their written materials to carry around a script. This is a theme that appears often in ANT-inspired research and is important for my work. I draw particularly on Cloatre's analysis of transnational legal texts that transport ordering mechanisms into various contexts and settings.⁶¹ These tools offer methods of long distance control⁶² and I

⁵⁶ Madeleine Akrich, 'The De-Scripture of Technical Objects' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992), 208. Latour has similarly illustrated how expectations about user behaviour are inscribed in such mundane artefacts as seat belts and the weights attached to hotel room keys (see Bruno Latour, 'Where are the missing masses? The sociology of a few mundane artifacts' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992).

⁵⁷ Akrich, 'The De-Scripture of Technical Objects', 208.

⁵⁸ Michel Callon, 'Writing and (Re)writing Devices as Tools for Managing Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 193-4.

⁵⁹ *ibid*, 193.

⁶⁰ *ibid*, 192. Emphasis in original.

⁶¹ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 181.

⁶² *ibid*, 26. In her discussion of 'control at a distance,' Cloatre takes her lead from Latour (Bruno Latour, *Science in action: how to follow scientists and engineers through society* (Harvard University Press 1987), 223) and Law (Law, 'On the methods of long-distance control - vessels, navigation and Portuguese route to India'). Her examination of the ways that these tools work aids my analysis because she illustrates the

examine the extent to which the contractual arrangements deployed in property-led development processes might offer a similar sense of control.

Adjustment, variation and change are also themes in ANT-inspired work. An example of this is de Laet and Mol's account of the take-up of a water pumping device in communities in Zimbabwe. Their account notes how designers scripted the use of the pump:

As a technology, the Zimbabwe Bush Pump 'B' type is expected to *perform*. It must act, *do* something. It must be made to *work*. And it is made to *keep on* working. Designed for simplicity, ease of maintenance, and assisted by manuals and instructions, it is created to survive.⁶³

A pump 'survives,' not because its original manufacturer produced effective guidance but, de Laet and Mol show, because it is designed to be adaptable and 'fluid.'⁶⁴ In her own analysis of de Laet and Mol's research, Cloatre explains that this demonstrates that 'the strength of the technology is to be adaptable to the various resources available to its users.'⁶⁵ Asking whether or not the adapted pump is the same as the original pump is moot as long as the pump continues to do its job. As I will demonstrate, adaptability is a trait that many local authority officers, property developers and private sector consultants deem to be desirable in a Development Agreement,⁶⁶ although statutory requirements do mean that asking if a varied DA is sufficiently similar to an original DA is an important question. There is a balancing, therefore, which I examine in this research, between producing a DA that is 'robust enough' to operate as a legal agreement while being 'plastic enough' to be adapted to meet the needs of a local authority and its development partners.⁶⁷

heterogeneous connections on which the performance of these legal tools depends (see Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 181).

⁶³ de Laet and Mol, 'The Zimbabwe Bush Pump: Mechanics of a fluid technology', 238. Emphasis in original.

⁶⁴ *ibid*, 226.

⁶⁵ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 27.

⁶⁶ In the remainder of this chapter I abbreviate the term 'Development Agreement' to DA. I use the same abbreviation throughout this thesis. As I explained in chapter one, a DA is usually an agreement between a local authority and its private sector development partner that facilitates the exercise of a local authority's compulsory purchase powers. It is commonly situated within a network of other contractual arrangements but, for reasons I explain in this thesis, is often the most significant of those arrangements.

⁶⁷ The quoted terms are taken from Star and Griesemer's study of standardisation work in Berkeley's Museum of Vertebrate Zoology (see Susan Leigh Star and James R. Griesemer, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 *Social Studies of Science* 387, 393). A similar study of the 'plasticity' of substances and materials can be found in Javier Lezaun, 'The Pragmatic Sanction of Materials: Notes for an Ethnography of Legal Substances' (2012) 39 *Journal of Law and Society* 20.

The balance between the need to produce a thing that has ‘lasting’ properties but it also ‘quickly replaceable’⁶⁸ has been fruitful for many researchers. Another way of thinking this through is by reference to Mawani’s portrayal of historical archives as things ‘in an ongoing state of creation and production through translation, interpretation, elaboration, dismissal, and disavowal.’⁶⁹ All of the ideas that I have discussed here have helped shape my thinking about property-led development practices. Of particular significance is the observation that the performance and use of a technology emerges ‘in the confrontation between the real user and the projected user.’⁷⁰ Anticipating the manner in which a projected user will deploy a particular technology necessitates assumptions about the passage of time that I address later in this chapter and throughout this thesis. But the production of a suite of contractual arrangements for the purposes of the Winchester Development included the formulation of a DA between WCC and its development partner that would be primarily used by those parties to sustain their preferred development trajectory. The primary projected users of the DA were future versions of WCC and its development partner, but, when the DA no longer served the original purposes of WCC or its development partner, they sought to collaborate in rewriting the agreement. Callon’s analysis of the rewriting of organisational documents helps me to understand this better and I also use an image from Latour of ‘plug-ins’ that can be installed on a computer system to activate new or under-utilised capacities.⁷¹ This is a productive image for my research because WCC and its development partners repeatedly sought to bolt other documents on to their original agreements to change their contents and make them, as they saw it, fit for their purposes.

These insights help me to explore contractual relations between WCC and its development partners that are constantly in flux.⁷² But the choices that WCC’s officers and their development partners made in their use of the DA compelled them to take into account how other users might take up the DA. If, as Akrich and Cloatre suggest, the way in which users deploy a technology only emerges through patterns of behaviour playing out over time and in places ‘far beyond the frontiers of the laboratory or the workshop,’⁷³ it becomes necessary to

⁶⁸ Brien Brothman, 'Perfect present, perfect gift: Finding a place for archival consciousness in social theory' (2010) 10 *Archival Science* 141, 148.

⁶⁹ Renisa Mawani, 'Law's Archive' (2012) 8 *Annual Review of Law and Social Science* 337, 354.

⁷⁰ Akrich, 'The De-Description of Technical Objects', 210.

⁷¹ Latour, *Reassembling the social: an introduction to actor-network-theory*, 207.

⁷² Blomley points to the need to consider the ways in which the relations between two contracting parties are ‘continuously being made and remade’ (Nicholas Blomley, 'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133, 142.

⁷³ Akrich, 'The De-Description of Technical Objects', 210; Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 92

examine how closely the users are following the script and whether or not unexpected users take up the device and use it in surprising ways. It is also, as Callon shows, essential to investigate the mechanisms that exist for changing the rules inscribed in a device if those rules no longer fit their original purpose. These are particularly pertinent issues for me because I am interested in identifying the extent to which the contractual arrangements, Compulsory Purchase Orders,⁷⁴ planning permissions and land acquisition agreements deployed in a property-led development process stabilise and carry around a vision of an appropriate development trajectory. Linked to this is an interest in the manner in which these mechanisms bring outsiders into line with a predefined development trajectory.

Contractual Relations and Power – alternative approaches?

My focus in this thesis is on the way that the contractual arrangements deployed in the Winchester Development opened new ‘paths for negotiation’⁷⁵ and participated in network-building processes. I am also interested in the ‘trials of strength and tricks’⁷⁶ through which one of WCC’s development partners enrolled the Council as an ally in a forward-facing property-led development. But I also examine how local authority officers, development directors and the array of consultants and experts performing the Winchester Development negotiated with law and legal principles. In particular, I examine the manner in which local authority officers and their legal advisers encountered regulations implementing EU procurement directives⁷⁷ and deployed contractual arrangements purported to have ‘legal’ effect.

These encounters with ‘law’ involved detailed meetings with legal advisers, the preparation of strategies for the formation and implementation of contractual arrangements and tricks either designed to reduce the extent to which legal restrictions governed the behaviour of the parties or to give the impression that draft contractual arrangements were close to having binding effect. During my analysis, I refer to Galanter’s influential observation that wealthy, professional ‘repeat players’ tend to bend encounters with law to their benefit.⁷⁸ But the interplay between WCC, its development partners, the contractual arrangements and the law was a complex and changing one and attempts that the Council and its development

⁷⁴ I abbreviate the term, Compulsory Purchase Order, to ‘CPO’ throughout this thesis.

⁷⁵ Johns, ‘Financing as Governance’, 398-9.

⁷⁶ Callon, ‘Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay’, 211.

⁷⁷ I referred to the significance of EU procurement law in chapter one and discuss its implementation and application in UK law again throughout this thesis.

⁷⁸ Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95, 125. See also Susan S. Silbey, ‘After legal consciousness’ (2005) 1 *Annual Review of Law and Social Science* 323, 325.

partners made to present their contractual arrangements as 'legally binding' and 'legally valid' provoked a trial of strength with outsiders who infiltrated the network. These actors sought to present alternative readings of EU procurement law and the content of the contractual arrangements, thus challenging the stability of the network that WCC and its development partners had formed.

The comments in the previous paragraph suggest that a theoretical approach investigating power imbalances and a tri-partite power struggle between WCC's officers, its development partners and outsiders might have been productive. I do not consider the power struggle between WCC's officers and its development partners in detail but I do consider Foucault's reading of 'discipline' as 'a type of power, [...] comprising a whole set of instruments, techniques, procedures, levels of application, [and] targets.'⁷⁹ Understood in this way, discipline is, Foucault explains, a 'technology' of power.⁸⁰ Interpreting the Winchester DA, for example, as an 'unceasing' disciplinary technique helps to reveal the manner in which parts of the Council were reshaped through subjection to the operation of the contractual arrangements and the way in which the contracting parties sought to discipline unruly outsiders.⁸¹

ANT-inspired researchers have explored understandings of power and, as Cloatre has put it:

The irreductionist approach of ANT has invited authors to focus on the specific material connections that enable the production of networked patterns of power and the maintenance of relationships of dominance, or control, at a distance.⁸²

Similarly, Latour argues that '[p]ower and domination have to be produced, made up, composed.'⁸³ The key issue for Latour, is to identify where power imbalances come from and what it is that produce them. This preoccupation with the things that produce and perpetuate 'power' are, as Latour and Cloatre both note, Foucauldian concerns.⁸⁴ An ANT-inspired approach emphasises, however, that 'power' is 'not a reservoir, a stock, or a capital that will automatically provide an explanation.'⁸⁵ This observation offers a reminder that social science should examine both 'the stuff' that is the source of power and the consequences of the

⁷⁹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991), 215.

⁸⁰ *ibid*, 215.

⁸¹ *ibid*, 236

⁸² Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 26.

⁸³ Latour, *Reassembling the social: an introduction to actor-network-theory*, 64.

⁸⁴ *ibid*, 86. Latour acknowledges (at footnote 106) that '[n]o one was more precise in his analytical decomposition of the tiny ingredients from which power is made.' See also Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 23.

⁸⁵ Latour, *Reassembling the social: an introduction to actor-network-theory*, 64.

exercise of power.⁸⁶ The implications of this for my research are that power struggles between local authority officers and private sector development directors, for example, can only be understood by looking at the techniques deployed, the processes through which those techniques were produced and implemented and the connections that shaped the way that those techniques performed.

The techniques I examine included the formation and implementation of contractual arrangements. While ANT-inspired research has shaped my approach to the analysis of these things, there are other theoretical frames that might have generated interesting findings about contractual relations. Macaulay's well-known analysis of contracting behaviour demonstrated that businesses often use contracts to provide the time and space to nurture deals in private.⁸⁷ This work also suggested that many contracting parties prefer arrangements based on trust, cooperation and flexibility, rather than strict implementation of the terms of an agreement, even when they have in place detailed and carefully planned contractual arrangements.⁸⁸ Macneil has since developed Macaulay's ideas under the broad rubric of relational contract theory⁸⁹ and discussed how contractual arrangements of various types often facilitate long-term relations between parties rather than setting out the terms of singular, discrete transactions.⁹⁰

Macneil has also shown that most transactions take shape in response to social, cultural and economic relations that exist outside the negotiated terms of an agreement.⁹¹ Applying these ideas to contracts deployed to facilitate partnerships between public bodies and private sector companies, Vincent-Jones demonstrates that those contractual arrangements rely upon 'a hybrid combination of mechanisms of public and private ordering.'⁹² An approach grounded in either RCT or Vincent-Jones's analysis of public contracts

⁸⁶ Bruno Latour, 'The powers of association' in John Law (ed), *Power, action and belief: a new sociology of knowledge?* (Routledge & Kegan Paul 1986), 273.

⁸⁷ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55. See also Hugh Beale and Tony Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 *British Journal of Law and Society* 45; Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' (2009) 29 *Oxford Journal of Legal Studies* 675.

⁸⁸ Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', 61.

⁸⁹ Hereafter referred to as 'RCT.'

⁹⁰ Ian R. Macneil, 'Values in Contract - internal and external' (1983) 78 *Northwestern University Law Review* 340.

⁹¹ *ibid.*

⁹² Peter Vincent-Jones, 'The New Public Contracting: Public Versus Private Ordering' (2007) 14 *Indiana Journal of Global Legal Studies* 259, 259. See also Peter Vincent-Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality* (Oxford University Press 2006); David Campbell, 'Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones' (2007) 14 *Indiana Journal of Global Legal Studies* 279.

might have generated insights into the interplay between the strict terms of a DA and the need for flexibility in the manner in which a local authority and its development partner seek to implement that DA. These approaches might also have illuminated aspects of the negotiations that took place between the local authority and its development partner to form the contract. I am keen to examine contract formation and the interplay, as Mitchell has put it, between the real and the paper deal,⁹³ as well as the web of connections and associations that shape contractual relations. But while RCT and Vincent-Jones's analysis of public contracts both invite an examination of the relations between contracting parties and third party human actors, ANT suggests that this analysis should go beyond a consideration of how humans interact to encompass an examination of the 'things' that make up networked relations. For this reason, an ANT-inspired approach promises a richer set of findings.

Law and legal technologies

In the previous section, I noted Foucault's observation that discipline is a 'technology of power.'⁹⁴ ANT enables me to evaluate how WCC and its development partners deployed legal technologies that shaped the interactions taking place within the Winchester Development. It is helpful, therefore, to consider the meaning of the term, 'legal technology.' In the most significant piece of research applying ANT techniques to studies of law, Cloatre suggests that the Trade-Related Aspects of Intellectual Property Rights agreement (TRIPS), an instrument of international law, is an example of a legal technology because it is a 'set of official rules carried on paper' that was 'expected to have a predefined impact'⁹⁵ by converting patents into 'compulsory tools' for the take up of medication and by shaping 'new legal spaces' in countries far from the sites at which those patents were granted.⁹⁶ She demonstrates that most accounts of TRIPS critiqued the agreement on the basis of an assumption that its implementation would thus lead to the formation of mechanisms established in less developed

⁹³ Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal'.

⁹⁴ Foucault, *Discipline and Punish: The Birth of the Prison*, 215.

⁹⁵ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 45. See also Emilie Cloatre, 'Trips and pharmaceutical patents in Djibouti: An ANT analysis of socio-legal objects' (2008) 17 *Social & Legal Studies* 263.

⁹⁶ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 35. The idea of 'legal technologies' is one also invoked by Carr in her critique of the manner in which technical legal thinking transforms a vulnerable adult requiring state-sponsored social care into a legal subject (Helen Carr, 'Legal Technology in an Age of Austerity: Documentation, "Functional" Incontinence and the Problem of Dignity' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016)). Cloatre and Wright also discuss their conception of a legal technology in their discussion of the carbon-offsetting scheme envisaged in the UN's Kyoto Protocol (Emilie Cloatre and Nick Wright, 'A Socio-legal Analysis of an Actor-world: The Case of Carbon Trading and the Clean Development Mechanism' (2012) 39 *Journal of Law and Society* 76).

countries to protect intellectual property rights established in developed European countries to the detriment of access to essential medications.

But Cloatre's ethnographic account first analyses how the effect of TRIPS was heavily contingent on the level of legal expertise in those less developed countries. Secondly, she shows how activities and practices in existing pharmaceutical, medical and import networks performed patented medication as a desirable alternative to more affordable medications regardless of any direct effects of efforts to implement TRIPS.⁹⁷ For example, she shows that, in Ghana, the prevalence of and suspicion towards counterfeit medications pushed consumers 'towards a limited number of (principally Western) producers'⁹⁸ and provoked a backlash against all unpatented drugs.⁹⁹ Access to medication was, Cloatre shows, a product of the connections that formed around drugs patented and branded at a particular time and in a particular place but transported to, 'translated' and entangled in local daily routines.¹⁰⁰ This shows that the action of picking up and doing something with the 'scripts' embedded within patents performed an important role in the formation and stabilization of those networks. In particular, she explains how these scripts reinforced the legitimacy of patented drugs and the illegitimacy of generic medications.¹⁰¹ On the other hand, however, TRIPS carried around a script for the formation of mechanisms designed to uphold pre-existing intellectual property rights but produced effects in Ghana and Djibouti that were different from those expected.

Although he does not use the term, Cowan similarly explains how the Human Rights Act 1998 is a legal technology that 'ushered in a new discursive juridical relation through which the Supreme Court and the ECtHR interact.'¹⁰² As a consequence of the manner in which this interaction has been performed, the ECtHR 'is now largely absent' from possession proceedings related to residential tenancies,¹⁰³ as Cowan puts it, although the relations between the Supreme Court and the ECtHR are constantly being remade, producing 'moments of tension and contradiction, of networks in the making.'¹⁰⁴ There is an overlap here with Riles'

⁹⁷ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 88.

⁹⁸ *ibid*, 139.

⁹⁹ *ibid*, 140.

¹⁰⁰ *ibid*, 181.

¹⁰¹ *ibid*, 131.

¹⁰² David Cowan, 'Territory and Human Rights: Mandatory Possession Proceedings' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 188. The context for Cowan's observation is a study of possession claims brought by landlords against persons in occupation of leasehold property. 'ECtHR' is the abbreviation that Cowan uses to refer to the European Court of Human Rights.

¹⁰³ *ibid*, 199.

¹⁰⁴ *ibid*, 188.

discussion of 'technicalities.'¹⁰⁵ These technicalities are, Riles suggests, 'what makes law'¹⁰⁶ and she focuses her attention on the methods that legal practitioners use to determine a legal dispute that has multi-jurisdictional elements. In this thesis, I examine the methods that legal practitioners deploy in property-led development, and consider the effect of 'technicalities' such as the statutorily-imposed rules for making, confirming and exercising a CPO.

Asking questions about the origins and effects of legal processes, and exploring the role of law in 'networks in the making,' is not new. For Cotterrell, studying the action of law in its everyday settings should reveal more than focusing solely on the content of legal materials.¹⁰⁷ This would, in Cotterrell's view, enable scholars to explore the multiple ways in which law is:

Used [...] to guide and structure social relations, engineer deals and understandings, define lines of authority, make provision for future contingencies, facilitate projects, distribute resources, promote security, limit risks, and encourage trust.¹⁰⁸

Such an approach might, however, reveal the structuring qualities of law but risks succumbing to a form of 'law-first' approach, assuming that law has some form of inherent authority and overlooking the ways in which individuals participate in creating, defining and shaping legal practices and legal meanings.

By contrast, Ewick and Silbey produced a notable exposition of the interplay between individual agency and legal practices in their investigation of 'legal consciousness.'¹⁰⁹ They located the individual as an active agent able to participate in but also constrained by legal practices that function as 'a social structure actively and constantly produced in what people say and do.'¹¹⁰ In a subsequent article analysing the concept of legal consciousness, Silbey explained that this approach enabled scholars to explore 'how "we the people" might be contributing to the law's systemic effects' and suggested that the character of legal action is not pre-determined but an effect that emerges from the ebb and flow of interactions and associations.¹¹¹ However, she also criticised the type of legal consciousness study that, as she

¹⁰⁵ Annelise Riles, 'A new agenda for the cultural study of law: Taking on the technicalities' (2005) 53 *Buffalo Law Review* 973.

¹⁰⁶ *ibid*, 974.

¹⁰⁷ Roger Cotterrell, 'Subverting orthodoxy, making law central: A view of sociolegal studies' (2002) 29 *Journal of Law and Society* 632. Prior similarly uses research in medical sociology to reveal how medical notes, records and charts are more than inert 'containers for words, images, information, [and] instructions' and to examine what these documents do (see Lindsay Prior, 'Repositioning documents in social research' (2008) 42 *Sociology* 821, 822).

¹⁰⁸ Cotterrell, 'Subverting orthodoxy, making law central: A view of sociolegal studies', 639.

¹⁰⁹ Patricia Ewick and Susan S. Silbey, *The common place of law: stories from everyday life* (Language and legal discourse, University of Chicago Press 1998).

¹¹⁰ *ibid*, 223.

¹¹¹ Silbey, 'After legal consciousness', 326.

perceived it, simply ‘tracks what particular individuals think and do.’¹¹² Instead, she advocated an analytical approach that looks past this ‘individual-level variable’ to consider how people participate in the ‘process of constructing legality.’¹¹³

An ANT approach, inspired by Latour’s work studying the roles and effects of the materials scientists deploy in developing scientific knowledge,¹¹⁴ suggests that analyses of law should not stop at a consideration of how people participate in the process of constructing legality and invites consideration of the role of nonhuman actors. Pottage, for example, notes the merits of this when he observes that legal knowledge ‘involves materialities of various kinds – space, bodily *hexis*, databases or archaic loose-leaf binders, forensic models, files, sketches, inscriptions.’¹¹⁵ An example can be found in an analysis of the regulation of tobacco and medicinal nicotine products in the UK, which shows how different regulatory regimes enacted tobacco and nicotine as different types of legal object.¹¹⁶ As these substances emerged with a new legal identity and various people picked up these products and used them, they both fed back into the regulatory regime. As a result, the regulations themselves became shaped by the networks they occupied and the objects that they purported to define. Thus, tobacco, medicinal nicotine and the regulations became co-dependent and constantly redefined as the practices emerging around them collided and created multiple effects. Seen in this way, law, in instantiations such as legislative texts and legal objects, is ‘both the result of socio-technical assemblages and becomes part of the specific materials.’¹¹⁷ Regulations make the entities ‘into something specific’ by enrolling them within regulatory networks and travelling ‘with them as scripts both enabling and constraining their actions.’¹¹⁸ But, since regulations exist in fragile networks, the effect of the regulations becomes precarious and the result of a contingent process.

Other legal studies grounded in an ANT approach take a similar view of legislative texts. In his analysis of the European Union’s *Advanced Therapy Medicinal Products Regulation*, Faulkner notes how legal texts might ‘encapsulate’ a variety of interactions, logics

¹¹² *ibid*, 324.

¹¹³ *ibid*, 347. Silbey explains that she uses the term, ‘legality,’ to refer to ‘the meanings, sources of authority, and cultural practices that are commonly recognised as legal, regardless of who employs them or for what purpose.’ In this thesis, I demonstrate that there are many instantiations of ‘legality’ in a property-led development process.

¹¹⁴ As discussed, for example, in Latour, *Science in action: how to follow scientists and engineers through society* and Latour and Woolgar, *Laboratory life: the social construction of scientific facts*.

¹¹⁵ Alain Pottage, ‘The Materiality of What?’ (2012) 39 *Journal of Law and Society* 167, 168.

¹¹⁶ Catriona Rooke, Emilie Cloatre and Robert Dingwall, ‘The Regulation of Nicotine in the United Kingdom: How Nicotine Gum Came to Be a Medicine, but Not a Drug’ (2012) 39 *Journal of Law and Society* 39.

¹¹⁷ *ibid*, 43.

¹¹⁸ *ibid*, 56.

and competing visions and hold them together in an apparently stable form.¹¹⁹ When a legal text 'works,' whether the text is a statute, a contract or a licence, it does so, McGee suggests, by condensing the messy processes of interaction that go into its production and by limiting the capacity of other actors to act.¹²⁰ Meanwhile, a legislative text might produce unexpected connections, as Cowan and Carr have shown.¹²¹ Their case study assumed that a group of private landlords were so diverse that they were effectively ungovernable by any central representative agenda or logic. Their analysis showed, however, how a government initiative to impose regulations on landlords provided the setting around which the landlords shared opposition to the regulations, although they did not necessarily adopt a shared voice.

Various accounts thus illustrate how socio-legal objects contribute to the formation of networks, and I discuss this research throughout this thesis when I illuminate the gathering of connections that generated the contractual arrangements deployed during the Winchester Development and that enabled those arrangements to act. I treat this gathering as dynamic, messy and involving connections that are constantly made, remade, severed and patched-up. I explain how these interactions conditioned the performance of legal documents such as leases, land acquisition agreements and CPOs. While I examine the circumstances in which these documents operated with 'a directive quality'¹²² that regulated action within the development process, I also scrutinise the more unexpected and unpredictable consequences of the operation of these legal materials.¹²³ I also consider what it means to think of a process, mechanism or device as a 'legal' technology. As Cowan and Wincott put it, 'the boundaries of legality have proved a particularly fertile research resource for socio-legal studies.'¹²⁴ This invites questions, to which I have already alluded, about the connections and associations that enable legal technologies to have effect and the connections and associations that mean that legal technologies have unexpected or non-existent effects.

In addition, this also invites an examination of the production of legal effects. In his ethnography of episodic 'law-making' practices in France's Conseil d'Etat, Latour examines

¹¹⁹ Alex Faulkner, 'Law's performativities: Shaping the emergence of regenerative medicine through European Union legislation' (2012) 42 *Social Studies of Science* 753, 755.

¹²⁰ Kyle McGee, *Bruno Latour: the normativity of networks* (Routledge 2014), 146.

¹²¹ Dave Cowan and Helen Carr, 'Actor-network theory, implementation, and the private landlord' (2008) 35 *Journal of Law and Society* 149.

¹²² Faulkner, 'Law's performativities: Shaping the emergence of regenerative medicine through European Union legislation', 769.

¹²³ Tait and Jensen make a similar observation in relation to the 'unintended consequences' of the translation and implementation of ideas, reports, models and planning frameworks designed in one place and deployed in another (Tait and Jensen, 'Travelling Ideas, Power and Place: The Cases of Urban Villages and Business Improvement Districts', 124).

¹²⁴ David Cowan and Daniel Wincott, 'Exploring the "Legal"' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 12.

'quasi-legal' forms, materials and processes that are, he suggests, 'capable of producing law.'¹²⁵ His focus is on the way lawyers, clerks and administrative assistants transform everyday documents and events into a 'legal' case. The process of making a case, he shows, occurs over time and requires inputs from a variety of sources. Before a case reaches a legally-trained practitioner, Latour explains, the files must be left to 'ripen' before they become 'judgment-compatible.'¹²⁶ He likens this process, somewhat quaintly, to the maturation of carefully selected fruit:

In the same way that our grandmothers slowly let their apples turn ripe – and sometimes go bad – during winter on wooden racks, the secretaries of the subsection let the files turn ripe – and sometimes go sour! – on wooden shelves.¹²⁷

The files, as Latour shows, do not usually 'go sour' because administrative officials monitor their ripening by periodically reviewing and adding to the files. Through gathering documents and legal opinions an official can thus create 'a network of [...] nudges in the right direction.'¹²⁸

Once a file has ripened sufficiently it will be presented to the lawyers who adjudicate the case. A process of legal reasoning then begins, which involves a series of 'episodes' during which judges meet to state the law.¹²⁹ But instead of straightforwardly applying the law to a set of facts, the judges will often pause or hesitate before reaching a decision. Latour explains that any account of judicial legal reasoning is incomplete 'if we eliminate from it the hesitations, the winding path, the meanders of reflexivity' that enable judges to reach a decision.¹³⁰ But Latour is careful to emphasise that statements of law do not materialise through a judge applying his or her analytical skills to it. Judicial decision-making is, Latour argues, a product of the juxtaposition between many things, including both the documents and other material artefacts that go into a file and the judges' understanding of existing legal principles.¹³¹

Law-making, in the sense described by Latour, is a necessarily 'slow and tortuous' process.¹³² The example of law-making in the Conseil d'Etat is a very specific example of legal practice, however, and Cloatre points out that identifying and defining law 'outside of the

¹²⁵ Latour, *The making of law: an ethnography of the Conseil d'Etat*, 75. The Conseil d'Etat is the highest domestic court of appeal for French administrative law cases.

¹²⁶ *ibid*, 75.

¹²⁷ *ibid*, 82.

¹²⁸ *ibid*, 91.

¹²⁹ *ibid*, 141.

¹³⁰ *ibid*, 151.

¹³¹ *ibid*, 168.

¹³² *ibid*, 273.

specific institutions that produce it is a different question.¹³³ This is undoubtedly true but Latour's work is important in showing why boundaries between what is and what is not 'legal' might be 'blurry.'¹³⁴ I analyse this by examining how local authority officers and development directors produce and present contractual arrangements. In particular, I scrutinise the way they use documents that they declare to be on the threshold of legality to create new connections, sever existing connections and instil a sense of an irreversible development trajectory.

Trajectories, chronotopes and travel

The idea of a development trajectory suggests that property-led development follows a straightforward route. As I will show, travel metaphors abound in the documents that local authority officers produced about the Winchester Development and in the accounts about property-led development that my interviewees provided. A way to unpick these images is through Valverde's use of Bakhtin's narrative theory, particularly through the concept of a 'chronotope.'¹³⁵ A chronotope is the device through which time, space and action are rendered in relation to each other in a novel to produce meaning. Bakhtin explains that:

In the literary chronotope, spatial and temporal indicators are fused into one carefully thought-out, concrete whole. Time, as it were, thickens, takes on flesh, becomes artistically visible; likewise, space becomes charged and responsive to movements of time, plot and history.¹³⁶

Chronotopes, Bakhtin suggests, take many forms. For example, the 'chronotope of the road' refers to the use of the open road as a device to move a narrative forward by providing the setting for encounters between 'people who are normally kept separate by social and spatial distance.'¹³⁷ The chronotope of the road is also, Vice suggests, the 'clearest expression of the link between time and space' because 'time spent means ground covered.'¹³⁸ These ideas help draw attention to how a local authority and a developer attempt to establish a sense of progress by invoking metaphorical milestones on the 'journey' that they undertake in carrying out property-led development.

Valverde explains that her interest in Bakhtin stems directly from his fusion of temporality and spatialization, and she provides an example in her discussion of judicial proceedings. The physical space of a courtroom blends, she explains, with a judge's ability to

¹³³ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 21.

¹³⁴ *ibid*, 4.

¹³⁵ Valverde, *Chronotopes of law: jurisdiction, scale and governance*.

¹³⁶ Mikhail M. Bakhtin, *The dialogic imagination: four essays* (University of Texas Press, 1981), 84.

¹³⁷ *ibid*, 243.

¹³⁸ Sue Vice, *Introducing Bakhtin* (Manchester University Press 1997), 210.

start, suspend or halt proceedings in a manner that produces a sense of 'the official time of law' during which significant 'legal' moments must inevitably occur.¹³⁹ The 'court of law' is, according to Valverde, thus a form of legal chronotope. In other work, Valverde has developed similar ideas and compared the temporality and spatialization of both crime detection and crime prevention work.¹⁴⁰ Detective work requires 'the retrospective reconstruction of a crime that took place in the past' and attends to 'the scene of the crime and radiates out from that.'¹⁴¹ By comparison, crime prevention work 'looks to the future' and 'encompasses an indefinite series of possible future events' that might take place in indistinct settings ranging from a house to a park to larger urban areas.¹⁴² Valverde's point is that the temporalities are as important as the spatializations for understanding detective work and crime prevention.

In this thesis, I explain the mechanisms that a local authority and a developer use to establish markers of progress or to designate moments as legally consequential. In his detailed ethnography of bureaucratic practices in Islamabad's municipal government, Hull accounts for the ways that paper and electronic record-keeping practices, designed to simplify bureaucratic processes, move through different settings and often introduce unexpected complexities to the processes that they are designed either to govern or to simplify. He notes, however, how 'paper' was initially utilised in an attempt to curb corruption through methodical record-keeping and controlling access to information:

The solution was to give paper some of the qualities of discourse, people, places, and time through the use of signatures, dates, stamps, and interartifactual references.¹⁴³

The Winchester DA and other contractual arrangements contained 'interartifactual references' to planning briefs, viability assessments, CPOs, planning permissions and leases, which combined to give different aspects of the contractual arrangements meaning. These documents enabled a gathering together of elements decided upon and drawn up in other times and at other places and thus were tools used, as Hull puts it, to 'engage with, or constitute realities "in the world".'¹⁴⁴

¹³⁹ Valverde, *Chronotopes of law: jurisdiction, scale and governance*, 17.

¹⁴⁰ Mariana Valverde, 'Studying the governance of crime and security: Space, time and jurisdiction' (2014) 14 *Criminology & Criminal Justice* 379, 386.

¹⁴¹ *ibid*, 386.

¹⁴² *ibid*, 386.

¹⁴³ Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012), 258. Others, such as Dery, have also analysed the ways in which paper records can instil a sense of continuity to bureaucratic practices (see David Dery, "'Papereality" and learning in bureaucratic organizations' (1998) 29 *Administration & Society* 677).

¹⁴⁴ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 5.

The Winchester DA also blended people, places and time through the signatures, dates and stamps that gave the agreement 'legal' effect. More interestingly for my purposes, a sequence of dates written into the DA laid out a series of deadlines by which the parties to the agreement intended to have satisfied various conditions set out in the agreement. I examine these deadlines to establish if they ensured that the Winchester Development merged the multiple temporalities of land acquisitions, planning applications, negotiations with tenants and funders, the developers' business plans and the Council's election cycles.¹⁴⁵

The dates written into the DA gave the Winchester Development a set of temporal coordinates, introduced some of 'the qualities' of time¹⁴⁶ and had the potential to become emblematic of 'ground covered.'¹⁴⁷ As Rakoff explains, temporal coordinates perform important ordering functions:

[W]e need to be able to "tell time" – that is, we need to place people and events in relation with each other, so that we can coordinate what they do. Indeed, the careful coordination of the time of many individuals, so that their efforts are either synchronous or carefully sequenced, is a hallmark of modern societies.¹⁴⁸

I examine the usefulness of a sequence of contractually-embedded deadlines to a local authority seeking to demonstrate progress on a property-led development project and for a developer seeking to generate actions from its local authority partner 'on time.'

Dates and deadlines can, as Grabham notes, have a disciplining effect.¹⁴⁹ If dates introduce 'baseline norms' for the completion of various actions, they might also acquire 'considerable moral force'¹⁵⁰ as well possible legal consequences insofar as a failure to carry out the necessary actions might give rise to specific redress mechanisms. For the purposes of my research, this invites questions about the extent to which the contractual arrangements deployed in Winchester operated as a public guarantee that progress along the development trajectory would occur in a 'timely' manner. In addition, I examine the extent to which, in the event that timely progress did not occur, mechanisms in the contracts would be used to hold either party to account.

¹⁴⁵ Cooper provides an illuminating account of attempts, and failures, by community groups to 'knit together' various competing temporal orders (see Davina Cooper, *Everyday Utopias: the conceptual life of promising spaces* (Duke University Press 2014), 140-1).

¹⁴⁶ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 258.

¹⁴⁷ Vice, *Introducing Bakhtin*, 210.

¹⁴⁸ Todd D. Rakoff, *A time for every purpose: law and the balance of life* (Harvard University Press 2002), 6.

¹⁴⁹ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107, 118.

¹⁵⁰ Rakoff, *A time for every purpose: law and the balance of life*, 129.

The usefulness of dates written into the DA as accountability mechanisms is analysed in this thesis because, as Hull observes, '[w]riting is usually seen to nail things down, but it can also set them in motion.'¹⁵¹ I examine the extent to which WCC and its development partners simply rewrote their agreements to deploy different dates instead of subjecting themselves to the effect of the passing of dates ostensibly chosen as deadlines for the completion of various actions. I contrast, therefore, self-selected dates, which could be changed, and deadlines imposed by statute, which could not be changed. I explore the differing ways in which these dates and deadlines shaped the Winchester Development and the implementation of the contractual arrangements.

Trajectories and linearity

As well as inviting a sense of distance to be travelled, the idea of a development trajectory suggests an element of linearity must be inherent to property-led development. In his discussion of 'projectness,' Law explains that many project management techniques rest upon an assumption that most types of development necessarily follow a linear trajectory, founded upon, measured against and sustained by progress against temporal coordinates.¹⁵² In doing so, Law touches upon themes considered by other scholars. Of particular significance to this thesis is Greenhouse's account of the ways in which constructions, representations and understandings of time become embedded in and reproduce cultural practices.¹⁵³ Various others have discussed the concept of 'time' as an ordering device and a social construct¹⁵⁴ and Greenhouse's point is that 'Western' understandings of time assume the 'linearity of time,' involving a 'geometric connection'¹⁵⁵ between an originary moment and 'some fixed (though unknown) point in time.'¹⁵⁶

Other theorists of time and social relations have investigated these cultural assumptions and have analysed their effects. In his work on the Grenadian revolution, Scott examines the teleological assumptions underpinning 'modern historical time':

As is well enough known, modern historical time – the collective time of nations and classes and subjects and populations – has been organised around a notion of discrete but continuous modular change, in particular, modular change as a linear,

¹⁵¹ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 248.

¹⁵² Law, *Aircraft stories: decentering the object in technoscience*, 8. I revisit the concept of 'projectness' later in this chapter.

¹⁵³ Carol J. Greenhouse, *A moment's notice: time politics across cultures* (Cornell University Press 1996), 20.

¹⁵⁴ See, especially, Elizabeth Grosz, *The nick of time: politics, evolution, and the untimely* (Duke University Press 2004) and Kevin K. Birth, *Objects of time: how things shape temporality* (Palgrave Macmillan 2012).

¹⁵⁵ Greenhouse, *A moment's notice: time politics across cultures*, 20.

¹⁵⁶ *ibid*, 35.

diachronically stretched-out *succession* of cumulative instants, an endless chain of displacements of before and after. Such succession, moreover, is progressive: change *is* improvement. Change, therefore, not only has a formal, built-in rhythm of movement and alteration but also a built-in *vector* of moral direction.¹⁵⁷

The richness of this passage offers an array of analytical prompts, particularly when considered alongside Johns' examination of public-private collaboration on large-scale infrastructure projects. Scott discusses the 'rhythm' of change in a way that mirrors Johns' observation regarding the 'deal-specific rhythm' that structures an infrastructure project.¹⁵⁸ Similarly, Scott's point that this process establishes a 'moral direction' brings to mind Johns' suggestion that the deal-orientation of infrastructure projects invests 'the decisions that flow from [the deals] with an autonomous logic that insulates them from particular types of inquiry.'¹⁵⁹ In both instances, the belief that there is a moral direction or an autonomous logic to the action functions as a self-justifying ordering device enabling both the production and destruction of certain connections and associations. Finally, Johns' representation of the 'succession of deals' that move a public-private partnership from the start of an infrastructure project to its culmination¹⁶⁰ expresses these ideas in a way that is similar to Scott's examination of the assumption that nation states and classes change through moving through a 'succession of cumulative instants' linked together in a 'chain.'

These points aid my analysis because, as Latour puts it, they critique a sense of time that 'passes as if it were really abolishing the past behind it.'¹⁶¹ In this thesis, I study the sharp differentiation between the conditional phase in property-led development, during which the developer's duty to construct a development is 'non-binding' and expressly open to further negotiation, and the unconditional phase, during which the duty is binding and ostensibly non-negotiable. The actions to be carried out in accordance with dates written into the DA and deadlines imposed by statute, and the actions that would follow those dates, projected WCC and its development partners forward to the moment at which 'unconditionality' would occur.¹⁶² As well as giving WCC and its development partners an apparently 'shared temporal coordination',¹⁶³ the dates incorporated into the DA used a cultural understanding of the

¹⁵⁷ David Scott, *Omens of adversity: tragedy, time, memory, justice* (Duke University Press 2014), 5. Emphasis in original.

¹⁵⁸ Johns, 'Financing as Governance', 401.

¹⁵⁹ *ibid*, 393.

¹⁶⁰ *ibid*, 398.

¹⁶¹ Latour, *We have never been modern*, 68.

¹⁶² I explained in chapter one that 'the pursuit of unconditionality' is one of the primary focuses of my thesis.

¹⁶³ Keenan, 'Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration', 100.

passage of time in a way that is quintessentially 'modern' and rests upon a belief that humanity is on a path of irreversible progress.¹⁶⁴

This modern temporality assumes, Latour argues, sharp distinctions between before and after, with the effect that '[t]he present is outlined by a series of radical breaks, revolutions, which constitute so many irreversible ratchets that prevent us from ever going backwards.'¹⁶⁵ Latour's image of a ratcheting motion is an important image for my research and informs my analysis because mechanical metaphors abound in the ways that property developers, local authority officers, councillors and property development consultants talk about property-led development. The image of a ratchet is also extremely rich because the idea of property-led development, as I mentioned in chapter one and earlier in this chapter, depends upon a belief in irreversible forward motion.

Another helpful concept outlined in the excerpt from Latour quoted in the previous paragraph relates to the sorting of events to reinforce a sense of progress. Scott makes similar observations in his account of political, artistic, social and cultural discourse before, during and after the Grenadian revolution. He considers post-revolutionary restorative justice mechanisms and explains how those mechanisms appeared to separate a time-before from a time-after:

These novel ends of justice are thought of as being served by the legitimating subjection of both perpetrators and victims to the technologies of 'truth and reconciliation' and, moreover, as serving the broader horizon of a political *transition* from authoritarian or illiberal rule.¹⁶⁶

The value of a truth and reconciliation commission lies, in this reading, in the opportunity it affords a society to consign political misdeeds to a discrete temporal moment.

Scott critiques the myth of transition, however, and similarly critical analyses can be found in two other recent accounts of temporal ordering techniques. In work analysing the experiences of transgendered people of sex/gender classifications in UK law, Grabham shows that the Gender Recognition Act 2004 'poses the act of claiming recognition as a monumental one-off event.'¹⁶⁷ The moment of official recognition of the subject's "'acquired" gender' means, Grabham argues, that transgendered people seeking gender recognition experience 'an imminent sense of the forthcoming,'¹⁶⁸ an impression of 'arrival into citizenship'¹⁶⁹ and the

¹⁶⁴ Latour, *We have never been modern*. See also Scott, *Omens of adversity: tragedy, time, memory, justice*, 5.

¹⁶⁵ Latour, *We have never been modern*, 71-2.

¹⁶⁶ Scott, *Omens of adversity: tragedy, time, memory, justice*, 128. Emphasis in original.

¹⁶⁷ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 110. See also Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law*.

¹⁶⁸ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 113.

¹⁶⁹ *ibid*, 123.

promise of a new beginning. In similar research analysing political controversies surrounding an 'apology' from the Australian government to displaced indigenous people, Bastian explains how the government presented the apology as 'a new point of origin from which all Australians might set out together.'¹⁷⁰ Bastian criticises the presentation of a new beginning as somehow generative of a new identity because the 'rush to turn the page' was also an attempt to close discussions about the nation's past¹⁷¹ and to reduce past injustices to part of the 'all-encompassing flow' of the country's temporality.¹⁷²

I consider these concerns about the use of 'monumental'¹⁷³ events in my analysis of the Winchester Development. I examine the extent to which unconditionality is an event that marks the passing of time, draws the contracting parties closer together, makes backward steps appear impossible and encompasses the messiness and disorder of the conditional phase into the 'flow' of the development process.

Staged improvements

The passage that I quoted from Scott in the previous section, in which he states that 'modern historical time [...] has been organised around a notion of discrete but continuous modular change,'¹⁷⁴ invites scrutiny of the organising function of time. This is an important point and the extent to which temporal qualities perform organising roles is a theme of this thesis. In his work on the use of an array of documents and document production practices in the IMF, Harper noted how these documents and practices performed a type of temporal ordering. He explained, for example, how some documents enabled practitioners to re-assess the past or 'glimpse the future' to evaluate the desirability of that future.¹⁷⁵ These documents were simultaneously forward and backward facing, and I examine this documentary technique in my analysis of the Winchester Development. I scrutinise viability modelling techniques that, as Henderson explains, enable a developer to perform a trajectory leading towards a 'desired future state.'¹⁷⁶

The preoccupations with viability held by WCC's officers and directors working for both of the Council's development partners are a feature of 'viability-led' development predicated

¹⁷⁰ Michelle Bastian, 'Political Apologies and the Question of a "Shared Time" in the Australian Context' (2013) 30 *Theory Culture & Society* 94, 104.

¹⁷¹ *ibid*, 113.

¹⁷² *ibid*, 110.

¹⁷³ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 110.

¹⁷⁴ Scott, *Omens of adversity: tragedy, time, memory, justice*, 5.

¹⁷⁵ Richard Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action* (Routledge 1998), 134.

¹⁷⁶ Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes', 601.

on a developer achieving a desired level of profitability from the development.¹⁷⁷ Recent research examines the ways that developers use viability modelling to rewrite past commitments and side-step obligations imposed upon them as a condition of the grant of a planning permission.¹⁷⁸ Of particular importance in that research is an exposition of the use by developers of 'viability concerns' to reduce their commitment to incorporate community benefits into their projects.¹⁷⁹ That research examines the implications of viability modelling in the context of planning decisions whereas my research investigates the consequences of using the DAs deployed in property-led development to carry around viability modelling techniques.

Viability assessments are, as Christophers argues, ubiquitous, with outputs that 'format' contemporary urban space.¹⁸⁰ I examine the use of viability modelling as a technique of long distance control,¹⁸¹ which favours repeat players¹⁸² with the expertise to manipulate modelling outputs. But viability assessments also encourage preoccupation with producing development proposals that are acceptable to third-party investors.¹⁸³ As Christophers,¹⁸⁴ Flynn,¹⁸⁵ Watt and Minton,¹⁸⁶ and others¹⁸⁷ explain, preoccupation with 'investability' can also be exploited by a developer and their consultants to produce the changes in a development

¹⁷⁷ For a discussion of profitability measures, consider Royal Institute of Chartered Surveyors, 'Financial viability in planning. RICS guidance note' (2012) <<http://www.rics.org/uk/knowledge/professional-guidance/guidance-notes/financial-viability-in-planning-1st-edition/>> accessed 26 February 2018.

¹⁷⁸ As discussed in Neil Crosby, Patrick McAllister and Peter Wyatt, 'Fit for planning? An evaluation of the application of development viability appraisal models in the UK planning system' (2013) 40 *Environment and Planning B - Planning & Design* 3 and Patrick McAllister, Emma Street and Peter Wyatt, 'Governing calculative practices: An investigation of development viability modelling in the English planning system' (2016) 53 *Urban Studies* 2363. See also Ingrid Nappi-Choulet, 'The role and behaviour of commercial property investors and developers in French urban regeneration: The experience of the Paris region' (2006) 43 *Urban Studies* 1511; Simon Guy, John Henneberry and Steven Rowley, 'Development Cultures and Urban Regeneration' (2002) 39 *Urban Studies* 1181.

¹⁷⁹ See, for example, Brett Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 *International Journal of Urban and Regional Research* 79.

¹⁸⁰ *ibid.*, 95.

¹⁸¹ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 26.

¹⁸² Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', 125.

¹⁸³ As discussed in Antoine Guironnet, Katia Attuyer and Ludovic Halbert, 'Building cities on financial assets: The financialisation of property markets and its implications for city governments in the Paris city-region' (2016) 53 *Urban Studies* 1442.

¹⁸⁴ Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models'.

¹⁸⁵ Jerry Flynn, 'Complete control: Developers, financial viability and regeneration at the Elephant and Castle' (2016) 20 *City* 278.

¹⁸⁶ Paul Watt and Anna Minton, 'London's housing crisis and its activists: Introduction' (2016) 20 *City* 204.

¹⁸⁷ Crosby, McAllister and Wyatt, 'Fit for planning? An evaluation of the application of development viability appraisal models in the UK planning system'; McAllister, Street and Wyatt, 'Governing calculative practices: An investigation of development viability modelling in the English planning system'.

project that they deem desirable. I will investigate how property developers use the products of these modelling techniques to direct a development project and pre-existing contractual arrangements through processes of what Johns has called 'highly moderated change.'¹⁸⁸

One of the strategies that I analyse is the differentiation, by a developer and its consultants, between viability assessments produced in the past and assessments produced in the present. This simple mechanism has an important effect in performing new connections, reproducing existing connections and severing unwanted connections. It is a mechanism that functions, as Bastian has put it, by 'conceptualizing time as being made up of a series of nows' and by constructing phases in the development process as a 'flexible medium in which to legitimate whatever connections or disconnections are preferred.'¹⁸⁹ The time-in-between these 'nows' is, as I demonstrate, the source of this 'flexible medium.'

There are various ways to approach the 'time-in-between' the moments and events that mark change. For example, Lee and Brown address this in their examination of the 'passing phases' of childhood development.¹⁹⁰ Similarly, Grabham examines waiting periods to be endured before the moment of 'accession' at which past complexities might be made to appear to have been resolved.¹⁹¹ In the context of the moment of accession that the Gender Recognition Act 2004 generates, this means that individuals seeking official recognition of their 'acquired' gender must wait for a period of two years while, as Grabham puts it, they 'amass sufficient time living in their assumed gender' to satisfy a gender recognition panel of their commitment to their gender identity.¹⁹² This 'administratively ambiguous state'¹⁹³ shapes many of these individual's experiences of time, marked particularly by what Grabham calls the 'legislated waiting periods contained within the Gender Recognition Act.'¹⁹⁴ I examine waiting periods, expectation of the forthcoming and experiences of 'accession' in property-led development.

Another way of thinking about these things is by examining property-led development as a process that is both staged and that moves forward through stages. I draw out the double-meaning of a 'stage' and, in investigating the staging of property-led development, I am influenced by Ricoeur's work on narrative forms that present history as a continuous

¹⁸⁸ Johns, 'Financing as Governance', 401.

¹⁸⁹ Bastian, 'Political Apologies and the Question of a "Shared Time" in the Australian Context', 110.

¹⁹⁰ Nick Lee and Steven D Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity' in John Law and Annemarie Mol (eds), *Complexities : social studies of knowledge practices* (Duke University Press 2002), 263.

¹⁹¹ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 108.

¹⁹² *ibid*, 116.

¹⁹³ *ibid*, 116.

¹⁹⁴ *ibid*, 113.

movement through one stage of a story to the next in a succession of ordered and orderly steps. This type of narrative proceeds, he explains, through a series of 'rule-governed transformations.'¹⁹⁵ I am also guided here by considerations of performance and performativity,¹⁹⁶ although I barely touch upon the richness of these ideas in my thesis. I do, however, consider how actors in the Winchester Development performed assumed roles and how documents such as the Winchester DA were performative, in the sense that they generated actions, events, connections and associations.

Similarly thought-provoking is Cooper's recent interpretation of Speaker's Corner in Hyde Park as a 'dramaturgical structure' offering an identifiable and well-known location that becomes a marketplace of ideas and staged performances on a weekly basis.¹⁹⁷ These stages are platforms for action and Greenhouse also invokes this idea when she argues that 'Western notions of time imply that human action unfolds *in time and place*' and that, as a consequence, 'time and place are treated as empty stages, awaiting human drama.'¹⁹⁸

Serres and Latour have encouraged researchers to explore 'the conditional space and time for transporting messages back and forth'¹⁹⁹ and I seek to examine the conditional phases, the pauses, the intervals and the staged action that went into the formation and recalibration of, as well as the progression along, a desired development trajectory.

Acting 'as if'

The final analytical thread that I explore in this thesis concerns the way in which a legal technology can enable actors to act 'as if' the technology will produce predictable future effects. Helpful here is the ANT concept of a 'black box'.²⁰⁰ This is an idea that originates in systems engineering whenever a process is too complex for a technician to understand. When a technician is only interested in starting a process and generating results from it, he or she

¹⁹⁵ Paul Ricoeur, *Memory, history, forgetting* (University of Chicago Press 2004), 243.

¹⁹⁶ As discussed in detail in Judith Butler, *Gender trouble: feminism and the subversion of identity* (Routledge 1990). ANT-inspired researchers also discuss performance and performativity (see, for example, Law and Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity' and Law, *Aircraft stories: decentering the object in technoscience*). See also J. L. Austin, *How to do things with words* (2nd edn, Clarendon Press 1975).

¹⁹⁷ Cooper, *Everyday Utopias: the conceptual life of promising spaces*, 200.

¹⁹⁸ Greenhouse, *A moment's notice: time politics across cultures*, 48. Emphasis in original.

¹⁹⁹ Michel Serres and Bruno Latour, *Conversations on science, culture, and time* (University of Michigan Press 1995), 117.

²⁰⁰ This is a concept discussed often in ANT. See, for example, Wiebe E. Bijker, Thomas Parke Hughes and Trevor J. Pinch, *The social construction of technological systems : new directions in the sociology and history of technology : Workshop : Papers* (MIT Press 1987); Latour, *Science in action: how to follow scientists and engineers through society*; Michel Callon, 'Techno-economic Networks and Irreversibility' in John Law (ed), *A Sociology of monsters: essays on power, technology and domination* (Routledge 1991).

will, Latour explains, 'draw a little black box' that stands in for the 'complex inner workings'²⁰¹ and that lets the technician focus upon the necessary inputs and the resultant outputs rather than the process itself. These black boxes are ubiquitous, Latour suggests, and do not materialise only in specialist fields:

The humblest technique – this lamp, this ashtray, this paper-clip – mixes periods, places and totally heterogeneous materials; it folds them into the same black box, causing those who use them to act, by diverting the course of their action.²⁰²

The users of a lamp, an ashtray or a paper-clip rarely question the mixings that go into the making of the materials, or the way that those mixings condition their actions, so these observations suggest that opening up these black boxes to further analysis might produce interesting results. The concept of black boxing has been fruitful for studies of regulatory techniques, as Cloatre and Dingwall²⁰³ and Bellanova and Duez²⁰⁴ show in their depiction of the assemblage of institutions, regulations, relationships, materials, values and technologies that go into the making of socio-legal objects.

Contractual documents, McGee argues, operate like a black box and as a form of 'cooled-down' legal technology²⁰⁵ that efface the messiness of the actions required to produce them, present a stable and apparently settled set of relations and generate an impression of processes being worked upon behind the scenes. But there are pauses and hesitations, as well as 'segments, intervals, and moments,'²⁰⁶ in the negotiation and implementation of contractual arrangements during which the contracting parties adopt contrasting or conflicting positions. To help think through the pauses, hesitations, segments, intervals and moments during which WCC's officers and their development partners held their differences apart and postponed their resolution, I refer to Mol's work on conflicting approaches to the diagnosis and treatment of lower-limb atherosclerosis in a Dutch hospital, which shows that differences in opinion as to causes of and treatments for the disease were 'distributed' to enable patients, pathologists, clinicians and administrators to coordinate their approach to each incidence of the disease.²⁰⁷ Distribution, in those circumstances, did not 'expunge messiness but shifts it.

²⁰¹ Latour, *Science in action: how to follow scientists and engineers through society*, 3.

²⁰² Latour, *The making of law: an ethnography of the Conseil d'Etat*, 272.

²⁰³ Emilie Cloatre and Robert Dingwall, "'Embedded regulation": The migration of objects, scripts, and governance' (2013) 7 *Regulation & Governance* 365.

²⁰⁴ Rocco Bellanova and Denis Duez, 'A Different View on the 'Making' of European Security: The EU Passenger Name Record System as a Socio-Technical Assemblage' (2012) 17 *European Foreign Affairs Review* 109.

²⁰⁵ McGee, *Bruno Latour: the normativity of networks*, 180.

²⁰⁶ Marilyn Strathern, 'On Space and Depth' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 91.

²⁰⁷ Mol, *The body multiple: ontology in medical practice*.

Pushes it along'²⁰⁸ and prevents 'distribution from becoming the pluralizing of the disease into separate but unrelated objects.'²⁰⁹

Earlier in this chapter, I referred to Scott's critique of notions of the time of the nation state moving forward through periods of 'discrete but continuous modular change'²¹⁰ and this idea, together with Mol's point about 'distribution,' helps with an analysis of the weaving together of the conditions in a DA and the changes that take place within the conditional phases of a property-led development. I ask if a conditional DA enables not only continuous change but also onward progression towards unconditionality because it is a type of modular object²¹¹ consisting of detachable components that can be worked upon at different times and in different places. This discussion suggests that a modular form enables control over a complex process by facilitating a series of simplifications that must be sustained to prevent complexities from ramifying until the components are ready to be fitted together and I explore this in my examination of the Winchester DA.

In her ethnography of drafting practices within UN conferences, Riles reveals how delegates situated a document drafted in one conference within the wider 'trajectory' of an overarching 'platform for action' by linking preparatory conferences and resolutions anticipated at future conferences.²¹² At one particular conference, when faced with an unexpected controversy over the inclusion of a particular term in a document, the delegates had temporarily placed that term 'in brackets' while negotiations on the document's content continued. This meant that the delegates could discuss the content of the rest of the document while acknowledging that they had not resolved the use of the controversial term. For the delegates tasked with resolving the controversy, bracketing the term created a moment of 'temporal and analytical gridlock' but this sense of stasis was, according to Riles, only ever 'perceptible from the perspective of one caught in the moment.'²¹³ Where those delegates were temporarily burdened by having to revisit earlier discussions regarding the meaning of the term in question, the eventual un-bracketing of the term meant that other

²⁰⁸ *ibid*, 165.

²⁰⁹ *ibid*, 117.

²¹⁰ Scott, *Omens of adversity: tragedy, time, memory, justice*, 5.

²¹¹ Susan Leigh Star, 'This is Not a Boundary Object: Reflections on the Origin of a Concept' (2010) 35 *Science Technology & Human Values* 601, 603. See also Star and Griesemer, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39'.

²¹² Annelise Riles, '[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis' in Annelise Riles (ed), *Documents: artifacts of modern knowledge* (University of Michigan Press 2006), 80.

²¹³ *ibid*, 82.

delegates and outsiders looking in could act both as if there had been no momentary hesitation and as if no similar controversy would emerge in future conferences.

A point worth revisiting here is the one that Callon has made regarding the 'multilateral negotiations, trials of strength and tricks' through which identities and desires of actors stabilise.²¹⁴ Bracketing a controversial term is a type of trick and other examples abound. In her discussion of Japanese investment banking practices, Riles analyses the use of 'collateral,' the practice of a party to a transaction providing some form of security for a debt, exercisable in the event of a future default in payment.²¹⁵ She explains, however, how banking practices have evolved to enable the party benefiting from the security to use the collateral in other transactions before there had been any default in the original transaction.²¹⁶ This practice is 'rehypothecation,' which relies upon a 'special kind of pause' and a 'fiction that the future moment of the swap's completion has already arrived.'²¹⁷ It is, therefore, 'a command, or a mutual agreement to act "As If".'²¹⁸ A type of fiction also characterises the succession of deals that constitute a public-private infrastructure project, according to Johns, in that the 'socio-legal architecture' of the project 'encourages [the public body and its private sector partner] to conduct themselves as if the deal were more or less a stand-alone field of work, set apart from surrounding circumstances and constituencies.'²¹⁹

These 'as-ifs' appear to perform important roles. As well as enabling the parties to a transaction to assume the occurrence of a future event, they help to formulate a 'world fit for projects,' predicated on a prevailing and largely unchallenged assumption that these projects depend for their progress on devices that conceal controversies and seclude the project from the world outside.²²⁰ But this project-oriented outlook involves a 'gradual approach that favours adjustments and corrections'²²¹ and that depends upon the project's 'ability to isolate itself, [to] take its distance.'²²² These efforts originate in a widely-held belief that what takes place in a secluded meeting room, office, workshop or laboratory might be messy or contentious but that these controversies can gradually resolve while protected from outside intervention.

²¹⁴ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay', 211.

²¹⁵ Riles, *Collateral knowledge: legal reasoning in the global financial markets*.

²¹⁶ *ibid*, 167.

²¹⁷ *ibid*, 173.

²¹⁸ *ibid*, 173.

²¹⁹ Johns, 'Financing as Governance', 399.

²²⁰ Law, *Aircraft stories: decentering the object in technoscience*, 197.

²²¹ Michel Callon, Pierre Lascoumes and Yannick Barthe, *Acting in an uncertain world : an essay on technical democracy* (Inside technology, MIT 2009), 16.

²²² *ibid*, 94.

But this also assumes that outsiders need not worry themselves about what goes on during these conditional phases. And while opening up a black box, examining the discussions that take place while a contentious term is 'bracketed' or scrutinising an 'as if' in an academic setting might generate interesting findings about 'processes in the making',²²³ it can be disruptive for designers and technicians engaged in network-building if black boxed processes fail, settled meanings of a term become contentious or the assumptions underpinning an 'as if' are challenged. In his analysis of *Électricité de France's* attempts to construct a project world for the VEL, its proposed electric car, Callon focuses particularly on the difficulties that EDF's engineers faced in establishing hydrogen fuel cells as a stable component of its design. Elements of the fuel cell became 'appallingly complex' when a black box 'whose operation had been reduced to a few well-defined parameters gave rise to a swarm of new actors.'²²⁴ Applying these ideas to my analysis of the Winchester Development equips me to examine the consequences of a failure, on the part of both WCC and its development partners, to gather together the components of a workable property-led development.

Conclusion

To answer the research questions I set out in chapter one, I draw upon findings developed in ANT and socio-legal studies to scrutinise ways in which the contractual arrangements deployed in property-led development generate actions. I scrutinise how the contractual arrangements that underpin property-led development utilise legal technologies but I also investigate the arrangements that extend a partnership between a local authority and a developer into non-legal fields by, for example, making it easier for a developer to secure development funding from third party financial institutions.²²⁵ In addition, Cloatre's work²²⁶ helps me to illustrate how legal technologies are enacted in practices and provides me with tools to examine the role that the contractual arrangements performed in generating, strengthening or severing certain connections and associations. These insights also enable me to scrutinise the role that newly-formed or existing connections performed in shaping the content, form and effect of the contractual arrangements deployed in property-led development. Directing attention to the role of law as a hybrid assemblage asks questions

²²³ Cowan, 'Territory and Human Rights: Mandatory Possession Proceedings', 199.

²²⁴ Callon, 'The Sociology of an Actor-Network: The Case of the Electric Vehicle', 29.

²²⁵ Smyth has discussed the manner in which access to finance operates as a 'generative mechanism' in interactions between local government bodies and private sector institutions (Stewart Smyth, 'The privatization of council housing: Stock transfer and the struggle for accountable housing' (2013) 33 *Critical Social Policy* 37, 49).

²²⁶ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*.

about what law is and the entities that create and constitute it, as well as those created or constituted by it.

My analysis of the particular contractual arrangements in the Winchester Development will consider the extent to which those arrangements contributed to the production and reproduction of an overarching development trajectory. In analysing the Winchester DA, I apply concepts related to fluidity, adaptation and change to explore how the conditions in the DA functioned as a series of components that addressed separate but not unrelated aspects of the development process. I am also interested in exploring the manner in which local authority officers and development directors proposed and eventually attempted to gather together these modular units to create a DA ready to become unconditional. The theme of 'ratcheting',²²⁷ which helps to illuminate the acts of tightening planned to enable property-led development to move forward towards unconditionality, is an important one in this thesis.

Underpinning my research is a critique of the belief that these processes could only progress if the actors attempting to guide those processes adopt a project-oriented outlook. The 'image of projectness'²²⁸ that Law describes rests upon the performance of a technological development as a sequence of linked, closely controlled and carefully managed projects,²²⁹ somewhat similar in form to the 'succession of deals' that Johns suggests many practitioners deem to be necessary to enable public infrastructure projects to move forward.²³⁰ Both approaches emphasise a presumption, held by many practitioners, that development projects of many types work best if they follow a linear trajectory, passing through 'segments, intervals, and moments',²³¹ as well as pauses,²³² hesitations,²³³ phases²³⁴ and 'monumental events',²³⁵ designed or anticipated in advance and laid out to enable a sense of both ratcheting and 'accession'.²³⁶ I explore temporalities and temporal constructions present in the Winchester

²²⁷ Latour, *We have never been modern*, 71-2.

²²⁸ Law, *Aircraft stories: decentering the object in technoscience*, 8.

²²⁹ Law and Singleton also discuss the way that the politicians, engineers, designers and other individuals involved in developing a military aircraft assumed that a project would 'work' if it 'moves through stages' subject to careful management (see Law and Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity', 768. See also Amade M'charek, 'Partial Lineages in Diversity Research' in Monica Konrad (ed), *Collaborators collaborating: counterparts in anthropological knowledge and international research relations* (Berghahn Books 2012)).

²³⁰ Johns, 'Financing as Governance', 398.

²³¹ Strathern, 'On Space and Depth', 91.

²³² Riles, *Collateral knowledge: legal reasoning in the global financial markets*, 173.

²³³ Latour, *The making of law: an ethnography of the Conseil d'Etat*, 151.

²³⁴ Lee and Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity', 263.

²³⁵ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 110.

²³⁶ *ibid*, 109.

Development and use the idea of time as an empty stage,²³⁷ and the double-meaning of the word 'stage,' as an important analytical tool.

²³⁷ Greenhouse, *A moment's notice: time politics across cultures*, 48.

BLANK PAGE

Chapter 3

Methods and Methodology

The research questions that I answer in this thesis focus upon the operation of law and legal technologies in property-led development. I examine the form, content and effect of contractual arrangements and the extent to which those contractual arrangements enable a local authority and its private sector development partner to assemble a development site and to order a multiplicity of connections, associations and relations activated during the development process. To answer my questions, I used a combination of methods, which I explain in this chapter. My methods primarily involved a case study based upon archival research and documentary analysis, alongside semi-structured interviews with property development professionals. These methods were a necessary consequence of research questions that required an examination of what legal technologies do in property-led development and how property development professionals seek to utilise those technologies. Extensive archival research, detailed documentary analysis and broad-ranging interviews were also necessary to facilitate an Actor-Network Theory (ANT) inspired approach designed to investigate the complexity of the interlocking processes that underpin property-led development.

The combination of methods utilised in this research enables me to contribute to existing knowledge in this area by providing new insights into the form, content and effect of the contractual arrangements commonly deployed in property-led development. There are two interlinked objects of analysis in this thesis. The first is a property-led development project carried out in Winchester¹ and the second is the role and impact of contractual arrangements in property-led development. The Winchester Development involved easily identifiable events and a collection of tangible, legal materials. It also, however, involved a multiplicity of more intangible concepts. For example, the signing of the Development Agreement² between Winchester City Council and its private sector development partner took place on 22 December 2004 and the DA is a document that exists in a material form that can be viewed online. But while the text of the DA revealed most of the contents of the agreement, those contents did not explain much about the role and impact of the agreement or the way in which local authority officers, developers and property development consultants produced and used it. Similarly, the text of the DA provided an interesting insight into the use of temporal

¹ I refer to this project as the 'Winchester Development' and provided a brief introduction in the first chapter. This chapter provides further background information about the development.

² In the remainder of this chapter I abbreviate the term Development Agreement to 'DA'.

concepts and the conditionality of the developer's obligation to construct the development but did not explain the operation of these concepts in all their complexity. As a result, I have examined how local authority officers, private sector development directors and their respective professional consultants negotiate, interpret, use and implement a DA and other contractual arrangements. This chapter explains how I did this.

My research has sought to explore, using Cowan's phrase, 'the way that law and legality emerge'³ in property-led development by highlighting the linkage between legal concepts and the things that people think about and do with contracts and other material manifestations of law such as Compulsory Purchase Orders.⁴ Given that I investigated legal phenomena in their operation, my work is a type of empirical legal research.⁵ The goal of empirical legal research is to 'generate knowledge about law,'⁶ and, to that end, I examined 'formal legal documents,' such as court decisions and statutory materials,⁷ and documents with a more 'blurry legal definition.'⁸ All of these documents provided 'observable and verifiable data' in their own right.⁹ To access data about their operation within a broader property development context, I looked at what property development professionals wrote in public reports and private correspondence about contractual arrangements, court decisions, planning permissions, CPOs and other documents.¹⁰ I also asked some of those individuals to explain how they used the contractual arrangements commonly deployed in property-led development. My approach was, therefore, 'qualitative'¹¹ and I attempted to collect data in a 'systematic' manner¹² while retaining sufficient flexibility to enable me to 'follow the actors.'¹³

³ David Cowan, 'Housing and Property' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010), 332.

⁴ In the remainder of this chapter I abbreviate the term Compulsory Purchase Order to 'CPO'.

⁵ Lisa Whitehouse and Susan Bright, 'The Empirical Approach to Research in Property Law' in Susan Bright and Sarah Blandy (eds), *Researching property law* (Palgrave 2016), 44. See also Peter Cane and Herbert M. Kritzer, 'Introduction' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010) and Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010).

⁶ Whitehouse and Bright, 'The Empirical Approach to Research in Property Law', 44.

⁷ Cane and Kritzer, 'Introduction', 5.

⁸ Emilie Cloatre, 'Fluid Legal Labels and the Circulation of Socio-technical Objects: the Multiple Lives of 'Fake' Medicines' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 98. See also Emilie Cloatre and Robert Dingwall, "'Embedded regulation": The migration of objects, scripts, and governance' (2013) 7 *Regulation & Governance* 365. I compare, for example, contractual arrangements that practitioners deem to be 'legally binding' with those that I characterise as 'nearly legal'.

⁹ Whitehouse and Bright, 'The Empirical Approach to Research in Property Law', 44.

¹⁰ Appendix B to this thesis is a list of the documents to which I referred.

¹¹ Whitehouse and Bright, 'The Empirical Approach to Research in Property Law', 44.

¹² Cane and Kritzer, 'Introduction', 4.

¹³ Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 12.

Doing so is a feature of ANT-inspired research because, Latour argues, a researcher should not 'limit in advance the shape, size, heterogeneity, and combination of associations' that they seek to study.¹⁴ For Cowan and Carr, applying this approach to legal studies is a 'significant methodological advance because it enables us to make connections visible.'¹⁵

In terms of generating knowledge about law, I consider legal processes, such as the making, confirmation and exercise of compulsory purchase powers, judicial review proceedings and the way in which local authorities prepare for those, and the mechanisms for varying contractual arrangements when those contractual arrangements are ostensibly governed by specific legal rules. Data explaining those processes came from formal legal documents,¹⁶ central government guidance and policy documents,¹⁷ existing academic literature in this field,¹⁸ 'official'¹⁹ Council documents and the transcripts and notes of 18 interviews that I conducted. From that data, I attempted to craft a 'representative account'²⁰ of the Winchester Development and the operation of the contractual arrangements deployed there. While the events that happened, the contents of the contractual arrangements and some of the actions of the various parties are 'matters of fact,'²¹ my interpretation of them is presented within what Latour has called 'the mediating constraints of writing.'²² This means that those matters of fact have inevitably been repackaged in my attempt to generate knowledge within the time constraints of a PhD and to present that knowledge in a readable form.

¹⁴ *ibid*, 11.

¹⁵ Dave Cowan and Helen Carr, 'Actor-network theory, implementation, and the private landlord' (2008) 35 *Journal of Law and Society* 149, 153.

¹⁶ Recent cases such as *R (Midlands Co-Operative Society Limited) v Birmingham City Council* [2012] EWHC 620 (Admin), [2012] Eu LR 640, *R (Faraday Development Limited) v West Berkshire Council* [2016] EWHC 2166 (Admin), 168 Con LR 131 and *R (Wylde) v Waverley Borough Council* [2017] EWHC 466 (Admin), [2017] ACD 57 involved challenges to decisions that the respective local authorities made in relation to their contractual arrangements with private sector development partners.

¹⁷ Including, for example, The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Criche Down Rules* (2004).

¹⁸ I examined this letter in detail in chapter two.

¹⁹ Paul Atkinson and Amanda Coffey, 'Analysing documentary realities' in David Silverman (ed), *Qualitative research: theory, method and practice* (2nd edn, SAGE 2004), 58; Alan Bryman, *Social research methods* (5th edn, Oxford University Press 2016), 553. Atkinson and Coffey and Bryman each note some of the pitfalls of treating official documents deriving from state institutions as factual accounts of reality. I consider these pitfalls in section three of this chapter.

²⁰ Whitehouse and Bright, 'The Empirical Approach to Research in Property Law', 45.

²¹ Latour, *Reassembling the social: an introduction to actor-network-theory*, 125. John Law has similarly argued that there are 'identifiable processes' that do exist and can be discovered, although he also states that those processes are often so complex that they 'necessarily exceed our capacity to know them' (John Law, *After method: mess in social science research* (Routledge 2004), 6).

²² Latour, *Reassembling the social: an introduction to actor-network-theory*, 128.

The product of my research is, therefore, a narrative reconstruction of the Winchester Development that ‘conjures up’ those things in a particular way. But while this thesis does not purport to be a complete account of either the events that happened in Winchester or the deployment of the contractual arrangements, it is founded in the methodical approach that I describe in this chapter.²³ In discussing my approach, I demonstrate that, notwithstanding the inherent limitations to any attempt to capture fluid and complex social processes, my research was sufficiently rigorous to produce dependable²⁴ findings that offer a valuable contribution to knowledge about law and property-led development.

In sections one, two and three of this chapter, I discuss the research design principles that underlie this thesis and explain the use of a case study. Section four then addresses my use of archival research and document analysis before the fifth section discusses the interview data that I assembled. In each of those sections, I explain how I generated data, my approach to data analysis, limitations to the research design and the ethical considerations that I took into account.

Exploratory Research

My desire to carry out doctoral research into property-led development was a product, at least in part, of experiences I gained between 2011 to 2013, while working as a solicitor specialising in planning and environmental law. The bulk of my work involved due diligence on behalf of companies purchasing other companies or companies purchasing land. This largely involved me reviewing documents such as planning permissions, planning agreements,²⁵ and geotechnical, environmental and flooding reports to advise on the potential liabilities a client might face in completing a proposed acquisition. Another strand of my work involved the drafting of planning agreements and highways agreements²⁶ and, in this capacity,

²³ Law argues that, while social science practice ‘helps to produce realities,’ it ‘does not do so freely and at whim’ (Law, *After method: mess in social science research*, 143).

²⁴ Webley, ‘Qualitative Approaches to Empirical Legal Research’, 935. Webley contrasts the concepts of dependability and integrity with those of validity and reliability. The key point, she suggests, is that ‘the evidence supports the findings’.

²⁵ The operation of planning agreements is a means for local authorities to benefit from ‘planning gain.’ An individual or organisation in receipt of planning permission can, pursuant to section 106 of the Town and Country Planning Act 1990, be required to enter into an obligation (commonly contained in an agreement referred to as a section 106 agreement) to provide some form of public benefit alongside the development to be constructed pursuant to the granted planning permission. For a full discussion of the function of planning agreements, see Victor Moore and Michael Purdue, *A practical approach to planning law* (12th edn, Oxford University Press 2012), chapter 18.

²⁶ Property developments proposals often include works that will affect public highways, whether through something relatively mundane like the construction of a link to an existing highway or in the form of something more disruptive, like the rerouting of existing highways. In those circumstances, the relevant highway authority, which is usually a branch of the local authority (see section 1(3) of the Highways Act 1980), will insist that the developer enters into an agreement pursuant to section 278 of

I became aware that local authorities and developers would also often enter into other forms of contractual arrangement before a local authority used its compulsory purchase powers to assemble a development site on behalf of a developer.

Before working as a solicitor, I had contemplated embarking upon postgraduate study and had continued to consider that possibility while in private practice. Property development and the exercise by local authorities of compulsory purchase powers seemed like a topic area with the potential for further academic study. My initial research proposal, which formed the basis for this research, was that I would carry out a case study examining the use of compulsory purchase powers, seeking to identify reasons why construction of a property-led development does not automatically follow land acquisition. It is difficult to recall precisely how my research design emerged from this vaguely defined intention, although it is clear that the specific focus of my research changed as I investigated property development further. Change in research design is not, Webley suggests, unusual:

In design terms, qualitative research unfolds – it develops as the researcher learns more; in other words the experiment is not usually set up and then allowed to run along a predetermined course. Instead, the research may be redesigned to meet changing conditions, perceptions and findings. This means that the research design may be relatively fluid; the parameters of the study and the approach and methods adopted may have to be amended to accommodate altered understandings and changing dynamics.²⁷

The focus of my research did not change radically but shifted incrementally from an interest in the compulsory purchase process towards an interest in the DAs between local authorities and their development partners.

Academic texts that I read at this stage played an influential role in this change of focus. I mentioned a number of these texts in chapters one and two, and Valverde's broad-ranging empirical research into 'city governance' practices contained the charge that 'researchers will need to devise strategies' to scrutinise contract details.²⁸ While I was carrying out my exploratory research and at a similar time to reading Valverde's text, I read Winter and Lloyd's summary of the use of compulsory purchase powers for property development purposes, which refers to a DA as follows:

The commercial terms are (at least in part) normally highly confidential, but it is not unusual at CPO inquiries for the acquiring authority to produce a redacted copy of those parts of the agreement which are not commercially sensitive and which are required to demonstrate the level of commitment of the parties

the Highways Act 1980 obliging the developer to pay for the costs of the necessary works. For a discussion of the operation of highways agreement, see *ibid*, 300-301.

²⁷ Webley, 'Qualitative Approaches to Empirical Legal Research', 932.

²⁸ Mariana Valverde, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012), 14.

(particularly the developer) to carrying out the development and (where appropriate) to relocating owners and occupiers affected by the compulsory acquisition and redevelopment process.²⁹

While it is no longer possible for me to account for the influence of other readings at this stage in the research process, Winter and Lloyd appeared to point to a possible strategy for scrutinising the contractual arrangements between a local authority and a developer. My next step was to seek a complete or redacted copy of a DA and information about the contents of an agreement.

To do so, I carried out a series of simple Google searches by typing the location of a development and the term, 'development agreement' into the online search engine. Typing 'winchester+“development agreement”' into Google's search engine did not produce a copy of the Winchester DA but did generate results directing me to reports discussing the DA that Winchester City Council's officers had presented to councillors in committee meetings. Using the search function of the Council's website enabled me to gather data from other committee meeting minutes and reports. At that stage, however, I was not focusing on a particular case but used this strategy to gather information about the various property-led development project including the Winchester Development. In doing so, I was concerned that writing about some property-led developments might create a conflict of interest because solicitors at the law firm at which I had worked had been instructed to advise members of the property development industry in some high profile developments. Although I had not worked on these developments myself, I had heard aspects discussed and had seen some documents pertaining to some developments that the parties involved would probably have deemed to be confidential. For that reason, it did not seem appropriate for me to focus upon projects in which I knew my former colleagues had been participants.

Having ruled out the possibility of examining certain developments, I continued gathering and reviewing information about the Winchester Development and the East Street/Brightwells development in Farnham,³⁰ with the intention that this data collection would help me to clarify my overall approach. My initial information gathering enabled me to ascertain some of the key components of the DAs operative in those settings. I established, for example, that these DAs did not oblige the developer to commence construction immediately following confirmation of the making of a CPO but that, even if a CPO had been confirmed, the developer's commitment to commence construction remained conditional. Moreover, officers

²⁹ Paul Winter and Richard Lloyd, 'Regeneration, compulsory purchase orders and practical related issues' (2006) *Journal of Planning and Environmental Law* 781, 791.

³⁰ For the sake of brevity, I refer throughout this chapter to 'the Farnham Development' and the development agreement deployed there as 'the Farnham DA.' Farnham is a small town in Surrey, about 38 miles from central London, with a similar population to Winchester.

reporting to the local authorities' committees each pointed towards the relevance of 'Long Stop Dates' and the concept of an 'Unconditional Date' as a significant marker of progress in the development process.

While I was gathering information about these DAs, I carried out an exploratory interview with a property developer, who I refer to throughout this thesis as D2.³¹ I conducted this exploratory interview to ascertain the extent to which practitioner accounts of property-led development might provide helpful insights into the form, content and purpose of the DAs that I had briefly encountered. McDowell explains that qualitative research, particularly qualitative research involving interviews, often relies on 'luck and chance, connections and networks.'³² My exploratory interview took place in October 2014 and was arranged through a family connection who eased my access and facilitated a first step in the interviewing process.

In this interview, I asked my interviewee about his experiences negotiating and implementing DAs, and to explain the components of an agreement that he deemed most important. He discussed the contents of DAs in some detail, provided some interesting commentary on the role of a DA in a particular development process and talked at length about his experience of the work that a developer needs to do to encourage a local authority to enter into a DA and to agree to exercise its compulsory purchase powers. The data generated from my exploratory interview and initial document analysis solidified my interest not only in the content of a DA but also in what property development professionals do with their DAs and how local authority officers and developers produce these agreements.

Research Design

Although my exploratory research had generated some interesting data, defining precise research questions and a research design to answer those questions depended on the information that I would be able to gather about the developments. I have already noted Winter and Lloyd's observation that some local authorities produce redacted copies of their DAs at CPO inquiries.³³ Waverley Borough Council³⁴ and Winchester City Council³⁵ had both recently made CPOs for their developments and both included copies of their agreements, with some financial details obscured, in their bundles of evidence submitted to the respective inquiries. Both local authorities had uploaded these versions of their DAs to their websites.

³¹ I refer to this individual and my other interviewees in the list of interviewees in Appendix D to this thesis.

³² Linda McDowell, 'Elites in the City of London: some methodological considerations' (1998) 30 *Environment and Planning A* 2133, 2135.

³³ Winter and Lloyd, 'Regeneration, compulsory purchase orders and practical related issues', 791.

³⁴ The local authority participating in the East Street/Brightwells development.

³⁵ Hereafter referred to as WCC.

As of 28 September 2017, Waverley Borough Council still had electronic links on its website to copies of two documents that, taken together, form the Farnham DA. These were available at http://www.waverley.gov.uk/downloads/200349/view_and_comment³⁶ and provided me with access to the contents of a DA and an insight into the way in which a local authority and a developer might adapt an agreement in response to the manner in which they carry out a development. The webpage containing links to the Farnham DA also has links to the other documents that Waverley Borough Council submitted to the CPO Inquiry.³⁷

Until early in 2017, Winchester City Council's website also contained a webpage providing links to its CPO, the Council's statement of case and statement of reasons for making the CPO, supporting documents and the submissions that individuals and organisations made to object to the CPO.³⁸ Included in the supporting documents were a copy of the Winchester DA, a deed of variation dated 22 October 2009 and two further deeds of variation, both of which were dated 10 December 2010. Although WCC has now removed the webpage containing links to the DA and the CPO Documents, the DA and the various deeds of variation are still available online³⁹ due to a request for publication that a member of the public made on 12 August 2014 using 'access to information legislation.'⁴⁰ This act of disclosure provided

³⁶ Under the heading, 'East Street development agreement' are two links. The first is entitled 'East Street Development Agreement – Part 1 – Deeds of Variation' and the second is entitled 'East Street Development Agreement.' These documents contain the original DA, dated 22 April 2003, with deeds between the local authority and the developer varying the original agreement. Waverley Borough Council and its development partner had entered into these 'deeds of variation' on 6 August 2009 and 31 August 2010 and annexure 1 to the 2009 deed of variation contains a copy of the original DA with parts of the text struck through by a single black line and replaced by new wording set out in an italicised, underlined typeface. The 2010 deed of variation also makes significant changes to the DA but these are not as extensive.

³⁷ These are collected under the following subheadings: 'Brightwells Compulsory Purchase Order (CPO) Statement of Case,' 'Brightwells Statement of Case supporting documents,' 'Brightwells Statement of Case supporting documents – Objections,' 'Brightwells Purchase Order (CPO) Statement of Reasons,' 'Brightwells Compulsory Purchase Order (CPO) and Plans' and 'Brightwells – minutes of pre inquiry meeting 27 November.'

³⁸ I refer to these documents collectively as the 'CPO Documents.'

³⁹ Appendix A to this thesis sets out the URLs for the copies of the DA and the deeds of variation.

⁴⁰ This is the terms that Mopas and Turnbull use to refer to this type of legislation (see Michael S. Mopas and Sarah Turnbull, 'Negotiating a Way in: A Special Collection of Essays on Accessing Information and Socio-Legal Research' (2011) 26 *Canadian Journal of Law and Society* 585, 588). In England and Wales, the Freedom of Information Act 2000 (hereafter referred to as 'the FOIA 2000') and the Environmental Information Regulations 2004 SI 2004/3391 (hereafter referred to as 'the EIR 2004') state that a local authority is a public body potentially obliged to confirm or deny the existence of requested information and potentially obliged to disclose that information. The FOIA 2000 applies to all information that a public body holds, while the EIR 2003 applies to information that relates to 'land.' Various exemptions exist that allow a public body to refuse to confirm or deny the existence of requested information and to refuse to communicate that information, including section 43 of the FOIA 2000 and regulation 12 of the EIR 2003, which permit a local authority to deem information exempt from disclosure if it deems that disclosure would interfere with a legitimate commercial or economic interest. WCC could not apply either exemption here because it had already disclosed a copy of the DA during the CPO proceedings.

vital access to many of the key terms in the DA and to deeds of variation and side letters that WCC, Thornfield and Henderson used to vary the original agreement.

This meant that I had gathered two DAs, a small number of Council documents referring to the DAs and the notes of an exploratory interview. This provided sufficient information for me to settle on the research questions that I set out in chapter one of this thesis, although I intended to answer those questions by writing about both the Farnham and Winchester Developments. To answer the questions, I planned to carry out a case study of both developments, although it was clear that observing the property development processes in Farnham and Winchester and the role of DAs and other contractual arrangements would, as Valverde has observed, be difficult without 'privileged access to the backrooms' where deals are made.⁴¹ I did not ask the local authorities or the developers involved to allow me to observe those meetings, however, because I felt that it was extremely unlikely that they would agree. Similarly, I did not expect that either local authority or their respective development partners would agree to be interviewed 'on the record' about those developments. Instead, I wanted to use interviews with property development practitioners to gather views of property-led development and the roles that contractual arrangements performed within that process.

Despite these potential limitations, I felt that a case study approach was best suited to answering my research questions. Nonetheless, there are potential criticisms of the case study approach that must be addressed. In particular, a case study approach might contain inherent limitations if a narrow focus restricts the 'generalizability' of the findings.⁴² As a counterpoint, however, other appraisals suggest that typicality in a case is irrelevant and that a case study will often have merit simply on the basis that the approach has generated a rich, varied and informative dataset.⁴³ This can mean that case study accounts of a phenomenon are often as descriptive as they are analytical, as Latour observes in a (presumably) fictional discussion between a professor and a doctoral student carrying out research into some form of 'organization':

S: [My supervisor] wants my case studies to 'lead to some useful generalization.'
He does not want 'mere description.' So even if I do what you want, I will have one nice description of one state of affairs, and then what? I still have to put it

⁴¹ Valverde, *Everyday law on the street: city governance in an age of diversity*, 14.

⁴² For a discussion rebutting some of these criticisms, consider Bent Flyvbjerg, 'Five misunderstandings about case-study research' (2006) 12 *Qualitative Inquiry* 219 and Eric W. K. Tsang, 'Generalizing from Research Findings: The Merits of Case Studies' (2014) 16 *International Journal of Management Reviews* 369.

⁴³ Schwandt and Gates refer to the value of any attempt to generate a 'detailed portrayal of some phenomenon' (Thomas A. Schwandt and Emily F. Gates, 'Case Study Methodology' in Norman k Denzin and Yvonna S Lincoln (eds), *The Sage handbook of qualitative research*, 5th edn (Sage 2018), 346).

into a frame to find a typology, compare, explain, generalize. That's why I'm starting to panic.

P: You should panic only if your actors were not doing that constantly as well, actively, reflexively, obsessively. They, too, compare; they, too, produce typologies; they, too, design standards; they, too, spread their machines as well as their organizations, their ideologies, their states of mind. Why would you be the one doing the intelligent stuff while they would act like a bunch of morons? What they do to expand, to relate, to compare, to organize is what you have to describe as well. It's not another layer that you would have to add to the 'mere description.' Don't try to shift from description to explanation: simply *go on with* the description. What your own ideas are about your company is of no interest whatsoever compared to how this bit of the company has managed to spread.⁴⁴

Latour argues that this preoccupation with detailed description need not come at the expense of an attempt to analyse the processes being described. Rather, he suggests that rich description of the 'sheer complexity' will reveal 'controversies' from which a researcher can draw tentative conclusions.⁴⁵

Nevertheless, a researcher should, Gates and Schwandt suggest, ask what the 'instance' that they are looking at is a 'case of.'⁴⁶ When I started looking at the Winchester and Farnham Developments, I was aware that neither would provide the basis for an in-depth investigation of a 'complete' property-led development because neither development had been concluded. If I had incorporated some analysis of a concluded property development process, I would have been able to analyse the moment that the developer and the local authority decided to work together on the development, through to the moment at which the local authority granted a lease of the development site to the developer. My initial documentary analysis of various completed developments revealed interesting findings regarding the manner in which a developer enrolls a local authority as a participant in property-led development, the way that a developer side-lines rival landowners and competing developers, and the collaborative efforts that enable a developer and a local authority to secure the participation of the retailers that would occupy an end development.

My initial investigations into the Farnham Development also generated interesting findings, however, particularly related to local opposition to the development, delays to the development process apparently caused by 'viability' issues and the way in which the local authority and the developer adapted their contractual arrangements to respond to these concerns. Unlike the completed developments that I considered, the Farnham Development was ongoing so provided an opportunity to monitor property-led development in progress. The Winchester Development was a similar process in progress, with press reports of vocal

⁴⁴ Latour, *Reassembling the social: an introduction to actor-network-theory*, 149-50. Emphasis in original.

⁴⁵ *ibid*, 16.

⁴⁶ Schwandt and Gates, 'Case Study Methodology', 342.

opposition to the development proposals, progress towards the construction of the development that had been postponed on a number of occasions and a DA that the local authority had rewritten to recalibrate its sense of an appropriate development trajectory. In addition, however, extra features to the Winchester Development made it stand out as a case with the potential for rich description and analysis. In particular, the CPO process had been particularly controversial in Winchester, and the local authority and objectors to the making of the order had provided extensive evidence to the public inquiry, all of which was available online. Moreover, the Council's original development partner had been placed into administration by the bank that provided much of the developer's funding, meaning that a new organisation had taken on the developer's responsibilities in the DA. Finally, the Winchester Development process was also the focus of judicial review proceedings into a decision that the Council made in 2014 to vary its DA.⁴⁷

From this array of initial findings, I had to select one or more 'cases' to study. I felt that studying property-led development processes in progress was a worthwhile approach so I initially intended to examine both the Farnham and Winchester Developments because I assumed that some form of comparative analysis would produce richer findings. I did not decide to work primarily on Winchester as a case study until I had carried out some further investigations into both developments, at which point I realised that a single case study would produce highly complex and original findings. Schwandt and Gates suggest that one principle for choosing whether to carry out a single case study or to add additional cases is that 'the researcher continues to add instances until she or he stops learning something new about the phenomenon.'⁴⁸ Each of the elements of the Winchester Development that I discussed in the previous paragraph offered an opportunity to learn something new and fed into my decision to make that development the focus of my thesis. I was confident, given the complexity of the Winchester Development, that studying it would enable me to contribute to existing research into property development practices.

Case Study

I provided a brief chronological summary of the Winchester Development in chapter one. In chapters four to six, I examine the contract formation process followed in Winchester and explain that the approach that WCC's officers and Thornfield's directors adopted is not unusual. I will also demonstrate that the Winchester DA contained concepts that are typical of

⁴⁷ *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), [2015] ACD 74. Similar judicial review proceedings, discussed in *R (Wylde) v Waverley Borough Council* (n16), also took place in relation to the Farnham Development. By that time, however, I had begun writing up my thesis, although I do make some observations regarding that development in chapter 10.

⁴⁸ Schwandt and Gates, 'Case Study Methodology', 347.

this form of property-led development. In particular, I analyse the conditions in the DA and the use of temporal concepts such as Long Stop Dates and an Unconditional Date. I also scrutinise variations to the DA that were similar in content and purpose to those enacted in developments like the Farnham Development. These factors meant that the Winchester Development offered what Bryman calls an ‘exemplifying’ case that would afford me the opportunity to describe and analyse the land assembly processes and contractual arrangements typically deployed in this type of setting.⁴⁹

Alongside the aspects of the Winchester DA that I mentioned in the previous paragraph, I also discuss the ‘required elements’ that Thornfield and WCC included in the agreement. This set of specifications was unique to the Winchester Development but activated aspects of procurement law that apply to all property-led development projects involving contractual arrangements between local authorities and private sector developers. Throughout this thesis, I discuss the circumstances that provoked WCC to authorise the rewriting of the pre-agreed required elements and the procurement law implications of doing so. This necessitates some discussion of the current tendency in property development practice for developers to construct or contribute to the construction of affordable housing but then to seek to avoid fulfilling that commitment.

The Winchester Development is, therefore, a case that illustrates common property-led development processes. But there are also elements of the Winchester Development that are more unusual that I seek to describe and analyse. In addition to the particular circumstances that led to the rewriting of the required elements in the DA, the development process became complicated when Thornfield’s bank placed Thornfield Properties into administration in 2010. This eventuality demonstrates one of the difficulties with Latour’s instruction that social scientists should ‘follow the actors.’ In the circumstances of the Winchester Development, Thornfield’s bank was clearly a significant actor but the need to produce timely doctoral outputs meant that it was impossible for me to investigate the relationship between Thornfield and its bank in any great detail. Instead, I seek to describe how the development process continued despite the insolvency of Thornfield’s parent company. In December 2010, Henderson UK Property Fund acquired Thornfield, changed the name of Thornfield to Silverhill Winchester No1 Limited and replaced Thornfield Properties as guarantor of the former’s obligations in the DA.⁵⁰ Analysing the manner in which WCC and

⁴⁹ Bryman, *Social research methods*, 62.

⁵⁰ For the sake of brevity, I refer to the developer after Thornfield Properties plc’s administration as ‘Henderson.’ Henderson UK Property Fund is a property investment vehicle owned by the multi-national property development and investment company, Henderson Global Investors. I provide more details on

Henderson used the existing DA as the basis for the making of a CPO in 2011 and for progression along the Thornfield-led development trajectory provides helpful insights into the role and effect of the contractual arrangements deployed in Winchester.

The judicial review into the Council's decision to agree to further variations of the DA⁵¹ and the 'Independent Review'⁵² the Council commissioned following the High Court's decision in *Gottlieb* both provided further unusual access to the development process and revealed otherwise hidden aspects of the operation of this type of contractual arrangement. In particular, the Independent Review illuminated aspects of the Council's preparation for the judicial review and the legal advice that it received on the operation of the DA. These are the type of discussions that usually remain confined to the 'backrooms'⁵³ but that unexpectedly came into view here. These aspects of the development process mean that the Winchester Development acts as a 'revelatory' case⁵⁴ in that I probe aspects of property-led development that are typically not available for analysis.

The Winchester Development was, therefore, a 'multi-headed beast'⁵⁵ that could be studied to gain an understanding of what a local authority and a developer do when they enter into contractual arrangements with a view to property-led development and what they do after they have entered into those arrangements. In writing up my findings, I wanted to produce an account of the negotiations and other actions that took place in Winchester before WCC and Thornfield Properties entered into their contractual arrangements, as well as the 'time-in-between' the date that they signed their contractual arrangements and the judicial review proceedings that quashed the Council's decision to approve variations to the DA. I wanted to understand what went into the DA, as well as examining the circumstances that led to the judicial review proceedings and the termination of the DA.

These points justify my description of my research as a case study and my choice of the Winchester Development as the subject of my analysis. A case study approach is not, however, a method in itself. Webley describes a case study approach as an 'umbrella strategy'⁵⁶ and Bryman points out that:

A case study entails the detailed exposition of a specific case, which could be a community, organization, or person. But, once a case has been selected, a research method or research methods are needed to collect data. Simply selecting

the ownership of Henderson in chapter six. Where it is necessary to distinguish between the Henderson entity acting as developer and the Henderson entity acting as guarantor, I make the distinction clear.

⁵¹ *R (Gottlieb) v Winchester City Council* (n47).

⁵² Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*.

⁵³ Valverde, *Everyday law on the street: city governance in an age of diversity*, 14.

⁵⁴ Bryman, *Social research methods*, 63.

⁵⁵ Law, *After method: mess in social science research*, 4.

⁵⁶ Webley, 'Qualitative Approaches to Empirical Legal Research', 939.

an organization and deciding to study it intensively are not going to provide data. Do you observe? Do you conduct interviews? Do you examine documents? Do you administer questionnaires?⁵⁷

To carry out my case study, I conducted further archival research into the Winchester Development. I also investigated 'live'⁵⁸ Council documents produced in conjunction with the development as WCC and its development partners continued with land assembly and preparations for the planned commencement of construction.

Document analysis

A starting point for my document analysis was the DA between WCC, Thornfield and Thornfield Properties. Alongside the copy of the DA submitted as evidence, the CPO Documents provided an important source of information about the Winchester Development and revealed some of the things that WCC, Henderson and their consultants deemed to be important about the DA. For example, WCC produced a 'statement of case' and a 'statement of reasons' that it presented to the CPO inquiry justifying the making of the CPO. The Council also submitted proofs of evidence from one of its senior officers, one of Henderson's directors and five consultants from the array of experts who Henderson had instructed.⁵⁹ In studying these documents, I particularly looked for passages that addressed the formation and use of the contractual arrangements as a tool of land assembly and started drawing out the themes that I discussed in chapters one and two.

Appendix B to this thesis is a list of the primary source documents produced during the Winchester Development that I use in this thesis. This list includes the CPO Documents I referred to in the previous paragraph. When I began my research, these CPO Documents were freely available on WCC's website. During the course of my research, however, WCC constructed a new website. In doing so, the Council moved some of its documents from its previous website to the new one although it does not appear to have transferred the CPO Documents to which I refer. Fortunately, I had downloaded copies of these documents and have retained electronic and paper copies on file.

The CPO Documents submitted on behalf of WCC to the CPO inquiry were produced for the express purpose of securing confirmation of the CPO. Taking into account the purposes

⁵⁷ Bryman, *Social research methods*, 40.

⁵⁸ Kevin Walby and Mike Larsen, 'Getting at the Live Archive: On Access to Information Research in Canada' (2011) 26 *Canadian Journal of Law and Society* 623, 625.

⁵⁹ Christine Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, Annex A contains a list of these consultants. They included an architect, a retail letting specialist, a planning consultant, a civil and structural engineer and a chartered surveyor.

for which documents are produced, Finnegan suggests, is an important part of document analysis⁶⁰ and Bryman advises that researchers should exercise 'caution' before treating 'official' documents 'as depictions of reality.'⁶¹ Taking my lead from Atkinson and Coffey, I felt that these documents nonetheless represented an untapped 'goldmine' of rich data demonstrating what WCC and Henderson thought was important about the DA and the development process.⁶² For example, Matthew Bodley, the chartered surveyor Henderson instructed to provide evidence in support of the Council at the CPO inquiry, enclosed with his evidence correspondence between Thornfield's directors and John De Stefano,⁶³ between Thornfield's directors and WCC's solicitors and between Henderson's directors and De Stefano, as well as file notes connected to that correspondence, all of which provided an insight into the formation of the DA.⁶⁴ Similarly, the evidence that Martin Perry, Henderson's director of retail development, submitted to the inquiry proved helpful by providing his perspective on the actions that Henderson had taken to discharge conditions in the DA.⁶⁵ Moreover, the nature of a contentious CPO process meant that objectors also produced evidence that I could analyse for contrasting views of the development process. For example, John De Stefano objected to the making of the CPO and instructed Bruce Hartley-Raven, a planning consultant, to provide evidence on his behalf at the inquiry.⁶⁶ This consultant submitted supporting documents that included correspondence between WCC's officers and De Stefano that Bodley, Henderson's chartered surveyor, had not disclosed. While combining these sources does not produce a complete picture, it does provide an opportunity to understand the data better.

Alongside this analysis of documents deployed as part of the CPO process, I also gathered and reviewed documents produced for the purposes of WCC's committee proceedings. I focused on three sets of internal WCC proceedings. First, I considered the

⁶⁰ Ruth Finnegan, 'Using Documents' in Roger Sapsford and Victor Jupp (eds), *Data collection and analysis* (2nd edn, SAGE 2006).

⁶¹ Bryman, *Social research methods*, 553. Atkinson and Coffey, 'Analysing documentary realities', 58, similarly warn that official documents rarely offer 'transparent representations of organizational routines, decision-making processes, or professional diagnoses'.

⁶² Atkinson and Coffey, 'Analysing documentary realities', 63.

⁶³ John De Stefano owned a group of companies that held interests on the earmarked Winchester Development site. In chapters four and five, I discuss negotiations between Thornfield and De Stefano in which Thornfield sought to acquire De Stefano's land as a precursor to entering into a DA with WCC. In chapter seven, I explain that Henderson had carried these negotiations forward after it replaced Thornfield as developer, and that De Stefano's land formed a significant component of the land to be acquired through the exercise of WCC's CPO.

⁶⁴ Matthew Bodley, *Proof of Evidence of Matthew Bodley. On matters related to compulsory purchase. 25 May 2012 (Appendix B, Document 3.09)*.

⁶⁵ Martin Robert Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*.

⁶⁶ Bruce Hartley-Raven, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Bruce Hartley-Raven. 6 June 2012 (Appendix B, Document 3.11)*.

proceedings of WCC's Cabinet between May 2002 and May 2016.⁶⁷ In chapter one, I explained that the Cabinet is WCC's primary decision-making body and was responsible for authorising officers to make the CPO and enter into contractual arrangements for the purposes of the Winchester Development.⁶⁸ Specific officers were responsible for the formulation of a development strategy, made recommendations to councillors on key decisions about the development, and implemented the Cabinet's decisions. I consider a variety of officers' reports in this thesis, including reports from the Council's Chief Estates Officer, Director of Development Services and Corporate Director (Service Delivery). These reports often contained significant annexes or appendices, including correspondence between WCC's officers and directors working for both Thornfield and Henderson. While these officers produced these reports to justify particular recommendations, they provide another vital insight into the operation of the contractual arrangements and the considerations that these officers deemed to be important. In particular, they reveal the things that officers wrote and that councillors read about the contractual arrangements and the development process.

In addition to looking at these reports, I also considered the minutes of Cabinet meetings to identify issues related to the development that councillors discussed during those meetings, the questions that they asked of senior officers and the factors that they considered in reaching their decisions. I also reviewed proceedings of the Council's Overview and Scrutiny Committee, which was responsible for monitoring the Cabinet's decision-making,⁶⁹ meetings of the full Council⁷⁰ and discussions involving the Silver Hill Informal Policy Group, which was set up specifically to discuss the development process. These groups provided a counter-balance to Cabinet meeting reports, particularly when the Overview and Scrutiny Committee considered documents that were openly critical of the Cabinet's decisions and the officers' recommendations.⁷¹ Reviewing these documents afforded me an opportunity to explore other views about the contents, form and effect of the Winchester DA.

⁶⁷ The Council's online database provides results from May 2002 onwards. Henderson withdrew its decision to seek judicial review of WCC's termination of the DA in April 2016. For the purposes of this thesis, this represented a logical end point.

⁶⁸ For a discussion of the Cabinet's powers and duties, see Winchester City Council, *Constitution of the City Council - Part 3A - Responsibility for Functions (Appendix B, Document 2.11)*, 6-22.

⁶⁹ For a discussion of the Overview and Scrutiny Committee's powers and duties, see Winchester City Council, *Constitution of the City Council - Part 4 - Overview and Scrutiny Procedure Rules (Appendix B, Document 2.13)*.

⁷⁰ The body that consisted of all the councillors elected in Winchester, appointed the Cabinet, discussed Cabinet decisions and voted on any matters referred to it by the Cabinet (see Winchester City Council, *Constitution of the City Council - Part 2 - Articles of the Constitution (Appendix B, Document 2.10)*, Article 2).

⁷¹ See, for example, Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*. There are limitations to the extent to which the

I began my analysis of these 'official' documents by looking for references to the DA and the other contractual arrangements deployed in Winchester. While these documents provided innumerable insights into those things, they also provided contextual material that was helpful in explaining why those contractual arrangements contained certain terms, how WCC used the contractual arrangements and what the Council did when it wanted to deviate from the agreed terms. To provide some sense of order and to structure my analysis, I constructed a detailed and regularly updated timeline, with extensive references, noting what appeared to be the key events in the development process. Rather than collating this information electronically, I decided to set out these key events, with additional contextual commentary, on a series of A1 flipchart pages. This rolling timeline started with the first reference that I found to Stagecoach's intention to develop the bus station site and continued to Cabinet discussions in May 2016. I did not extend the timeline beyond that point because WCC had terminated the DA and I had already gathered a large amount of information on the Winchester Development. If I had chosen to continue my timeline, I would have included some of the 'mopping up' that one of my interviewees described as necessary when a local authority terminates a DA with a developer.

I traced the development through these official documents by utilising the search function embedded on WCC's website. This search function enables a member of the public with internet access to browse proceedings of the full Council, the Cabinet and the Overview and Scrutiny Committee by clicking on the date of a meeting. Clicking on the relevant date brings up a webpage summarising the business discussed at the meeting, with clickable links to the meeting minutes and reports. Each webpage also refers to any reports discussed in the meeting that officers deemed exempt from publication.⁷² In collecting my data, I clicked on the webpage for each meeting between May 2002 and May 2016, scanned the text for references to the Winchester Development and, in the event that there were references to the development, conducted a more careful reading of the minutes and any corresponding reports. I then added details to my rolling timeline, which I used to highlight emerging themes.

The WCC documents to which I refer in this thesis were, like the CPO Documents I mentioned earlier in this section, freely available on WCC's website when I started my research. Most of these documents have been transferred from the Council's previous website

Overview and Scrutiny Committee was able to challenge Cabinet decision-making, however, a point that Coulson considers in relation to local government more generally (see Andrew Coulson, 'Scrutiny in English Local Government and the Role of Councillors' (2011) 82 *Political Quarterly* 102 and Andrew Coulson and Philip Whiteman, 'Holding politicians to account? Overview and scrutiny in English local government' (2012) 32 *Public Money & Management* 185).

⁷² Where WCC's officers deemed items certain items to be 'exempt' from publication, I was not, therefore, able to access those documents.

to its current website. Some, however, appear to be inaccessible as of 16 February 2018. All of the documents to which I refer are listed in Appendix B. I have paper and electronic copies on file of all the WCC documents to which I refer.

There were, of course, some limitations to this approach. First of all, I referred in the preceding paragraph to reports that the Council deemed unsuitable for publication. This means that there are aspects of the development process that remain unseen, although I have already noted that this is an inevitable consequence of empirical research. Nonetheless, the published minutes and reports produced a rich source of data on the development in their own right. The second limitation to this approach is that I may have omitted interesting and important details from my timeline. However, my analysis of these documents involved a significant amount of looping as I revisited documents that I had read earlier in the process to clarify points that had since taken on a different meaning. This process also involved a significant amount of sideways reading, as I placed documents alongside each other so that I could cross-refer to issues discussed in a different time or at a different place. When I wrote up my findings, I treated my timeline as a resource that could be amended and the documents that I had reviewed as items that were available for further review. Reading and analysing these documents was, therefore, an ongoing activity. This meant that my timeline became a patchwork, with notes on additional sheets glued alongside existing text.

I made a significant set of additions to my rolling timeline following publication in January 2016 of the Independent Review into the events that led to the judicial review of the Cabinet's August 2014 decision to authorise variations to the DA. The solicitor appointed to carry out the Independent Review conducted 57 interviews with individuals involved in the Winchester Development and considered both publicly available and otherwise confidential documents.⁷³ Like the official documents that WCC's councillors and officers produced in conjunction with the development, the Independent Review was written with a specific purpose and was designed to enable the Council to address any procedural failings that led it to 'lose' the judicial review.⁷⁴ Although the information presented in the Independent Review must be read in the knowledge that it has been filtered and interpreted by the author, it provides another rich source of data and is one of the unusual features of the Winchester Development that made it suitable for a detailed case study. A similarly illuminating document was the law report set out in *R (Gottlieb) v Winchester City Council*.⁷⁵ This document, alongside other court proceedings that took place during the Winchester Development, provided a

⁷³ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 9-10.

⁷⁴ *ibid*, 3.

⁷⁵ As referred to at n47.

further perspective on the operation of the DA and the matters that WCC officers, councillors, representatives of the developers, and other interested parties deemed to be important about it.

Analysing these documents offered one of the only ways available to 'follow the actors' in this development process. An example helps to illustrate this point. I began my analysis of the Winchester Development with no intention to discuss the manner in which procurement law requirements act upon property-led development. I assumed these requirements were so mundane as to warrant no further examination. However, as my document analysis progressed, I realised that this was an inescapable aspect of property-led development that could not be side-lined in my account. As a result, much of my writing in this thesis discusses the effect of procurement law requirements on the Winchester Development and on property-led development more generally. In addition, and for the reasons that I discussed in chapter two, I treated the documents deployed in the Winchester Development as actors in their own right. I sought to analyse the development, therefore, to ascertain how these documents functioned in specific circumstances.⁷⁶ To do so, I looked for the roles that the DA, other contractual arrangements and Council documents performed in instilling a sense of an overarching development trajectory and keeping the development 'on track.'⁷⁷

Semi-structured interviews

While document analysis was my principal method of data collection in this research, I also carried out a series of 'semi-structured' interviews.⁷⁸ The advantage of adding interviews to my document analysis was that I could explore the 'everydayness'⁷⁹ of the contractual arrangements deployed to facilitate property-led development and tap into the experiences of individuals who had produced, used and found their actions directed by these documents.⁸⁰ To do so, I identified individuals who I thought would have stories to tell about their property development experiences, although I began the interview process aware that interviews do not necessarily provide 'good data'⁸¹ on an interviewee's experiences. In particular, I was aware that my interviewees would be recounting events that had happened in the past, with

⁷⁶ Lindsay Prior, 'Doing things with documents' in David Silverman (ed), *Qualitative research: theory, method and practice* (2nd edn, SAGE 2004), 91.

⁷⁷ *ibid*, 88.

⁷⁸ I explain what I understand by this term in this section.

⁷⁹ Sarah Blandy, 'Socio-legal Approaches to Property Law Research' in Susan Bright and Sarah Blandy (eds), *Researching property law* (Palgrave 2016), 31.

⁸⁰ Webley explains that '[i]nterviews are extremely effective at garnering data on individuals' perceptions or views and on the reasoning underlying the responses. They also provide an insight into individuals' experiences' (Webley, 'Qualitative Approaches to Empirical Legal Research', 937).

⁸¹ *ibid*, 937.

the possibility that those individuals would be selective in the material that they recounted or would simply have forgotten certain details.

Nonetheless, I set out to conduct at least 15 interviews with individuals I deemed to be 'property development professionals.' I chose this number for temporal and analytical reasons. Carrying out significantly more interviews might have led me to spend less time preparing for or analysing the interviews.⁸² On the other hand, I was concerned that carrying out fewer interviews might have generated data that was less rich and varied so I initially sought to interview seven or eight local authority officers and seven or eight developers. This changed, however, when I carried out the exploratory interview with D2 to which I referred earlier in this chapter.

In that interview, D2 recommended that I should also interview some property development consultants. He explained that a developer would usually engage consultants on a number of matters and, of these, D2 recommended that I should speak to as many chartered surveyors as I could because those individuals would often work for three or four different developers on the drafting and implementation of DAs. Prior to meeting D2, I had been advised that 'snowballing' is often an effective means to gain access to 'elite' groups,⁸³ so I asked him to recommend consultants who might be willing to talk to me. Based on his recommendations, I made contact with two property development consultants, one of whom agreed to be interviewed.

I took the same approach at the end of other interviews and asked each interviewee if he or she could suggest any colleagues, clients or business partners who might be willing to participate. Alternatively, if an interviewee explained that there were certain aspects of the discussion that fell outside of their expertise or experience, I asked if the interviewee was aware of a person who might be able to assist with that subject matter. In some circumstances, this produced helpful suggestions. For example, CON4 explained that a particular local authority officer had been proactive in establishing close links with a developer during a particular development process. I asked CON4 if he could introduce me to the individual. He did so, and the local authority officer agreed to participate in my research.

Of the 18 interviews that I conducted, however, only four were the product of snowballing techniques. The other 14 interviews took place with individuals who I selected by

⁸² A potential problem that Kvale and Brinkmann identify (see Steinar Kvale and Svend Brinkmann, *InterViews: learning the craft of qualitative research interviewing* (2nd edn, Sage Publications 2009), 113).

⁸³ Welch *et al* describe snowballing as a 'method of locating information-rich key informants by asking other interviewees' (Catherine Welch and others, 'Corporate elites as informants in qualitative international business research' (2002) 11 *International Business Review* 611).

reviewing magazines like *Estates Gazette* and *Property Week* and identifying property development companies, consultancies and local authorities then involved in property-led development projects as potential sources of participants. This meant that I did not attempt to select my interviewees entirely at random and I needed to be attentive to the potential for biases⁸⁴ in the way that I selected potential participants from those organisations.

This selection process was, in hindsight, somewhat time-consuming and might have been improved. Having identified development companies, consultancies and local authorities engaged in active projects, I accessed those organisations' websites, looking for details about individuals acting in those projects. I looked for online résumés that detailed experience in negotiating and implementing DAs or in conducting land assembly through the use of compulsory purchase powers. Trawling through these websites for information about potential participants, and attempting to track down contact details for these individuals had the advantage that I could write personalised letters or emails to those people. A disadvantage of my approach was that I identified more senior individuals in these organisations simply because those individuals were more likely to have personal profiles on their organisation's website. This was a consequence of my approach that I only realised after conducting the interviews, at which point it was too late to seek out opportunities to meet less senior developers, consultants or local authority officers. The benefit of discussing property-led development with less senior people might have been that those individuals could have spoken more clearly about the day-to-day challenges of contract formation, negotiation and implementation, as well as other everyday aspects of property-led development. On the other hand, those individuals might have been less well-equipped to comment upon strategic decision-making in larger organisations and the interplay of an array of contractual arrangements and other legal technologies.

In total, I wrote 49 letters or emails. As well as introducing myself and explaining why I was writing to the individual in question, I used this correspondence to summarise the purpose of my research. When I introduced myself, I mentioned that I was both a PhD student and a former solicitor on the basis that the latter of these labels might have demonstrated to professional persons that I was approaching the topic area with some prior knowledge. With

⁸⁴ McDowell, 'Elites in the City of London: some methodological considerations', 2137. One of the potential limitations to this study is that I primarily spoke to developers and property development consultants based in London, although their organisations were engaged in development projects throughout the UK. With only two exceptions, I contacted local authority officers and councillors working in towns and cities within three hours travel time from Sheffield. In addition, of the 49 letters or emails I sent to potential interviewees, 44 were sent to men. I have conducted no research into the gender of individuals employed as senior local authority officers, property developers or consultants. However, I was aware that most of the profiles that I encountered online referred to men, and the gender imbalance in the sample does not reflect a conscious attempt to target this group.

each letter or email, I enclosed or attached a Participant Information Sheet providing more detail on the purpose of the research, explaining that I would ask the individual to discuss their experiences of property-led development and the operation of contractual arrangements in those settings. In addition, I stated in my Participant Information Sheet that, if the individual agreed to participate, I would record and produce a transcript of our conversation that I would analyse and from which I would extract quotes. I also informed my potential participants that, if they agreed to be interviewed, I would endeavour to preserve their anonymity.

I received 14 positive responses to my initial invitations. For the remainder, I sent a follow-up letter or email three weeks after my first invitation. From those, I received four positive replies, which gave a sample of 18 interviewees, consisting of six local authority officers, three councillors, four developers and five consultants. I contacted individuals at organizations involved in each of the developments to which I have referred in this chapter but, given that I promised each of my interviewees anonymity, it is inappropriate to state whether or not any of the interviews I conducted were with individuals connected to those developments. To ensure that my research is as dependable and replicable as possible, however, I have included some limited biographical details of my interviewees, which are set out in Appendix D to this thesis.

I met with 15 of my interviewees in meeting rooms at their workplaces, two interviews took place by Skype⁸⁵ and the final interview took place by telephone.⁸⁶ 17 of my interviews took place between October 2014 and April 2015. The exception was an interview in October 2016, which I was able to arrange through a connection that I had made earlier in the research process. Each interview lasted between 60 and 80 minutes. Prior to meeting with these individuals, I had gathered as much information related to projects on which they were working as I could reasonably review. This meant that it took up to one day to prepare for each interview but this enabled me to ask questions of my interviewees that specifically related to the projects on which they had worked. 13 of my interviewees provided their consent to be

⁸⁵ Bryman notes that conducting interviews by Skype has advantages for both an interviewee and an interviewer in allowing flexibility in the timing of the interview and enabling costs savings. He also suggests that there is 'little evidence that the interviewer's capacity to establish rapport is significantly reduced in comparison with face-to-face interviews' (Bryman, *Social research methods*, 492). My experience of conducting interviews by Skype was that it was straightforward to establish rapport with these interviewees, although there are other circumstances that may have played into this. Both interviews took place while the interviewees were working from home. Establishing rapport may have been more challenging if the interviewees plugged in to Skype while sat in a meeting room at their workplace.

⁸⁶ I did not tape the telephone interview but conducted the interview using a telephone with a speakerphone. This enabled me to take extensive notes while the interview took place. My experience of conducting a telephone interview was less positive than my experiences of Skype interviews because the setting felt more impersonal.

recorded before I started recording but five did not.⁸⁷ Moreover, consent is, as Mason puts it, ongoing.⁸⁸ In two of my interviews, individuals made comments about a development process that they immediately caveated by stating that they did not want those comments to be quoted or noted down. As a result, I excised those passages from the transcripts that I produced.

I asked each of my interviewees to describe the contents of the DAs deployed in projects on which they had worked and to provide their analysis of the way those agreements either facilitated or hindered land assembly and progress along a pre-agreed development trajectory. Although I sought to ensure that my interviewees addressed these points, I did not conduct the interviews with a set of questions that I had prepared in advance. My interviews were, therefore, intentionally semi-structured⁸⁹ and I asked my interviewees to address themes that they felt were important in a conversational manner by encouraging them to recount their overall impressions of the development projects that they discussed.

A beneficial outcome of this flexibility was that my interviewees often introduced topics and issues that I had not previously considered.⁹⁰ For example, CON3 was a consultant whose firm had been engaged by a local authority to assist in the selection of a development partner for a particular project. The local authority had approached him with a proposal for a relatively small development but his firm surveyed the site, identified additional landholdings that they felt might be added to the land that the local authority had earmarked for development, and encouraged the local authority to engage in a project that was more significant both in terms of size and cost than the local authority had proposed. The local authority had, eventually, been convinced of the merits of CON3's proposal, although he explained that some senior officers and councillors had remained strongly opposed. This was an aspect of property-led development that I had not considered at all before I spoke to CON3 and was one of the revelations that meant I broadened my document gathering and analysis to

⁸⁷ Although these individuals did not consent to being recorded, they did allow me to take notes of our conversation. I proceeded with the interviews on that basis. To ensure that the interview was as conversational as possible, I tried to limit my note-taking so that I only recorded the details of the discussion that I deemed to be most relevant. Of the interviews that I did not record, one individual explained that he would probably be more open if I did not record the interview. The other four interviewees did not agree to be recorded so I have used only short quotes from those interviews and observations drawn from my notes to corroborate points that other interviewees made.

⁸⁸ Jennifer Mason, *Qualitative researching* (2nd edn, SAGE 2002), 82.

⁸⁹ See Webley, 'Qualitative Approaches to Empirical Legal Research', 937 and Bryman, *Social research methods*, 467.

⁹⁰ Mason points out that 'most qualitative interviews are designed to have a fluid and flexible structure, and to allow the researcher and interviewee(s) to develop unexpected themes' (Mason, *Qualitative researching*, 62).

incorporate documents produced by and for WCC prior to the date on which it selected Thornfield Properties as its development partner.

Immediately after my interviews had concluded, I made notes reflecting on my overall impressions. I then produced transcripts of the interviews that I recorded and spent a significant amount of time anonymising the data in the transcripts.⁹¹ It took me around a day to type each transcript but, as I was listening to the tapes, I added comments, questions and observations to the text in a series of footnotes. I tried also to reflect on my own role as interviewer in these situations. In particular, I was able to observe situations in which I may have missed a particular line of enquiry because I had been fixated on a different set of issues. Where possible, I tried to apply these lessons in future interviews.

When I approached my interviewees, I advised them that I would not keep tapes of the interviews because those tapes would not be edited to remove identifying details. Promising anonymity and confidentiality creates problems with the validity of research data and the replicability of the research methods given that subsequent researchers should have no idea as to the identity of the individuals with whom I met and cannot listen to the tapes that I produced.⁹² While these points go some way towards undermining the reliability of the interview data I generated, McDowell notes that many of her interviewees 'felt vulnerable' at presenting their views to a researcher recording their comments.⁹³ My experience of interviewing individuals from a 'relatively small and close-knit world'⁹⁴ was similar.

Nonetheless, having typed out the transcripts of these interviews, I read through them several times, looking for themes that had already emerged in my document analysis or threads that I had not yet followed. As my research progressed, I continually referred back to the transcripts and looked for data from these interviews that might help my analysis of the Winchester Development. This meant reading across from the interview data to explore themes that emerged in both settings. In doing so, I was aware of using material from the interview transcripts as a means to supplement my analysis of the Winchester Development but justify doing so on the basis that my interviews generated data that could not be obtained through archival research and document analysis alone. I do not suggest that the data was

⁹¹ Each interviewee used the names of places, organisations and people that, if quoted, would identify the developments we discussed and might reveal the interviewees' identities. When quoting comments that refer to specific developments I have, therefore, used a non-specific identifier, such as 'DevCo' for a development company or 'the council' where an interviewee referred to a particular local authority.

⁹² McDowell talks openly about the 'anxiety' that comes from promising interviewees anonymity combined with the awareness that efforts to protect the anonymity of an individual might be ineffective (McDowell, 'Elites in the City of London: some methodological considerations', 2144).

⁹³ *ibid*, 2144.

⁹⁴ *ibid*, 2144.

always directly comparable, and both methods of data collection produced different, situated accounts of property-led development.

My interview data was not just supplementary, however, and offers a rich dataset providing numerous insights into the decision-making processes that characterise property-led development. The combination of methods that I deploy in this research enabled me to draw out underlying themes more effectively and to explore the content, form and effect of the contractual arrangements deployed in property-led development in new ways. My interview data thus illuminates some of the contractual underpinnings for property-led development in a way that has not been done before.

Conclusion

This research utilised a mixture of qualitative research methods to generate knowledge about property-led development. By engaging with the DA and the other agreements that WCC and its developments partners deployed in Winchester, I was able to analyse the contractual underpinnings of that development. An ANT-inspired approach enabled me to mine my data for evidence of the complexity of property-led development. Detailed document analysis and extensive archival research was my principal method of data collection because this enabled a longitudinal examination of the operation of these contractual arrangements over the course of the development process. Semi-structured interviews with property development professionals and local authority officers and councillors complemented that data, and helped me to understand the contents of the agreements deployed in Winchester and provided a broader dataset than would have been obtained if I had limited my approach to a study of documents.

Nonetheless, I recognise that my account of the Winchester Development and the operation of the Winchester DA is not a complete account of that process. In this chapter, I have discussed gaps or limitations in the research design that were either a result of the choices I made or unavoidable products of carrying out research in this area. Nonetheless, my research does offer an exploratory reading of a subject area that has not been considered in great detail. In the remainder of this thesis, I present my findings.

BLANK PAGE

Chapter 4

Pitches, projects, processes and performances

Property-led development of the type that I am analysing is a process that often spans many years. Nonetheless, it is a relatively common undertaking and settled ideas direct the manner in which many local authorities and their private sector development partners carry out that process. But conceptualising property development as a process necessitates some consideration of the start of the process, the culmination of the process and the actions to be performed during the process. John Law has pointed out, however, that many analytical accounts of technoscientific development projects assume an underlying structure and he critiques the manner in which many researchers evaluating those projects search for an identifiable beginning and ending.¹ The search for a beginning and an ending is understandable, however, given that many of these projects take place on the basis of a pre-arranged programme for action involving the 'routinized deployment' of various resources² that plots a progression from a beginning, through a sequence of events, to a finite conclusion.³

A local authority and a private sector developer both start a property development process with a sense of a desirable ending, which I described in chapter one, involving a completed development, buildings occupied by retailers, rental proceeds or the proceeds of the sale of buildings filling the developer's coffers and the local authority basking in the prestige of a new development. Accompanying this focus on an ending is a desire to perform the process according to a 'script'⁴ that has worked in other places at other times. And this script envisages a 'set of processes in the making'⁵ performed on and as a series of stages, starting with attempts, led by a developer but supported by the local authority, to acquire ownership of land in the area earmarked for development.

This sense of processes to be followed assumes that a local authority and a developer will reach their desired end-point through their own highly skilled work at, first, arranging this

¹ John Law, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002).

² Emilie Cloatre, 'Fluid Legal Labels and the Circulation of Socio-technical Objects: the Multiple Lives of 'Fake' Medicines' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 97.

³ Madeleine Akrich, 'The De-Description of Technical Objects' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992); Bruno Latour, 'Where are the missing masses? The sociology of a few mundane artifacts' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society : studies in sociotechnical change* (MIT Press 1992).

⁴ Akrich, 'The De-Description of Technical Objects', 208.

⁵ David Cowan, 'Territory and Human Rights: Mandatory Possession Proceedings' in David Cowan and Daniel Windicott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 199.

series of actions into a meaningful and measurable sequence, and, second, following that sequence through to its conclusion. But the local authority and the developer deploy and assign roles to a range of allies deemed fundamental to transition through the stages. Asking how a local authority and a developer initiate a development process and how they enrol these allies forms the basis of this chapter. I scrutinise this because the initial stage of property-led development is the period during which a local authority and a developer begin to activate people, corporations, legal technologies,⁶ documents and ideas to establish the ties that initiate a sequence of actions pointed towards a Development Agreement,⁷ land assembly and, as a component of land assembly, land acquisitions.

But the 'enrolment'⁸ of third party allies is only one of the aspects of the early stages of property-led development that merits examination. The process of enrolment can also involve efforts on the part of a developer to convince a local authority of the merits of a particular type of development. For these reasons, I begin this chapter by analysing accounts that some of my interviewees⁹ gave of developers and consultants attempting to enrol local authority officers and councillors as participants and advocates for a particular vision of property-led development. In addition, I also consider an account that one of my interviewees¹⁰ gave of a senior local authority officer's attempt to enrol a reluctant councillor from the same local authority¹¹ as a supporter of a set of development proposals.

Having discussed these accounts, and to analyse the interactions between human actors in more detail, I then turn to focus specifically on a property-led development project that took place in Winchester between 1997 and 2016.¹² I scrutinise the early stages of that

⁶ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 45. See also Helen Carr, 'Legal Technology in an Age of Austerity: Documentation, "Functional" Incontinence and the Problem of Dignity' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016) and Emilie Cloatre and Nick Wright, 'A Socio-legal Analysis of an Actor-world: The Case of Carbon Trading and the Clean Development Mechanism' (2012) 39 *Journal of Law and Society* 76. These technologies include rights of landownership, existing and prospective contractual arrangements, orders for the compulsory purchase of third party land, planning permissions, EU procurement and state aid rules for public works contracts and public works concession contracts and agreements for lease with prospective tenants. The latter three of these technologies are at the margins of this chapter and will be considered in chapters five to 10.

⁷ Throughout this thesis I have been abbreviating the term development agreement to 'DA'. I continue to do so in this chapter.

⁸ Michel Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay' in John Law (ed), *Power, action, and belief: a new sociology of knowledge? Sociological Review Monograph* (Routledge & Kegan Paul 1986), 211.

⁹ I refer to interviews with COU1, COU2, CON3 and LA4. Appendix D contains some limited biographical details explaining who these interviewees are and when I met them.

¹⁰ I refer here to my interview with COU3.

¹¹ In chapter one, I explained the relationship between councillors and local authority officers.

¹² I call this development 'the Winchester Development' throughout this thesis. As I mentioned in chapter one, many of the Winchester City Council documents to which I refer in this thesis call the

development and consider negotiations between officers in Winchester City Council's¹³ Estates and Development Services teams,¹⁴ directors employed by Thornfield Properties plc¹⁵ and landowners with interests in the site that WCC and Thornfield earmarked as suitable for development. In investigating these negotiations, I also seek to address the observation that I made in chapter one that a local authority is a 'fragmented'¹⁶ body that cannot sensibly be described as a 'single, undifferentiated actor.'¹⁷ To that end, I discuss the ways in which officers acted on behalf of the Council in those negotiations and the role that councillors in WCC's Cabinet performed in affirming the actions that officers recommended following their negotiations with Thornfield's directors.

My focus in this chapter extends beyond interactions between human actors, however, so the presence and importance of third-party land will be analysed in detail, as will the question of what legal technologies 'do' at this stage of a property-led development process. In particular, I examine the interaction of humans and various documentary technologies and the staging¹⁸ of these interactions. I explore the initial phase in the Winchester Development by analysing it as a performance¹⁹ that unfolds in episodes²⁰ that legal technologies and 'nearly legal'²¹ technologies guide by embedding a standardising, underpinning logic and in which they participate by acting out various roles. I investigate how

Winchester Development, 'Silver Hill.' This is because one of the roads crossing the development site, marked on the plan in Appendix C, is called Silver Hill. For the sake of simplicity, I use the term 'the Winchester Development' to signify the location in which the development took place.

¹³ Throughout the remainder of this chapter, I refer to Winchester City Council as 'WCC'.

¹⁴ In chapter one, I explained the relationship between WCC's Cabinet members and local authority officers and the relationship between the Council's Cabinet, the Full Council and committees such as the Overview and Scrutiny Committee.

¹⁵ I introduced Thornfield Properties plc in chapter one. Thornfield Properties plc was Winchester City Council's chosen development partner. For the purposes of the Winchester Development, Thornfield Properties plc incorporated a special purpose company on 22 August 2000, called Thornfield Properties (Winchester) Limited, to carry out the Winchester Development. In this thesis, I shorten the name of Thornfield Properties plc, to 'Thornfield Properties.' Where I discuss 'the developer' for the purposes of analysing the Winchester Development, I am referring to Thornfield Properties (Winchester) Limited, which I also shorten to 'Thornfield'.

¹⁶ Ann Harding, 'The rise of urban-growth coalitions, UK- style' (1991) 9 *Environment and Planning C: Government and Policy* 295, 296.

¹⁷ David Adams, Robert Croudace and Steve Tiesdell, 'Exploring the 'Notional Property Developer' as a Policy Construct' (2012) 49 *Urban Studies* 2577, 2587.

¹⁸ Carol J. Greenhouse, *A moment's notice: time politics across cultures* (Cornell University Press 1996), 48; Davina Cooper, *Everyday Utopias: the conceptual life of promising spaces* (Duke University Press 2014), 200.

¹⁹ Judith Butler, *Gender trouble: feminism and the subversion of identity* (Routledge 1990).

²⁰ Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010), 141.

²¹ The term 'nearly legal' is one that I adopted after reading a blog post on a housing law website using that name (see <https://nearlylegal.co.uk/>). The blog post that I read was one of general interest and was not relevant to this research. I later realised that the term, nearly legal, was useful for conceptualising aspects of the network of contractual arrangements often deployed for property-led development.

these technologies set the stage for further negotiations, stabilised an emerging 'project world'²² and guaranteed forward momentum along a pre-defined development trajectory.

I draw the bulk of my findings related to the Winchester Development in this chapter from two sets of documents. Reports that WCC's officers produced for consideration by councillors at committee meetings provided revealing information on the negotiations that took place between officers and Thornfield's directors and the recommendations that officers made to Cabinet members regarding the Council's emerging relationship with Thornfield. In addition, documents submitted to the 2012 inquiry into WCC's making of a Compulsory Purchase Order²³ to complete the land assembly process gave me an insight into the attempts that Thornfield's directors made to acquire land interests on the earmarked development site. The CPO documents that I examine included letters between 1998 and 2002 between WCC's officers, Thornfield's managing director, two of Thornfield's development directors and a third-party landowner. These letters contained copies of draft land acquisition agreements that Thornfield's directors proposed to use to move the land assembly process forward and that I tie into my analysis. Taken together, these documents provide a valuable illustration of both the negotiations taking place at this stage of the land assembly process and the 'legally binding' and 'nearly legal' technologies underpinning those negotiations.²⁴

Alongside my analysis of these documents, I use the Independent Review that WCC commissioned in 2016 into its decision-making throughout the Winchester Development to clarify information available in the officers' reports and the CPO documents.²⁵ Similarly, the accounts of these processes that my interviewees²⁶ provided help me to explain aspects of the Winchester Development and to place my findings within the context of wider property-led development practice.

All the world's a stage

During my research, I asked my interviewees to explain the operation of the contractual arrangements that a local authority and a developer deploy to assemble a

²² John Law and Valerie Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity' (2000) 41 *Technology and Culture* 765.

²³ I have been abbreviating this term to 'CPO' and continue to do so in this chapter.

²⁴ Appendix B to this thesis is a list of the primary source documents produced during the Winchester Development that I use in this thesis.

²⁵ Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*. In chapter three, I explained the background to the Independent Review and the access that the author of the Independent Review received to otherwise confidential Council documents.

²⁶ In addition to the interviews with CON3, COU1, COU2 and COU3 that I mentioned in n9, I discuss material I gathered in interviews with D1, D2 and CON2. In chapter three, I explained that these interviews did not discuss the Winchester Development specifically but talked about property-led development more generally.

development site but I also examined the deliberations that preceded the formulation of these agreements. For example, LA4 told me that property-led development follows ‘a sort of standard template’ that assumes that a period of negotiation between a developer and a local authority will lead to the selection of that developer as the local authority’s preferred development partner. Following that period of negotiation, LA4 explained, the local authority and the developer will identify the land required for the development, test the feasibility of a range of different proposals for the planned development, and commence the land acquisition process. But before looking at land assembly and land acquisitions in detail, I want to address some of the ways in which developers and consultants working on behalf of developers enrol local authority officers and councillors in their vision of development.

My interviews with developers, consultants, local authority officers and councillors indicate that this action often takes place behind the scenes. COU2 described the first meeting that she had with the property development company chosen to carry out a large property-led development in her area. During that first meeting, she explained, she had the ‘feeling of [PAUSE] of sort of [PAUSE] maybe, the charm being put on’. She remembered ‘quite a big meeting’ with ‘about five or six of them, you know, who had [ADOPTS HUSHED TONE] come to say hello and what their plans were and what they hoped to do.’ Her description of this meeting indicated her perception that the representatives of the development company viewed it as an opportunity to emphasise their commitment to the project and their interest in the area.

This suggests a sense that this meeting was an important opportunity for a display of credentials, in which the developers were the performers and the councillors found themselves compelled to act as an attentive audience. A similar perspective appeared in my interview with COU3, who was an opposition councillor for a different local authority. She recalled briefings that she received that were related to a large property-led development proposal for her area and meetings with developers and senior local authority officers at which she received updates on the emerging development proposals. She described one of these briefings at which the council’s Chief Executive²⁷ had informed the councillors that he had an announcement for them:

[H]e sort of said, “I just want to tell you in advance, just to give you notice, before it’s announced [PAUSE FOR DRAMATIC EFFECT], the name [ANOTHER DRAMATIC PAUSE] of the development [FURTHER DRAMATIC PAUSE], it’s going to be called [FINAL DRAMATIC PAUSE], _____.” He was trying to make it exciting for us that we got to know the name 24 hours before it went to the press.

²⁷ COU3 was a councillor for a local authority whose most senior officer was referred to as the Chief Executive. By comparison, other interviewees discussed their experiences of working with local authorities whose most senior officers were referred to as the Chief Operating Officer.

It is noteworthy that the person performing here was a senior local authority officer seeking to impress the merits of a development on doubtful councillors. But in doing so, he was also attempting to enrol the councillors as an attentive audience. This meeting and the attempted theatricality of the advance announcement of the official name clearly failed to impress COU3, however, and COU2 similarly noted that the first meeting that she had with the developers hoping to carry out the development in her area had not left her particularly convinced that the development would proceed according to the proposed schedule.

But my interviews did reveal instances in which private meetings did enrol hesitant or sceptical local authority officers and councillors as enthralled and active participants in a development process. While COU2 and COU3 doubted the merits of the pitches they received, COU1, my other councillor interviewee, presented a different point of view and explained that he felt that his role required him to advocate the merits of development proposals advanced by his council's development partners. He explained that he would do so by reiterating his council's positive attitude towards private development.

By comparison, a more complex picture of the early stages of property-led development can be seen in a situation CON3 described, in which a local authority had engaged his firm, a large consultancy practice, to provide an analysis of property interests in a city's main retail area. He recalled that his firm had seized this as an opportunity to promote a single large-scale property-led development in the city centre even though the local authority's officers and councillors had initially favoured a series of smaller developments. CON3's firm had argued that the officers and councillors 'needed to be more proactive' and 'that what [the city centre] needed was a gargantuan amount of very boring, very conventional, multiple-oriented retail on a large site led by a large department store.'²⁸ He explained that 'we had the process of the council telling us that there wasn't a site and us insisting that, "Yes, there was a site."' The consequence, as he put it, was that 'we identified the site and led the development competition that ended up with the appointment of a developer.'

The local authority, in the example that CON3 gave, duly chose a developer based on the consultant's recommendation, following a selection process that the consultant had initiated. CON3 explained that his motivation was not his own 'munificence' but the pursuit of an opportunity to generate monetary returns for his firm:

²⁸ This model for property-led development is very similar to that described by, for example, Steven R. Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes' (2011) 42 *Geoforum* 592, 593 and Mike Biddulph, 'Urban design, regeneration and the entrepreneurial city' (2011) 76 *Progress in Planning* 63, 86.

We're a private company, with a commercial interest in earning money, and if I can persuade someone to do something that is considerably larger than they had in mind, I'll earn a lot more money.

The initial interactions between CON3 and the local authority's officers and councillors had thus amounted to a successful sales exercise for CON3's firm. This exercise involved a 'pitch' from CON3 to the local authority's officers and councillors and, after 'trials of strength'²⁹ between CON3 and the local authority's representatives, a further series of pitches from interested developers to the local authority. This account helpfully illuminates some of the sequenced actions that take place at the 'beginnings' of a property-led development project.

A 'binding' legal agreement

In the previous section of this chapter, I considered some of the ways that a developer might perform in front of a local authority, whereas this section considers some of the legal technologies that a developer might deploy to aid that performance. In particular, I investigate the way that a developer might present the beginnings of a property-led development project as a gathering together of potential energy that can be released to move a process forward. I am keen to explore the rules that govern those actions and investigate the blending of statutory obligations, the 'template' that emerges out of standard property-led development practice and the script written down and carried around in a network of contractual arrangements.

Among the observations I made in the previous section, I pointed out that property-led development often begins with a pitch from a developer to a local authority officer or councillor. I also mentioned that some local authority councillors perceive a need to project an entrepreneurial outlook towards property-led development opportunities proposed for their areas. This outlook is a recurring point of analysis in this thesis and can also be observed in the Winchester Development in the way that WCC's officers grasped a development opportunity that arose in relation to land in central Winchester on which the bus company, Stagecoach (South) Limited,³⁰ operated a bus station.³¹ Table 4.1 contains a timeline showing some of the key events in the beginnings of the Winchester Development.³²

²⁹ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay', 211.

³⁰ Throughout this thesis I will abbreviate Stagecoach (South) Limited to 'Stagecoach'.

³¹ Appendix C contains a plan illustrating the location of the Stagecoach bus station and various other land interests referred to in this chapter. Stagecoach's land is numbered SSL on that plan.

³² As I noted in the introduction to this chapter, there is no single starting point for a process of this type. Choosing to analyse the role of Stagecoach means privileging one set of interactions over other interactions. I hope, however, to address some of the other connections out of which the Winchester Development process took shape in the remainder of this chapter.

Table 4.1 Timeline showing the actions through which Winchester City Council and Thornfield Properties plc identified a development site and initiated the land assembly process	
Key dates	Actions related to the Winchester Development
November 1997	WCC's consultants publish an Urban Design Report considering property-led development proposals for the area around the Bus Station
c. February 1998	Thornfield Properties plc formed and enters into Thornfield Stagecoach Agreement with Stagecoach (South) Limited for redevelopment of Winchester Bus Station. Thornfield Properties' representatives approach WCC's officers with a pitch regarding development of the Bus Station
May 1998	Thornfield Properties' directors carry out negotiations with John De Stefano regarding acquisition of land interests adjacent to the Bus Station
15 September 1998	Further presentation from Thornfield Properties' representatives to WCC's officers regarding development of the Bus Station site
2 December 1998	Thornfield Properties' directors propose terms to purchase De Stefano's land
26 February 1999	Thornfield Properties' directors propose revised terms to De Stefano for an Option Agreement for the purchase of De Stefano's land
15 June 1999	Internal WCC discussion regarding Thornfield Properties' proposals
15 March 2000	Thornfield Properties' directors propose revised terms to De Stefano
21 March 2000	Internal WCC discussion regarding Thornfield Properties' proposals
22 August 2000	Thornfield Properties (Winchester) Limited incorporated to acquire land on the development site and carry out the Winchester Development
September 2000	WCC's officers commission legal advice on working with Thornfield without first carrying out a tender process to select a development partner
20 July 2001	Thornfield's directors propose revised terms to De Stefano
December 2001	WCC strategic review concludes that WCC can work with Thornfield without carrying out a tender process. WCC's Cabinet approves this course of action
2002	Thornfield enter into an Option Agreement for the purchase of Coitbury House, adjacent to the Bus Station
28 May 2002	Thornfield's directors propose revised terms to De Stefano and write to WCC's Director of Development Services encouraging him to recommend that WCC enters into an Exclusivity Agreement and a Development Agreement with Thornfield and makes a Compulsory Purchase Order
6 June 2002	De Stefano abandons negotiations with Thornfield, citing concerns about Thornfield's ability to pay the negotiated purchase price
24 July 2002	WCC 'agreement in principle to work with' Thornfield by making CPO

At some point before the publication of an Urban Design Report in November 1997, 'Stagecoach's property advisers' approached WCC's officers regarding the redevelopment of the bus station.³³ In response, WCC's officers indicated their preference for a more extensive redevelopment of a wider area including but not limited to the bus station site.³⁴ D2 was not involved in the Winchester Development but he explained that a company like Stagecoach, which does not specialise in property-led development, would engage expert developers to carry out redevelopment of an extensive landholding like the Winchester bus station. At the time that Stagecoach entered into discussions with WCC's officers regarding the redevelopment of the bus station, Tony Marcus had formed Thornfield Properties plc³⁵ and Stagecoach and Thornfield Properties entered into what I call the Thornfield Stagecoach Agreement.³⁶ I cannot confirm the date of the TSA but this was a common development model for these two companies in the late-1990s.³⁷ WCC's Corporate Director, one of the Council's most senior officers,³⁸ described the TSA in a report to a Cabinet meeting as a 'binding commercial agreement to achieve the redevelopment' of the bus station site,³⁹ presumably through which Stagecoach would provide its land and Thornfield Properties would develop the site, with both sharing in the monetary proceeds of development.⁴⁰ The timeline in table 4.1 includes an approximation of the date on which Stagecoach and Thornfield Properties signed the TSA, based on the date that Marcus incorporated Thornfield Properties plc.

Regardless of the date on which Thornfield Properties and Stagecoach signed the TSA, and regardless of the terms contained in it, it was a form of legal technology that performed

³³ Llewelyn-Davies, *Central Winchester Study. Final Report. November 1997 (Appendix B, Document 2.01)*, paragraph 2.9.1. The report does not state who Stagecoach's property advisers were. I assume that they were either individuals connected to Thornfield Properties or individuals working for a property development consultancy.

³⁴ *ibid*, paragraph 10.1.5.

³⁵ I discussed the formation of Thornfield Properties plc in chapter one.

³⁶ I will abbreviate this term to 'TSA' in this chapter. When Thornfield began negotiating a DA with WCC, Thornfield and Stagecoach entered in a subsequent agreement that set out the specifications for the construction of a new bus station on the development site. I explain aspects of this subsequent agreement in chapter eight. It seems likely that Thornfield Properties entered into the TSA soon after incorporation of the company in February 1998.

³⁷ They had entered into similar agreements in other places. See, for example, Exeter City Council, 'Executive Committee. 19 March 2002. Item 10. Economic Development Plan 2002/2003' <<http://committees.exeter.gov.uk/CeListDocuments.aspx?Committeed=112&MeetingId=391&DF=19%2f03%2f2002&Ver=2>> accessed 25 March 2017, paragraph 3.3.

³⁸ I referred to the management structure of WCC in chapter one.

³⁹ Steve Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.1.4.

⁴⁰ This thus sounds like a type of joint venture agreement. I explained the use of joint venture arrangements in this type of development in chapter one. For an insight into their proliferation, consider Antonia Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37 *Journal of Law and Society* 412, 425.

an important role in the unfolding Winchester Development. Butler has pointed out that 'signs and other discursive means'⁴¹ sustain many types of performance and the emphasis that WCC's Corporate Director put on the 'binding' nature of the TSA is an important performance of legality because this suggests that Council officers felt that the agreement made some form of development on Stagecoach's land inevitable. But the TSA also had a 'blurry legal definition.'⁴² It is not clear what WCC's Corporate Director meant when he described the TSA as 'binding' and nor is it clear what Thornfield Properties and Stagecoach were 'legally' obliged to do as a result of having entered into the agreement. It is important, though, that WCC's Corporate Director viewed it as 'binding' and presented it to the Council in this way because officers and councillors could then point to it as a source of authority demonstrating that some form of property development action would take place on Stagecoach's land.

The TSA also functioned as a source of legitimacy for Thornfield Properties when, on 15 September 1998, representatives working for the company pitched proposals to the Council's officers for redevelopment of the bus station site and the land surrounding it.⁴³ The legitimising function of the TSA flowed from the fact that Thornfield Properties did not, at this time, own any landholdings itself in Winchester.⁴⁴ In addition, the TSA enabled Stagecoach and Thornfield Properties to give a credible warning to the Council's officers that they would redevelop the bus station 'independently' of any development on neighbouring land if the Council did not support its proposals by agreeing to assist with the assembly of other land interests on the site.⁴⁵

But despite this warning, Thornfield Properties sought first to draw other organisations and land interests into the emerging development network. During its presentation to WCC in September 1998, Thornfield Properties' representatives 'expressed a desire to enter into a DA with the Council'⁴⁶ and the Council's officers confirmed that they were willing to work with

⁴¹ Butler, *Gender trouble: feminism and the subversion of identity*, 185.

⁴² Cloatre, 'Fluid Legal Labels and the Circulation of Socio-technical Objects: the Multiple Lives of 'Fake' Medicines', 98.

⁴³ As recorded in a letter from Karen Hawes, one of Thornfield's development directors, to John De Stefano, one of the landowners who held interests on the land adjacent to the bus station. See, Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to John De Stefano (26 August 1998) (Appendix B, Document 3.10.02)*. I refer to De Stefano's land interests throughout this chapter.

⁴⁴ Thornfield Properties is not listed as one of the landowners consulted during the preparation of an Urban Design Report that WCC commissioned to assess the Council's options for development around the Stagecoach bus station. See, for example, Llewelyn-Davies, *Central Winchester Study. Final Report. November 1997 (Appendix B, Document 2.01)*, paragraphs 2.2—2.8.

⁴⁵ *ibid*, paragraph 2.9.1.

⁴⁶ Winchester City Council, *CAB938. Broadway Friarsgate Development. Report of the Chief Estates Officer. 6 October 2004 (Appendix B, Document 1.08)*, paragraph 1.3.

Thornfield Properties if the company's directors first initiated negotiations with other landowners.⁴⁷ In doing so, the Council's officers were showing that they shared with Thornfield Properties' directors, even at this early stage and before their organisations had entered into any 'formal' legal agreements, a 'coordinated perspective'⁴⁸ on the merits of the potential development and the belief that 'clever management'⁴⁹ of land interests would enable the parties to achieve their common objective. These observations suggest that the parties conceived of a development project that needed to be carried out in many of the ways that Law has suggested are typical.⁵⁰

Similarly, in his work on the law-making practices of the Conseil d'Etat, Latour describes 'episodes' in which 'a whole series of tensions, vectors, currents, pressures is slightly rearranged'⁵¹ and the period between 1998 and 2002 consisted of concerted episodes of letter writing, meetings and negotiations, during which Thornfield's directors and WCC's officers sought to rearrange landownership rights in this area of Winchester and identify a mutually acceptable trajectory for development. But pauses in correspondence separated these episodes and it is important to note that these episodes did not perceptibly move the development process forward. Instead, they involved repeated jostling for position as the parties considered how they might 'slightly rearrange' the various interests. On that basis, and as CON2 explained to me when describing the typical movement from initial negotiations to formal agreements, these episodes combined fast-paced action and a great deal of work separated by periods of waiting.

In retrospect, WCC's Corporate Director suggested that it had been directors working for Thornfield Properties who had been active at this stage while the Council's initial involvement in the Winchester Development had been, as he put it, 'passive.'⁵² The rationale for this approach was, the Corporate Director explained, that the Council hoped that organisations with land interests in the area would agree to joint proposals for property-led development.⁵³ A chronology of events in the Independent Review into WCC's decision-making through the Winchester Development refers, however, to internal Council discussions in 1999

⁴⁷ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 43.

⁴⁸ Law and Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity', 768.

⁴⁹ Henriette Langstrup, 'Interpellating Patients as Users: Patient Associations and the Project-Ness of Stem Cell Research' (2011) 36 *Science Technology & Human Values* 573, 577.

⁵⁰ Law, *Aircraft stories: decentering the object in technoscience*.

⁵¹ Latour, *The making of law: an ethnography of the Conseil d'Etat*, 141.

⁵² Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.1.6.

⁵³ *ibid.*, paragraph 3.1.6.

and 2000 regarding Thornfield Properties' proposals.⁵⁴ These included a meeting to consider a report from WCC's legal advisors⁵⁵ that Council officers commissioned in September 2000, immediately after Thornfield Properties had incorporated Thornfield Properties (Winchester) Limited as a special purpose company established to carry out the Winchester Development.⁵⁶ The advisor's report noted that EU procurement law meant that WCC could work with Thornfield without first carrying out a formal tendering process inviting proposals from other potential developers.⁵⁷ This report formed the basis for a further 'strategic review' completed in December 2001 that 'concluded that the semi reactive position where the Council negotiated with a single developer was a legally acceptable route to follow.'⁵⁸

WCC's Cabinet approved this development trajectory at a further Cabinet meeting on 19 December 2001, after which the Council issued a press release stating that it had 'chosen' Thornfield as its preferred development partner,⁵⁹ although it made clear that it would wait for Thornfield to assemble a development site before committing more closely to Thornfield's programme for action.⁶⁰ CON2 explained that one of the reasons why a local authority might

⁵⁴ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 44.

⁵⁵ The Independent Review states that the Council's solicitors 'were appointed on the basis that their bills were paid by Thornfields [sic]' (ibid, 19), although the author of the Independent Review does not provide any supporting evidence for that statement or explain the terms of any arrangement between WCC, Thornfield and WCC's solicitors at this stage in the development process. Each of D2, D3 and D4 explained that a developer would very often agree to pay a local authority's legal and other professional fees but would do so on the understanding that these fees would be subtracted from any profit payable to the local authority from a completed development. It seems unlikely that Thornfield had agreed, however, to pay WCC's consultants fees at this stage of the development process. Indeed, it seems more likely that Thornfield only became obliged to pay WCC's costs in respect of external legal and professional advice after Thornfield and WCC entered into an Exclusivity Agreement in 2003 (see, for example, Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 11), which I discuss in detail in chapter five. The use of legal advice as a strategy of property-led development is an important theme of this thesis that I explore more fully in chapter 10.

⁵⁶ For the sake of brevity, I refer from here on to 'Thornfield' when discussing the actions of representatives working for both Thornfield Properties plc and Thornfield Properties (Winchester) Limited. To this point, I have differentiated between Thornfield Properties plc and Thornfield Properties (Winchester) Limited to demonstrate when the former created the latter as the vehicle that would lead the development process.

⁵⁷ Winchester City Council, *CAB938. Broadway Friarsgate Development. Report of the Chief Estates Officer. 6 October 2004 (Appendix B, Document 1.08)*, paragraph 1.4.

⁵⁸ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 9. I will explain the procurement law background to these deliberations briefly in chapter five when I discuss the DA that WCC and Thornfield entered into. I then conduct a much more detailed analysis of the legal advice that WCC received throughout the development process in chapter 10.

⁵⁹ Hampshire Chronicle, 'City picks Friarsgate developer (20 December 2001)'

<http://www.hampshirechronicle.co.uk/news/5612114.City_picks_Friarsgate_developer/> accessed 20 April 2017.

⁶⁰ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 9.

expect a developer to make independent progress on land acquisitions before entering into a DA is because a DA usually commits a local authority to make a CPO to complete the assembly of a development site. A developer and a local authority would always be aware, CON2 explained, of the need to acquire some of those land interests before the local authority made the CPO to 'reduce the risk' that the CPO would be overturned at a public inquiry. The key point here, however, is that WCC's officers wanted Thornfield's directors to make efforts to acquire some of those land interests before the officers recommended that the Council's Cabinet approved either a DA between the Council and Thornfield or the making of a CPO.

Legal and 'nearly legal' agreements

The issue of landownership was a significant obstacle for Thornfield that its directors attempted to avoid through a complex network of 'legally binding' and 'nearly legal' agreements. I have already suggested that the TSA, which afforded Thornfield's directors an opportunity to pitch a development proposal to WCC, had an indistinct legal meaning despite WCC's officers presenting it as a 'binding commercial agreement.' This agreement nonetheless provided some justification for WCC's decision to work with Thornfield,⁶¹ although the Council's officers viewed this as an insufficient basis on which to formalise the closeness of its ties to Thornfield. This was because those officers wanted Thornfield's directors first to make further efforts to consolidate land interests on the site. With that in mind, I now want to consider the ways in which Thornfield's directors mobilised agreements that they presented as 'nearly legal' in order to generate actions from WCC and other organisations connected to the Winchester Development.

Another way of thinking about this way of using 'binding' and 'nearly legal' agreements is by understanding this use as 'vehicular.' Cowan and Wincott explain that a 'vehicular idea ... moves things on.'⁶² In a slightly different vein, Mol has suggested that 'distribution' is an ordering device that 'does not *expunge* messiness but shifts it. Pushes it along.'⁶³ Both concepts, though, aid an understanding of the way that reliance upon 'binding' and 'nearly legal' agreements means that their existence can move property-led development

⁶¹ Winchester City Council, CAB938. *Broadway Friarsgate Development. Report of the Chief Estates Officer. 6 October 2004 (Appendix B, Document 1.08)*, paragraph 1.3; Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 7.

⁶² David Cowan and Daniel Wincott, 'Exploring the 'Legal'' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 26. Cowan and Wincott explain that they draw their discussion of vehicular ideas from Gregor McLellan, 'Travelling with Vehicular Ideas: The Case of the Third Way' (2004) 33 *Economy and Society* 484 and Thomas Osborne, 'On Mediators: Ideas and the Ideas Trade in the Knowledge Society' (2004) 33 *Economy and Society* 430.

⁶³ Annemarie Mol, *The body multiple: ontology in medical practice* (Duke University Press 2002), 165.

forward. On that basis, it is important to ask what developers do to ensure that these documents circulate in ways that direct the processes running through a property-led development scheme.

While WCC's officers had been carrying out internal discussions and considering external advice regarding the merits of working with Thornfield, Thornfield's directors had negotiated the terms for the purchase of a property on the development site called Coitbury House, referred to in the plan set out in Appendix C as plot 6.⁶⁴ The terms for that proposed acquisition envisaged that Thornfield would initially acquire the freehold title before transferring the title to the Council 'at cost'⁶⁵ on the assumption that the Council would incorporate this title into the freehold title it would hold to the entire development site and out of which it would grant Thornfield a long leasehold interest.⁶⁶ The report of Tony Langridge, WCC's Chief Estates Officer, which relayed the details of this proposed acquisition to the Council's Cabinet, implies that Thornfield did not complete the acquisition of Coitbury House immediately after it 'concluded terms,' however, although this is not surprising.⁶⁷ Rather, as CON2 explained, this type of acquisition, made in advance of a DA, is usually conditional on the developer and the local authority entering into that DA or on a successful defence of the making of a CPO at a public inquiry. This form of land acquisition agreement is thus a type of option agreement⁶⁸ and the deployment of an OA for the purchase of Coitbury House is an example of a 'routinized reliance'⁶⁹ on this type of agreement. An OA is a helpful tool for a developer like Thornfield engaged in the process of assembling a development site because it affords the developer the flexibility to choose whether or not to exercise the option. A contrast can be drawn, therefore, between the sense of movement and transition running through the property development process and the way that an OA stores up the potential for further change while maintaining the stability of existing landownership.

The information pertaining to the freehold title to Coitbury House available from the Land Registry⁷⁰ shows that the acquisition of the title eventually took place because WCC is the

⁶⁴ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 11. The plan in Appendix C indicates the location of Coitbury House in relation to the Winchester bus station.

⁶⁵ *ibid*, paragraph 11.

⁶⁶ *ibid*, paragraph 15. Layard explains that this model is typical for urban property development projects (see Antonia Layard, 'Shopping in the Public Realm: A Law of Place', 416).

⁶⁷ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 11.

⁶⁸ I will abbreviate this term to 'OA' throughout this thesis.

⁶⁹ Emilie Cloatre and Martyn Pickersgill, 'International law, public health, and the meanings of pharmaceuticalization' (2014) 33 *New Genetics and Society* 434, 440.

⁷⁰ Recorded at the Land Registry under title number HP654264, a copy of which I purchased and downloaded on 25 March 2017 at 11:18.59.

current registered proprietor. There is also an extant notice on the registered title in respect of an interest in favour of Thornfield. This interest refers to a right over the property granted in the DA that Thornfield and WCC eventually entered into. Although I cannot definitively establish the date that Thornfield exercised its option to purchase Coitbury House, I surmise that Thornfield ‘concluded terms’ for the acquisition of the title to Coitbury House around the same time that it was carrying out other negotiations with landowners with interests in the Winchester Development site. Thornfield then completed the purchase and transferred the title to WCC shortly before Thornfield and WCC entered into their DA. In the DA, WCC then agreed to include the land on which Coitbury House was situated in the long leasehold it would grant to Thornfield. This was, therefore, a way for Thornfield to ‘expunge the messiness’⁷¹ of the multitude of other ongoing interactions from this negotiation while enabling it to show its commitment to the overall project. Moreover, the OA enabled Thornfield’s directors to progress with other transactions with confidence that they had settled the terms for their company’s acquisition of Coitbury House while retaining the assurance that the company did not have to complete the acquisition if assembly of the remainder of the site proved problematic.

Correspondence between Thornfield’s directors and individuals with other landholdings adjacent to the bus station site suggests that Thornfield’s directors attempted to secure their position in the Winchester Development by linking a series of transactions in an ordered sequence of events.⁷² This publicly available correspondence illuminates some of these ‘backroom deals’⁷³ and shows Thornfield developing its position in letters⁷⁴ exchanged between Karen Hawes and Andrew Sanderson, who were two of Thornfield’s development directors, Michael Capocci, Thornfield’s managing director, an individual called John De Stefano and representatives acting on behalf of De Stefano. De Stefano owned a group of companies that held the freehold titles to various parcels of land adjacent to Stagecoach’s bus station.⁷⁵ De Stefano also owned a long leasehold title, which WCC had granted to one of his

⁷¹ Mol, *The body multiple: ontology in medical practice*, 165.

⁷² Matthew Bodley, a planning consultant providing evidence to the Winchester compulsory purchase order inquiry in 2012 submitted copies of this correspondence as evidence to demonstrate longstanding efforts that Thornfield and its successor, SHW1, made to acquire various land interests adjacent to the site of the Winchester Development (as discussed in Matthew Bodley, *Proof of Evidence of Matthew Bodley. On matters related to compulsory purchase. 25 May 2012 (Appendix B, Document 3.09)*). Some of this correspondence covers the period between 1998 and 2002 that I am discussing here.

⁷³ Mariana Valverde, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012), 12.

⁷⁴ Extracts of that correspondence are available in Bodley, *Proof of Evidence of Matthew Bodley. On matters related to compulsory purchase. 25 May 2012 (Appendix B, Document 3.09)*.

⁷⁵ These are marked on the plan reproduced in Appendix C as plots A, B and C.

companies, of a covered market called Kings Walk, which Thornfield and WCC hoped to incorporate into the development site.⁷⁶ Various retailers leased premises on the plots that De Stefano's companies owned and correspondence throughout this period between Thornfield's directors and De Stefano concerned interim lettings of those premises while Thornfield and De Stefano negotiated the sale of both the freeholds and the head leases.⁷⁷

Prior to the presentation that Thornfield's directors gave to WCC's officers in September 1998, Karen Hawes had met with De Stefano to discuss the purchase of De Stefano's land interests in Winchester.⁷⁸ In response, De Stefano had instructed Hawes as to the terms on which he would sell his land interests to Thornfield. Equipped with this information, Hawes then informed De Stefano that Thornfield would revisit the discussions after its representatives presented proposals for redevelopment of the bus station site and De Stefano's land to WCC.⁷⁹

In their negotiations with De Stefano, which took place in written correspondence and in various face-to-face meetings, Hawes and Thornfield's other directors came close on three occasions to finalising a conditional OA for the purchase of De Stefano's land. Hawes proposed terms on behalf of Thornfield in December 1998⁸⁰ before abandoning the conditional agreement and then revisiting negotiations on amended terms in February 1999.⁸¹ The proposed condition in the OA was, however, an extremely vaguely worded proviso to the

⁷⁶ Extracts of the correspondence that Matthew Bodley submitted to the compulsory purchase order inquiry set out details of ownership of these interests. See, for example, Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John De Stefano to Andrew Sanderson (15 December 2000) (Appendix B, Document 3.10.07)*. These plots are marked as plots A and B in the plan at Appendix C.

⁷⁷ See, for example, Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to John De Stefano (2 December 1998) (Appendix B, Document 3.10.03)*.

⁷⁸ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John De Stefano to Karen Hawes (22 May 1998) (Appendix B, Document 3.10.01)*.

⁷⁹ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to John De Stefano (26 August 1998) (Appendix B, Document 3.10.02)*.

⁸⁰ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to John De Stefano (2 December 1998) (Appendix B, Document 3.10.03)*.

⁸¹ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to John De Stefano (26 February 1999) (Appendix B, Document 3.10.04)*. The agreed terms required a payment of an initial option fee of £12,500 from Thornfield to De Stefano on exchange of contracts with further payments throughout the option period that would have amounted to a total option fee of £200,000, with the option terminable if it had not been exercised within four months of the 'Unconditional Date' of the DA that Thornfield hoped to enter into with WCC. The exchange of correspondence between Thornfield and De Stefano indicated that the agreed purchase price for the land would be between £7m and £8m.

effect that the option would only be exercisable in the event of 'Thornfield being committed to carry out a development on the Bus Station site.'⁸² Moreover, the period for which the option would subsist was time-limited, with an end-date of 31 December 2001. This meant that the agreement, had it been finalised, would have demarcated a phase in the development process during which neither Thornfield's directors nor De Stefano would have needed to take any further action in relation to this land, other than through Thornfield's intermittent payment of the option fee. This option fee was, therefore, a way for Thornfield to acquire an 'interval' or 'pause' in its pursuit of De Stefano's land during which its directors could pursue a DA with WCC. This is what Strathern has referred to as an important 'ordering function.'⁸³ Applying that idea in this context helps to illuminate the way in which Thornfield's directors formulated this phase in the land acquisition process to reproduce and sustain an overarching development trajectory. This performs a property development trajectory as a series of processes in the making⁸⁴ in which progress along the overall trajectory occurs as some processes change while others are suspended in a complex blending of flux and stasis. The concept of 'segments, intervals, and moments' that are 'produced' and that provide an exemplification of and sustenance of an overarching process is one to which I will return throughout this thesis.⁸⁵

Although De Stefano indicated that the terms proposed in February 1999 were terms to which he approved,⁸⁶ and solicitors acting on behalf of the two parties exchanged draft versions of the OA,⁸⁷ Thornfield's directors and De Stefano did not reach the point that they were ready to finalise the agreement. These negotiations were important for Thornfield's directors, however, because achieving an OA that both parties were ready to sign had the potential to draw WCC into a formal DA in which it confirmed its intention to support Thornfield's proposals. As these episodic negotiations unfolded, Thornfield's directors sought to move towards a position from which they could present this type of 'nearly legal' agreement to WCC's officers in order to satisfy the officers that Thornfield had made sufficient

⁸² It is not clear what this means, although it seems likely that the option would only have been exercisable if the DA had become unconditional. In chapter five I reflect on the legal basis for this type of agreement and speculate that this type of condition might be so vague as to render the agreement unenforceable.

⁸³ Marilyn Strathern, 'On Space and Depth' in John Law and Annemarie Mol (eds), *Complexities : social studies of knowledge practices* (Duke University Press 2002), 91.

⁸⁴ Cowan, 'Territory and Human Rights: Mandatory Possession Proceedings'.

⁸⁵ Strathern, 'On Space and Depth', 91.

⁸⁶ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John De Stefano to Karen Hawes (3 March 1999) (Appendix B, Document 3.10.05).*

⁸⁷ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Bond Pearce Solicitors (on behalf of Thornfield Properties plc) to John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) (31 March 1999) (Appendix B, Document 3.10.06).*

efforts to acquire some of the land interests in the site. As demonstrated, however, an OA would have tied Thornfield into nothing more than payment of an option fee and the purchase of the land at a pre-agreed price so an option on these terms was a low-risk bargaining device to draw WCC into closer ties. I have already alluded to the sense of a property-led development process that moves forward through incremental steps and the finality of landownership that only changes at landmark moments. It is important to note, however, that an OA functions as a means to demonstrate a developer's commitment to a vaguely defined general trajectory whereas a binding obligation either to purchase or fund the purchase of land would commit a developer to a much more tangible and specific commitment at a defined moment, carrying with it a more significant financial outlay. An OA is, therefore, a type of gesture pointing towards a willingness to engage in these future commitments without tying a developer into binding obligations until they are assured of further, council-supported, land acquisitions.

In the next episode...

The correspondence between Thornfield's directors and De Stefano shows that the negotiating process was episodic. Periods of concerted correspondence, meetings and negotiations gave way to pauses or intervals before the correspondence, meetings and negotiations reopened in another episode of concentrated interactions. But treating property-led development as episodic or staged creates the possibility for third-party interests to disrupt a neat linear trajectory. In particular, De Stefano was under no incentive to assist Thornfield's directors with their efforts to line up the various interests on the development site and, while these negotiations were taking place, WCC's officers were waiting.

De Stefano and Thornfield's directors abandoned their first negotiations and later correspondence indicates that De Stefano had significant doubts about Thornfield's ability to fund the purchase of his land.⁸⁸ At the same time, Thornfield's directors seem to have been unable to obtain assurance from the company's bank that the bank would approve Thornfield's purchase of the De Stefano land unless Thornfield obtained formal confirmation that WCC would support the land acquisition process by making a CPO.⁸⁹ As I have already

⁸⁸ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) to Peter Dempster, Dempster Binning LLP (on behalf of Thornfield Properties plc) (6 June 2002) (Appendix B, Document 3.10.11).*

⁸⁹ As recorded in a note recording a telephone call from Michael Capocci, Thornfield's managing director, to Felicity Devonshire, De Stefano's wife. Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Note to file by Mike Capocci (6 June 2002) (Appendix B, Document 3.10.13).*

mentioned, however, WCC's officers were reluctant to seek Cabinet approval for the making of a CPO until Thornfield had made progress on land acquisitions, demonstrating that, while Thornfield's directors attempted to craft a sense of irreversible progression along a neat development trajectory, there remained an ongoing circularity to these episodic negotiations.

Thornfield's directors and De Stefano discussed various mechanisms through which Thornfield could take control of the De Stefano land, including a joint venture arrangement between the companies⁹⁰ and a loan of £10m from Thornfield to De Stefano secured against the De Stefano land with an option to purchase at a price of £4.25m.⁹¹ After they abandoned those negotiations, they revived their discussion in May 2002 when the parties' solicitors discussed new terms for an option agreement based on the payment of an advanced sum of £10m and a subsequent sum of £13m or £14.25m, depending on the extent of the land to be purchased. This draft option thus proposed an upfront payment and a purchase price far higher than the terms that had been agreed in 1999 and envisaged that it would be WCC that would purchase the De Stefano land, using Thornfield's money, before transferring a long leasehold title to Thornfield later in the development process.⁹² In negotiating these terms, De Stefano imposed a deadline of 7 June 2002 for Thornfield to be in position to exchange contracts.⁹³

While these terms might have enabled Thornfield's directors to move the development process forward, the correspondence indicates that Thornfield's directors were simultaneously attempting to align the Council with this trajectory. In chapter one, I noted that a local authority is not a 'single, undifferentiated actor'⁹⁴ and can be more appropriately understood as an assemblage⁹⁵ of overlapping parts, each possessing various capacities. WCC's

⁹⁰ As recorded in a letter from De Stefano to Andrew Sanderson, a Thornfield development director. Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John De Stefano to Andrew Sanderson (15 December 2000) (Appendix B, Document 3.10.07).*

⁹¹ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Andrew Sanderson to John De Stefano (20 July 2001) (Appendix B, Document 3.10.08).*

⁹² Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Peter Dempster, Dempster Binning LLP (on behalf of Thornfield Properties plc) to John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) (28 May 2002) (Appendix B, Document 3.10.09).*

⁹³ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) to Peter Dempster, Dempster Binning LLP (on behalf of Thornfield Properties plc) (6 June 2002) (Appendix B, Document 3.10.11).*

⁹⁴ Adams, Croudace and Tiesdell, 'Exploring the 'Notional Property Developer' as a Policy Construct', 2587.

⁹⁵ The idea of an 'assemblage' is discussed at length in, for example, Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 204; Nicholas Blomley,

Director of Development Services, Steven Bee, and the Council's Chief Estates Officer, Tony Langridge, had, between 1998 and 2002, exercised their capacity to consider the proposals, on behalf of the Council, put forward by Thornfield.

It is notable that Thornfield's directors appear initially to have discussed their development proposals with Bee, who was the WCC officer responsible for WCC's planning, design and project management teams. After Thornfield's directors moved the Council closer to land acquisitions and the making of contractual arrangements designed to facilitate the exercise of the Council's compulsory purchase powers, however, it was Langridge, the officer responsible for 'maximising the return of the [Council's] estate and seeking out regeneration opportunities',⁹⁶ who appears to have become the lead officer. But neither of these officers could enter into 'binding' land acquisition agreements with Thornfield on behalf of the Council without Cabinet approval. Nor could these officers activate the Council's capacity to make a CPO without Cabinet approval. Thornfield's directors thus sought to use their negotiations with De Stefano to prompt those officers to seek Cabinet affirmation for a commitment to the use of compulsory purchase powers.

In July 2001, Thornfield and De Stefano had not been sufficiently close to agreement to enable Thornfield's directors to align WCC to their preferred development trajectory. In a letter dated 20 July 2001, sent while Thornfield's directors had been discussing an iteration of the option agreement with De Stefano, Andrew Sanderson, one of Thornfield's development directors, had encouraged De Stefano to send a letter to Thornfield by return confirming De Stefano's approval of the terms of the draft option. Sanderson explained that he would use that letter 'to put a bomb under the Local Authority to ensure they meet our timescale.'⁹⁷ No such letter from De Stefano had been forthcoming, however, and Sanderson had been consequently unable to convince WCC's officers to advise the Cabinet to deploy the Council's compulsory purchase powers to complete the land acquisition process.

Michael Capocci, Thornfield's managing director, was, by contrast, able to use the episode of negotiations and correspondence that occurred between May 2002 and July 2002 to produce a tentative alignment between Thornfield and the Council, side-line De Stefano and move the land acquisition process forward. In a letter dated 28 May 2002, when he was

'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133; Catriona Rooke, Emilie Cloatre and Robert Dingwall, 'The Regulation of Nicotine in the United Kingdom: How Nicotine Gum Came to Be a Medicine, but Not a Drug' (2012) 39 *Journal of Law and Society* 39, 43.

⁹⁶ Winchester City Council, *Constitution of the City Council - Part 7 - Management Structure (Appendix B, Document 2.14)*, 1.

⁹⁷ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Andrew Sanderson to John De Stefano (20 July 2001) (Appendix B, Document 3.10.08)*.

apparently hopeful of concluding the OA on the terms that I described above, Capocci wrote to Steven Bee, WCC's Director of Development Services, stating that:

My company are in the course of acquiring the De Stefano block which will put them in the position where having negotiated a development agreement with the Council, we could implement the scheme straight away.⁹⁸

In this letter, Capocci also informed Bee of the latest proposed terms for the purchase of De Stefano's land.⁹⁹ He also sent Bee drawings of the planned development, an appraisal demonstrating the 'viability' of Thornfield's proposals for the development site and a request to enter into an Exclusivity Agreement¹⁰⁰ 'with a view to entering into a development agreement.'¹⁰¹ The letter is a key document that demonstrates that the proposed acquisition represented, for Capocci, a position from which he felt able to request a DA that committed WCC to make a CPO.

D1 informed me that a developer will often, however, try to use some form of EA to set the stage for a nascent land acquisition process to become more carefully scripted in a DA. An EA would, D1 explained, benefit a developer by generating a series of actions from a Council, local landowners, potential tenants and potential funders. LA4 similarly told me that a DA would be the device that would enable the local authority and the developer to complete the land acquisition stage of development but that an EA would be an essential precursor to a DA. These comments suggest that an EA comes 'loaded with assumptions'¹⁰² so I now look into the ways that these pre-conceived ideas about the 'proper' way to transit from initial negotiations between a local authority and a developer materialised in Winchester.

The complex circular links between an undrafted EA, a similarly undrafted DA and various binding and nearly legal agreements emerge in the correspondence between

⁹⁸ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).*

⁹⁹ *ibid.*

¹⁰⁰ Throughout this thesis I will abbreviate the term exclusivity agreement to 'EA.' In the course of this chapter and in chapter five, I will explain the function of an EA in property-led development.

¹⁰¹ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).* At certain stages of the Winchester Development, WCC's officers also suggested that the Council might enter into a 'lock-out agreement' with Thornfield. This merely reflects a difference in labelling because the documents that referred to a lock-out agreement envisaged a similar type of agreement to that envisaged in documents discussing an EA. For that reason, I use the term exclusivity agreement throughout this chapter and the remainder of this thesis even though some of the Council's documents referred to a lock-out agreement.

¹⁰² Emilie Cloatre and Robert Dingwall, "'Embedded regulation": The migration of objects, scripts, and governance' (2013) 7 *Regulation & Governance* 365, 375; Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 22.

Thornfield's directors and WCC's officers. The TSA between Thornfield and Stagecoach¹⁰³ gave Thornfield an opportunity to acquire the site of the Winchester Bus Station while the 'concluded terms' for the purchase of Coitbury House¹⁰⁴ and the 'nearly legal' OA for the De Stefano land were conditional on a DA that did not exist but that would, Capocci suggested, follow automatically from an EA between Thornfield and WCC. WCC's officers may have wanted to achieve the 'comprehensive redevelopment'¹⁰⁵ of the Bus Station site and surrounding land but this would only be possible, Capocci was suggesting, if there was a DA in place and that DA had become unconditional. At the same time, however, Capocci emphasised his company's willingness to carry out some form of 'fallback scheme' if WCC did not agree to sign an EA.¹⁰⁶

The letter from Capocci to Bee on 28 May 2002 implied, therefore, that Thornfield had various programmes of action available to it. In order to direct WCC towards closer contractual ties, in the form of an EA, Capocci mobilised the 'nearly legal' status of Thornfield's OA with De Stefano and pointed out that the OA would '[r]ationalise the complex web of interests in the site, in particular the De Stefano "hostage creating" long leasehold interest.'¹⁰⁷ The emotive language in this statement is striking. Capocci pointed towards his company's ability to acquire De Stefano's land and thus eliminate an obstacle to the comprehensive development of the site. The quotation marks around the phrase, 'hostage creating,' in Capocci's letter gives the impression that he was quoting someone else, as if he was a messenger informing the Council that it was a hostage to De Stefano and that Thornfield was the solution.

In this letter, Capocci explained that 'I am now in solicitors [*sic*] hands with De Stefano in respect of the purchase of his interest' and reiterated this point when he stated that his company was 'in the course of acquiring' De Stefano's land.¹⁰⁸ This is an illustration of what I mean by an agreement that is being presented as 'nearly legal.' The letter implied that Thornfield would be ready to complete the transaction as soon as the solicitors had completed the legal 'technicalities'¹⁰⁹ necessary to convert a 'nearly legal' agreement to a 'legally binding' agreement. And the implication that this OA was 'nearly legal' legitimised the instruction

¹⁰³ Discussed above at n36.

¹⁰⁴ Discussed above at n64.

¹⁰⁵ Llewelyn-Davies, *Central Winchester Study. Final Report. November 1997 (Appendix B, Document 2.01)*, paragraph 10.1.8.

¹⁰⁶ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10)*.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ Annelise Riles, 'A new agenda for the cultural study of law: Taking on the technicalities' (2005) 53 *Buffalo Law Review* 973.

Capocci gave to Bee that the latter should use his position to commit the Council to sign an EA with a view to reaching a DA. The 'nearly legal' nature of the OA, coupled to the already 'binding' TSA and the 'concluded terms' for the purchase of Coitbury House bolstered Capocci's position by showcasing an apparently compelling programme for action that Thornfield would follow, if necessary, *without* WCC's support but that would be enhanced *with* WCC's support. The 'nearly legal' OA was, therefore, an important device in guiding the Council towards an EA and then a DA. This interplay reveals some of the looped negotiations that took place at this stage of the Winchester Development, as well as the roles that various legal and nearly legal agreements performed in those negotiations.

A tipping point

In the previous section of this chapter, I pointed out that John De Stefano had set a deadline of 7 June 2002 for Thornfield's directors to exchange contracts on the latest iteration of the proposed OA for the purchase of De Stefano's land. I also noted that Michael Capocci, Thornfield's managing director, had informed WCC's Director of Development Services, Steven Bee, that he was 'in the course of acquiring' De Stefano's land.¹¹⁰ However, De Stefano's imposition of a deadline for the exchange of contracts imported to the negotiations some of 'the qualities' of time, as Hull puts it,¹¹¹ in that the negotiations thus became temporally bounded and marked by the 'ticking of the clock.'¹¹²

One of the consequences of this was that Bee wrote to Capocci on 6 June 2002. In that letter, Bee stated his approval for Thornfield's development proposals but indicated that the price that Thornfield would pay in the 'nearly legal' OA was unnecessarily high. Moreover, Bee informed Capocci that he now accepted that Thornfield had made sufficient efforts to acquire the De Stefano land. He also told Capocci that, regardless of Thornfield's failure to actually acquire that land, he would recommend that the Council's Cabinet should authorise officers to enter into an EA, discuss a DA and, after signing the DA, make a CPO.¹¹³ In doing so, Bee categorised Thornfield's episodic negotiations with De Stefano as a type of 'passing phase'¹¹⁴ in

¹¹⁰ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).*

¹¹¹ Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012), 258.

¹¹² Law, *Aircraft stories: decentering the object in technoscience*, 197.

¹¹³ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12).*

¹¹⁴ Nick Lee and Steven D Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 263.

the progression of the development. Those negotiations had, notwithstanding the outcome, made possible movement to the next phase of the process and had enabled Thornfield's directors to enrol Bee as an ally who promised to recommend closer ties between WCC and Thornfield at a forthcoming meeting of the Council's Cabinet.¹¹⁵ At that meeting, which took place on 24 July 2002, the Cabinet approved 'an agreement in principle' between the Council and Thornfield that would form the basis for the parties to collaborate further on land assembly.¹¹⁶

Capocci had told Bee that he was 'in the course of acquiring' De Stefano's land¹¹⁷ but Bee's decision to seek approval for an 'agreement in principle' with Thornfield pulled Thornfield's directors off that course. In the previous paragraph, I suggested that Bee did this to ensure that Thornfield did not convert its apparently 'nearly legal' OA with De Stefano into a 'binding' OA. Doing so might, Bee indicated, have led Thornfield to acquire De Stefano's land at a price that Bee felt might have diverted money away from other development costs.¹¹⁸ But Bee does not appear to have been aware that the negotiations between Capocci and De Stefano had almost run their course anyway.

Bee had written to Capocci on 6 June 2002 informing him of his support for Thornfield's plans. But De Stefano's 7 June deadline for the exchange of contracts with Thornfield had prompted other actions on 6 June. During that day, Capocci telephoned De Stefano seeking extra time to secure approval from Thornfield's bank for the terms of the 'nearly legal' option.¹¹⁹ Capocci's note of that telephone call indicates that he spoke to Felicity Devonshire, De Stefano's wife, who discussed Capocci's request with De Stefano's solicitor. Devonshire then informed Capocci that they would not extend the deadline and intended to terminate the negotiations. A letter from De Stefano's solicitor, sent to Capocci the following

¹¹⁵ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12).*

¹¹⁶ I have been unable to locate the minutes of the meeting that took place on 24 July 2002, although the proceedings were discussed in a report that Bee presented, in his capacity as Director of Development Services, to the Cabinet on 15 January 2003 (see Winchester City Council, *WDLP15. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 15 January 2003 (Appendix B, Document 1.01)*, paragraph 1.3). I analyse this 'agreement in principle' in chapter five.

¹¹⁷ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).*

¹¹⁸ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12).*

¹¹⁹ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Note to file by Mike Capocci (6 June 2002) (Appendix B, Document 3.10.13).*

day, indicates that De Stefano was unwilling to extend his deadline for exchange of contracts because he had lost rental proceeds from properties left unlet while negotiations with Thornfield had been ongoing. In turning away from the negotiations with Thornfield, De Stefano's solicitor also pointed to his client's long-standing concerns about Thornfield's ability to fund the purchase if the option became exercisable, to which I referred earlier in this chapter.¹²⁰ On that basis, Thornfield had lost the opportunity to purchase De Stefano's land at almost precisely the same moment that Bee, the Council's Director of Development of Services, told Capocci that he would seek Cabinet approval for the proposed 'agreement in principle.'

There is nothing in Bee's letter to indicate that he had been aware, at the time he signed the letter, of the content of the telephone call between Capocci and Felicity Devonshire. Instead, Bee focused on the concerns that he held regarding the price that Thornfield's directors had negotiated for the purchase of the De Stefano land.¹²¹ Given that Capocci had indicated that Thornfield was about to conclude terms on that basis,¹²² Bee felt compelled to inform Capocci not to exchange contracts.¹²³ In effect, Thornfield's failure to acquire De Stefano's land at anything other than an above market price thus legitimised the Council's eventual decision to support Thornfield and to agree to assemble the land interests required for a comprehensive development, even though Thornfield was unable to pay the purchase price that had been negotiated.

Despite Capocci's failure to purchase the De Stefano land, he had been able to fall back on the closeness of his company's ties to Stagecoach, the other principal landowner on the site. This had given Thornfield's directors a basis from which they could encourage the Council's officers to exercise their compulsory purchase powers to assemble a development site. WCC's officers and Thornfield's directors had attempted to follow well-established rules for property-led development that assume landownership as a founding principle and

¹²⁰ As recorded in correspondence between solicitors acting on behalf of the respective parties. Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) to Peter Dempster, Dempster Binning LLP (5 July 2002) (Appendix B, Document 3.10.14).*

¹²¹ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12).*

¹²² As stated in Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).*

¹²³ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12).*

overriding objective.¹²⁴ Even after Thornfield's directors and De Stefano had discontinued negotiations regarding their OA, WCC's Director of Development Services met with De Stefano to encourage the latter to enter into some form of 'agreement' with Thornfield about his land interests,¹²⁵ although this attempt to draw De Stefano back into negotiations was unsuccessful.

It is possible that Thornfield's directors knew that De Stefano had over-valued his land and Capocci may have decided to present a 'nearly legal' OA carrying around an inflated price to demonstrate to Bee the lack of any realistic prospect of purchasing De Stefano's land at or close to market value without a CPO. But these points are speculative and I have no evidence to corroborate them. Nevertheless, it is clear that Thornfield's directors and WCC's officers agreed to explore a development trajectory on which they expected the future acquisition of De Stefano's land to occur, even if they had to take De Stefano's land from him.

Thornfield's directors and WCC's officers had followed a programme for action that resembled the practices some of my interviewees described. For example, D1, CON2 and CON3 each discussed the manner in which a developer makes preliminary efforts to consolidate land interests on a proposed development site before a local authority agrees to support further acquisitions by making a CPO. But successfully following a trajectory linking the stages of a property-led development process is not 'given in the order of things'¹²⁶ and any sense of a line linking these stages requires, as Greenhouse puts it, 'constant maintenance.'¹²⁷ Without WCC's willing use of its compulsory purchase powers, it would have been impossible for Thornfield to acquire all the land interests on the development site¹²⁸ and securing confirmation from WCC's Cabinet that the Council would exercise its powers in this way had the potential to initiate a form of collaboration that would become, as a result, more 'carefully scripted.'¹²⁹

Choosing to take De Stefano's land without his consent, however, locked-in stresses that reappeared as determined challenges to the making of a CPO and, more circuitously, to a

¹²⁴ As discussed in chapter one. See Patsy Healey, 'Urban Regeneration and the Development Industry' (1991) 25 *Regional Studies* 97; Alastair Adair, Jim Berry and Stanley McGreal, 'Financing property's contribution to regeneration' (2003) 40 *Urban Studies* 1065; Anna Minton, *Ground control: fear and happiness in the twenty-first-century city* (Penguin Books 2009); Layard, 'Shopping in the Public Realm: A Law of Place', 416; Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes'.

¹²⁵ Bruce Hartley-Raven, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Bruce Hartley-Raven. Appendix 2, letter from John De Stefano to Steven Bee (15 November 2002) (Appendix B, Document 3.11.01).*

¹²⁶ Law, *Aircraft stories: decentering the object in technoscience*, 187; See also John Law, 'After ANT: complexity, naming and topology' in John Law and John Hassard (eds), *Actor network theory and after* (Blackwell 1999).

¹²⁷ Greenhouse, *A moment's notice: time politics across cultures*, 211.

¹²⁸ I discussed the making and exercise of a CPO in far more detail in chapter one.

¹²⁹ Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 65.

concerted challenge to the Cabinet's decision to reaffirm a course of action that would enable officers to work with Thornfield's directors without carrying out a competitive tender open to other developers. These stresses came, eventually, to undermine the smooth progress of the Winchester Development and are issues that I will revisit in chapters five to 10.

Conclusion

In this chapter, I have considered the ways in which Thornfield's directors enrolled WCC's officers, the Council's Cabinet and parts of the Council assemblage as participants in the Winchester Development and how this led WCC's officers to recommend that the Council's Cabinet approved closer ties between the Council and Thornfield. The existence of a 'binding' joint venture agreement between Thornfield and Stagecoach demonstrated how a developer might use 'legally binding' and 'nearly legal' resources to present a programme of action with parts for local authority officers and councillors to play, parts for the developer to play and parts for the contractual arrangements to play. At this stage of the Winchester Development, WCC's officers seem to have hoped to be led through the development process by Thornfield's directors.

It is helpful here to reflect on this stage of the Winchester Development with reference to Cowan's idea of 'processes' and 'networks in the making.'¹³⁰ Thornfield's directors had been lining up various things before they approached the Council. They had identified the opportunity to acquire an interest in the development site and had ascertained the potential for development on neighbouring land, albeit that the land required belonged to other landowners. Before pursuing negotiations for the acquisition of the neighbouring land, Thornfield's directors sought and obtained confirmation that the Council would support its plans.

These descriptions of a developer's acquisition of a stake in the land on which development is planned suggests events might occur rapidly after the initial 'pitch' from a developer to a local authority. This might be one way of thinking about the way that a development process begins. But to return to Cowan's idea of processes in the making, I want to emphasise that there were various processes beginning together in the Winchester Development. Thornfield's negotiations regarding a joint venture partnership with Stagecoach informed and preceded negotiations regarding the Council's willingness to support a development proposition encompassing neighbouring land. These processes fed each other in a progressive loop sustained by the Council's confirmation that it was receptive to the developer's proposals.

¹³⁰ Cowan, 'Territory and Human Rights: Mandatory Possession Proceedings', 188.

This chapter has shown, therefore, why the acquisition of a land interest on a development site can be so significant for a developer seeking to enrol a local authority partner. The process of enrolment for the Winchester Development involved a multitude of negotiations and a slow gathering of potential energy that the developer's acquisition of a land interest on the development site unleashed. There is, however, no clearly identifiable beginning to the Winchester Development other than a series of negotiations and transactions involving local landowners, a property development company and the Council. This, nonetheless, is an example of a property-led development network in the making.

The findings I have set out in this chapter demonstrate that some local authority officers and private sector developers understand the early stages of property-led development as a movement from somewhat open-ended initial negotiations to negotiations 'with a view to entering into a development agreement.' I have shown how a developer can deploy a variety of resources to direct that movement, including EAs, joint venture agreements with landowners and optional land acquisition agreements designed to demonstrate their commitment to a particular development proposition. The Winchester Development involved a series of processes that fed each other in a progressive loop as Thornfield's directors moved backwards and forwards from negotiations with one landowner to negotiations with other landowners and to negotiations with WCC's officers. The 'nearly legal' agreements that Thornfield's directors produced to perpetuate this motion had the benefit, from the point-of-view of a developer, of demonstrating a commitment to the emerging development trajectory without tying the developer too closely to a particular development script.

Interpreting property-led development as a scripted process invites an analysis of the way that it is performed. I have evaluated some of these performances by considering, for example, the ways in which developers 'pitch' their credentials as a potential development partner by exhibiting various apparently 'binding' and 'nearly legal' agreements to local authorities. But I have also considered property-led development as a staged performance consisting of periods or steps connected in a sequence of linked movements. As I have indicated through my reference to Greenhouse's work on cultural understandings of time, this may be a product of Western notions of time, which reveal a prevailing tendency to arrange time into neat stages, with progress marked by steps in a process.¹³¹ Underlying this assumption is a belief that this attempt to arrange makes further ordering possible. In property-led development, the initial negotiations are presented as a step in the process pointed towards the assembly of land interests and the DA relied upon for the culmination of the development. In Winchester, WCC's officers and Thornfield's directors deployed an EA to

¹³¹ Bruno Latour, *We have never been modern* (Harvard University Press 1993), 68.

mark the time during which they would work together to take that step. This EA forms part of the subject matter to be discussed in chapter five, where I ask if using contractual arrangements to divide time into somewhat meaningful phases¹³² provides a different type of stage on and during which a developer and a local authority can negotiate with other landowners and with each other to define and redefine their development approach.

By analysing the Winchester Development, I have suggested that, if there is a line linking the initial negotiations between the Council's officers and Thornfield's directors, its EA and its DA, it is one that the developer plotted and the Council followed. I have shown that a sense of progression is made perceptible by the parties entering into agreement with each other, reaching agreement for the acquisition of land from others, establishing close ties with various allies and distancing potential opponents. Chapter five will consider how this process continues while a developer and a local authority negotiate a DA.

¹³² Elizabeth Grosz, *The nick of time: politics, evolution, and the untimely* (Duke University Press 2004), 232.

BLANK PAGE

Chapter 5

The journey from Exclusivity Agreement to Development Agreement

In this thesis, I am analysing property-led development as a performance of a series of actions mapped out in accordance with temporal coordinates and pre-conceived ideas about an ideal development trajectory. This chapter focuses on part of that development trajectory and examines the extent to which interviews I conducted with local authority officers, developers and consultants¹ reveal the means to achieve movement along that trajectory. Alongside this, my ongoing examination of a property-led development project planned for Winchester city centre² offers a case study of the actions that a local authority and a developer might take to progress from an initial developer pitch to land acquisitions, as well as their expectation of further progression onwards towards construction. I refer in this chapter to documents WCC's officers produced for consideration at Council committee meetings, the minutes of proceedings at those meetings, and documents submitted to the 2012 inquiry into WCC's making of a Compulsory Purchase Order³ for the purposes of the Winchester Development. In addition, I use the Independent Review that WCC commissioned in 2016 into its decision-making throughout the development process to fill in important gaps in the information available in Council documents.⁴

In chapter four, I discussed the gradual tightening of relations between Winchester City Council⁵ and Thornfield Properties (Winchester) Limited⁶ based on Thornfield's work to assemble land interests on the Winchester Development site and the eventual 'agreement in principle' with Thornfield that WCC's Cabinet⁷ approved as the basis from which officers would

¹ I discuss material I gathered in interviews with LA2, LA4, D1, D2, D4, CON2, CON3 and CON4. Appendix D contains some limited biographical details explaining who these interviewees are and when I met them.

² I have been calling that development 'the Winchester Development.'

³ I have been abbreviating this term to 'CPO' and continue to do so in this chapter.

⁴ I explained why the Independent Review is such a valuable resource in chapter three of this thesis. Each of the WCC documents I have referenced in this chapter contains a cross-reference to the numbered list of documents in Appendix B.

⁵ Throughout this thesis I will abbreviate Winchester City Council to 'WCC.'

⁶ As I explained in chapter four, Thornfield Properties (Winchester) Limited was a special purpose company that Thornfield Properties plc set up on 22 August 2000 for the purpose of carrying out the Winchester development. Where it is necessary to refer to Thornfield Properties plc, I use the full name of that company. Where I discuss 'the developer' for the purposes of analysing the Winchester development, I am referring to Thornfield Properties (Winchester) Limited, which I shorten to 'Thornfield.'

⁷ In chapter one, I explained the relationship between councillors and local authority officers and, in WCC, the relationship between the Council's Cabinet, the Full Council and committees such as the Overview and Scrutiny Committee.

assist Thornfield's directors with that part of the process.⁸ In this chapter, I expand on this analysis by showing how WCC's officers and Thornfield's directors continued their efforts to reorder landownership. I explain that their shared perception of the preferred path to be followed to achieve this reordering led WCC's officers and Thornfield's directors to move from initial negotiations to an Exclusivity Agreement.⁹ I analyse what an EA is and examine reasons why this type of agreement is routinely deployed in these circumstances, scrutinising the way it gathers together a series of previous actions and stimulates a wider sequence of subsequent actions.

This chapter starts with further exploration of the idea that I introduced in the previous chapter regarding the use of 'nearly legal' agreements as an instrument for 'lining up' those subsequent actions. I have already shown how developers and local authorities inculcate a sense of movement along a development trajectory by pointing to both 'legally binding' and 'nearly legal' agreements as markers of progress. To develop these insights further, I now explore how WCC's officers used a nearly legal version of the EA as a device to encourage councillors to approve a 'Planning Brief,' which became a component of WCC's development plan documents.¹⁰ The Planning Brief set out the Council's overall development objectives for the development site,¹¹ as well as some more detailed specifications related to the height and density of buildings,¹² phasing of the construction process¹³ and the use of particular building materials,¹⁴ among other things.¹⁵ I ask how that Planning Brief interacted with contractual

⁸ Winchester City Council, *WDLP15. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 15 January 2003 (Appendix B, Document 1.01)*, paragraph 1.3.

⁹ Throughout this thesis I have been abbreviating the term exclusivity agreement to 'EA.' I continue to do so in this chapter.

¹⁰ For a discussion of the content and purpose of development plan documents, see Victor Moore and Michael Purdue, *A practical approach to planning law* (12th edn, Oxford University Press 2012), chapter 4. WCC adopted the Planning Brief as part of its then extant local plan on 25 June 2003 (see Winchester City Council, *Adopted Broadway Friarsgate Planning Brief. Part 1. Development Objectives (Appendix B, Document 2.03)*).

¹¹ These objectives were broadly-defined and related to the Council's desire for a development that would 'reinforce, and be complementary to, the rest of the town centre' (see Winchester City Council, *Adopted Broadway Friarsgate Planning Brief. Part 1. Development Objectives (Appendix B, Document 2.03)*). In chapter two I referred to other academic work that has noted the use of this type of Planning Brief to construct a particular 'representation' of a place as ripe for development and to 'enrol' developers and other human actors in a property development project (see, for example, Malcolm Tait and Ole B. Jensen, 'Travelling Ideas, Power and Place: The Cases of Urban Villages and Business Improvement Districts' (2007) 12 *International Planning Studies* 107, 119).

¹² Winchester City Council, *Adopted Broadway Friarsgate Planning Brief. Part 3 - Design Framework (Appendix B, Document 2.06)*, paragraph 3.5.

¹³ *ibid*, paragraph 3.8.

¹⁴ *ibid*, paragraph 3.11.

¹⁵ This approach seems to have been common. For example, Erwin Heurkens, David Adams and Fred Hobma, 'Planners as market actors: the role of local planning authorities in the UK's urban regeneration practice' (2015) 86 *Town Planning Review* 625 provide a case study of a property-led development

arrangements deployed at this stage, and how WCC's officers and Thornfield's directors situated it within the overarching development trajectory.

Once I have considered both the 'nearly legal' EA as a type of triggering device and the interplay between the 'nearly legal' EA, the Planning Brief, and the 'legally binding' EA, I move on to discuss that binding EA as a starting point for negotiations around a 'Developer Brief' that WCC's officers commissioned from consultants. Those officers provided the Developer Brief to Thornfield on the basis that the Brief 'set out the terms on which [the Council] would be prepared to promote a scheme'¹⁶ and use Compulsory Purchase powers.'¹⁷ I show how this Developer Brief formed part of the overarching development trajectory by providing the outline for the 'Heads of Terms'¹⁸ that would then provide the basis for the Development Agreement¹⁹ that WCC's officers and Thornfield's directors both anticipated would follow the EA. I note that the Council's officers issued this Developer Brief only to Thornfield and chose neither to notify other developers of the existence of this Brief nor to publish the Brief more widely.²⁰

I discuss the negotiations that WCC's officers and Thornfield's directors carried out between publication of the Developer Brief and before they signed their DA. I show that the DA, in common with other DAs, was designed to provide the basis for the making of a CPO. I probe the extent to which an EA produces a form of temporally-bounded shelter for those negotiations to take place and examine the issues that a local authority and a developer debate between entering into an EA and a DA. Taking the terms of the Winchester EA as a basis for my analysis, I question whether pre-defined time limits in the EA, which purported to set a date by which the parties needed to have concluded the negotiations for their DA, created a fixed target or reflected a more general objective that could shift with the needs of WCC or the developer. In doing so, I also reveal how choices WCC's officers made in entering

project in Bristol in which Bristol City Council used a Planning Brief to communicate ten objectives for the development.

¹⁶ D1 used the term 'scheme' to refer to the plans that would form the basis for a built development. This seems to be the way WCC used the term here.

¹⁷ Steve Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.2.4.

¹⁸ PS1 explained that 'Heads of Terms' are 'four or five pages of plain English before you instruct a lawyer.' In essence, Heads of Terms are a way to set out the main points on which two parties have found common ground and that they intend to use to reach a more formal and 'binding' agreement (see, for example, PLC, 'Practice note - Transfer of shares, (Resource ID: 0-107-6683)' <www.practicallaw.com> accessed 20 July 2017).

¹⁹ Throughout this thesis I have been abbreviating the term development agreement to 'DA'. I continue to do so in this chapter.

²⁰ As discussed in Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 15.

into a DA with Thornfield locked-in stresses to the development process that exacerbated and added to those I identified in chapter four. Finally, I ask how a DA might function as a coordinating mechanism, a means of channelling actions towards more clearly defined goals, and an embarkation point for the next stage of the development process.

Planning, compulsory purchase powers and creating irreversible situations

As I mentioned in chapter four, Thornfield's directors had been engaged in a process of 'lining up' land acquisitions before they asked WCC's officers to enter into an EA.²¹ In my earlier discussion, I focussed on the interplay between Thornfield's 'binding' agreement with Stagecoach (South) Limited²² regarding Winchester bus station,²³ Thornfield's purportedly 'nearly legal' option agreements with local landowners,²⁴ and Thornfield's 'viability' appraisals assessing the profitability of its proposals for the Winchester development site.²⁵ When Michael Capocci, Thornfield's managing director, asked Steven Bee, WCC's Director of Development Services and one of the Council's most senior officers, to enter into an EA 'with a view to entering into a DA,'²⁶ he situated these agreements within a forward-facing development trajectory linking Thornfield's negotiations with local landowners to a DA and onwards to culmination of the land acquisition process. Underpinning this proposed contractual framework was, as Capocci put it to Bee, the presumption that these agreements would provide the basis for the making of a CPO that would 'assist' Thornfield's efforts at land

²¹ The first record of a request for a lock-out agreement or EA is in Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).*

²² Hereafter shortened to 'Stagecoach.'

²³ As discussed in Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.1.4.

²⁴ Before requesting an EA with WCC, Thornfield's directors had negotiated for the acquisition of land from two landowners with interests on the development site on the basis of option agreements conditional on Thornfield and WCC entering into a DA. While Thornfield finalised its option to acquire Coitbury House (as discussed in Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 11), it had been unable to finalise an option with John De Stefano for his landholdings (as discussed in Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) to Peter Dempster, Dempster Binning LLP (on behalf of Thornfield Properties plc) (6 June 2002) (Appendix B, Document 3.10.11)*. Both Coitbury House and John De Stefano's land are highlighted on the plan in Appendix C to this thesis.

²⁵ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).*

²⁶ *ibid.*

acquisition.²⁷ Making a CPO is, as I demonstrated in chapter one, a complex process and, in the event that officers sought the Cabinet's approval for the making of a CPO, those officers would have needed to address the requirements set out in Circular 06/2004.²⁸ This meant that WCC's officers would have needed to be able to demonstrate that the making of a CPO was a 'last resort' when efforts to acquire that land by negotiation had failed.²⁹ In addition, to secure confirmation of the making of the CPO, those officers would have needed to be able to show that there existed no 'planning impediments' to the development of the land³⁰ and that 'adequate funding would be available'³¹ to compensate the landowners to be dispossessed by the Council's exercise of its compulsory purchase powers.

The DA was the document designed to facilitate the making, confirmation and exercise of a CPO in Winchester. But the EA was the document that WCC's officers and Thornfield's directors hoped would help them sign a DA, so it was essential that the EA enabled them to address the points set out in Circular 06/2004. A legal network founded on future land acquisitions is inherently forward-looking and anticipates the moment of those land acquisitions but depends upon the making of a CPO. In the following sections of this chapter, I investigate the ways in which WCC's officers prepared for the making of a CPO by publishing a Planning Brief for public consultation and issuing a Developer Brief to Thornfield containing 'the terms' on which WCC would make a CPO. I explore the formulation of a planning framework first before then analysing the operation of the Developer Brief.

The formulation of a planning framework

Table 5.1 contains a timeline showing progress on the Winchester Development between July 2002 and December 2004.

²⁷ *ibid.* In chapter one, I explained the basis on which a local authority can 'make' and then 'exercise' a CPO and discussed the wider policy context for the use of compulsory purchase powers at the time that WCC and Thornfield were considering how to approach the Winchester Development.

²⁸ As I explain later in this chapter, WCC and Thornfield entered into a DA on 22 December 2004 so, to the extent that that DA would facilitate the making, confirmation and exercise of a CPO, Circular 06/2004 was the relevant guidance. In chapter one, I pointed out that the current government guidance on the making, confirmation and exercise of a CPO is Department for Communities and Local Government, *Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land by, or under threat of, compulsion* (2015).

²⁹ The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Crichel Down Rules* (2004), paragraph 24.

³⁰ *ibid.*, paragraphs 22-23.

³¹ *ibid.*, paragraph 21.

Table 5.1 Timeline showing key actions between WCC and Thornfield's 'agreement in principle' up to the date of their Development Agreement			
Key dates	Actions related to the Planning Brief	Actions related to the EA	Actions related to the Developer Brief
24 July 2002	WCC 'agreement in principle to work' with Thornfield		
15 January 2003	WCC officers present draft Planning Brief to Cabinet	WCC officers present 'nearly legal' EA to Cabinet	
Early March 2003	Draft Planning Brief published for public consultation	WCC enters into EA with Thornfield, creating six-month exclusivity period	
April 2003	Consultation on Planning Brief concludes and Planning Brief published		WCC issues Developer Brief to Thornfield, inviting response by 1 August 2003. No other developers receive the Developer Brief
25 June 2003	Planning Brief adopted as a background document to the Winchester Local Plan		
1 October 2003		WCC and Thornfield agree to extend EA to 29 February 2004	WCC Cabinet meets to consider Thornfield response to Developer Brief, rejects proposals but invites revisions
11 February 2004			WCC Cabinet approves Thornfield revisions as basis for Heads of Terms of DA
25 May 2004			WCC Cabinet meets to consider 'detailed set' of Heads of Terms
6 October 2004			WCC Cabinet approves draft DA
15 October 2004		WCC and Thornfield extend EA to cover period until DA signed	
22 December 2004	WCC and Thornfield enter into Development Agreement		

The actions that WCC's officers and Thornfield's directors took to establish a planning framework for the Winchester Development provide a further insight into the deployment of

'nearly legal' agreements in this type of development process. On 15 January 2003, WCC's Director of Development Services presented a report to a meeting of the Council's Cabinet, in which he noted that, on 24 July 2002, Cabinet had approved 'an agreement in principle to work with Thornfield' and that a more formal agreement had subsequently 'been prepared in draft'³² with completion of that agreement pending the publication of a Planning Brief also being discussed at that meeting.³³ The report from WCC's Director of Development Services did not make explicit the link between the draft agreement and the draft Planning Brief and there is no reason that I can identify as to why the documents had to be linked in this way. However, a significant competitive advantage did accrue to Thornfield from the way that WCC's officers linked the draft Planning Brief and the nearly legal EA. The nearly legal EA formed the basis of the EA that WCC's officers and Thornfield's directors eventually signed. That EA would prohibit WCC's officers from conducting landownership negotiations with any developer other than Thornfield. The draft Planning Brief was different, and was designed to provide guidance to any developer considering whether or not to submit an application to WCC for planning permission for the development of the earmarked site. WCC's planning officers would have been compelled to consider all planning applications submitted to them but the link that WCC's Director of Development Services made between the EA and the Planning Brief meant that Thornfield had a considerable advantage over other developers in relation to the other aspects of land assembly. Those other developers might have secured planning permission for the development of the site but it was Thornfield, as a function of the EA its directors proposed to sign with WCC, that would secure an exclusive opportunity to participate in the land acquisition process. This is an example of WCC's officers favouring Thornfield's proposals. On the recommendation of WCC's Director of Development Services, councillors duly approved the draft Planning Brief and the Council published it for consultation in early March 2003,³⁴ at the same time that the Council entered into the EA with Thornfield.³⁵

³² Between the Cabinet meeting on 15 January 2003 at which WCC's Director presented this report and the date on which Thornfield and WCC entered into their agreement, the label given to the agreement shifted from a lock-out agreement to an EA. This is not an issue I consider in detail because the content, purpose and effect of the agreement seem to have remained constant.

³³ Winchester City Council, *WDLP15. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 15 January 2003 (Appendix B, Document 1.01)*, paragraph 1.3. The version of the Planning Brief published for consultation is Winchester City Council, *Draft Broadway Friarsgate Planning Brief. 2003 (Appendix B, Document 2.02)*.

³⁴ Winchester City Council, *WDLP21. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 29 May 2003 (Appendix B, Document 1.02)*, paragraph 1.2; Winchester City Council, *CAB938. Broadway Friarsgate Development. Report of the Chief Estates Officer. 6 October 2004 (Appendix B, Document 1.08)*, paragraph 1.2.

³⁵ WCC informed the Inspector appointed to carry out the 2012 public inquiry into WCC's exercise of its compulsory purchase powers that it entered into the EA with Thornfield on 5 March 2003 (see Christine

In March 2003, when WCC's Director of Development Services confirmed that officers had published the draft Planning Brief for consultation, he pointed towards a succession of other documents that would come to constitute the planning basis for the Winchester Development. Following publication of the draft Planning Brief, WCC carried out a six-week consultation to inform the final version,³⁶ which would, WCC's director explained:

Inform and guide the drafting of a master plan for the site, which will be prepared by the architects acting for the developer, Thornfield plc. A planning application is anticipated in 2004 and if permitted, development will start on site as soon as landownership issues have been resolved.³⁷

While this statement lined up the planning documents that would follow the Planning Brief, it also reflected the Council director's preoccupation with addressing third-party landholdings that he felt might inhibit the reordering of landownership in favour of the Thornfield-led development proposition. While WCC's director presented concrete and quantifiable outcomes from the Planning Brief that would be carried out in accordance with specific target dates, these things would only enable construction to start if, he explained, the 'landownership issues have been resolved.'

In chapter one, I noted that 'landownership issues' are a recurrent preoccupation for local authorities and property development companies engaged in property-led development projects. But, in this instance, the Council director's statement that there were 'landownership issues' was extremely vague. Stating early in a development process that there were landownership issues to be resolved implied the need for a CPO, although Council officers did not, at this stage, publicly state that they would seek Cabinet approval for making a CPO. The director's statement, therefore, gave expression to an idea and was a way to 'bind action to [an] abstract and invariant principle.'³⁸ Without a detailed investigation of the ownership background to the development site, neither WCC's officers nor Thornfield's directors could have established the extent of the freehold, leasehold and minor interests that they would need to consolidate in order to assemble a development site. Moreover, as D1 pointed out, it is often impossible for a developer and a local authority to identify all the extant interests on a development site if some interests are unregistered,³⁹ meaning that neither WCC's officers nor

Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport*. 17 December 2012 (Appendix B, Document 3.03), 45.

³⁶ Winchester City Council, *WDLP21. Broadway Friarsgate Planning Brief. Report of Director of Development Services*. 29 May 2003 (Appendix B, Document 1.02), paragraph 1.2.

³⁷ *ibid*, paragraph 1.3.

³⁸ David Scott, *Omens of adversity: tragedy, time, memory, justice* (Duke University Press 2014), 64.

³⁹ Sections 1(1) and 99(1) of the Land Registration Act 2002 (hereafter referred to as 'the LRA 2002') require the Chief Land Registrar to keep a 'register of title' to land in England and Wales. The registrar awards a unique title number to any geographically defined plot of land and the register then records

Thornfield's directors could have been sure precisely what interests they needed to acquire to 'resolve the landownership issues.'

D1 explained that a CPO is a way to assuage this uncertainty and to guarantee that a developer eventually gets a 'clean' title to land, purged of any potentially adverse interests. But a simple statement that a local authority and a developer are working towards the resolution of landownership issues leaves a lot unsaid. LA4 and PS1 informed me that, prior to making a CPO, a local authority and a developer will carry out a great deal of work to agree the value of the land to be acquired, the likely amount of compensation to be paid to all the existing landowners, the basis on which the developer would fund payment of that compensation, the mechanism for the transfer of the newly acquired land from the local authority to the developer, and the circumstances in which the developer would start building on that land.

Steven Bee, WCC's Director of Development Services, acknowledged these uncertainties in a letter he wrote to Michael Capocci, Thornfield's managing director, in response to the latter's request both for an EA with the Council and for confirmation that the Council would exercise its compulsory purchase powers.⁴⁰ In that letter, Bee made clear that numerous variables stood between 'an agreement in principle' to make a CPO and the actual making of a CPO:

The Council has previously agreed that it would, in principle, be prepared to exercise its CPO powers to secure the appropriate development of the site. A commitment to exercise these powers will require a further resolution by Cabinet,⁴¹ and will have to be based on an analysis of the likely costs to which the Council could be exposed, and how these could be met. Your assertion that

the identity of the proprietor of the freehold or leasehold estate in question. The register also records most third-party interests such as easements, charges and covenants that benefit or burden the title in question. The presence of these matters on a centralised register should, in theory, make identification of the extant interests on a development site straightforward. However, not all third-party interests need to be registered (as discussed in sections 11(4)(b) and 12(4)(b) and section 29(2)(ii) and (iii) of the LRA 2002) and it is quite possible that some freehold and leasehold estates on a development site may be 'unregistered' if, for example, an estate has been in the ownership of the same individual or corporation for a long period of time. In those circumstances, establishing the identity of the proprietor or identifying the existence of third-party rights, such as easements, might be more challenging.

⁴⁰ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12).*

⁴¹ Section 101(1) of the Local Government Act 1972 allows a council to delegate performance of some of its functions to a committee or an officer. As I pointed out in chapter one, WCC has a published constitution stating the function of and range of actions delegated to the Cabinet (see Winchester City Council, *Constitution of the City Council - Part 3A - Responsibility for Functions (Appendix B, Document 2.11)*, section 2) and the range of functions delegated to officers (see Winchester City Council, *Constitution of the City Council - Part 3B - Scheme of Delegation to Officers (Appendix B, Document 2.12)*).

Thornfield would agree to a back to back arrangement,⁴² and underwrite all the Council's costs, is helpful, and we look forward to exploring this further.⁴³

The phrase, 'back to back arrangement,' that Bee used here typically describes the situation in which a local authority acquires land following the exercise of a CPO and, soon after, transfers that land to a developer. This mechanism was common in the early 1990s⁴⁴ and remains common now.⁴⁵

In addition to referring to a 'back to back arrangement' for land assembly, this letter from WCC's Director of Development Services is interesting because it demonstrates that, privately, Bee acknowledged the complexity of the negotiations to be carried out prior to the making of a CPO. But the same director's public statement to the Council's Cabinet had presented the formulation of a planning framework for development as something that would enable construction to commence 'as soon as landownership issues have been resolved.'⁴⁶ By using the phrase 'as soon as' in this context, the director identified 'landownership issues' as an obstacle but implied confidence that resolution would be achieved swiftly.⁴⁷ His private letter to Michael Capocci,⁴⁸ by contrast, came closer to acknowledging that the task of resolving landownership issues would necessitate convoluted negotiations.

The preoccupation with landownership issues, the earlier efforts that Thornfield had made to make land acquisitions on the earmarked development site and the perception that

⁴² Thornfield's directors suggested that WCC might acquire the land interests on the development site, consolidate the various interests into a single freehold title and act as owner of that freehold title. They then suggested that WCC might then lease the whole site to Thornfield on the basis of a 125-year lease (see Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10)*). In chapter six, I point out that WCC and Thornfield eventually agreed that WCC would lease the assembled development site to Thornfield on the basis of a 200-year lease (Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 15).

⁴³ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12)*.

⁴⁴ Ann Harding, 'The rise of urban-growth coalitions, UK- style' (1991) 9 *Environment and Planning C - Government and Policy* 295, 309.

⁴⁵ Antonia Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37 *Journal of Law and Society* 412, 418. See also *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437.

⁴⁶ Winchester City Council, *WDLP21. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 29 May 2003 (Appendix B, Document 1.02)*, paragraph 1.3.

⁴⁷ In chapter one I noted that some of the academic literature analysing the use of compulsory purchase powers in property-led development projects has identified the use of compulsory purchase powers as a tool of land assembly used to 'get the job done quickly' (see Rob Imrie and Huw Thomas, 'Law, legal struggles and urban regeneration: Rethinking the relationships' (1997) 34 *Urban Studies* 1401, 1408).

⁴⁸ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Steven Bee to Michael Capocci (6 June 2002) (Appendix B, Document 3.10.12)*.

that progress would be lost without some form of 'binding' legal agreement to underpin the land assembly process tied WCC closely to Thornfield. And this is an important point because the draft version of the Planning Brief put before WCC's Cabinet on 15 January 2003 was a document written on the basis that it would 'give general guidance for *developers* and their design team.'⁴⁹ The Planning Brief expressly sought proposals from any 'developers' interested in pitching ideas to the Council.⁵⁰ By contrast, WCC's Director of Development Services referred to Thornfield as '*the developer*' in the report that accompanied the final published version of the Brief at the end of May 2003.⁵¹ Before the consultation on the draft Planning Brief had concluded, WCC had moved from an 'agreement in principle' with Thornfield to an EA with Thornfield because WCC's officers and Thornfield's directors wanted to work towards resolving landownership issues.

There were a number of different devices at play here that were attempts to produce what Latour might call 'irreversible situations.'⁵² No landownership rights had yet changed hands, WCC's Cabinet had not yet approved the making of a CPO, and Thornfield was not yet obliged to build anything on the development site. These were all matters to be 'resolved' at some point in the future. But, as CON2 informed me and Circular 06/2004 demonstrated, WCC's officers and Thornfield's directors would have known that they would need to point to the legitimising value of a granted planning permission at any future public inquiry into the making of a CPO.⁵³ Publication of the Planning Brief, even though the Brief was ostensibly directed towards any developer interested in carrying out the development of the site, functioned as one of a sequence of cumulative acts of ratcheting⁵⁴ or tightening⁵⁵ that can embed a developer's position in an emerging property-led development project. It did so because publication of the Planning Brief initiated the construction of a planning framework that would not only provide the basis for the grant of planning permission to Thornfield but that would also enable WCC's officers to deploy a granted planning permission as justification for the making of a CPO. Taking these points into account demonstrates why WCC's Director of

⁴⁹ Winchester City Council, *WDLP15. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 15 January 2003 (Appendix B, Document 1.01)*, paragraph 2.5. Emphasis added.

⁵⁰ *ibid*, paragraph 1.0.5. The adopted version of the Planning Brief replicated this language (see Winchester City Council, *Adopted Broadway Friarsgate Planning Brief. Part 1. Development Objectives (Appendix B, Document 2.03)*, paragraph 1.0.4).

⁵¹ Winchester City Council, *WDLP21. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 29 May 2003 (Appendix B, Document 1.02)*, paragraph 1.3. Emphasis added.

⁵² Bruno Latour, *The Pasteurization of France* (Harvard University Press 1988), 50.

⁵³ The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Criche Down Rules*, paragraph 23.

⁵⁴ Bruno Latour, *We have never been modern* (Harvard University Press 1993), 72.

⁵⁵ Richard Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action* (Routledge 1998), 258-9.

Development Services informed the Council's Cabinet that publication of a Planning Brief would do more than simply enable the formulation of a planning framework for the proposed development.

But, while a master plan, a planning application and a planning permission were presented as inevitable consequences of a Planning Brief, resolving land assembly issues through the exercise of the Council's compulsory purchase powers still required other inputs. To mitigate the consequent uncertainty, and to ensure that land assembly became a more predictable process, WCC and Thornfield entered into their EA so that both parties benefited from Thornfield's early efforts at land acquisitions and its agreement with Stagecoach. In discussing the modern conception of progress, Latour identifies the assumption that, 'as we advance in time, each stage outstrips the preceding one,'⁵⁶ and the approach to property-led development that I am describing fits neatly within this classification. The advances were incremental and the stages were only subtly separated but the move from a 'nearly legal' EA to a signed and 'legally binding' EA confirmed that Thornfield was WCC's chosen development partner even while the Planning Brief invited proposals from other developers. This allowed WCC's officers and Thornfield's directors to focus more closely on joint efforts at land acquisition rather than the predominantly Thornfield-led initiative that had been followed to that point and that I described in chapter four. In addition, however, there is the hint here of a difference between private and public development trajectories. In private, WCC and Thornfield had established a similar 'temporal orientation'⁵⁷ in which Thornfield was the chosen developer and both parties directed their actions towards the grant of planning permission to Thornfield, the making of a CPO and the transfer of the land to Thornfield. On the other hand, WCC's officers were presenting a different chronology for public consumption, in which the Council not only carried out a consultation period seeking public input into the built form that the development would take but also suggested that participation in the process was open to any developer.

A credible basis for a CPO? Moving from an EA to a DA

In this section, I analyse how the parties used the EA to give the subsequent negotiations some of 'the qualities' of time⁵⁸ both as a legal necessity and to frame those negotiations. I also address the Developer Brief that WCC's officers issued to Thornfield setting

⁵⁶ Michel Serres and Bruno Latour, *Conversations on science, culture, and time* (University of Michigan Press 1995), 49.

⁵⁷ Sarah Keenan, 'Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration' (2017) 28 *Law & Critique* 87, 100.

⁵⁸ Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012), 258.

out the basis on which WCC would exercise its compulsory purchase powers and ask how this further tightened the ties connecting WCC and Thornfield.

One of the points that I have emphasised so far in this thesis is that property-led development involves a complex set of processes initiated, gathered together, held apart, moved on, or concluded by the deployment of various types of ‘nearly legal’ or ‘legally binding’ agreements. In the previous section, I considered how the ‘nearly legal’ EA deployed in Winchester performed a role in advancing the planning part of the Winchester Development by acting as a catalyst for the production, circulation and approval of a Planning Brief designed to inform Thornfield’s master planning for the site and its eventual planning application. But, when the Council’s Director of Development Services observed that the Planning Brief would allow work to start on site only when ‘landownership issues have been resolved,’⁵⁹ he emphasised that the early stages of property-led development also take shape in response to progress on land acquisitions as a component of land assembly. Consequently, noting the links between the ‘nearly legal’ EA and publication of the Planning Brief does not adequately explain why the EA was an important document.

I have already mentioned that Thornfield’s directors sought an EA with WCC ‘with a view to entering into a development agreement’⁶⁰ but this is another somewhat abstract statement so it is important to ask what WCC’s officers and Thornfield’s directors did with the EA to make entering into a DA possible. There are, however, very few WCC documents that were made publicly available that stated the Council’s reasons for deploying an EA. The author of the Independent Review into the Winchester Development had ‘privileged access’⁶¹ to otherwise confidential WCC Cabinet meeting minutes and reports, however, and she notes that the Council entered into the EA on a similar basis as Thornfield, ‘in anticipation’ of reaching a position in which they could sign a DA.⁶² Although the Independent Review provides some insight into WCC’s decision-making, it is imprecise as to the terms of the EA other than to suggest that it granted Thornfield an initial six month period to submit proposals to WCC regarding the exercise of the Council’s compulsory purchase powers and presenting

⁵⁹ Winchester City Council, *WDLP21. Broadway Friarsgate Planning Brief. Report of Director of Development Services. 29 May 2003 (Appendix B, Document 1.02)*, paragraph 1.3.

⁶⁰ Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10)*.

⁶¹ Mariana Valverde, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012), 14. In chapter three, I explained the circumstances in which WCC’s officers instructed the author of the Independent Review to carry out her review and the ‘access’ to WCC’s officers, councillors, consultants and documents that she received.

⁶² Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 30.

Thornfield's view of the form that the built components of the development should take.⁶³ The EA facilitated the preparation of Thornfield's proposals and the subsequent negotiation envisaged in the Developer Brief.

WCC's officers issued the Developer Brief in April 2003,⁶⁴ less than a month after the date on which WCC and Thornfield signed their EA and WCC published its Planning Brief for consultation. The two Briefs served different purposes but while the consultation period for the Planning Brief began in March 2003 and publication of the Planning Brief was a matter of public record, WCC did not publicise that it had sent the Developer Brief to Thornfield until much later in the development process.⁶⁵ Without reviewing the content of the Developer Brief, it is only possible to speculate why WCC's officers treated it as confidential⁶⁶ but, as I noted in the previous section by reference to correspondence between WCC's Director of Development Services and Thornfield's directors, the making of a CPO involves negotiations between a local authority and a developer regarding their valuation of the land to be acquired and it seems likely that WCC's officers and Thornfield's directors would have viewed these valuations as commercially sensitive. Moreover, the development proposal WCC and Thornfield were pursuing involved the lease of the assembled development site from the Council to the developer. The Developer Brief may have included some financial details pertaining to those land valuations, the ground rent that Thornfield would have paid to WCC for the lease of the entire site and any profit-sharing mechanism for the completed development, perhaps necessitating confidentiality.⁶⁷

⁶³ *ibid*, 44.

⁶⁴ I have not seen a copy of the Developer Brief but the Council stated at the 2012 Compulsory Purchase Order inquiry that it had issued the Brief in April 2003 (see Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*) and the Independent Review (see, Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 15).

⁶⁵ The first reference that I can find to a Developer Brief is in Winchester City Council, *CAB938. Broadway Friarsgate Development. Report of the Chief Estates Officer. 6 October 2004 (Appendix B, Document 1.08)*, paragraph 1.5, which states that the Brief 'set out the Council's requirements and aspirations for the site in its capacity of landowner.'

⁶⁶ WCC discussed the Brief and Thornfield's response to it in Cabinet meetings, but did so in closed sessions from which the public were excluded. The minutes of these meetings state simply that 'Cabinet considered the [...] report which set out the Developer's response to the Brief' (see, for example, Winchester City Council, *Minutes of the meeting of the Cabinet held on 1 October 2003 (Appendix B, Document 1.03)*, item 472).

⁶⁷ Section 100A(4) of the Local Government Act 1972 allows a council to exclude the public from a meeting if it feels that their participation would enable them to obtain information that the local authority deems to be 'exempt' from disclosure. Section 100I and Schedule 12A of the 1972 Act list the circumstances in which a local authority might justifiably deem information 'exempt.' Schedule 12A of the 1972 Act, as amended by the Local Government (Access to Information) (Variation) Order 2006 SI 2006/88, contains broadly defined categories of information that a local authority might deem to be exempt from public discussion, including 'information relating to the financial or business affairs of any person (including the authority holding the information)' (see, schedule 12A, paragraph 3). The version

I base these assumptions on the content of the Developer Brief on my reading of contemporaneous Developer Briefs. For example, in chapter three, I referred to a property-led development in Farnham that began at a similar time to the Winchester Development. For the purposes of the former, Waverley Borough Council published a 'Development Brief' designed to generate property development proposals from developers.⁶⁸ The Farnham Brief included a section outlining the Heads of Terms that the council envisaged would form the basis for a DA.⁶⁹ However, when Waverley Borough Council's Executive approved a draft of the Farnham Brief in an ostensibly public meeting, they discussed 'general, non-exempt, sections of the Brief' in the open part of the meeting and financial details deemed exempt from the need for public discussion in private.⁷⁰

The Winchester Developer Brief called for a set of proposals from Thornfield's directors by August 2003.⁷¹ The six-month exclusivity period, beginning on the date of the EA in March 2003, would run in parallel until September 2003. During that time, the EA obliged both parties to conduct negotiations 'in good faith' and required Thornfield to cover all the costs WCC incurred in instructing consultants to engage in negotiations on its behalf.⁷² In return, WCC promised not to negotiate with any other developers in relation to the development opportunity and to maintain commercial confidentiality throughout.⁷³ As a means to direct the parties towards signing a DA, the EA was important, therefore, because it

of Schedule 12A of the 1972 Act in force at the time that WCC issued its Developer Brief allowed a local authority to treat as exempt from public discussion '[a]ny terms proposed or to be proposed by or to the authority in the course of negotiations for a contract for the acquisition or disposal of property.'

⁶⁸ Hereafter referred to as 'the Farnham Brief.'

⁶⁹ Cluttons, 'East Street Area of Opportunity, Farnham. Development Brief. Waverley Borough Council. Undated' <http://www.waverley.gov.uk/downloads/file/3323/brightwells_development_plan_2002> accessed 12 November 2017, 44-50. The clickable link refers, apparently erroneously, to a document entitled 'Brightwells Development Plan 2002.'

⁷⁰ Waverley Borough Council, 'Minutes of the meeting of the Executive held on 24 July 2002' <<http://waverweb.waverley.gov.uk/live/wbc/newcomdb.nsf/f0688ddc4711c8578025761c004fe22b/8882dbd8708a56eb802575ae0036a267?OpenDocument>> accessed 12 November 2017, appendix G. Waverley Borough Council made a copy of the Farnham Brief available on its website in 2012 (see Waverley Borough Council, 'East Street Farnham. Compulsory Purchase Order Statement of Case. September 2012'

<http://www.waverley.gov.uk/downloads/file/3297/brightwells_cpo_statement_of_case> accessed 28 March 2017, paragraph 3.3), when it made a CPO designed to move forward the land assembly process in Farnham, 10 years after issuing the Brief. WCC has not placed a copy of its Developer Brief on its website, although it did include a redacted paper copy in its bundle of documents submitted to its CPO inquiry in June 2012 (see Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, 45.

⁷¹ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 45.

⁷² Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 11.

⁷³ *ibid*, paragraph 11.

was a means to compel the parties to maintain a 'shared temporal coordination'⁷⁴ throughout those negotiations. This type of EA gave the development trajectory some of 'the qualities' of time⁷⁵ by setting out a framework to measure progress against fixed temporal markers.

Imposing a temporal framework on action can, as Grabham has shown, create 'momentum and force' because 'prescribed periods of time are conceptually linked with high pressure.'⁷⁶ A temporal framework has the potential, therefore, to function as a form of 'disciplinary' technique.⁷⁷ It is easy to assume that the EA defined a prescribed timeframe for 'the exclusivity period' to compel the parties to reach agreement on the terms of a DA before the time expired and this is an assumption that I consider later in this chapter. But a prescribed time limit was also a necessity if the parties wanted to create a 'legally binding' agreement. The House of Lords judgment in the case of *Walford v Miles*⁷⁸ confirmed that an EA will be enforceable in the event of a breach of any of its terms, first, if the 'buyer' provides some sort of consideration to the 'seller'⁷⁹ and, second, if the agreement imposes a sufficiently certain obligation upon a 'seller' not to negotiate with other parties for a fixed period. While the temporal framework in the EA created, as I will show, no more than a hypothetical schema for the movement along the pre-defined development trajectory, part of the purpose for the imposition of a time limit was the way that it endowed the EA with 'legal' force. By creating a 'legal' agreement, WCC's officers and Thornfield's directors presumably sought to put in place redress mechanisms that could be deployed if either party did not negotiate the terms of a DA in good faith or if, for example, Thornfield refused to pay costs that WCC incurred or if WCC's

⁷⁴ Keenan, 'Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration', 100.

⁷⁵ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 258.

⁷⁶ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107, 118.

⁷⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991), 215.

⁷⁸ [1992] 2 WLR 174 (HL). This thesis does not analyse the *Walford v Miles* judgement or its detailed application to the Winchester EA but, for further reading, consider Leon E. Trakman and Kunal Sharma, 'The binding force of agreements to negotiate in good faith' (2014) 73 *Cambridge Law Journal* 598 and Henry Hoskins, 'Contractual obligations to negotiate in good faith: faithfulness to the agreed common purpose' (2014) 130 (Jan) *Law Quarterly Review* 131.

⁷⁹ There is limited detail available to indicate the consideration Thornfield offered to WCC although I have noted that Thornfield agreed to pay WCC's professional costs throughout the duration of the exclusivity period. In other places, the consideration the developer provided to the local authority is more clearly defined. For example, in Leicester, Hammerson plc and Leicester City Council entered into an EA to facilitate negotiations on a DA and to allow Hammerson to test the feasibility of proposals for the Highcross development in Leicester. The EA required an initial payment of £25,000 from Hammerson to the council with a subsequent payment of £25,000 on the anniversary of the date of the agreement, followed by biannual payments of the same amount during the lifetime of the agreement. See, Leicester City Council, 'Shires West Update - Report of the Corporate Director of Resources, Access and Diversity - Supporting Information - 4 August 2003' <directory.leicester.gov.uk/media/2538/foia-7791-attachment.doc> accessed 15 April 2015, paragraph 1.2.

officers started to negotiate a DA with an alternative developer. An EA is, therefore, a type of navigational device holding the parties to their pre-plotted heading for a set period of time by, on the one hand, tying the developer and the local authority together and, on the other hand, setting both parties' expectations for progress towards a DA.

In addition, there are other reasons for the use of this type of agreement. One of the ways of thinking through the significance of an EA might be by understanding it as a 'summing up of interactions'⁸⁰ into an overarching development trajectory. In Winchester, the EA was also a way of linking the present to the future through that summing up. It did so by projecting forward WCC's agreement, as of March 2003, not to negotiate with other potential developers in the event that other developers responded to the Council's Planning Brief with development proposals to rival Thornfield's.⁸¹ But in addition to acting as a summing up and a device to hold the parties to an agreed development trajectory, an EA provides a developer with a sense of comfort. For example, D1 told me that 'before you get into the details of the DA, you'll have spent a lot of time and money on your concept' and will want to 'know that you've got a credible scheme.' An EA appears to be important to a developer, in those circumstances, if he or she can use an exclusivity period to carry out extensive tests to assess the profit-generating capacity of the proposals. What these points also demonstrate is that a developer and a local authority will often begin an exclusivity period with little certainty that doing so will lead to a completed development or that they have a 'credible' basis for making a CPO.

An EA nonetheless provides comfort to a developer who is about to incur substantial 'costs' drawing up and testing the profitability of plans or negotiating with landowners, prospective tenants or local authorities. Without an EA, that developer would have no 'legally binding' assurance that the local authority shared his commitment to the development. The underlying concern here appears to be with future costs recovery and a fear that a developer would be unable to recover costs expended if the local authority retained and utilised the flexibility to discuss development proposals with other potential development partners. In Winchester, the EA meant that this expenditure of time and money on drawing up plans, embarking on detailed negotiations as to the terms of a DA, valuing land and testing profitability took place sheltered by a neatly demarcated exclusivity period. But as well as enhancing the prospect of recovery of costs *already* expended, D1 indicated that obtaining the

⁸⁰ Bruno Latour, 'On recalling ANT' in John Law and John Hassard (eds), *Actor network theory and after* (Blackwell 1999), 17.

⁸¹ The only record of alternative development proposals that I have found were proposals John De Stefano put forward for development on his land interests adjacent to the bus station. I will discuss De Stefano's proposals in more detail in chapter six.

opportunity to assess costs *to be* expended in acquiring land, paying inducements to key retail tenants and constructing the end development is an important function of an EA.

My interviewees gathered these considerations together under the label, 'feasibility.' D2 offered an insight into the interplay of costs and profit when he explained that a developer would have spent some time before entering into an EA assessing the value of land interests in the vicinity of a development site. LA4 made a similar point and explained that a developer will carry out a lot of 'costing up' before negotiations on a DA begin so that the developer and the local authority know where they 'are starting from' in those negotiations. From LA4's perspective, these feasibility exercises involve spreadsheets with 'huge, big matrices that work all this out, that are mind-numbing, that are the size of a snooker table.' And he explained that a local authority should participate in a developer's feasibility testing to some extent in order to assess the credibility of the developer's assumptions regarding land valuations, construction costs and likely profit so that it could form a clear bargaining position on the contents of a DA.

But both D2 and LA4 explained that, while a developer would have conducted feasibility testing before the exclusivity period, the developer would then, after entering into the EA, carry out further assessments to enable a more detailed estimate of the likely cost of land acquisitions and other development costs that would arise if the local authority made a CPO. Those estimates would inform the developer's decision whether or not to pursue a DA because, if the land acquisition costs were too high, D1 and D2 explained, the developer would not expect to make a suitable profit and would not want to continue with the project. Existing research into the financial planning underpinning these legal arrangements has demonstrated that developers come to treat a pre-determined rate of return as an 'entitlement.'⁸² D1 told me that he would simply allow any 'binding' EAs to expire by effluxion of time if he did not expect to manufacture a development proposition that produced estimated profits in line with his expectations.

But beyond a general expression of a belief that an exclusivity period allowed thorough costs assessments and presaged a more detailed DA, D1 suggested that there was little else to this type of agreement. In chapter four, I argued that developers seek to line up option agreements with existing landowners to enable them to purchase land interests once they have secured a DA with a local authority and there is something similarly 'routinized' or procedural⁸³ about the use of EAs. The Winchester EA was time-limited and purported to define a coordinated period of negotiations, but CON2 told me that an EA is simply 'an interim

⁸² Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391, 405.

⁸³ Emilie Cloatre, 'Fluid Legal Labels and the Circulation of Socio-technical Objects: the Multiple Lives of 'Fake' Medicines' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 97.

measure while you're waiting for your DA' and thus little more than a way of filling time. This is shown most clearly in D1's struggle to articulate what an EA is for:

It's an agreement to keep you tied, without being formally tied. And it gives everyone an easy out as well. There's no formal process. And it's not even something that you would say is something. It doesn't contain something that you would say, "You need to do [PAUSE]." It's just something that [PAUSE]. If it's felt that the parties need to have a bit of certainty, they do it.

LA4 similarly argued that there is usually 'nothing [in an EA] to bind anyone' other than a promise from the local authority not to negotiate with rival developers. My understanding of the Winchester EA is that Thornfield's duty to pay WCC's costs and the imposition of a time limit might have ensured that the agreement contained 'binding' obligations.⁸⁴ But the legal definition of these agreements is, at best, 'blurry.'⁸⁵ For developers, consultants and local authority officers, it appears that the only two things that matter are that the parties enter into it with a view to agreeing a DA and its output is, therefore, an agreed DA deployed to facilitate a CPO. Attempting to enforce the obligations in an EA is only something that would occur in the event of a refusal by the developer to pay the local authority, a failure by either party to negotiate in good faith, or if the local authority sought to enter into a DA with another developer. PS1 explained that this is the type of thing that a developer and a local authority would simply 'get the lawyers' in to resolve.

Thought of in this way, an EA might be just another type of rather abstract 'vehicular idea' in that its role, like the nearly legal agreements I discussed in chapter four, is 'to move things on'⁸⁶ and direct actions towards a future goal. LA4 explained that this is 'how you get to the development agreements' and CON2 noted that it is part of 'the route along the way to getting your DA.' Latour points us towards the way that a series of 'hesitations' often facilitate decision-making processes⁸⁷ and there is something similar at work here in the early stages of property-led development. The way that D1, D4, CON2 and LA4 described the operation of an EA reveals a perception that an EA helps make possible onward movement through the development process by marking out a scheduled interval during which a developer can expend costs with a growing confidence in its ability to recover those costs or, alternatively, establish the possibility that it might not attain a desirable level of profitability.

⁸⁴ As defined in *Walford v Miles* (n78).

⁸⁵ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 99.

⁸⁶ David Cowan and Daniel Wincott, 'Exploring the 'Legal'' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 26.

⁸⁷ Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010), 91.

Heads of Terms, time limits and extensions

In this section, I reflect on the requirement that a legally enforceable EA must have a time limit but demonstrate that this principle rests upon an inherent vagueness that allows substantial flexibility to the manner of its application. So far in this thesis, I have argued that a developer and a local authority set out a linear trajectory connecting initial negotiations to an EA and an EA to a DA but that they also seek out periods of hesitation during which land acquisitions, feasibility tests and other discussions take place. The deployment of various 'legally binding' and 'nearly legal' technologies marks progress and facilitates further movement along that line by 'summing up' prior interactions⁸⁸ and establishing a closed project world⁸⁹ in which a subsequent period of negotiation can play out on the stage set to be filled by a DA. Underlying this linear trajectory is an assumption that a developer and a local authority will 'get to' a DA to enable the local authority to legitimately make a CPO. In the next chapter, I will explain why a DA 'stands behind a CPO,' as LA2 put it, but my focus here is on the ways that WCC's officers and Thornfield's directors manipulated the purported time limits set out in the Winchester EA to ensure that they reached a point from which they were prepared to enter into a DA.

The time limits set out in the EA were affected by, and had an effect on, the time limits in the Developer Brief to which I referred in the previous section of this chapter. There were two apparent deadlines operative here. Thornfield's directors needed to respond to the Developer Brief with development proposals by 1 August 2003 and the exclusivity period that the EA purported to create was scheduled to run until September 2003. I have already suggested that the temporal framework that the EA imposed created a sense of momentum and force.⁹⁰ This is helpful for my analysis of the operation of the Winchester EA because there is a perception that temporal targeting produces an organisational culture in which collaborative and productive processes channel resources towards the satisfaction of predefined goals in a timely manner.

Entering into a DA was the predefined goal set out in advance as the intended target of the negotiations during the Winchester exclusivity period. But the negotiations between WCC's officers and Thornfield's directors demonstrate what happens when the intended target

⁸⁸ Latour, 'On recalling ANT', 17.

⁸⁹ John Law and Valerie Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity' (2000) 41 *Technology and Culture* 765; Henriette Langstrup, 'Interpellating Patients as Users: Patient Associations and the Project-Ness of Stem Cell Research' (2011) 36 *Science Technology & Human Values* 573; Amade M'charek, 'Partial Lineages in Diversity Research' in Monica Konrad (ed), *Collaborators collaborating: counterparts in anthropological knowledge and international research relations* (Berghahn Books 2012).

⁹⁰ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act'.

is not achieved within the prescribed time limit because, during the Winchester Development, it was the desire for a DA that was fixed, not the time limit.

Thornfield's directors submitted a response to the Developer Brief that WCC's officers presented to the Council's Cabinet at a closed meeting on 1 October 2003. The publicly available minutes recording the discussion are short and simply state:

Cabinet considered the above report which set out the developer's response to the Brief regarding redevelopment of the Broadway/Friarsgate area, and proposed the next steps to be taken (detail in exempt minutes).⁹¹

There is no further public record of the discussion or the proposed steps, which was problematic for landowners likely to be affected by the Winchester Development because these discussions and the 'steps to be taken' were preliminary steps to the making of a CPO. The Independent Review provides more, albeit limited, insight and points out that WCC rejected Thornfield's proposals in October 2003 but invited revisions to be submitted during the exclusivity period, which was extended to 29 February 2004 by an alteration to the EA.⁹²

An exclusivity period originally scheduled to run for six months had, therefore, been extended to run for 12 months. This demonstrates that there was a 'plasticity'⁹³ or 'fluidity'⁹⁴ to the temporal framework deployed in the EA because time itself could not be mastered and ran on regardless of progress against pre-defined targets. The adaptability of time limits will be a theme of the remainder of this thesis as I analyse the various ways in which local authorities and developers attempt to measure the amount of time actions take to perform while also attempting to accommodate the exigencies, unpredictabilities and overflows⁹⁵ of property-led development. Hull notes that '[w]riting things down is usually seen to nail things down, but it can also set them in motion'⁹⁶ and writing down a time limit for the end of the Winchester exclusivity period simply led to repeated variation of that time limit. This suggests that setting the time limit for the exclusivity period at six months was either an estimate for the amount of

⁹¹ Winchester City Council, *Minutes of the meeting of the Cabinet held on 1 October 2003 (Appendix B, Document 1.03)*, item 472.

⁹² Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 45. The Independent Review does not indicate why the Council rejected Thornfield's initial response.

⁹³ Javier Lezaun, 'The Pragmatic Sanction of Materials: Notes for an Ethnography of Legal Substances' (2012) 39 *Journal of Law and Society* 20, 37. See also Susan Leigh Star and James R. Griesemer, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 *Social Studies of Science* 387, 393.

⁹⁴ Marianne de Laet and Annemarie Mol, 'The Zimbabwe Bush Pump: Mechanics of a fluid technology' (2000) 30 *Social Studies of Science* 225.

⁹⁵ Michel Callon, 'An Essay on Framing and Overflowing : Economic Externalities Revisited by Sociology' in Michel Callon (ed), *The laws of the markets* (Blackwell Publishers 1998); Nicholas Blomley, 'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133.

⁹⁶ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 248.

time that WCC and Thornfield would need to reach a DA or an arbitrary figure simply based on standard property-led development practice.⁹⁷

My supposition that 6 months may have been a somewhat arbitrary figure is supported by the way that WCC considered Thornfield's second response to the Developer Brief and moved towards a DA. WCC's Cabinet met on 11 February 2004 and, at that meeting, agreed that Thornfield's 'revised response' offered 'a way forward'⁹⁸ that could form the basis for the 'Heads of Terms' for a DA.⁹⁹ But, even so, the parties had a long way to go before they entered into a DA. PS1 suggested that 'getting to' Heads of Terms can be difficult when 'you're trying to identify 14 or so main points' as the basis for further negotiations. But, nonetheless, LA2 explained that some sort of Heads of Terms or memoranda of understanding is essential to give 'each party the comfort to keep going.' This played out in Winchester in the form of a 'detailed set' of Heads of Terms that WCC's officers put before WCC's Cabinet on 25 May 2004.¹⁰⁰

Heads of Terms, LA4 explained, help a local authority and a developer identify where they are 'starting from' in this type of negotiation. PS1 evoked the purity of 'pre-legal' Heads of Terms when he told me:

When I do a legal agreement, I start with what I call guiding principles. That's usually four or five pages of plain English before you instructed a lawyer. And all the parties agree those. But even if that's compressed to two pages of heads of terms, your lawyers will convert it to 70 pages of what ifs. And the what ifs contain all of the circumstances in which you will consider variation, or termination, or whatever. It's those that [PAUSE]. Often you've just lost the plot of what was in those. And whether someone knocked one of those out late at night because they thought that it was something to give in relation to another point.

⁹⁷ The Farnham development that I referred to in chapter three and briefly earlier in this chapter involved an exclusivity period allowing the council's preferred developer a 6 month period to carry out a public consultation on their development proposals and prepare an application for planning permission (see Waverley Borough Council, 'East Street, Farnham Regeneration - Appendix O - Report to the meeting of the Executive held on 14/01/2003'

<<http://waverweb.waverley.gov.uk/live/wbc/newcomdb.nsf/f0688ddc4711c8578025761c004fe22b/8452d29b96cc9f22802575ae00369d84?OpenDocument>> accessed 22 March 2017).

⁹⁸ Winchester City Council, *Minutes of the meeting of the Cabinet held on 11 February 2004 (Appendix B, Document 1.04)*, item 1077.

⁹⁹ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 45.

¹⁰⁰ Winchester City Council, *Minutes of the meeting of the Cabinet held on 25 May 2004 (Appendix B, Document 1.05)*, item 1510. WCC's Cabinet approved the Heads of Terms in a closed meeting for which the minutes remain confidential. At some point before this meeting, WCC's officers and Thornfield's directors may have agreed a further extension of the original exclusivity period because the first extension only moved the scheduled end to 29 February 2004. I have not discovered any record of any such extension, however, although the Cabinet did meet on 27 July 2004 to discuss an extension until 30 November 2004 Winchester City Council, *Minutes of the meeting of the Cabinet held on 27 July 2004 (Appendix B, Document 1.05A)*, item 25.

His comment on the relationship between Heads of Terms and ‘a legal agreement’ reveals a sense of a loss of control once ‘lawyers’ convert ‘plain English’ into ‘70 pages of “what ifs.”’ But his focus on ‘guiding principles’ indicates that varying or terminating a DA is something that some developers and local authorities do not consider at the outset of negotiations, preferring to leave this to the ‘lawyers.’ In chapters six to 10, however, I will demonstrate why a variations clause can become an extremely important component of a DA.

Instead of discussing future variation to or termination of a DA, PS1, LA4, D1 and D4 referred to an ‘invariant’ focus on the costs of land acquisition and construction, and the way that those costs will be recovered. D1 pointed out that, even after agreeing Heads of Terms, ‘you get more understanding about costs, you do more survey work, and things come out of the woodwork that get bolted on.’ I will consider the use of bolt-ons, or what Latour might call ‘plug-ins,’¹⁰¹ throughout the remainder of this thesis but my point here is that a local authority and a developer try to ‘start’ from simple Heads of Terms but find the actual negotiations on the terms of a DA to be frustratingly complex. For example, LA4 commented that ‘so much work is done before you get to a DA’ and that negotiations following the approval of Heads of Terms would not just concern land acquisition costs and construction costs but also encompass matters pertaining to the potential return on costs, the height and density of buildings, the combination of retail, leisure, office and residential units in the development, and the type of retail tenants that the developer would pursue.

For the purposes of the Winchester Development, WCC’s Overview and Scrutiny Committee met on 27 September 2004 to consider a report from the Council’s Chief Estates Officer, deemed exempt from publication, on a Thornfield-produced financial appraisal and a further clarification of the Heads of Terms.¹⁰² Following that meeting, WCC’s Cabinet met, on 6 October 2004, with Thornfield’s managing director, architects, retail consultants and building consultants in attendance, to listen to WCC’s officers pitch the terms of the negotiated DA to them and to approve that DA.¹⁰³ Cabinet duly confirmed its approval¹⁰⁴ but WCC and Thornfield did not enter into their DA until 22 December 2004, necessitating a further extension of the exclusivity period until the DA had been signed.¹⁰⁵ These extensions were

¹⁰¹ Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 207.

¹⁰² Winchester City Council, *Minutes of the meeting of the Principal Scrutiny Committee held on 27 September 2004 (Appendix B, Document 1.06)*, item 291.

¹⁰³ Winchester City Council, *Minutes of the meeting of the Cabinet held on 6 October 2004 (Appendix B, Document 1.07)*, item 320.

¹⁰⁴ *ibid.*

¹⁰⁵ Winchester City Council, *Minutes of the meeting of the Cabinet held on 15 December 2004 (Appendix B, Document 1.09)*, item 639; Winchester City Council, *CAB984. Broadway Friarsgate - Extension of Exclusivity Agreement. Report of Chief Estates Officer. 15 December 2004 (Appendix B, Document 1.10)*.

necessary because, while WCC and Thornfield could identify that the desired output of the exclusivity period was a DA, negotiating a DA can be difficult. CON2 told me that local authorities and developers generally prefer to be able to enter into a DA as soon as possible in a development process so that they can 'get on' with securing third-party land by making a CPO. But it is also clear that there are circumstances when waiting or drawing out a 'legally' defined exclusivity period might be desirable. WCC's Chief Estates Officer pointed to the need to extend the exclusivity period simply because the Council had incurred substantial costs in negotiating and drawing up the DA and the EA contained a mechanism for recovery of those costs from Thornfield on the signing of a DA.¹⁰⁶ LA2 talked about the period between a local authority and a developer entering into an EA and then agreeing a DA and commented that sometimes 'these things take a heck of a long time' but that such things as provision for future cost recovery and past progress on land acquisitions would give a local authority 'comfort to keep going.'

These points show that cost recovery is an important interest of both a local authority and a developer at this stage of property-led development. From D1's point-of-view, however, a drawing out of the pause between an EA and a DA can provide an opportunity for a developer. Referring to a project he was then involved in, he had been 'constantly reappraising, looking at value engineering, costs savings, everything else' while negotiating a DA but could not manufacture his desired rate of return from the mix of buildings and uses that the Council wanted the end development to include. As a result, he had refused to sign a DA that the Council believed had been settled. He acknowledged that the 'local authority may see this as a gun to the head' but he argued that 'we're saying, "we will sign but on those ground rules,"' which obliged the local authority to change its requirements. D1 noted that, if he had signed the DA on the existing terms, he would have had to have had 'the same discussion about costs and revenues three or four months down the line.' Nonetheless, he understandably preferred to keep what he perceived to be unaffordable requirements out of the DA. But all of this suggests that while a property-led development project might initially gain shape, purpose and structure from a time limit, more pressing concerns with cost recovery, profit-generating capacity, and land acquisition, among other things, very often take precedence. This is an underlying thread that I will explore throughout the remainder of this thesis.

¹⁰⁶ Winchester City Council, CAB984. *Broadway Friarsgate - Extension of Exclusivity Agreement. Report of Chief Estates Officer. 15 December 2004 (Appendix B, Document 1.10).*

'A cautious approach?'

In the final part of this chapter I analyse another component of the exclusivity period in Winchester involving legal advice that WCC's officers received regarding the lawfulness of entering into a DA with Thornfield without having first publicly advertised the development opportunity or carried out a competitive tender. My analysis in this section will initially focus on the decision that WCC's officers made not to circulate the Developer Brief to any developer other than Thornfield or to discuss it in public meetings with councillors.

Some local authorities involved in the 'promotion' of development projects taking place in the early to mid-2000s seem to have taken a different approach to the use of this type of Developer Brief, with some using a Developer Brief as a component of a competitive tendering process and only agreeing to enter into an EA with a developer after the conclusion of that competition.¹⁰⁷ Incorporating a Developer Brief into a tender competition is consistent with what CBRE, a well-known property development consultancy, described as a 'cautious' interpretation¹⁰⁸ of the then extant EC Directive on the procedural requirements for the award of public works contracts.¹⁰⁹

¹⁰⁷ For example, in relation to the Farnham development referred to at n98, Waverley Borough Council issued a Planning Brief in February 2000 identifying a development site in its area (Waverley Borough Council, 'Planning Brief for the East Street Area of Opportunity Farnham. February 2000' <http://www.waverley.gov.uk/download/downloads/id/3308/planning_brief_february_2000.pdf> accessed 28 March 2017). After receiving 25 expressions of interest from property development companies in response to the Planning Brief, the council then issued a 'detailed development brief' in April 2002 to eight of those developers, from which it selected its preferred development partner (Waverley Borough Council, 'East Street Farnham. Compulsory Purchase Order Statement of Case. September 2012', paragraph 3.8). Waverley then only entered into an EA with its chosen development partner after the tender process had concluded (Waverley Borough Council, 'East Street, Farnham Regeneration - Appendix O - Report to the meeting of the Executive held on 14/01/2003', paragraphs 1-2).

¹⁰⁸ CBRE, 'EU Procurement Regulations. The Impact on Joint Venture Proposals. January 2008' <http://www.cbre.co.uk/portal/page/portal/emea_en/services/public_sector/public_sector_content/public_sector_leftcol/eu_public_procurement_regulations_impact_on_jv%20Proposals.pdf> accessed 7 July 2017, paragraph 1.2. The cautious approach was, according to CBRE's report on the state of development practice in the early to mid-2000s, to carry out a competitive tender for all major property development projects.

¹⁰⁹ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts OJ [1993] L199/54 (hereafter referred to as 'the 1993 Directive'). The 1993 Directive has since been superseded by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ [2004] L134/114 ('the 2004 Directive'). The Public Contracts Regulations 2006, SI 2006/5 (hereafter 'the PCR 2006') transposed the 2004 Directive into domestic law. The 2004 Directive has since been superseded by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive [2014] OJ L94/65 and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ [2014] L94/1, respectively transposed into UK law by the Public Contracts Regulations 2015 SI 2015/102 and the Concession Contracts Regulations 2016 SI 2016/273, which replaced the PCR 2006.

WCC's officers chose, however, not to take a cautious approach, although the author of the Independent Review revealed that this may have gone against the expectations of both the organisation that drafted the Developer Brief¹¹⁰ and Thornfield's directors:

[The Developer Brief] was sent only to Thornfields [*sic*] asking for a response by 1st August 2003. The brief itself assumes that it will be sent to more than one developer. There is some evidence that Thornfields [*sic*] itself thought that the brief may also have gone to other developers.¹¹¹

This suggests that the consultants who prepared the Developer Brief assumed that WCC's officers would use it as the basis for some form of competitive tendering process in which various developers submitted proposals to the Council to enable it to select its preferred developer. Doing so would have meant that WCC used the Brief in a similar way to that which CON3 described when he recalled how his consultancy had 'led' competitions for local authority clients and produced a Brief, evaluated proposals according to pre-defined metrics and recommended a developer to the local authority.

The approach that WCC's consultants anticipated was also consistent with the 'cautious view' that CBRE advocated. It should be noted, however, that some of my other interviewees expressed strong reservations about the suitability of a 'cautious' approach. CON2 told me that he would always encourage developers and local authorities to avoid having to carry out a competitive tender where possible because doing so would entail costs for a local authority from running the competition. In addition, CON2 pointed to the possibility of litigation if losing bidders felt that the local authority had followed an inappropriate procedure or the consultants had carried out the evaluation of proposals in a way that left the local authority's eventual decision open to challenge.

D4 similarly told me that the costs, complexity and risk of losing in a competitive tender meant that he would always seek to arrange a partnership with a local authority in such a way that a competitive tender was not necessary by, for example, negotiating a DA that did not impose an enforceable obligation on a developer to acquire land or commence construction.¹¹² LA2 similarly talked about the frustration of having 'to guard against challenge'

¹¹⁰ I assume that WCC instructed consultants to draft the Developer Brief. CON3 told me that his firm would often prepare tender documents for local authorities. The Independent Review states that WCC appointed a consultancy practice on 22 September 2000 (Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 44) and it is likely that this firm prepared the Developer Brief. The Farnham Development Brief that I referred to earlier in this chapter (see n69) was produced on behalf of Waverley Borough Council by Cluttons, the council's consultant.

¹¹¹ *ibid*, 15.

¹¹² Recent case law in *R (Midlands Co-operative Society Ltd) v Birmingham City Council* [2012] BLGR 393, [2012] EU LR 640 and in *R (Faraday Development Ltd) v West Berkshire Council* [2016] EWHC 2166 (Admin), 168 Con LR 131 discusses this type of arrangement and confirmed that a DA in these terms will not be subject to the requirement for an open market tendering competition prior to award of the contract.

and the perception that ‘you just end up lining procurement lawyers’ pockets quite significantly’ because any advice produces ‘a list as long as your arm of what the risks are.’ He acknowledged that his attitude was more bullish than other local authority officers but suggested that some local authorities could be more tolerant of ‘procurement risks’ on the basis that few are ‘successfully prosecuted.’ Even CON3, whose firm exploited the fee-generating potential of the competitive tender process, expressed his frustration with what he perceived as a risk-averse outlook on the part of procurement lawyers who, he felt, always instructed him that any action he intended to take carried the inherent potential for a procurement challenge.

My research has indicated that, by contrast, WCC’s officers had received more bullish legal advice from Dechert LLP, a firm of external solicitors, to the effect that the Council could lawfully work exclusively with Thornfield without carrying out any form of competitive tender.¹¹³ Although WCC’s officers repeatedly turned to this legal advice throughout the Winchester Development as a source of legitimacy, it proved highly contentious as the development process unfolded, as I will demonstrate in chapter 10.

Dechert’s solicitors may have recommended this approach because of uncertainty regarding the implications of EU procurement law. One of the solicitors who participated in the Winchester Development has since noted that ‘compliance with EU procurement rules among local authorities was patchy’¹¹⁴ until two landmark European Court of Justice decisions in 2007 and 2010¹¹⁵ clarified the law. These decisions confirmed that DAs imposing an obligation on a developer to carry out construction ‘works’ constituted a ‘public works contract’¹¹⁶ and so fell

¹¹³ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraphs 8-9. Although WCC’s officers appear not to have made any public reference to this legal advice until 2005, they had consulted Dechert in 2003 and 2004, prior to signing the DA. In that advice, Dechert advised that the DA would simply entail the transfer of land from WCC to Thornfield and so would fall outside of the scope of EU procurement rules (see Winchester City Council, *CAB2665. Silver Hill - Judicial Review Decision. Report of Chief Operating Officer - As Monitoring Officer. 3 March 2015 (Appendix B, Document 1.46)*, paragraph 2.1).

¹¹⁴ Mark Bassett, ‘Timely delivery for regeneration projects’ (*Solicitors Journal*, <<https://www.solicitorsjournal.com/comment/timely-delivery-regeneration-projects>> accessed 7 July 2017. Bassett did not work for Dechert but for another law firm that became involved in challenges to the Thornfield-led development trajectory. I discuss the role of legal advisers in more detail in chapter 10 of this thesis.

¹¹⁵ Case C-220/05 *Auroux v Commune de Roanne* [2007] ECR I-385; Case C-451/08 *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben* [2010] ECR I-2707.

¹¹⁶ As defined in Article 1(a) of the 1993 Directive and regulation 2(1) of the Public Works Contracts Regulations 1991 SI 1991/2680 (‘PWCR 1991’).

within the scope of EU procurement rules.¹¹⁷ Moreover, these cases confirmed that contracts in which the developer stood to retain the majority of both the profits generated from the completed development and/or the rental proceeds generated from tenants occupying units in the completed development would also constitute a 'public works concession contract'¹¹⁸ similarly subject to the requirement for a competitive tendering process prior to award of the contract.

In light of the existence of these unresolved controversies at the time that WCC was negotiating its DA with Thornfield, WCC's officers were aware of the risk that they might face a challenge under EU procurement law to their decision to negotiate with Thornfield without carrying out an open market tendering process.¹¹⁹ But by pushing forward the Thornfield-led development trajectory without first carrying out an open market tendering process, WCC's officers avoided having to go back in time to re-open negotiations with Stagecoach, John De Stefano and others regarding acquisition or use of their landholdings for the purposes of the Winchester Development.

The Council's uncertainty about the legitimacy of its ties to Thornfield was clear in the way that, when the Council entered into its DA with Thornfield, its Chief Estates Officer produced a retrospective account explaining how officers had approached the negotiations with Thornfield.¹²⁰ He described three choices that officers had faced when they began negotiating with Thornfield. The first option he identified was a 'pro-active' approach in which officers invited proposals from interested developers, carried out a competitive tendering process and selected the best developer from those submitting proposals. By comparison, he suggested that officers could have taken an 'entirely reactive' approach, which would simply have involved waiting for planning applications from developers, with no promise of Council support for the land acquisition process and the risk that either no developer submitted a planning application, no planning applications met the Council's requirements for comprehensive redevelopment of the entire site, or no developer was able to consolidate the landholdings on the site.¹²¹ Neither of these approaches would, he explained, have afforded the Council the certainty that Thornfield would be the developer carrying out the project.

¹¹⁷ For a practitioner perspective on the implications of this, consider David Elvin and Charles Banner, 'The application of the Public Contracts Directive to development agreements and planning agreements following *Auroux v Roanne*' (2008) 8 *Journal of Planning and Environmental Law* 1072.

¹¹⁸ As defined in Article 1(d) of the 1993 Directive and regulation 2(1) of the PWCR 1991.

¹¹⁹ As noted in Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 8.

¹²⁰ *ibid*, paragraph 9.

¹²¹ *ibid*, paragraph 8.

Between the 'pro-active' and the 'entirely reactive' approaches that WCC's Chief Estates Officer presented was a 'semi reactive position' that had, he argued, enabled officers and councillors¹²² to retain a measure of 'control' over the content and delivery of the final development proposals and to avoid the costs of commissioning a tender competition.¹²³ But this account was founded on the strained notion of a 'semi-reactive position' and appears to have been an attempt to explain away the lack of a tendering procedure prior to the signing of the DA. It was an account that appears to have been an attempt to legitimise past decision-making and to ensure that the Council was not required to unravel its already close ties to Thornfield.

As I will show in the remainder of this thesis, WCC's officers tried to move on from their decision to enter into an EA and then a DA with Thornfield without carrying out a tendering exercise. The manner in which officers had used the Developer Brief and the circumstances in which they obtained Cabinet approval for an EA with Thornfield enabled them to commit the Council to a relatively low-cost development trajectory that simply required the Council to continue its negotiations with an established partner rather than to start again with alternative developers. But WCC's officers and councillors locked stresses into the DA by entering into the EA before it issued the Developer Brief, issuing the Brief to only one developer and entering into the DA with Thornfield without first carrying out a tendering competition. These stresses materialised later in the development process and conditioned the manner in which the DA worked.

Conclusion

In this chapter, I have tracked the ways that local authorities and their private sector development partners progress along a pre-defined development trajectory from a 'nearly legal' EA to a DA. This chapter has explained that, for some local authorities and developers, an EA is a means to record that the parties intend to pursue the making of a CPO and collaborate in the land acquisition component of property-led development. I have illustrated that an EA is a device designed to enable the movement from initial negotiations to a DA by giving the negotiating parties the confidence that they can expect to recover past and current costs incurred in negotiating the DA, as well as the future costs to be incurred in funding land acquisitions, negotiating with third parties and constructing the built development.

¹²² Councillors retained a small element of control over the process through their ability to vote against approval for the terms of any officer-negotiated DA. Any such vote would have made it unlawful for the Council's officers to sign the DA.

¹²³ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 9.

The Winchester Development has provided an illuminating insight into the use of time as a resource in this type of development process. While the EA defined a time-limited exclusivity period that afforded WCC's officers and Thornfield's directors a scheduled pause in the 'supposedly all-encompassing flow'¹²⁴ of the overarching process, I have shown that the scheduling was open to change. Thus, while a time limit was a legal necessity if the parties intended to create a 'binding' agreement, the significance of the time limit is called into question by the parties' shared willingness to change the date on which the period was due to expire. Time continued to flow during the Winchester Development, but the temporal framework that the EA produced was malleable enough to allow the development to continue despite the passing of pre-defined time limits. Underlying this willingness to adapt and remould the agreed temporal framework was a desire to achieve a DA, with the expectation that doing so would facilitate both the making, confirmation and exercise of a CPO and further progress along the development trajectory. But this preoccupation with forward movement meant that WCC's officers made choices regarding the Council's partnership with Thornfield and the scope of EU procurement law that locked-in stresses that the DA carried forward as WCC and Thornfield followed their preferred development trajectory. I will explore the ways in which these stresses undermined the Winchester Development throughout the remainder of this thesis, including in the next chapter, where I consider the content of the Winchester DA and the manner in which a DA enacts unresolved issues as a set of conditions.

¹²⁴ Michelle Bastian, 'Political Apologies and the Question of a "Shared Time" in the Australian Context' (2013) 30 *Theory Culture & Society* 94, 110.

Chapter 6

A 'conditional phase'

In this thesis, I have introduced the idea of property-led development as a carefully planned process involving a succession of written agreements that purport to separate that process into distinct phases. In this chapter, I continue that theme and analyse the content of the Winchester Development Agreement.¹ In doing so, I analyse the text of the Winchester DA² and utilise various documents produced for WCC's committee meetings.³ I also use the input of my interviewees⁴ to show how local authority officers, councillors, developers and property development consultants involved in property-led development understand the function and purpose of DAs. I note that these individuals described how a DA marks the commencement of a 'conditional phase' in a development process, beginning on the date of a DA, and I explain how these individuals envisage the ending of this conditional phase. This enables me to connect my findings regarding the Winchester Development to an analysis of wider property-led development practice.

I include in this chapter a brief chronology of the events that occurred in relation to the Winchester Development between 22 December 2004, when Winchester City Council⁵ and Thornfield Properties (Winchester) Limited⁶ signed the Winchester DA, and 14 April 2011. This latter date marked the conclusion of an unscripted 'standstill period' that had begun when Halifax Bank of Scotland put Thornfield's parent company into administration. Table 6.1 summarises these key events.

¹ Throughout this thesis I have been abbreviating this term to 'DA.' I continue to do so in this chapter. I introduced the 'Winchester Development' in chapters one and three.

² Appendix A to this thesis explains how I obtained a copy of the Winchester DA, various deeds of variation and supplementary deeds.

³ Appendix B to this thesis is a list of the primary source documents produced during the Winchester Development that I use in this thesis.

⁴ I discuss interviews with D1, D2, D3, D4, CON2, CON3, CON4, LA2, LA3, LA4 and PS1. Appendix D contains some limited biographical details explaining who these interviewees are and when I met them.

⁵ Throughout this thesis I have been referring to Winchester City Council as 'WCC.' I continue to do so in this chapter.

⁶ Thornfield Properties (Winchester) Limited was a special purpose company set up by Thornfield Properties plc to enter into a DA with WCC and carry out the Winchester development. Thornfield Properties (Winchester) Limited was, therefore, 'the developer' for the purposes of the Winchester DA. I have referred to Thornfield Properties (Winchester) Limited throughout this thesis as 'Thornfield' and continue to do so here.

Table 6.1 Timeline illustrating some of the key events following the signing of the Winchester DA and the administration of Thornfield Properties plc	
Date	Event
22 December 2004	WCC (Local Authority), Thornfield Properties (Winchester) Limited (Developer) and Thornfield Properties plc (Guarantor) enter into Development Agreement with Long Stop Date set at 22 December 2009
27 March 2007	WCC's Planning Development Control Committee approves application for planning permission pending section 106 agreement between WCC and Thornfield Properties (Winchester) Limited
9 February 2009	WCC's Planning Development Control Committee grants Thornfield Properties (Winchester) Limited planning permission
October 2009	WCC agrees revisions to the Winchester DA proposed by Thornfield Properties (Winchester) Limited and both parties exchange letters changing the Long Stop Date in the Winchester DA to 31 December 2012
January 2010	Thornfield Properties plc placed into administration by Halifax Bank of Scotland
24 November 2010	WCC's Cabinet approves Henderson UK Property Fund's purchase of Thornfield Properties (Winchester) Limited and replacement of Thornfield Properties plc as Guarantor. New Long Stop Date set at 31 August 2014
10 December 2010	Henderson completes purchase of Thornfield Properties (Winchester) Limited and becomes 'the Developer' in the Winchester DA. Henderson's parent company replaces Thornfield Properties plc as Guarantor. 'Standstill period' of six months and 10 days commences
14 April 2011	Change of name of 'the Developer' in the Winchester DA from Thornfield Properties (Winchester) Limited to Silverhill Winchester No 1 Limited

Setting out these events assists in establishing the decision-making processes playing out during the Winchester Development. One of the themes underlying my analysis to this point has been that property-led development involves a complex set of processes initiated, gathered together, held apart, moved on, or concluded by the deployment of various types of 'nearly legal' and 'legally binding' agreements. In this chapter, I evaluate some of the attributes of the conditional phase initiated by the Winchester DA. I ask if it simply functions as another in a series of 'segments, intervals, and moments'⁷ that are necessary to make possible the linear progression that I described in chapters four and five from original pitch through an 'exclusivity period' to a DA and onwards to a completed development. In doing so, I reflect on

⁷ Marilyn Strathern, 'On Space and Depth' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 91; See also David Scott, *Omens of adversity: tragedy, time, memory, justice* (Duke University Press 2014), 109.

the relentlessly forward-facing orientation⁸ of the Winchester Development trajectory and the network of contractual arrangements that 'scripted,'⁹ re-inscribed and then sought to facilitate seamless movement along that trajectory. I ask what it is about the conditional phase that made possible this sense of 'a chain of progressive succession'¹⁰ and lay the groundwork for subsequent chapters to explore what happened in Winchester when that movement turned out to be neither seamless nor irreversible.

In the first part of this chapter, I explain how the Winchester DA initiated the conditional phase of the Winchester Development. I scrutinise the conditional phase as a scripted pause and as a device to provide a temporal framework for a series of 'rule-governed transformations'¹¹ and 'for transporting messages back and forth'¹² in a way intended to move the Winchester Development forward. An elaboration of some of the key moments in this phase helps me to investigate this. I analyse the ways that WCC's officers and Thornfield's directors structured their attempt at lining things up based on a planned movement from 'conditionality' to 'unconditionality.' I explain what it means to call a date 'unconditional' and, borrowing D1's phrase, I ask how it benefits a developer or a local authority to treat that date as 'a line in the sand' that marks the passage from a conditional phase into unconditionality. I then question if local authority officers and their private sector development partners deploy a conditional DA with the expectation that 'the Unconditional Date' will inevitably occur. To complement these points, I examine the operation of a series of 'Long Stop Dates' written into the Winchester DA to ask if the DA limited the possible duration of the conditional phase.

Thereafter, this chapter considers the contents of the Winchester DA. While preparing the DA, Thornfield had used the exclusivity period to take the time to consider the feasibility of its proposals for the development of the earmarked site. When discussing the exclusivity period in chapters four and five, I pointed to the way that the actors involved in this type of process recognise the need to accommodate emergent and pre-existing uncertainties and

⁸ Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016), 168; See also Mariana Valverde, 'Studying the governance of crime and security: Space, time and jurisdiction' (2014) 14 *Criminology & Criminal Justice* 379, 386 on the forward-looking orientation of crime prevention work.

⁹ Madeleine Akrich, 'The De-Description of Technical Objects' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992), 208; Michel Callon, 'Writing and (Re)writing Devices as Tools for Managing Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 192.

¹⁰ Scott, *Omens of adversity: tragedy, time, memory, justice*, 108.

¹¹ Paul Ricoeur, *Memory, history, forgetting* (University of Chicago Press 2004), 243.

¹² Michel Serres in Michel Serres and Bruno Latour, *Conversations on science, culture, and time* (University of Michigan Press 1995), 117.

examined their use of a 'succession of deals'¹³ to produce a gradual fixing of meaning.¹⁴ The exclusivity period to which I referred gave WCC's officers and Thornfield's directors an opportunity to arrange their initial proposals. Having done so, and as I mentioned in chapter five, they then incorporated the outcome of their negotiations into a DA. Here, I outline the 'required elements' written into the DA that stated the built features that both parties expected to form the basis of the constructed development.¹⁵ I will explain the purpose of these 'required elements' and the implications of writing them down in a DA in the second part of this chapter and in more detail in chapters seven to 10.

In addressing these required elements in this chapter, I also begin to investigate the attempts at 'lining things up' that took place during the conditional phase, and note that the exclusivity period did not resolve all the uncertainties that emerged both before and during that phase. I question if there is a 'lop-sidedness' to the actions lined up in a DA and I ask if the conditional phase afforded the parties both a further transitional phase of 'adjustments'¹⁶ and the opportunity to adapt proposals that were left initially and intentionally 'partially undetermined'¹⁷ to allow the exigencies of property-led development to play out. I concluded chapter five by discussing how a developer and a local authority 'bolt things on' to a 'nearly legal' DA during the negotiation process, and I revisit that concept here. In particular, I note the circumstances that led to Thornfield Properties plc, the parent company of Thornfield Properties (Winchester) Limited, being placed into administration by its bank. I explain that this did not lead to the termination of the DA but initiated a change of ownership of Thornfield and the renaming of 'the developer' carrying out the Winchester Development. I analyse the adjustments, bolt-ons, and changes to the DA that this provoked.

A Conditional Phase

Each of the developers, local authority officers and property development consultants who I spoke to explained that it is common practice for a developer and a local authority to use a conditional DA to facilitate property-led development. This type of DA would contain an obligation imposed on a developer to commence construction of a development. But that

¹³ Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391, 398.

¹⁴ Richard Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action* (Routledge 1998), 45.

¹⁵ The DA referred to these both as 'required elements' and the 'minimum requirements.' Clause 5.3 of the DA set these out in detail and these basic requirements were 90,000 square feet of retail floor-space, 364 residential units of which 35% were to be affordable homes, 279 public car parking spaces, a new civic square, a new bus station, premises for WCC's CCTV equipment, a new shop mobility and dial a ride service, a new market space and a financial contribution to public art provision.

¹⁶ Callon, 'Writing and (Re)writing Devices as Tools for Managing Complexity', 192.

¹⁷ *ibid*, 193.

obligation would only become enforceable if the local authority and the developer first discharged a series of conditions. Prior to 'unconditionality', a developer will have no more than a vague future commitment to commence construction of a development, the components of which would be based loosely on proposals agreed during the exclusivity period. Valverde has described how '[v]agueness ... is often a desideratum in legal discourse'¹⁸ and this is a notable feature of the Winchester DA and the DAs that my interviewees described. CON2, CON3 and D1 explained that the indeterminacy of the commitments in a conditional DA enables the contracting parties to work together before they are certain that the components necessary for a 'viable'¹⁹ project will connect. If those components do connect sufficiently, CON2, CON3 and D1 explained, the contracting parties would transition from the conditional phase to the unconditional phase and the developer would be expected to start building. If uncertainties remained around the ability of the contracting parties to join up site assembly, viability and planning issues, among other things, CON2, CON3 and D1 told me, they could use the conditionality of a DA to avoid onerous and expensive additional commitments but would remain in the conditional phase for as long as they needed to resolve these issues. If they could still not resolve those issues, they would terminate the process.

PS1 argued that feasibility testing before the conditional phase should enable a developer 'to say, "I know what my costs are, I know what my [land] values are. Therefore, I will build this building in three years' time.'" But, as I demonstrated in chapter five, Thornfield's directors ran those feasibility assessments during the exclusivity period of the Winchester Development without being certain that they would complete the land acquisition process. For those reasons, D2 explained that he would always expect a developer to ensure that it did not commit to constructing a development unless it was certain that it had all the land it required. Moreover, as D3 pointed out, a developer will also ensure that it is not committed to construct a development unless it is certain that it has adequate funding in place to finance land acquisition and construction,²⁰ agreements for lease with a sufficient quantum of prospective tenants to guarantee profitability, and long-term confidence that they would secure their desired financial return from the completed development.

With the exception of COU2 and COU3, my interviewees told me that it is also commonplace for a local authority to agree to provide land for a developer by making a

¹⁸ Mariana Valverde, 'The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty' (2012) 21 *Social & Legal Studies* 3, 8.

¹⁹ The notion of a 'viable' project is one to which I will return in chapters seven to 10.

²⁰ D3 also pointed out that a developer would also seek to finance land acquisition costs and the costs of construction through entering into some form of agreement with a bank, pension fund or insurance company.

Compulsory Purchase Order.²¹ I am keen to explore how a DA commits a local authority to make a CPO because there is some indication that a local authority will often need reassurance before doing so. For example, property-led development, land assembly initiatives and the exercise of compulsory purchase powers carry significant political uncertainties²² and financial implications. Among the numerous financial implications, WCC's Head of Estates described the need to instruct consultants to assess existing landownership interests on a site and prepare lists explaining those interests.²³ In addition, a local authority might make, obtain confirmation for and exercise a CPO but the developer might refuse to accept the transfer of an assembled site if it felt that the development proposal was no longer viable, if it could not secure funding, or if it had gone into administration.²⁴

This means that a local authority is often unwilling to expose itself to those perceived risks without a commitment from a developer to provide an end product in the form of a constructed development. But a local authority's reluctance to make a CPO without a developer's commitment to commence construction, combined with a developer's unwillingness to commit to constructing a development without first securing all the land, creates a mismatch. Nevertheless, my research shows that the parties typically choose not to delay entering into their DAs because they use their DAs to manage those uncertainties. They do so by making their DA conditional on the satisfaction of various matters, including the making of a CPO. CON3 told me that DAs are, therefore, 'largely, hugely, conditional.' He went on to explain that the conditions 'usually concern site assembly, planning permission, anchor store, pre-letting, and then may go on to concern funding or viability.'

I will analyse the conditions in the Winchester DA later in this chapter. The implication of the conditionality inherent to most DAs means that, once the local authority has obtained confirmation for the making of a CPO, and once the developer has secured planning

²¹ Throughout this thesis I have been abbreviating this term to 'CPO.' I continue to do so in this chapter. As I mentioned in chapter one, a local authority cannot 'exercise' its compulsory purchase powers until it has, first, drafted the necessary order, second, its Cabinet had approved the 'making' of it, and, third, the CPO that it is has 'made' has been 'confirmed' at a public inquiry.

²² Raco *et al* observe that 'the ordering of times and spaces in urban regeneration policy is an inherently political process which requires decisions to be taken not only over what types of development should take place but also *when* they should be phased, and when different interests should expect to see their needs and priorities addressed (Mike Raco, Steven Henderson and Sophie Bowby, 'Changing times, changing places: urban development and the politics of space - time' (2008) 40 *Environment and Planning A* 2652, 2657). Specific political 'risks' that might arise include the reputational effects of promoting a CPO that is overturned on inquiry, or 'blighting' land to be acquired by announcing the intention to compulsorily purchase land before abandoning the process.

²³ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 2.1.

²⁴ This is an eventuality that WCC's officers had to consider in relation to the Winchester Development, more fully addressed in chapter 10.

permission, satisfied itself that the development is viable, obtained funding, and so on, the parties will have satisfied the conditions and the DA will become unconditional. That moment, described by CON3 and in various DAs as ‘the Unconditional Date,’ triggers the obligation to commence construction of the development. There is a lop-sidedness to this arrangement given that a local authority must be willing to make a CPO before the developer commits to construction. This lop-sidedness is a focus for much of the analysis in this chapter.

The contents of the Winchester DA

In the report that WCC’s Director of Development Services presented to the Council’s Cabinet²⁵ confirming that a DA had been signed with Thornfield, the Council’s director noted that the DA was ‘on standard institutional terms’²⁶ that an ‘institutional’ investor, such as a bank, pension fund or insurance company, would find acceptable. An institutional investor matters here because, D4 told me, very few developers can fund a development project entirely out of their own cash reserves and local authorities similarly lack the financial resources to fund a development, necessitating some form of financing arrangement with a funder. CON4 told me that there is a tendency to write DAs based on ‘the tried and trusted’ because funders will rarely invest in projects that try to ‘start breaking new ground.’ A funder would expect an income from its initial investment, as well as either a stake in the completed development or repayment of its original financial provision, so PS1 pointed out that he would base his assessment of the suitability of a proposed DA on the parts of an agreement that he thought would matter to a funder. He explained that a funder would primarily look at the ‘minimum value’ set out in the DA as a price to be paid by the developer for the grant of a long leasehold of the site, the ground rent payable and the length of term of the lease, which would all be included in a DA.²⁷ In addition, PS1 told me, a funder will consider that the developer has an ‘investable’ proposition if the DA and accompanying viability statements suggest a suitable rate of return.

It is notable that WCC’s Director of Development Services sought to sell the Winchester DA to the Council’s Cabinet on the basis that it was ‘institutionally acceptable’ rather than by making reference to the ‘required elements’ in this particular DA, which

²⁵ In chapter one, I explained the relationship between councillors and local authority officers and, in WCC, the relationship between the Council’s Cabinet, the Full Council and committees such as the Overview and Scrutiny Committee.

²⁶ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 14.

²⁷ See *ibid*, paragraph 15, which states that the length of the term to be granted to Thornfield would be 200 years. The Independent Review into WCC’s decision-making during this development process states that the agreed minimum for the annual ground rent was £250,000 (see, Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 17).

included items such as affordable housing,²⁸ a new bus station, a new 'civic square' and 'dial a ride' premises 'to meet the needs of people with disabilities or other mobility impairment.'²⁹ WCC's website identifies the pressing need for affordable housing in Winchester and notes that 'over 2,300 households' are on the council's housing waiting list.³⁰ Each of these required elements might be deemed a form of public service and thus a component of the DA worth selling to the Cabinet. Instead, the contents of the DA that WCC's Director of Development Services emphasised to the Cabinet indicate a perceived need to showcase the Council to 'institutional investors.' This is, of course, a type of 'performance'³¹ and suggests that a demonstration of the project's appeal to private finance was a marker of legitimacy.

The report that WCC's Director of Development Services gave to the Cabinet is also notable for the way that it brushed over the complexity of moving from a conditional DA that required the making of a CPO to an unconditional DA that would impose a binding commitment on Thornfield to build the development. The report set out some of the conditions contained in the DA³² but simply stated that, if the site had been assembled and planning permission had been obtained, Thornfield could commence building.³³ As I will show, however, this comment assumed that Thornfield would want to commence building and was thus a significant simplification of the nature of the move from conditionality to unconditionality. I consider the implications of this assumption in the remainder of this thesis.

When is a date 'unconditional' and when is a date a 'long stop'?

So far in this chapter I have shown that the Winchester DA contained a conditional obligation that had the potential to compel Thornfield to construct a development incorporating a set of 'required elements.' In this section of the chapter, I will explain that the

²⁸ The term 'affordable housing' is, of course, extremely broad-ranging, as demonstrated in Brett Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 *International Journal of Urban and Regional Research* 79, 83-85. Out of the 364 residential units required in the Winchester DA, 35% of those units were to be 'affordable,' with 80% of those affordable units to be 'shared ownership,' 16% 'social rented' and 4% 'key worker'. See, for example, Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraphs 16 and 21.

²⁹ Winchester City Council, *Adopted Broadway Friarsgate Planning Brief. Part 2B - Background and Analysis Cont'd (Appendix B, Document 2.05)*, paragraph 2.7.7.

³⁰ Winchester City Council, 'The Need for Affordable Housing' <<http://www.winchester.gov.uk/housing/new-affordable-housing/need-affordable-housing/>> accessed 14 July 2017.

³¹ Judith Butler, *Gender trouble: feminism and the subversion of identity* (Routledge 1990).

³² Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 15.

³³ *ibid*, paragraph 18.

function of two Long Stop Dates in the DA was to show the point in time by which unconditionality should have occurred.

To make the Winchester DA unconditional, various conditions needed to be discharged. These conditions stated that the developer needed to have secured planning permission ('the planning condition'), obtained a road closure order ('the road closure condition') and produced a survey of the site confirming that no geotechnical, environmental, flooding or archaeological matters would diminish the assumed financial viability of the development ('the site survey condition').³⁴ Thornfield needed also to have exchanged agreements for lease with tenants for an agreed proportion of the proposed retail area of the development ('the pre-letting condition'), and to have entered into a 'legally binding' funding agreement with a 'fund' to finance the costs of development ('the funding condition.'). It should also have drawn up another 'legally binding' agreement stating that the developer would sell the affordable housing element of the proposed development to a registered social housing provider ('the affordable housing condition'). The DA does not explain what the term 'legally binding' meant in either the context of the affordable housing agreement or the funding agreement, however.³⁵ Finally, the DA was also conditional on the developer producing a financial appraisal showing that the proposed development was financially viable in terms that the developer deemed acceptable ('the viability condition').

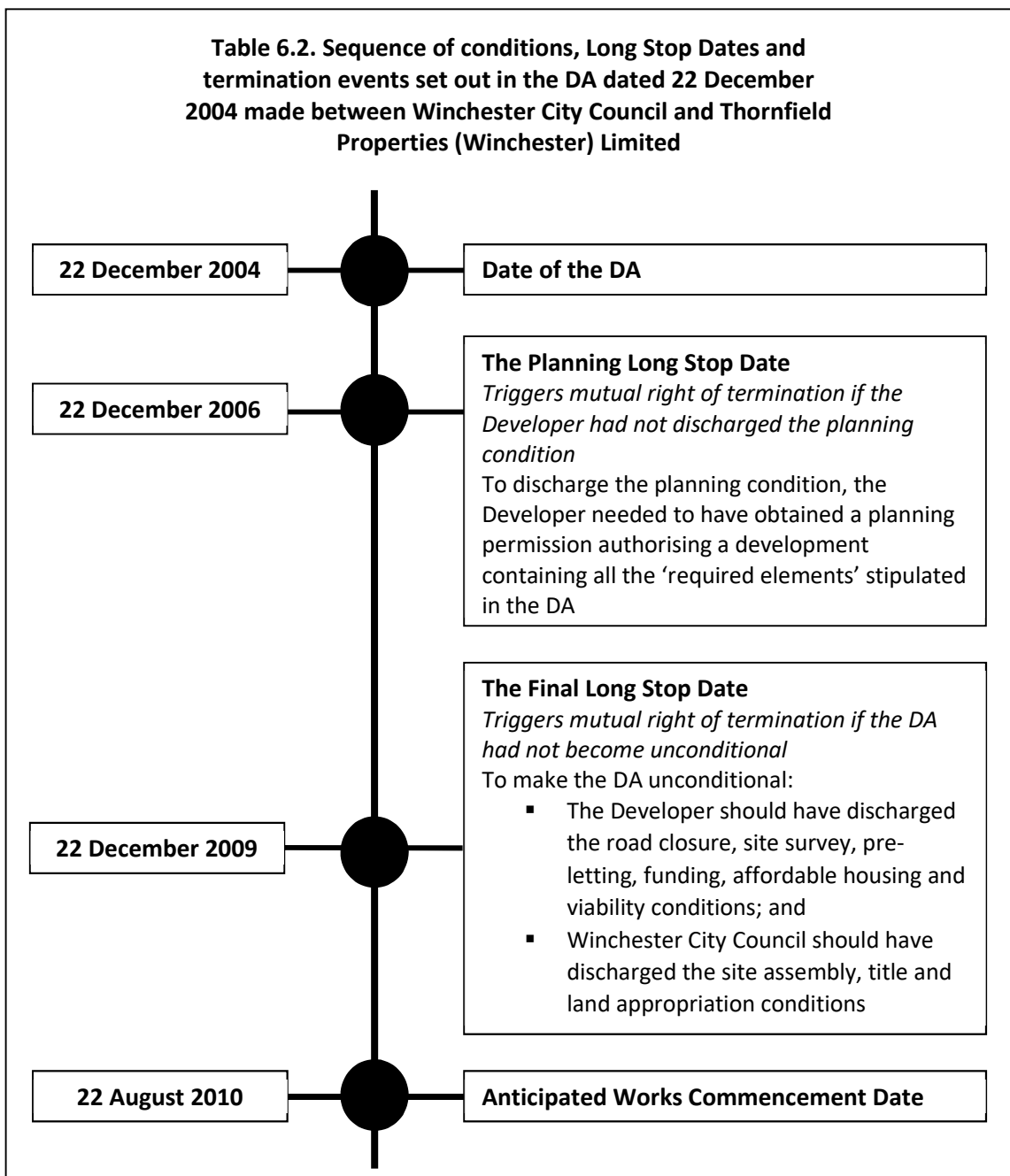
The Winchester DA also contained clauses stating that the obligation to commence construction of the development was conditional on 'the land appropriation' and 'the site assembly' conditions, which would be satisfied either when the local authority entered into agreements for sale with third party owners to acquire the interests in the development site or when the Secretary of State confirmed the making of a CPO following a public inquiry. These conditions required, therefore, the making of a CPO and the successful defence of its validity at the public inquiry that, CON2 and CON3 pointed out, is inevitable when a local authority seeks to compel private landowners to part with their land.³⁶ 'The title condition' required WCC to confirm it could provide a 'good and marketable title to the development site when it granted a lease of the site to the developer. While the scope of these conditions was, therefore, far-reaching and required WCC to assemble the development site, it did not require WCC to

³⁴ As set out in schedule 2, paragraph 2 of the DA.

³⁵ This became a significant issue in 2016 when Thornfield's successor company attempted to demonstrate that it was ready to make the DA unconditional. It had negotiated heads of terms with a registered social housing provider and had a 'nearly legal' agreement in place to satisfy the 'affordable housing condition' but it could not agree terms for a funding package with a financial institution so was unable to present a 'nearly legal' funding agreement as a precursor to the 'legally binding' funding agreement needed to satisfy the 'funding condition.' I discuss this in more detail in chapter 10.

³⁶ Acquisition of Land Act 1981, s12(2) and s13A(3)(a). I explain the making of the Winchester CPO in more detail in chapter seven, where I also analyse the objections to the making of the CPO that necessitated a public inquiry.

transfer the land to the developer at this stage.³⁷ I have set out the conditions and the Long Stop Dates in the Winchester DA at table 6.2.



Despite the inherent flexibility of drafting a DA as a 'hugely conditional' document, the Winchester DA set out the steps that the parties should have taken to discharge those conditions. It also specified two 'Long Stop Dates' by which discharge should have occurred, and the circumstances in which the parties could terminate the DA if discharge did not occur

³⁷ The grant of a long lease to the developer would only occur, as I pointed out above, on completion of construction. Once the site had been assembled and the DA had become unconditional, a licence from WCC to Thornfield automatically took effect allowing Thornfield to enter WCC's newly-acquired land to commence construction.

prior to the Long Stop Dates.³⁸ The DA initially stipulated that Thornfield needed to have secured planning permission for the development by the Planning Long Stop Date, on 22 December 2006.³⁹ Thereafter, WCC and Thornfield needed to have collaborated to discharge the remaining conditions by the Final Long Stop Date, on 22 December 2009.⁴⁰ I will focus on the concept of a Final Long Stop Date in this chapter before revisiting, in chapter seven, the practicalities WCC's officers and Thornfield's directors faced in discharging the planning condition in time for the Planning Long Stop Date.

The Winchester DA, in common with others my interviewees described, therefore contained an apparently carefully delineated temporal framework, imposing obligations on the contracting parties that would have taken effect if a series of time-limited conditions were satisfied. One of the complexities of this type of DA, however, is the interplay between 'the Unconditional Date' and this sequence of Long Stop Dates. The Final Long Stop Date is the date, scheduled in advance, by which unconditionality must happen. The Unconditional Date, which is not scheduled in advance, is the date on which unconditionality occurs,⁴¹ although the parties to a DA begin the conditional phase with the expectation that the Unconditional Date will occur on or before the Final Long Stop Date, given that a right to terminate the agreement arises on the Final Long Stop Date. These are, therefore, 'dates' that serve different purposes. The Final Long Stop Date is the pre-defined cut-off point after which the conditional phase would end if the DA had not already become unconditional and if the parties then exercised their termination rights.⁴² On the other hand, the Unconditional Date is an anticipated event and a moment for the parties to aspire towards. The Winchester DA looked forward to the Unconditional Date, then onwards to the moment by which construction should have commenced,⁴³ then onwards again to the moment that WCC would grant a lease of the development site to Thornfield, then onwards into the open-ended operational phase of the development during which Thornfield expected to generate profits and WCC would share in

³⁸ As set out in clause 24.1.1 and schedule 2, paragraphs 15.1 and 15.2 of the DA.

³⁹ Referred to as 'the date which is two years after the date of this Agreement.' As set out in clause 1.1.10 of the DA.

⁴⁰ Referred to as the date '5 years from and including the date of this Agreement.' As set out in clause 1.1.50 of the DA.

⁴¹ The specific clause dealing with this in the Winchester DA stated that the Unconditional Date would be '[t]he date when the last outstanding Conditions is [*sic*] waived' (see clause 1.1.73). The DA then stated that the developer would have to ensure that construction commenced within nine months of the Unconditional Date.

⁴² As I will demonstrate in chapter 10, the Long Stop Date occurred in Winchester before the discharge of the conditions but WCC allowed the developer to attempt to demonstrate satisfaction of the conditions before serving notice of termination.

⁴³ Referred to in the DA as 'the Works Commencement Date.'

those profits.⁴⁴ Although my focus is on the conditional phase of the Winchester DA, the sense of stages that would follow each other sequentially in a 'progressive succession'⁴⁵ is clearly laid out in a way that 'implies a line'⁴⁶ between the date of the DA and the Unconditional Date, albeit one that is of an undefined length and that can only be measured after the Unconditional Date has occurred.

From uncertainty to cohesion: The time before the Unconditional Date and the time after the Unconditional Date

In this section I explore the concept of an Unconditional Date in more detail. Analysing a DA based on the concept of the Unconditional Date means looking at the purpose of the conditions in this type of agreement. CON3 described a DA as a means to plot the coordinates of the journey from conditionality to unconditionality because it is a way, he explained, for a local authority and a developer to state what they intend to do to enable the developer to start building. From CON3's point-of-view, a DA enables two contracting parties to 'transit' from an indeterminate development proposition, contingent on site assembly, funding, planning and viability, to a position from which the developer is prepared to commence construction. The suggestion that a DA is a device that enables 'transit' recalls the point I made in chapters four and five that an EA is a 'vehicular' device that allows a local authority and a developer to move forward in the development process.⁴⁷

Similarities are also apparent between the Winchester exclusivity period and the conditional phase. In the same way that the exclusivity period began on the date of the EA, the conditional phase began on the date of the DA. Each phase was also forecast to end with a specific event, respectively the date of the DA and the date that the DA became unconditional. But the Winchester DA, which laid out the conditions to be discharged before unconditionality could occur, was a more obvious attempt to 'plot' subsequent actions than the Winchester EA. In his work on narrative techniques and historical writing, Ricoeur talks about plotting as a means to draw 'causes, intentions, and also accidents into a single meaningful unity' and to

⁴⁴ WCC would receive its profit share by way of an 'overage' payment. The officers report produced in February 2005 explained simply that the council would 'receive a share of the developer's profits 'by way of a capital payment' (see Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 20). I will investigate this profit-sharing mechanism in more detail in chapter nine, where I point out that, in July 2014, WCC chose to provide more details of the basis for the overage calculation (see Winchester City Council, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 10.2).

⁴⁵ Scott, *Omens of adversity: tragedy, time, memory, justice*, 108.

⁴⁶ Carol J. Greenhouse, *A moment's notice: time politics across cultures* (Cornell University Press 1996), 35.

⁴⁷ David Cowan and Daniel Wincott, 'Exploring the 'Legal'' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 26.

guide 'complex action from an initial situation to a terminal one by means of rule-governed transformations.'⁴⁸ The Winchester DA functioned in this way to force the contracting parties to make decisions, carry out actions, interpret events and respond to accidents through the prism of the planned movement from conditionality to unconditionality.

But Ricoeur also points out that a plot is also a way to make a reader believe in the narrative coherence of the story being told.⁴⁹ This is a helpful way to think about the temporal schema deployed in a DA. There is an alluring internal cohesiveness to the presentation of a movement from an uncertain 'initial situation' at the start of the conditional phase to the settled state of the Unconditional Date. And there are many ways in which WCC's officers and Thornfield's directors treated the date of the DA as an initial situation. For example, WCC's Chief Estates Officer used his reports to Cabinet to present the date that the parties signed the DA as an originating moment⁵⁰ after which a 'period of activity' began that focused on the submission of a planning application and extensive 'pre-application discussions' between Thornfield's directors and Council planning officers.⁵¹ The DA was also, WCC's Chief Estates Officer pointed out, the stimulus for Thornfield to enter into a conditional contract for the purchase of the site of the bus station on the development site.⁵²

Similarly, there are also many ways in which a local authority and a developer treat the Unconditional Date as a destination, with repeated invocations of journey metaphors. D3 invoked the image of a developer 'racing' to bring together the components of a viable development, while D4 presented a developer involved in this sort of process as the 'driver' and the local authority as a passenger who sits back and awaits arrival at the Unconditional Date. Slightly more flamboyantly, LA2 described the moment of unconditionality as confirmation that a developer had 'purified' uncertainties as to site assembly, planning, viability and funding that had been present at the date of the DA but that had been eradicated with the passing of the Unconditional Date. These insights hint that something magical happens on the Unconditional Date and presents a 'moment of accession'⁵³ that occurs with

⁴⁸ Ricoeur, *Memory, history, forgetting*, 243.

⁴⁹ *ibid*, 243.

⁵⁰ Greenhouse, *A moment's notice: time politics across cultures*, 86.

⁵¹ Winchester City Council, *PS202. Silver Hill Development Update Report. Report of Chief Estates Officer. 17 October 2005 (Appendix B, Document 1.13)*, paragraph 1.1.

⁵² This contract seems to have superseded the agreement between Thornfield and Stagecoach (South) Limited that I discussed in chapters four and five. It was conditional on Thornfield securing planning permission for the development and construction of a new bus station on the development site (see Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 4). Thornfield's agreement with Stagecoach had, as I mentioned in chapters four and five, itself acted as a stimulus for the entire development process.

⁵³ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107, 108.

the passage from the conditional phase into unconditionality. CON3 used similar language to that deployed in the Winchester DA⁵⁴ and told me that, once the Unconditional Date has occurred, from a developer's point-of-view, 'the agreement comes in with the full force of a contract.' This comment suggests that there is something transformational about a DA that has become a 'legally binding' agreement and the emphasis on the 'fullness' of the unconditionality that occurs on the Unconditional Date depicts both the ripening⁵⁵ of the DA and the perceived significance of this as an event.

But my research also demonstrates how a developer might carefully control the passage from conditionality to unconditionality in a similar way to the type of 'highly moderated change' that Johns identifies as an attribute of the contractual underpinnings of many urban infrastructure projects.⁵⁶ Referring to his experience of working with a developer on a property-led development project, LA2 told me that he presumed that he had a 'deal' with a developer as soon as his local authority entered into a DA with that developer. When I put that idea to CON3, however, he refuted it and stated that 'a DA, until it becomes unconditional, is about as meaningful as a menu.' He expanded on this point by describing a DA as a 'governor on change' and a 'partnership regulator' and I understand these images to be expressions of a desire for the mechanical⁵⁷ given that a governor or a regulator is a type of device used to control the flow of fuel to an engine to ensure steady motion. On that basis, CON3 appears to be suggesting that 'the driver' of a development process should be able to use a DA to regulate the rate of change from a conditional state to an unconditional state. D3 expressed this in terms of the implications for a local authority when he explained that he had encountered some 'naïve' local authority officers and councillors who believed that a development would get constructed in close accordance with the terms of a conditional DA whereas, in his experience, the conditionality of a DA afforded a developer an ongoing opportunity to pick and choose the type of development that they wanted to carry out.

Others amongst my interviewees also used mechanical imagery to describe the movement from conditionality to unconditionality. For example, D1 talked about assembling the conditional components of a DA and knowing 'which buttons to push.' CON4 offered the image of lining 'your ducks up in a row' before the Unconditional Date but acknowledged that getting planning, compulsory purchase, funding and lettings to 'coincide' in time for the

⁵⁴ Other DAs I studied expressed this in the same way. A DA that Waverley Borough Council entered into for a development in Farnham in Surrey stated that the 'provisions of this agreement will come into full force and effect.'

⁵⁵ Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010), 82.

⁵⁶ Johns, 'Financing as Governance', 401.

⁵⁷ Elizabeth Grosz, *The nick of time: politics, evolution, and the untimely* (Duke University Press 2004), 232.

Unconditional Date 'requires an element of luck as well as skill.' By contrast to the sense of magic underlying a 'moment of accession,' these points are important because they suggest that property-led development actually involves methodically lining things up for the Unconditional Date and that there is no magic in the movement from conditionality to unconditionality.

The difference in perception here between local authority officers and developers is striking. On the one hand, there are developers who appear to treat the journey to unconditionality as something involving luck but which can be controlled. These developers presented the journey from conditionality to unconditionality as involving a series of somewhat quotidian actions, with generally predictable effects. On the other hand, there are local authority officers who had to wait for unconditionality with a growing 'sense of the forthcoming.'⁵⁸ There is a lop-sidedness apparent in these experiences of the passage of time in property-led development.

Regardless of the combination of luck and skill required to make an Unconditional Date happen, the prospect of unconditionality does give a 'glimpse of the future'⁵⁹ and enables a developer to assess the desirability of that future. CON3 explained that he would communicate this to his developer clients by telling them that after the Unconditional Date:

[You're] pretty much bound to complete. It's very difficult to walk away because you leave all of your money in the ground. I mean, it's an absolute disaster scenario for companies, and it has happened. But it's pretty much [PAUSE], they lose everything. The council keeps the site, keeps the works [PAUSE], you know. So it rarely happens, and that's why [developers] are very concerned to regulate the timing of the Unconditional Date. Because after that, they're committed.

This is another illustration of the perceived transformational effect of a 'legally binding agreement.' By contrast, CON3 explained, if a developer chose to abandon a development before the Unconditional Date, the developer involved would lose only the costs it had invested in preparing planning applications and negotiating with prospective tenants and funders. Even if the developer had acquired some of the land interests required to assemble the development site before the Unconditional Date, CON2 told me, it would have obtained a saleable asset that it would use to recover some of its costs in the event of termination.

But, CON2 explained, the costs a developer accrued before the Unconditional Date were a small proportion of the development costs that would begin to accrue after the Unconditional Date. He told me that he would advise a developer to prolong the conditional phase of a development process if there was any reason to doubt the profitability of the proposition because unconditionality would mean that the developer had 'to start spending

⁵⁸ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 113.

⁵⁹ Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action*, 134.

two or three hundred million pounds' on land acquisitions and building work. If land acquisition took place and construction started in those circumstances, a developer might, using CON3's description, 'leave all of [the] money in the ground' if they withdrew from the agreement having started construction or if they started construction but failed to make enough money to recover their costs.

Termination of a DA thus signifies a type of ending. An Unconditional Date is also, in the sense that Ricoeur describes, 'a terminal' situation because developers and local authorities treat it as an unrepeatable event that changes the relationship between a developer and a local authority. But, using Johns' phrase, this is 'highly moderated change.'⁶⁰ After the Unconditional Date, the developer is no longer subject to a vague commitment to construct a development but a binding commitment to pursue that development to the completion of construction or 'leave its money in the ground.' After the Unconditional Date, a local authority would exercise its CPO,⁶¹ start compensating landowners for the acquisition of their land, and expect the developer to fund those acquisitions. It is at this point, as CON2 put it, that the financial outlay shifts from 'tens of millions of pounds' to 'hundreds of millions of pounds.'

Drawing a line: the Long Stop Date and the discharge of conditions

Based on the previous discussion, the prospect of movement from conditionality to unconditionality would seem to be a matter at the discretion of the developer, who seeks to exploit the flexibility inherent to the conditionality of a DA to manage the conditional phase in its favour. In this section of this chapter, I ask if mechanisms in a DA exist to address this apparent lop-sidedness.

Most DAs do contain mechanisms that purport to 'generate actions'⁶² from a developer, and the Winchester DA, for example, imposed an obligation on Thornfield to use its 'reasonable endeavours at its own cost to procure the satisfaction of [the conditions] as soon as reasonably practicable but in any event prior to the Long Stop Date.'⁶³ This clause is notable

⁶⁰ Johns, 'Financing as Governance', 401.

⁶¹ In the Winchester DA, clause 10.2 stated that Thornfield could serve an 'Acquisition Notice' on WCC requiring it to proceed with the exercise of its compulsory purchase powers to acquire all outstanding land interests on the site.

⁶² Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 45.

⁶³ Schedule 2, paragraph 3.3. The DA referred specifically here to the planning condition, the road closure condition, the survey report condition, the pre-letting condition, the funding condition, the affordable housing condition and the viability condition. It did not refer to the site assembly condition, although the DA separately required Thornfield to use its 'reasonable endeavours' to negotiate with existing landowners regarding the sale and purchase of their interest (see Schedule 2, paragraph 1.2). It should be noted that the DA also imposed a similarly worded 'reasonable endeavours' obligation on WCC, as stated in schedule 2, paragraph 3.4 of the DA.

because it makes clear that discharge or satisfaction of the conditions must occur before the Final Long Stop Date, although this expectation is caveated by the inclusion of a 'reasonable endeavours' clause. D1 attempted to describe the flexibility inherent to a reasonable endeavours clause when he told me that:

The flexibility aspects are really by virtue of the fact that you can't really impose on a developer, and vice versa a council, conditions in a DA that *have* to be addressed. What you can say is that you'll use reasonable endeavours. Reasonable endeavours is probably a simple way of saying that we'll show [PAUSE], sort of [PAUSE], sort of [PAUSE], show keenness, and a want to do something. But, obviously, that has to be done in a way that is best for the project rather than just [PAUSE], sort of [PAUSE], ploughing ahead.

This description of the purpose of a reasonable endeavours clause neatly captures the vagueness of this type of provision. CON3 also discussed the use of reasonable endeavours clauses and told me that a DA 'doesn't really lock a developer' into specific actions because the developer is 'merely there to use reasonable endeavours' in seeking to discharge the conditions. Similarly, CON2 commented that, while a developer will 'enter into a reasonable endeavours clause to fulfil' the conditions, the flexibility of this concept means that 'you've got enough get-outs there' to avoid any undesirable commitments.

Of more significance is the reference in the DA to the Long Stop Dates, which I referred to in Table 6.2. As I have already stated, the Winchester DA contained a Planning Long Stop Date that was set to occur exactly two years after the date of the DA, and a Final Long Stop Date that was scheduled to fall exactly five years after the date of the DA. WCC and Thornfield entered into the DA on 22 December 2004 so those Long Stop Dates fell on 22 December 2006 and 22 December 2009, respectively.⁶⁴ My analysis of the temporal framework that a conditional DA provides for the conditional phase of a property-led development project has so far considered the connections between the date of the Winchester DA and the Unconditional Date anticipated in that DA. By contrast, these Long Stop Dates marked the moment upon which the DA would become terminable if the Unconditional Date had not occurred. I have argued that the apparent link between the date of the DA and the Unconditional Date 'implies a line'⁶⁵ extending from the initial pitch from Thornfield to WCC and seamlessly onward to an operational development. Alongside this line linking the date of

⁶⁴ WCC documents also refer to the second Long Stop Date as scheduled to occur on 31 December 2009 (see, for example, Winchester City Council, *CAB2085. Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 3.4). This is because clause 24.1.1 of the DA states that either party shall be entitled to serve notice on the other if the Unconditional Date had not occurred before 31 December 2009. I do not consider there to be a material difference between a Long Stop Date falling on 22 December 2009 or a Long Stop Date falling on 31 December 2009 so have not investigated that point.

⁶⁵ Greenhouse, *A moment's notice: time politics across cultures*, 35.

the DA and the Unconditional Date, the link between Long Stop Dates, termination rights and the Unconditional Date also purported to draw a line that carries an important justificatory logic that I now consider.

In chapters four and five, I described some of the ways in which WCC and Thornfield gave various different ‘nearly legal’ and ‘legally binding’ agreements some of ‘the qualities’ of time⁶⁶ by embedding a sequence of dates in those documents. In a similar way, local authorities and their developer partners make a conditional DA ‘timely’ through the use of Long Stop Dates. Earlier in this chapter, I demonstrated that the line linking the date of a DA and the Unconditional Date is initially of an undefined length and can only be measured after the Unconditional Date has occurred. In one sense, therefore, legitimacy flows through a DA from the way that the Unconditional Date is presented as a forthcoming event that will provide a record of the movement from conditionality to unconditionality. By pointing to an Unconditional Date as a temporal reference point and a marker of progress, a local authority and a developer can thus show how they will demonstrate that they are effectively working towards the destination laid out in an overarching development trajectory.

Using a specific date as a Long Stop Date in a conditional DA has, on the other hand, the potential to perform a different type of legitimising role. This is because Long Stop Dates in a DA are a means to construct the conditional phase of the development process as a ‘finite segment’⁶⁷ between the date of a DA and the moment that the DA becomes unconditional. In discussing property development projects generally, D1 used the image of a ‘line in the sand’ that separates parts of a development process in the sense of ‘a line’ that marks a limit or a boundary. The Final Long Stop Date in a DA ostensibly marks the last possible moment on which the Unconditional Date can occur and so sets the pre-agreed extent of the conditional phase. A temporal reference point embedded within a DA might thus afford the process a form of legitimacy on the basis that a Final Long Stop Date has the potential to end the process if insufficient progress has been made by that date. The underlying assumption is, therefore, that this Long Stop Date will ‘generate actions’ from both the contracting parties on the basis that the developer will otherwise risk losing the development opportunity that comes from the making of a CPO and that the local authority will lose the developer’s capacity to generate funding.

There are numerous examples of this from my research. For example, PS1 argued that a series of Long Stop Dates in a DA should act as ‘a sequence of triggers that you have put in place to ensure that the developer does one thing, and then something else, and then

⁶⁶ Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012), 258.

⁶⁷ Greenhouse, *A moment's notice: time politics across cultures*, 20.

something else.’ D1 offered a further acknowledgement of the potential of a Long Stop Date as a type of monitoring and accountability device by suggesting that ‘a date’ provides something for a local authority ‘to fall back on’ in the event of a lack of overall progress on a development proposal because it gives ‘the comfort of knowing that [a developer is] not spinning things out.’ Similarly, he observed that a Final Long Stop Date is a necessity ‘because, obviously, if it didn’t have a date, one could hide behind the agreement and it might be years before the development gets on site.’⁶⁸ This use of Long Stop Dates to give the development process some of the qualities of time resembles other mechanisms for, as Rakoff describes it, placing ‘people and events in temporal relation with each other’ that, he suggests, are ‘a hallmark of production in modern societies.’⁶⁹ The reassurance that a developer is not ‘spinning things out’ could only come, D1 suggested, from forming some form of linkage between progress on the discharge of conditions and calendar time.

The assumption that a Final Long Stop Date would prevent a developer ‘spinning things out’ also underpinned the Winchester DA. The Council’s Chief Executive presented a report to the Council’s Cabinet that explained that, while the ‘Long Stop Date in the Development Agreement (31 December 2009) does not bring the agreement to an end on that date,’ the inclusion of a Long Stop Date, he said, ‘was obviously intended to provide an incentive on both parties to proceed diligently.’⁷⁰ The reference to ‘an incentive’ demonstrates a belief that the imposition of temporal markers would motivate Thornfield’s directors to behave in a particular way, thus addressing some of the inherent lop-sidedness of this type of agreement. That the purpose of the Long Stop Date was, according to both WCC’s Chief Executive and D1, also apparently ‘obvious’ suggests that this type of arrangement is founded upon a self-evident logic. In the remainder of this chapter, however, I question this logic.

D1 and PS1 both told me that the ‘disciplining’⁷¹ effect of a Long Stop Date is crucial to the legitimacy of a DA as a tool that facilitates a property-led development proposal. But PS1 also emphasised that a Long Stop Date is a crucial tool for a local authority’s officers and cabinet members, who might need to justify their decision to enter into a DA with a developer

⁶⁸ In terms of asking whether or not a time limit is a legal necessity for a binding DA, the case law on conditional contracts suggests that if an agreement contains no time limit, any conditions ‘must be fulfilled within a reasonable time determined objectively’ (see Robert Megarry and others, *The law of real property* (8th edn, Sweet & Maxwell 2012), paragraph 15-009.

⁶⁹ Todd D. Rakoff, *A time for every purpose: law and the balance of life* (Harvard University Press 2002), 6.

⁷⁰ Winchester City Council, CAB2085. *Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 3.4. In doing so, the Council’s Chief Executive seems to have interpreted the Final Long Stop Date as falling on 31 December 2009 rather than 22 December 2009. I cannot explain why.

⁷¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991), 215.

to councillors, local residents and voters. By putting in place a mechanism intended to ensure that the move from conditionality to unconditionality occurred on or before a fixed date, the local authority he argued, is equipped to measure progress towards the discharge of conditions against a precise temporal scale. Both D1 and PS1 made these points in light of the generally held suspicion, that D1 acknowledged, that most developers will seek to exploit the desperation of a local authority to manipulate property-led development processes in their own favour.⁷²

LA3 and LA4 both countered this and insisted that a Long Stop Date can provide a sufficiently robust mechanism to ensure that a developer takes a DA to unconditionality and then carries out construction. For example, LA4 told me that ‘a Development Agreement sets a framework. What it says and what happens might not tally exactly but it is close enough.’ In addition, he argued that a developer’s willingness to agree to a Long Stop Date might not produce an absolute guarantee that unconditionality will occur within a given period but does provide sufficient assurance about the ongoing reliability of a developer and the suitability of a DA as a means to ensure that construction takes place. Despite these comments, however, there is more evidence of a lop-sidedness here, this time in the way that developers and local authority officers interpret Long Stop Dates.

Something ‘scientific’ or something ‘arbitrary’ – setting the Long Stop Dates in a DA

One of the questions that my research sought to answer is how local authorities and their development partners set the Long Stop Dates in a DA and how they use those dates after they have been agreed. I investigate this further in this section of this chapter.

During my fieldwork, CON2 told me that he had negotiated numerous Long Stop Dates in DAs on behalf of different property development companies. He explained that he would first have a meeting with his client from the development company to ‘estimate how long it’ll take us to actually just discharge the conditions, and then we add a bit on.’ His experience of the planning application process, leasing arrangements and the compulsory purchase process would inform that general sense of what he deemed suitable. He would then enter into negotiations with a local authority with a general sense as to a suitable calendar date for the Long Stop Date. The extent of any negotiations with the local authority as to the actual Long Stop Date would depend, thereafter, on the parties’ respective views on the reasonableness of

⁷² This suspicion has emerged most acutely in recent years in the tendency of developers to deploy mechanisms to remove parts of a development proposition deemed to be of community benefit. The provision of affordable housing is particularly at stake here (see Jerry Flynn, ‘Complete control: Developers, financial viability and regeneration at the Elephant and Castle’ (2016) 20 *City* 278 and Paul Watt and Anna Minton, ‘London’s housing crisis and its activism: Introduction’ (2016) 20 *City* 204, for example).

the 'bit' added on. If the local authority felt that the developer was trying to add too much on, CON2 told me, they might seek to negotiate a Long Stop Date slightly closer to the anticipated date of the DA, whereas a developer would seek to ensure that the temporal framework contained enough flexibility to allow them to maximise the amount of time available before the DA imposed a binding commitment to construct.

Nevertheless, CON2 argued that there 'is a bit of science' to the setting of a Long Stop Date. This assertion rested upon an assumption that a developer would calculate a Long Stop Date in a logical manner based on experience, expertise and past experimentation. By contrast, CON2 suggested that a local authority would be more unpredictable and might introduce concerns that were irrelevant or unrelated to the actual task of working through the conditions in a DA:

There's a bit of negotiation to it, and [PAUSE], so [PAUSE]. There's a bit of science to it from the developer's side and there is sometimes from the local authority's side. [But t]here's something like, "We need this before our council changes," or "We've made promises to our electorate that we're going to do this." So some of it is purely arbitrary.

From his point-of-view, setting a Long Stop Date might involve some thoughtful analysis and the application of expertise from a developer and his or her consultants, although his emphasis on the need to 'add a bit on' and the inherent inexactness of this approach suggests that the choice is shaped more by whim and spur of the moment decision-making than he admitted. His description of the basis for the selection of the Long Stop Date hints that it is a provisional judgement based on personal choice rather than a careful sequencing of actions. He highlighted the purportedly 'scientific' approach of a developer and bemoaned the 'arbitrary' approach of a local authority but it seems reasonably pragmatic and entirely unsurprising that a local authority might focus on electoral cycles and commitments to constituents. Presumably, however, he characterised this as an arbitrary choice because it might introduce to a conditional phase of a development process factors other than the commercial priorities of a developer and its consultants.

In Winchester, public documents that WCC produced at the time that it entered into the DA with Thornfield do not explain the basis for the choice of Long Stop Dates.⁷³ However, the lack of progress on satisfaction of the conditions in line with these Long Stop Dates by the end of 2008 led WCC's Head of Estates to seek approval from the Council's Cabinet for an

⁷³ Winchester City Council, CAB938. *Broadway Friarsgate Development. Report of the Chief Estates Officer. 6 October 2004 (Appendix B, Document 1.08)*; Winchester City Council, CAB1030. *Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.11)*.

extension of the Long Stop Date to 31 December 2012.⁷⁴ The rationale for this extension was that WCC's officers and Thornfield's directors had negotiated a 'Compulsory Purchase Order Indemnity Agreement'⁷⁵ that was still in draft form but that would supplement the DA and require Thornfield to reimburse the costs that WCC incurred in preparing, making, defending and implementing a CPO for the development.⁷⁶

CON2 explained that a CPOIA is a standard component of the network of contractual arrangements that a local authority and a developer would enter into to facilitate this type of development. But it is interesting here because it is another example of a local authority officer using a 'nearly legal' agreement to generate actions from councillors. In his report to the Council's Cabinet, WCC's Head of Estates emphasised that the agreement 'is now at final draft stage'⁷⁷ and explained that WCC and Thornfield would proceed with the making of the CPO after the CPOIA was 'in place.'⁷⁸ Putting the CPOIA 'in place' was impossible, he indicated, while the Long Stop Date was still set to fall in December 2009 because it was unlikely that WCC would be able to satisfy the site assembly condition by that date given the typical length of time between making a CPO and its confirmation at a public inquiry.⁷⁹ WCC's officers, presumably with Cabinet approval, and Thornfield's directors subsequently exchanged letters in which they agreed not to exercise the termination rights that would arise on the Long Stop Date until 31 December 2012.⁸⁰

This decision to extend the Long Stop Date in the Winchester DA requires more analysis. Earlier in this chapter, I mentioned the way that developers and local authority officers present the incorporation of a Long Stop Date into a DA as a marker of the legitimacy of a DA and as a means of holding a developer to account for any lack of progress on the satisfaction of DA conditions. But it is important to ask how willing a developer and a local authority are to vary those dates and extend a conditional phase. In chapter five, I analysed the temporal parameters laid out for the duration of an exclusivity period and noted a pervasive assumption that temporal limitations produce a target-driven organisational

⁷⁴ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 9.2. I will discuss the making of the CPO in chapter seven.

⁷⁵ Hereafter referred to as a 'CPOIA.'

⁷⁶ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 6.1.

⁷⁷ *ibid*, paragraph 6.1.

⁷⁸ *ibid*, paragraph 1.1. As I will demonstrate in chapter seven, however, WCC did not enter into a CPOIA until much later in the development process.

⁷⁹ *ibid*, paragraph 9.2.

⁸⁰ Winchester City Council, CAB2085. *Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 3.4.

culture.⁸¹ But I also noted that the pre-agreed termination date of the exclusivity period that WCC and Thornfield agreed in the Winchester EA was malleable enough to adapt to the fixed need to enter into a DA. WCC's willingness to change the Long Stop Date in the Winchester EA suggests a similar plasticity.⁸² LA4 compared the materiality of a DA as a paper artefact⁸³ with the adaptability of its contents:

Development Agreements make people happy in the sense that they've got a bit of paper there [*pointing to a bundle of papers on the desk*] but the reality is that you're driven by the market.

While he also extolled the disciplining effects of a series of Long Stop Dates, LA4 commented that a DA will 'theoretically, have dates. But we all know that we vary them.' Varying the Long Stop Dates was a technical⁸⁴ task requiring expertise to ensure that the DA retained its internal cohesiveness, LA4 explained, so you just 'bring your lawyers in to adjust them.'

I have already discussed D1's description of matters that get 'bolted-on' to a draft DA when two contracting parties move from Heads of Terms to a position at which they are ready to enter into that DA. Varying the Long Stop Date through an exchange of letters is an example of bolting things on or plugging things in⁸⁵ to an agreed DA. The bolt-ons added to the DA that I described in chapter five were items that changed the DA while it was still at its draft stage and, in the example I gave, D1 used the 'nearly legal' status of the DA to extract concessions from a local authority that benefitted his company. WCC's officers and Thornfield's directors, by contrast, bolted on the letters exchanged between them to the DA during the conditional phase, after the DA had become a 'legal' agreement. This demonstrates both that the process of changing, enhancing and layering continues after a DA has been agreed and that a conditional DA remains a complex assemblage⁸⁶ composed of many moving parts.

⁸¹ As also discussed, for example, in John Law, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002).

⁸² Javier Lezaun, 'The Pragmatic Sanction of Materials: Notes for an Ethnography of Legal Substances' (2012) 39 *Journal of Law and Society* 20; Susan Leigh Star and James R. Griesemer, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 *Social Studies of Science* 387.

⁸³ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*.

⁸⁴ Annelise Riles, 'A new agenda for the cultural study of law: Taking on the technicalities' (2005) 53 *Buffalo Law Review* 973.

⁸⁵ Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 207.

⁸⁶ *ibid*, 204; Nicholas Blomley, 'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133.

Maintaining the internal cohesiveness: Bolt-ons, standstills and changes

As I pointed out earlier in this chapter, WCC agreed to change the original Long Stop Date in the DA it had with Thornfield, from 31 December 2009 to 31 December 2012.⁸⁷ It did so because the Council's Head of Estates indicated that a change to the Long Stop Date would enable the two parties to proceed with the compulsory purchase of the land required for the development site.⁸⁸ The final observation that I want to make in this chapter, however, relates to a further change to the DA and a related change to the Long Stop Date that provoked concern amongst WCC's officers on the basis that these subsequent changes might have led to a challenge under EU procurement law. The context in which WCC considered the justification for these further changes is worth briefly setting out.

There were three parties to the Winchester DA. WCC was the local authority obliged to make, secure confirmation for and, following the Unconditional Date, exercise a CPO. Thornfield Properties (Winchester) Limited, the entity that I have been referring to as Thornfield, was the developer that would, on the Unconditional Date, be obliged to commence construction and reimburse WCC for the costs it expended in making, seeking the confirmation of and exercising its CPO. The third entity was Thornfield Properties plc, the parent company of Thornfield Properties (Winchester) Limited. Thornfield Properties plc was 'the guarantor' of Thornfield's obligations in the DA. This meant that Thornfield Properties plc would be obliged to reimburse WCC's costs expended in relation to the CPO if Thornfield Properties (Winchester) Limited did not do so.⁸⁹

Thornfield Properties plc was 'jointly owned in 50:50 equal shares' by a group of private individuals and Halifax Bank of Scotland plc (HBOS).⁹⁰ I have not explored this ownership structure in detail but press reports state that, in January 2010, Thornfield Properties plc had accrued debts to HBOS of around £120million, with the result that HBOS placed it into administration in order to recover those debts.⁹¹ The administrators appointed to manage Thornfield Properties plc's assets sought to extract any value available from the company's various interests by attempting to sell its subsidiaries, and bundling into that

⁸⁷ Winchester City Council, CAB2085. *Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 3.4.

⁸⁸ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 9.2.

⁸⁹ As stated in Schedule 9 of the DA.

⁹⁰ Winchester City Council, CAB1534. *Silver Hill Winchester - Proposed Use of Compulsory Purchase Powers. Report of Head of Estates (Appendix B, Document 1.17A)*, paragraph 5.6(a).

⁹¹ See, for example, Graham Ruddick, 'Lloyds' property companies collapse into administration under £500m debts' *The Daily Telegraph* (<<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/6948268/Lloyds-property-companies-collapse-into-administration-under-500m-debts.html>> accessed 11 April 2015).

transaction any DAs into which those subsidiaries had entered.⁹² This included the DA that Thornfield Properties (Winchester) Limited had entered into with WCC.⁹³ The Council treated the purchase by a third party of Thornfield Properties (Winchester) Limited as a matter that did not amount to a significant variation to the DA because the same company would remain the developer, albeit that a new parent company owned its shares.⁹⁴

However, given that Thornfield Properties plc, the developer's original parent company, was also a guarantor of its subsidiary's obligations in the DA, WCC sought external legal advice in March 2010 before the administrators had disclosed any bidders for Thornfield Properties (Winchester) Limited. It sought this advice on the basis that a change in the developer's guarantor might trigger the requirement for an open market tendering process during which other potential developers would be able to bid for the award of the contract.⁹⁵ At the same time, the Henderson UK Property Fund, a property investment vehicle managed by Henderson Global Investors, bid to acquire Thornfield Properties (Winchester) Limited and to act as guarantor of its obligations under the Winchester DA.⁹⁶ After a period of discussion between WCC officers and Henderson, WCC's Chief Executive informed the Council's Cabinet that 'Mr Giffin [the QC appointed to advise WCC] has advised that it would be lawful' for a company to purchase Thornfield Properties (Winchester) Limited and to supersede Thornfield Properties plc as guarantor.⁹⁷ This published account of the QC's advice was, however, somewhat abbreviated and the Chief Executive's report noted that more detail on the advice was available in an exempt appendix to the report.⁹⁸ The author of the Independent Review provides some insight into that advice by pointing out that Mr Giffin also informed the Council that the DA 'should have been openly procured' when it originally awarded the DA to

⁹² Winchester City Council, CAB2085. *Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 1.2

⁹³ *ibid*, paragraph 1.3.

⁹⁴ *ibid*, paragraph 3.1.

⁹⁵ I will discuss the circumstances in which a variation to a DA will trigger a competitive tendering exercise in chapters seven, eight and nine when I analyse further variations made to the DA. In chapter 10, I analyse legal advice as a strategy in property-led development.

⁹⁶ In the remainder of this chapter, for the sake of brevity, I refer to 'the developer' in the Winchester DA as 'Henderson.' Where it is necessary to distinguish between the Henderson entity acting as developer and the Henderson entity acting as guarantor of the developer's obligation, I make the distinction clear. Henderson Global Investors was itself wholly owned by Henderson Group plc, a FTSE-250 listed company. For a discussion of Henderson Group plc, see Martin Robert Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraphs 2.1 and 3.1-3.7.

⁹⁷ Winchester City Council, CAB2085. *Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 4.1.

⁹⁸ *ibid*, paragraph 4.1.

Thornfield in 2004.⁹⁹ In addition, Mr Giffin informed the Council's officers that he believed that the DA was 'a public works contract and that a change of developer is a variation.'¹⁰⁰

As I have stated, however, the Council's officers appear to have taken the view that the identity of 'the developer' had not changed. Their rationale, as noted above, was that Thornfield Properties (Winchester) Limited simply converted from a special purpose development company wholly owned by Thornfield Properties plc to a special purpose development company wholly owned by Henderson. In addition, there were continuities between Thornfield and Henderson that were not noted in the report referred to above. For example, Michael Capocci, an individual I referred to in chapters four and five, was Thornfield's managing director and led negotiations on behalf of his company for the acquisition of John De Stefano's land on the Winchester Development site.¹⁰¹ Mr Capocci was also the Thornfield director who had led his company's efforts to convince WCC's officers to seek Cabinet approval for the DA that Thornfield sought.¹⁰² What is interesting about this is that Mr Capocci became, after Henderson replaced Thornfield, a director working on behalf of Henderson.¹⁰³

This point demonstrates how Henderson 'stepped into the shoes' of Thornfield. The company registered at Companies House with company number 04057646, at one time called Thornfield Properties (Winchester) Limited, was, at all times during the life of the DA, 'the developer.' Henderson did, however, change the name of the company to Silverhill Winchester No1 Limited.¹⁰⁴ There is a distinction, however, between the developer and the parent company that was the guarantor of the developer's obligations in the DA. I do not want to dwell on this distinction, however, so call the developer after Thornfield's administration,

⁹⁹ In doing so, he rebutted the advice that the council had received in 2004 to the effect that the DA was solely a 'land transaction' and so fell outside the scope of EU procurement rules. I discussed this advice briefly in chapter five (see also Winchester City Council, CAB2665. *Silver Hill - Judicial Review Decision. Report of Chief Operating Officer - As Monitoring Officer. 3 March 2015 (Appendix B, Document 1.46)*, paragraph 2.1).

¹⁰⁰ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 18. In chapter five, I provided some background to the EU and domestic legislation and case law that applied here. I provide more detail in chapter 10 when I conduct a detailed analysis of the legal advice that WCC's officers received during the Winchester Development.

¹⁰¹ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Note to file by Mike Capocci (6 June 2002) (Appendix B, Document 3.10.13)*.

¹⁰² Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10)*.

¹⁰³ He is included, for example, in the list of attendee at WCC committee meetings at which Henderson was represented (see Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 5 February 2014 (Appendix B, Document 1.31)*).

¹⁰⁴ For a record of the name, name changes, the registered office and the company number of Silverhill Winchester No1 Limited, please refer to Companies House, 'Company details - Silverhill Winchester No1 Limited' <<http://wck2.companieshouse.gov.uk//compdetails>> accessed 18 July 2017.

‘Henderson,’ to reflect the change of overall ownership of the special purpose company fulfilling the role of ‘the developer.’

Regardless of the change of ownership of the developer and the new guarantor, WCC's officers chose not to treat this variation as a ‘material’ change to the DA that might have necessitated a tendering competition.¹⁰⁵ Given that the Council chose to proceed with Henderson as the new parent company of the developer and as the new guarantor,¹⁰⁶ however, Mr Giffin advised that he could not ‘be confident that no-one would challenge’ the Council’s Cabinet decision to approve the substitution of Thornfield Properties plc with a new guarantor.¹⁰⁷ He thus recommended a ‘standstill period’ of six months from the date on which Henderson’s parent company superseded Thornfield Properties plc as the new owner of Thornfield Properties (Winchester) Limited and the new guarantor.¹⁰⁸ There is no published WCC report at the time noting this standstill period. Instead, the evidence that Martin Perry, Henderson’s Director of Retail Development, submitted to the inquiry held, in 2012, to confirm the Winchester CPO, referred to ‘a collateral agreement’ between WCC and Henderson entered into on 10 December 2010, on the same day that Henderson acquired Thornfield Properties (Winchester) Limited and became the guarantor of the company’s obligations.¹⁰⁹ This evidence also stated that the precise duration of the standstill period was ‘6 months and 10 days to allow for any potential challenge.’¹¹⁰ WCC and Henderson agreed that neither organisation would incur any costs related to the Winchester Development during the standstill period.

The standstill period thus acted as a further ‘bolt-on’ to the Winchester DA, and a means to afford the parties a pause within the conditional phase during which they allowed time to pass to enable them to obtain the confidence that they could proceed without fear of challenge. The circumstances of the deployment of this bolt-on to the DA are very unusual and I found no similar circumstances during my research. This is, therefore, a novel use of time as a resource and, if the conditional phase is presented as a necessary pause in the otherwise

¹⁰⁵ I consider the importance of distinguishing between ‘material’ and immaterial changes to a DA in chapters seven to 10 when I consider subsequent variations to the Winchester DA.

¹⁰⁶ Winchester City Council, *Minutes of the meeting of the Cabinet held on 24 November 2010 (Appendix B, Document 1.22)*, item 3.

¹⁰⁷ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 3.

¹⁰⁸ *ibid*, Appendix 4, 3.

¹⁰⁹ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 6.1.

¹¹⁰ *ibid*, paragraph 6.1. A claimant seeking to pursue court proceedings against a public body for breach of procurement law requirements must do so within three months from the date on which they knew or ought to have known of the breach (see, for example, Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] PTSR 1377). Allowing a period of ‘six months and 10 days’ seems to have been sufficient for WCC and Henderson to obtain the confidence that no such challenge would emerge.

seamless progression from initial pitch to EA to conditional DA to unconditionality, perhaps this standstill period can be described as a pause within a pause.

At the same time as agreeing to the standstill period, Henderson's directors also requested, and WCC's Cabinet approved, a further bolt-on to the DA in the form of another change to the Long Stop Date, this time from 31 December 2012 to 31 August 2014.¹¹¹ Although he did not refer specifically to the proposed standstill period, WCC's Chief Executive justified this change on the basis that Thornfield Properties plc's administration had delayed progress on discharge of conditions and would prevent Henderson discharging the conditions in the DA before 31 December 2012.¹¹² Moreover, the Chief Executive explained, the Council needed to agree to a change to the DA because Henderson's directors had informed him that a funding institution would not invest in a development project if a local authority had an imminent right to terminate the DA. For that reason, the Chief Executive explained, a further drawing out of the conditional phase was necessary to ensure that 'the project did not become unfundable.'¹¹³ This willingness to change the Long Stop Dates may not, in general terms, be surprising given that D4 told me that 'you have a Long Stop Date but it's capable of being moved out in the event that things don't happen. And, actually, that's the practice.'

No challenge to WCC's decision to accommodate Henderson as the new developer and guarantor did emerge, and in chapter seven I consider how Henderson's directors took forward the work that Thornfield's directors had invested in discharging the conditions in the DA. This standstill period and the variation to the Long Stop Date were part of a sequence of bolt-ons added to the DA that WCC and Thornfield originally agreed. LA3 explained that adaptations to a DA are necessary so that the text of a DA 'doesn't get left behind' by events. The bolt-ons that I have discussed in this chapter were a means to adapt an already flexible temporal schema to, paraphrasing Scott, absorb contingencies, incidents and accidents as 'mere moments' in the conditional phase.¹¹⁴ But what is revealing here is the way that WCC's officers, Thornfield's directors and then Henderson's directors each found ways to bolt 'time' on to the DA when unexpected things happened. The use of Long Stop Dates in a DA has the potential to produce a 'finite segment'¹¹⁵ with an agreed start point and a settled end point, but the practices of the contracting parties can mean that this end point is likely to continuously move, as this chapter has shown.

¹¹¹ Winchester City Council, *Minutes of the meeting of the Cabinet held on 24 November 2010 (Appendix B, Document 1.22)*, item 3.

¹¹² Winchester City Council, *CAB2085. Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 3.4.

¹¹³ *ibid*, paragraph 3.4.

¹¹⁴ Scott, *Omens of adversity: tragedy, time, memory, justice*, 87.

¹¹⁵ Greenhouse, *A moment's notice: time politics across cultures*, 20.

Conclusion

The conditional phase in a property-led development DA is, as I have shown, a scripted pause in the progression along a development trajectory that follows an exclusivity period and should lead, according to developers, local authority officers, councillors and consultants, into the unconditional, construction phase of a development. I have explained here that the period between the date of the Winchester DA and a sequence of Long Stop Dates written into that DA marked out the temporal parameters of this conditional phase. By referring to material I gathered in interviews, I have also demonstrated that, at the outset of this phase, a developer will usually have no more than a vague future commitment to commence construction based loosely on proposals agreed during an exclusivity period. But, I have argued, there is an alluring internal cohesiveness to the presentation of the movement from this 'largely undetermined'¹¹⁶ and 'initial situation'¹¹⁷ through to the settled state that comes with the Unconditional Date, which presents the promise of closure and onward movement through the development process. This movement, however, has been shown to be the product of 'highly moderated change'¹¹⁸ and I revealed some of the ways in which a developer seeks to exert control over the date on which unconditionality occurs.

In this chapter, therefore, I explored the suggestion that many of my interviewees made that a DA is a device that enables regulated 'transit' and linked this to my analysis of EAs in chapters four and five. This has revealed that a DA, like an EA, created a temporal schema into which other events could be absorbed. I pointed out, however, that one of the complexities of this type of DA is the interplay between an Unconditional Date and the sequence of Long Stop Dates that I referred to above. The prospect of an Unconditional Date provides a local authority and a developer with a 'glimpse of the future'¹¹⁹ and enables a developer, in particular, to decide whether or not to embrace that future.

A sequence of Long Stop Dates, on the other hand, gives the conditional phase of a DA some of 'the qualities' of time¹²⁰ and has the potential to construct the conditional phase of a development process as a 'finite segment.'¹²¹ The potential inherent to the Long Stop Dates flowed from the way the Winchester DA enabled either the developer or the local authority to terminate the DA if the last Long Stop Date in the DA occurred before the Unconditional Date. But I have shown the inherent inexactness of the practice of setting Long Stop Dates and the way that a lack of progress on the satisfaction of conditions very often leads to changes to

¹¹⁶ Callon, 'Writing and (Re)writing Devices as Tools for Managing Complexity', 192.

¹¹⁷ Ricoeur, *Memory, history, forgetting*, 243.

¹¹⁸ Johns, 'Financing as Governance', 401.

¹¹⁹ Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action*, 134.

¹²⁰ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 258.

¹²¹ Greenhouse, *A moment's notice: time politics across cultures*, 20.

Long Stop Dates rather than the implementation of termination rights. By studying the Winchester DA, I have revealed the way in which these changes, performed through bolting on various extensions to the DA, created an assemblage composed of many moving parts designed and repeatedly redesigned to accommodate unexpected changes. This analysis has also enabled me to investigate the novel use of time as a resource in the Winchester DA to create a 'standstill period' during which time passed while the development process remained static. This passage of time carried with it the receding threat of a challenge to the lawfulness of changes to the DA.

In the next chapter, I continue my analysis of the conditional phase of the Winchester Development and look more specifically at the actions that WCC's officers and Thornfield's directors took to discharge the planning and site assembly conditions prior to Thornfield's administration. I then consider the ways in which Henderson's directors continued the process after Thornfield's administration.

Chapter 7

A 'passing phase'

In this chapter, I address some of the issues that arise when a developer and a local authority begin the process of discharging the conditions laid out in a Development Agreement.¹ In chapter six, I showed that discharge of the conditions is viewed as a preparatory step to the moment at which a conditional DA converts from a vague expression of intended future action into a collection of 'legally binding,' unconditional commitments that impose immediate expectations, including an enforceable obligation on a developer to commence construction. Taking my lead from the text of the Winchester DA and the comments that my interviewees made regarding the actions required to discharge those conditions,² I ask what a local authority and a developer do to move through the 'conditional phase of a development process.' This conditional phase formed the subject matter of much of my analysis in chapter six where I demonstrated that developers, local authority officers and property development consultants treat 'conditionality' as the latest in a sequence of 'passing phases.'³ Treating conditionality as a passing phase has the effect of presenting a DA as a thing that needs time to mature or 'ripen'⁴ while the developer and the local authority work on it and with it. I investigate, therefore, what happens during the conditional phase and how the DA directs the work that developers and local authorities carry out. In particular, I examine the discharge of the planning condition in the Winchester DA and the move towards the grant of a planning permission for the Winchester Development. I then consider the discharge of the site assembly condition and the role that a Compulsory Purchase Order⁵ played in this.

Taking my lead from Ricoeur's discussion of 'rule-governed transformations,'⁶ I analyse parts of the Winchester DA and scrutinise documents presented as evidence to the CPO inquiry and documents produced for consideration in WCC's Council and Cabinet meetings.⁷ In chapter six, I analysed the DA by reference to Table 6.2, which included the conditions to be discharged before the DA became unconditional. In this chapter, I include Tables 7.1 and 7.2, which both illustrate that, in practice, the discharge of conditions is far messier than the neat

¹ Throughout this thesis I have been abbreviating this term to 'DA.' I continue to do so in this chapter.

² I refer to material obtained in interviews with D1, D3, CON2, CON3 and CON4.

³ Nick Lee and Steven D Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 263.

⁴ Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010), 82.

⁵ Throughout this thesis I have been abbreviating this term to 'CPO.' I continue to do so in this chapter.

⁶ Paul Ricoeur, *Memory, history, forgetting* (University of Chicago Press 2004), 243.

⁷ Appendix B to this thesis is a list of the primary source documents produced during the Winchester Development that I use in this thesis.

sequence that the contents of a DA might present. I examine the conditional phase of the Winchester Development, during which Winchester City Council's officers⁸ and first Thornfield Properties (Winchester) Limited's⁹ directors and then Henderson UK Property Fund's¹⁰ directors went about discharging the conditions in the DA.

I have already shown that discharging conditions in a DA necessitates engagement with various temporalities,¹¹ some of which I addressed in chapter six and remain relevant here, and some of which I newly introduce. For example, the conditional phase was a period in the Winchester Development during which WCC's officers and Thornfield's directors sought to address the different temporalities of Thornfield's expectation of a long-term rate of return on its investment, the short-term need for affordable housing in Winchester, the statutory temporalities of conducting a compulsory purchase process,¹² and contingencies put in place to manage unforeseen events such as the administration of Thornfield's parent company and the acquisition by Henderson of Thornfield and the renaming of Thornfield to Silverhill Winchester No 1 Limited.¹³

I begin this chapter by examining the extent to which the Winchester DA imposed an order for the discharge of conditions. Chapter six revealed that the Winchester DA originally stipulated that a Planning Long Stop Date would occur on 22 December 2006 and that a Final Long Stop Date would occur on 22 December 2009. This meant that WCC and Thornfield anticipated that discharge of the planning condition would happen 'first' but in this chapter, by scrutinising the DA and discussing material gathered in my interviews, I ask why, what

⁸ Throughout this thesis I have been referring to Winchester City Council as 'WCC.' I continue to do so in this chapter.

⁹ Thornfield Properties (Winchester) Limited was a special purpose company set up by Thornfield Properties plc to enter into a DA with WCC and carry out the Winchester development. Thornfield Properties (Winchester) Limited was, initially, 'the developer' for the purposes of the Winchester DA. I have referred to Thornfield Properties (Winchester) Limited throughout this thesis as 'Thornfield' and continue to do so here.

¹⁰ Throughout this thesis I have been referring to Henderson UK Property Fund as 'Henderson.' I continue to do so in this chapter. As I explained in chapter six, Henderson UK Property Fund replaced Thornfield Properties plc as guarantor of the developer's obligations in the DA after Halifax Bank of Scotland placed Thornfield Properties plc. Henderson also acquired the Thornfield entity that was the developer. For the sake of brevity, I refer to 'the developer' after Thornfield Properties plc's administration as 'Henderson.'

¹¹ Davina Cooper, 'Time against time: Normative temporalities and the failure of community labour in Local Exchange Trading Schemes' (2013) 22 *Time & Society* 31.

¹² In the sense that WCC had to allow a period of 21 days for objectors to challenge the compulsory purchase order (see Acquisition of Land Act 1981, s12(1)(c)), then prepare evidence for a public inquiry, attend that inquiry, await confirmation of the inquiry's decision, and then pause until the limitation period for challenge to the confirmation of the order to expire. I revisit statutory temporalities in chapter 10.

¹³ As I noted earlier in this chapter, although the same corporate entity acted as the developer for the purposes of the Winchester DA, I refer to the developer as 'Henderson' following the administration of Thornfield's parent company to reflect the change of overall ownership of the development company.

Thornfield's directors did to achieve satisfaction of the planning condition and how they went about incorporating the 'required elements'¹⁴ into their application for planning permission.

I then explain that Thornfield discharged the planning condition just before Halifax Bank of Scotland, Thornfield's principal creditor, placed Thornfield's parent company into administration. After the standstill period that I discussed in chapter six, Henderson took on the DA and the planning permission granted to Thornfield, so I ask what Henderson did with the DA and what it did to continue work already done to discharge the planning and site assembly conditions. I explore the ways that a DA encourages, facilitates and supports the making and confirmation of a CPO by asking if the discharge of the planning condition helps with this and if the non-discharge of other conditions inhibits this. Similarly, I ask if a DA assists the making and confirmation of a CPO by presenting a route to completion of development even though movement along that route is conditional on other factors. In that respect, I consider if a DA is a way to make a Planning Inspector adjudicating at a CPO inquiry 'believe'¹⁵ that development will happen. I examine how some local authorities and developers achieve this by encouraging Inspectors to overlook the messiness¹⁶ of conditionality and to act 'as if'¹⁷ the other conditions were mere formalities that would smoothly follow discharge of the planning and site assembly conditions in a seamless progression towards unconditionality.

A sequential process or an irregular gathering together? Discharging the conditions in a DA

In chapter six, I showed that a DA will often contain a temporal framework produced to construct a phase during which the contracting parties can test their initial proposals before committing to the costs of land acquisition and construction or attempting to finalise agreements with funders or prospective tenants. The conditional phase in the Winchester Development began on 22 December 2004, which was the date of the DA. The DA then laid out a sequence of dates, purporting to mark smaller phases through which the overarching process needed to move to reach unconditionality. By the 'Planning Long Stop Date,' scheduled to fall on 22 December 2006,¹⁸ Thornfield needed to have discharged the planning

¹⁴ I explained what these required elements were in chapter six. In summary, the DA stated that the completed development should incorporate 90,000 sq ft of retail floor-space, 364 residential units (of which 35% were to be affordable homes), a new public square, a new bus station and other public services. The DA termed these the 'required elements.'

¹⁵ Ricoeur, *Memory, history, forgetting*, 243.

¹⁶ Annemarie Mol, *The body multiple: ontology in medical practice* (Duke University Press 2002).

¹⁷ Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 173; Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391, 399.

¹⁸ Table 6.2 in chapter six set out the dates by which discharge of conditions in the Winchester DA should have occurred. The Planning Long Stop Date was stated in clause 1.1.10 of the DA.

condition by obtaining a planning permission that authorised the construction of a development that incorporated certain 'required elements.'¹⁹

If Thornfield failed to discharge the planning condition by the Planning Long Stop Date, either party could terminate the DA.²⁰ But if Thornfield had discharged the planning condition, the DA envisaged a shift towards satisfaction of the next set of conditions by a Final Long Stop Date, originally scheduled to occur on 22 December 2009.²¹ The DA gathered together these conditions but set no particular sequence for their discharge, other than to state that the viability condition would only be discharged by the receipt of a positive viability appraisal produced after satisfaction of the other conditions.²² Any such appraisal would only be satisfactory for the purposes of the viability condition if it demonstrated that the proposals were likely to achieve a stipulated level of profitability.²³ While the DA did not specify any sequence for the discharge of the conditions, it was clear that the planning condition was the 'first' that needed to be discharged and that the viability condition, for reasons to be discussed in chapter nine, was the condition that would be discharged 'last' to determine whether or not the development would go ahead.

Despite the ostensible gathering together of the conditions to be discharged between the planning condition and the viability condition, one of my interviewees pointed out that most developers approach these conditions in sequence even if the order of discharge is not written into a DA. For D1, 'first is planning,' suggesting that the Winchester DA contained a standard temporal structure.²⁴ Then he explained that 'next' is the site assembly condition and then the other conditions would follow, with the viability condition, which he called 'the overriding one,' to be discharged 'last.' Coupled to the express provision in the Winchester DA that satisfaction of the viability condition could only be assessed after the prior satisfaction of

¹⁹ As stated in clauses 1.1.65 and 5.3 of the DA. I noted in the introduction to this chapter that those required elements were written into the DA and stipulated that the completed development should incorporate 90,000 sq ft of retail floor-space, 364 residential units (of which 35% were to be affordable homes), a new public square, a new bus station and other public services.

²⁰ As stated in schedule 2, paragraph 15.1 of the DA.

²¹ As stated in clause 1.1.50 of the DA.

²² As stated in schedule 2, paragraph 2.9 of the DA. Most DAs make this clear. The DA for a similar development in Farnham in Surrey stated that the viability condition in the relevant DA would only be satisfied after all other conditions in the DA had been satisfied and, even then, only if the developer obtained an appraisal demonstrating 'in its reasonable opinion' that its expected profitability targets would be achieved (as stated in clause 3.6.7 of the DA).

²³ The requisite level of profitability has been redacted in the published DA, although evidence submitted to the compulsory purchase order public inquiry revealed that the 'viability measure' was 10% profit on cost (Martin Robert Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 14.8).

²⁴ One of the other DAs I obtained while carrying out my research did not state this explicitly but did stipulate that the developer could only ask the Council to exercise its compulsory purchase powers in pursuit of satisfaction of the site assembly condition after the grant of planning permission and, thus, after discharge of the planning condition.

all other conditions, this demonstrates that there is a sequence that some developers adopt to move through the conditional phase. At various points in this chapter, and in more detail in chapter nine, I ask what it means to say that questions surrounding viability have the scope to override progress on other conditions. My primary focus here, however, is on the planning and site assembly conditions.

Balancing specificity and fluidity: planning for variations or variations for planning?

The phase of the Winchester Development that I consider first is the ‘time-in-between’ the date of the DA and the Planning Long Stop Date. To discharge the planning condition in the Winchester DA, the developer needed to have secured planning permission for a development incorporating all the required elements set out in clause 5.3 of the DA, which contained the minimum specifications for such matters as the amount of retail floor-space, the number of residential units and affordable homes, and the range of public services to be incorporated into the built development. The DA allowed, however, some flexibility in the provision of these required elements by including a ‘variations clause’ that enabled Thornfield to seek WCC’s approval for changes to these required elements.²⁵

One way of thinking about this variations clause is by considering the way that Callon describes ‘writing practices’ that, through a ‘method of successive *adjustment*,’ enable various different types of organisation to ‘progressively become aware of what they want to express’ in their documents.²⁶ Similarly, Hull has observed that ‘writing’ can sometimes ‘nail things down’ but that it can also ‘set things in motion.’²⁷ Applying these ideas to the required elements in the Winchester DA is helpful because setting out these minimum requirements purported to stipulate certain buildings that had to be included in the constructed development. But the list of required elements set out in the DA only went some way towards confirming the parties’ expectations. The variations clause in the DA, by contrast, sought to balance the ‘directive quality’ of the list of required elements with the ‘productive flexibility’ that comes from acknowledging that the expectations written into the DA at the date of the DA might need to be re-written in response to circumstance.²⁸ In the same way that an historical archive is, Mawani argues, ‘in an ongoing state of creation and production through

²⁵ As stated in clause 5.1.3 of the DA.

²⁶ Michel Callon, ‘Writing and (Re)writing Devices as Tools for Managing Complexity’ in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 192-3. Emphasis in original.

²⁷ Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012), 248.

²⁸ Alex Faulkner, ‘Law’s performativities: Shaping the emergence of regenerative medicine through European Union legislation’ (2012) 42 *Social Studies of Science* 753, 769.

translation, interpretation, elaboration, dismissal, and disavowal,²⁹ the meaning and effect of a written DA is subjected to change as it is read, implemented, adjusted and moved around. Incorporating a set of required elements alongside a variations clause is to attempt to embed within a DA the capacity to bend practices to it by requiring certain outcomes, while allowing the flexibility to bend the DA in response to external requirements if the originally desired outcomes became unworkable. Crafting a DA in this way would appear to require a careful balancing of specificity with fluidity.

During my research, a particular view emerged of the way to balance specificity with fluidity. CON2 and CON3 argued, for example, that DAs successfully achieved an appropriate balance if they embraced change rather than imposed strict directives. CON2 explained that starting out with a list of 'design parameters' to be incorporated into a DA means that the writing and implementation of the DA tends to get a 'bit lengthy.' CON3 similarly argued that some indeterminacy is desirable in a DA because it enables a developer to adapt its original proposals. His assessment of the content of a DA was that it 'needs to be framed with sufficient flexibility' and that if 'it assumes anything to do with fixed, blueprint design, as several do, you know that it's a document fundamentally misconceived by the inexperienced.' CON4 offered a similar observation when he explained that a DA that fails to accommodate change 'isn't worth the paper that it's written on because [the original design] is simply not going to happen.' These insights demonstrate that a mechanism to allow variation is an essential component of a DA. But it is important to ask how this type of mechanism performs in practice. This was one of my principal research questions and to answer this question, I examine Thornfield's efforts to discharge the planning condition in the DA and investigate the ways that WCC and Thornfield made changes to the DA.

Table 7.1 illustrates the changes to the required elements that WCC and Thornfield made to enable Thornfield to discharge the planning condition.

²⁹ Renisa Mawani, 'Law's Archive' (2012) 8 *Annual Review of Law and Social Science* 337, 354.

Table 7.1 Timeline illustrating some of the key events between Thornfield’s application for planning permission and the grant of planning permission	
Date	Event
12.12.2005	Thornfield submits draft application for planning permission to WCC for approval in the Council’s ‘capacity as landowner’ and Cabinet approves variation to DA reducing number of residential units in ‘required elements’ from 364 to 285
13.04.2006	Cabinet approves variation to DA reducing number of residential units in required elements from 285 to 277
23.05.2006	Thornfield submits application for planning permission to WCC in the Council’s ‘capacity as’ local planning authority
27.03.2007	Planning Development Control Committee approves Thornfield’s application for planning permission pending section 106 agreement between WCC and Thornfield
17.10.2007	Cabinet recommends that officers make CPO when Compulsory Purchase Order Indemnity Agreement agreed with Thornfield
March 2008	Officers receive legal advice on risks of procurement challenge to proposed variations to the ‘required elements’ in the DA
21.10.2008	Planning Development Control Committee approves amendments to application for planning permission that increases the amount of retail floor-space, increases the number of residential units and reduces the amount of affordable housing
18.11.2008	Cabinet agrees to vary DA to allow Thornfield to make a financial contribution to the provision of off-site affordable housing and to change the Final Long Stop Date
09.02.2009	WCC and Thornfield sign section 106 agreement and planning permission granted Planning condition discharged

Against the background of points that I have already made in this chapter regarding the level of fluidity or specificity written into a DA, WCC’s officers did ‘know,’ at the time that the Council entered into the DA, some of the components that they wanted the DA to include. For example, the Planning Brief that WCC’s Cabinet approved in April 2003, setting the Council’s design parameters for the development, stated that ‘[t]he Council expects a significant residential component’ through the provision of ‘housing above shops.’³⁰ The Planning Brief also envisaged that ‘35% of these dwellings [would] be affordable’³¹ but did not stipulate a specific number of residential units that the development would have to include. The DA, by contrast, stated that the ‘minimum requirement’ was the provision of 364 residential units. I can find no account from the time that the parties entered into the DA that

³⁰ Winchester City Council, *Adopted Broadway Friarsgate Planning Brief. Part 2A - Background and Analysis (Appendix B, Document 2.04)*, paragraph 2.5.1.

³¹ *ibid*, paragraph 2.5.4. The 65% of the residential units not required to be affordable would have been units either available for sale or rental on the open market, with the prospect of a significantly higher rate of return for Thornfield than the affordable housing would generate.

explains why WCC and Thornfield incorporated this precise number of residential units into the DA as a required element. As I will show, it is likely that this is the number of residential units that Thornfield deemed necessary to enable them to achieve their desired level of profitability so it was written into the DA in an attempt to hold the Council to this figure.

Soon after WCC and Thornfield entered into the DA, however, it became clear that this number of residential units could not form the basis for 'a workable proposition.'³² After entering into the DA, Thornfield's directors began negotiations with WCC's planning officers to inform the preparation of a draft application for planning permission.³³ Alongside those negotiations, WCC and Thornfield carried out a 'wide scale consultation with the public' regarding Thornfield's proposals for the development.³⁴ This public consultation revealed opposition to the design based on the proposed height and density of the buildings.³⁵ Similarly, WCC's Chief Estates Officer informed the Council's Cabinet that the proposed 'scale and massing of the buildings is [...] a potentially major planning issue' in light of the Council's planning policies related to preservation of 'the area's character.'³⁶ What is interesting about the Chief Estates Officer's comments is that he was reporting to the Council's Cabinet in his capacity as a senior officer in the landholding function of the Council. As I noted in chapter one, his primary role was to maximise the value of the Council's estate, not to implement planning policy.³⁷

The proposed height and density of the buildings appears to have been necessitated, however, by the desire to incorporate 364 residential units. Thornfield's directors had sought a turning away from the Planning Brief, which had suggested that the development site could support 100 residential units,³⁸ to enable the construction of higher buildings to incorporate 'additional residential units [to] help the scheme viability.'³⁹ I discuss these 'viability' concerns in chapter nine but my point here is that Thornfield's initial application for planning permission

³² Winchester City Council, PS202. *Silver Hill Development Update Report. Report of Chief Estates Officer. 17 October 2005 (Appendix B, Document 1.13)*, paragraph 1.1.

³³ *ibid*, paragraph 2.1.

³⁴ *ibid*, paragraph 1.1.

³⁵ Winchester City Council, CAB1179. *Silver Hill Development Landowner's Approval. Report of Chief Estates Officer. 12 December 2005 (Appendix B, Document 1.15)*, paragraph 5.2.

³⁶ *ibid*, paragraph 3.5.9.

³⁷ The Council's constitution states that this individual's current job title is 'Assistant Director (Estates and Regeneration).' See Winchester City Council, *Constitution of the City Council - Part 7 - Management Structure (Appendix B, Document 2.14)*, 4.

³⁸ Winchester City Council, *Adopted Broadway Friarsgate Planning Brief. Part 2A - Background and Analysis (Appendix B, Document 2.04)*, paragraph 2.5.1.

³⁹ Winchester City Council, CAB938. *Broadway Friarsgate Development. Report of the Chief Estates Officer. 6 October 2004 (Appendix B, Document 1.08)*, paragraph 3.4.2.

was for a lower density development incorporating 285 residential units, not the 364 units required in the DA.⁴⁰ WCC's Chief Estates Officer noted that:

It is possible, however, that meeting the requirements of the local planning authority could have an impact on financial viability. Were this to be the case both Thornfield and the Council, as landowner, have to reconsider their respective positions and this is a risk which Members should be aware of.⁴¹

The way that WCC, 'as landowner,' and Thornfield, as developer, responded to this 'risk' forms the focus of my analysis here.

This process of change exemplifies the way in which WCC's officers and Thornfield's directors went about 'gradually producing' a set of proposals that were both 'desired and tested.'⁴² It also demonstrates how changes to a DA might be necessitated not just by what a developer wants but sometimes by what a local authority wants. But this is a complex picture because it also illustrates that changes to a DA might also be necessary because of what one part of a local authority wants while another part of the local authority desires something different. WCC, in common with other local authorities, was a complex assemblage that functioned as a local planning authority obliged to consider applications for planning permission and a landholding body with an interest in pursuing the development of its own land.⁴³ As Adams *et al* have pointed out, a local authority is not a 'single, undifferentiated actor.'⁴⁴ Clause 33 of the DA stated that WCC entered into the agreement solely 'in its capacity as landowner' and clause 36.3 similarly stated that no provisions in the DA should be construed in a way that would 'fetter the discretion of the Council in its capacity as planning authority or in the exercise of any other statutory function.' On the other hand, Thornfield's 'pre-planning discussions' had 'taken place with the Council as local planning authority' rather than as a landowner.⁴⁵

⁴⁰ Winchester City Council, CAB1179. *Silver Hill Development Landowner's Approval. Report of Chief Estates Officer. 12 December 2005 (Appendix B, Document 1.15)*, paragraph 5.2.

⁴¹ *ibid*, paragraph 3.6.

⁴² Michel Callon, Pierre Lascoumes and Yannick Barthe, *Acting in an uncertain world : an essay on technical democracy* (Inside technology, MIT 2009), 205. See also Michel Callon, 'Writing and (Re)writing Devices as Tools for Managing Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002).

⁴³ To maintain the separation between these two functions, councillors who sat on both the Cabinet and the Planning Committee left meetings of those two committees while discussions regarding the Thornfield's application took place. See, for example, Winchester City Council, *Minutes of the meeting of the Cabinet held on 13 April 2006 (Appendix B, Document 1.16)*, item 21.

⁴⁴ David Adams, Robert Croudace and Steve Tiesdell, 'Exploring the 'Notional Property Developer' as a Policy Construct' (2012) 49 *Urban Studies* 2577, 2587. See also Ann Harding, 'The rise of urban-growth coalitions, UK- style' (1991) 9 *Environment and Planning C - Government and Policy* 295, 296.

⁴⁵ Winchester City Council, PS202. *Silver Hill Development Update Report. Report of Chief Estates Officer. 17 October 2005 (Appendix B, Document 1.13)*, paragraph 1.1.

In its 'capacity as landowner,' WCC's estates team had agreed to the incorporation of 364 residential units as a minimum requirement in the DA. But, 'as local planning authority,' WCC's planning officers had advised Thornfield's directors that 364 residential units did not form the basis of a 'workable proposition.' Because the construction of 364 residential units was a required element in the DA, WCC's Chief Estates Officer recommended that the Cabinet should approve a variation to the DA to accommodate this change.⁴⁶ If WCC and Thornfield had retained the original figure as a required element in the DA but Thornfield had obtained planning permission for the lower figure, Thornfield would have failed to discharge the planning condition and an actionable termination right would have been available to WCC. This might have been important only as a 'technicality'⁴⁷ because WCC, in its capacity as landowner, might not have chosen to utilise that termination right to bring the DA to an end. But the problem would, I presume, have lain in the uncertainty that this technicality might have created.

In chapter six, I noted that Henderson's directors had informed WCC's officers and councillors that no funding body would agree to invest in a development proposition if a local authority had a 'live' right to commence an action for termination against a developer. The Winchester DA stated that the planning condition would only be discharged by the grant of a planning permission that incorporated all the required elements. A change to the required elements, itself a 'technicality,' was necessary to avoid creating this impediment to investment. WCC's Cabinet duly approved this variation⁴⁸ and a subsequent variation⁴⁹ and Thornfield then submitted its application for planning permission on 23 May 2006 proposing 264 residential units, alongside the other items specified in the required elements of the DA.⁵⁰ WCC's planning committee stated its general approval for the proposals but refused to grant planning permission until Thornfield also entered into a 'section 106 agreement.'⁵¹

⁴⁶ Winchester City Council, CAB1179. *Silver Hill Development Landowner's Approval. Report of Chief Estates Officer. 12 December 2005 (Appendix B, Document 1.15)*, paragraph 5.3.

⁴⁷ Annelise Riles, 'A new agenda for the cultural study of law: Taking on the technicalities' (2005) 53 *Buffalo Law Review* 973.

⁴⁸ Winchester City Council, *Minutes of the meeting of the Cabinet held on 12 December 2005 (Appendix B, Document 1.14)*, item 623.

⁴⁹ Winchester City Council, *Minutes of the meeting of the Cabinet held on 13 April 2006 (Appendix B, Document 1.16)*, item 21.

⁵⁰ Winchester City Council, *Grant of Planning Permission. Case: 06/01901/FUL (Appendix B, Document 2.07)*.

⁵¹ Winchester City Council, *Minutes of the meeting of the Planning Development Control Committee held on 27 March 2007 (Appendix B, Document 1.17)*, 12-13. Pursuant to section 106 of the Town and Country Planning Act 1990, a developer or other property owner can, by agreement, enter into a 'planning obligation' with a local planning authority in which the developer agrees to contribute to the provision of local infrastructure or the provision of communal facilities in the local area. Regulation 122(2) of the Community Infrastructure Levy Regulations 2010, SI 2010/948 then sets out the

Although Thornfield had applied for planning permission on 23 May 2006, WCC's planning committee did not grant planning permission until 9 February 2009.⁵² As I stated previously, the planning condition in the DA would be discharged by the grant of planning permission, and discharge had to occur prior to the Planning Long Stop Date, scheduled to occur on 22 December 2006. The DA accommodated the possibility that the grant of planning permission might actually occur after the Planning Long Stop Date, without triggering termination rights, by postponing the Planning Long Stop Date if Thornfield had submitted an application for planning permission but 'a s106 agreement is being negotiated but is not yet completed.'⁵³ The WCC planning committee that recommended the grant of planning permission pending the finalisation of a section 106 agreement noted that this agreement was 'still the subject of negotiation with the applicant.'⁵⁴ This meant that an agreement whose terms had not been settled was still sufficient to stop time running for the purposes of the DA.

The text of the DA did not state a date beyond which this pause would have been unacceptable, although presumably the termination rights arising on the passing of the Planning Long Stop Date would have been activated if negotiations on the terms of the section 106 agreement had failed. And the postponement of the Planning Long Stop Date did not effect a similar postponement of the Final Long Stop Date, which was unaffected by the application for planning permission.⁵⁵ This is, though, another example of a scripted pause in the Winchester Development trajectory. This pause differs from the standstill period that I analysed in chapter six, however, which was scripted by an external legal advisor in response to unexpected events. The pause following the application for planning permission, by contrast, followed a script that the DA 'carried around.'⁵⁶

circumstances in which a local planning authority can treat a planning obligation as 'a reason for granting planning permission for the development.' These circumstances include a requirement that the planning obligation is necessary to make the development acceptable in planning terms. WCC's planning committee recommended that the Winchester section 106 agreement needed to set out specific requirements related to the provision of affordable housing. In addition, the committee stated that the section 106 agreement should include lump sum financial contributions to public open space provision, highways improvements, public art initiatives and the provision of a new car park office.

⁵² Winchester City Council, *Grant of Planning Permission. Case: 06/01901/FUL (Appendix B, Document 2.07)*.

⁵³ As stated in schedule 2, paragraph 15.3.1 of the DA.

⁵⁴ Winchester City Council, *PDC768. Report of Head of Planning Control. 21 October 2008 (Appendix B, Document 1.18)*, Executive Summary.

⁵⁵ Table 6.2, set out in chapter six, states the originally agreed Long Stop Dates.

⁵⁶ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 181. The relevant part of the DA can be found in Schedule 2, paragraph 15.1.3.1, which states that the Planning Long Stop Date shall be postponed if 'a s106 agreement is being negotiated but not yet completed.'

Thornfield's directors had submitted an application for planning permission in May 2006 because the DA required the company to obtain planning permission to discharge the planning condition prior to the Planning Long Stop Date. But, they had left the terms of a section 106 agreement unresolved because doing so 'postponed' the Planning Long Stop Date and allowed them to explore further adjustments to the required elements while sheltered from the possibility of termination rights arising. In particular, Thornfield's directors sought to amend the application for planning permission to allow an increase in retail floor-space.⁵⁷ But the proposals for amendments to the planning permission also sought an increase to the number of residential units permitted back up from 264 to 287, with the number of private units scheduled to increase from 158 to 187 and the number of affordable housing units scheduled to fall from 106 to 100.⁵⁸ The rationale for these proposed changes was that Thornfield's directors believed that the proposals previously agreed no longer formed the basis for a 'viable' development.⁵⁹

Amending the planning application to accommodate these changes also necessitated, for the reasons I outlined above, corresponding variations to the DA. But Thornfield's viability concerns had implications for the provision of affordable housing. A further proposed change to the DA would enable Thornfield's directors to choose either to build the agreed quantum of affordable housing or to remove affordable housing entirely as a component of the built development.⁶⁰ This amendment to the DA envisaged that, if Thornfield chose not to construct on-site affordable housing, it would make a financial contribution to the Council in lieu. At the same time as seeking WCC's approval for these changes to the required elements, Thornfield's directors also sought a variation to the mechanism envisaged in the DA for the grant by WCC to Thornfield of long leasehold interests in the development site after the Unconditional Date.

⁵⁷ Winchester City Council, *PDC768. Report of Head of Planning Control. 21 October 2008 (Appendix B, Document 1.18)*, paragraph 5.22.

⁵⁸ *ibid*, paragraph 2.7.

⁵⁹ *ibid*, paragraph 1.8.

⁶⁰ Winchester City Council, *CAB1739. Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 9.4. This eventuality had already been foreseen in the terms proposed for the section 106 agreement Thornfield needed to enter to secure the grant of planning permission. Research into the provision of affordable housing as a component of large scale urban property development is a growing area. For more discussion, particularly concerning the use of viability modelling as a means for developers to avoid pre-agreed obligations see, for example, Neil Crosby, Patrick McAllister and Peter Wyatt, 'Fit for planning? An evaluation of the application of development viability appraisal models in the UK planning system' (2013) 40 *Environment and Planning B - Planning & Design* 3; Brett Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 *International Journal of Urban and Regional Research* 79; Patrick McAllister, Emma Street and Peter Wyatt, 'Governing calculative practices: An investigation of development viability modelling in the English planning system' (2016) 53 *Urban Studies* 2363.

WCC has published a redacted version of the deed of variation that affected these changes, although the extent of the redaction makes it impossible to analyse these changes. However, the report that WCC's Chief Estates Officer presented to the Council's Cabinet on these variations stated that the proposed variation would mean that WCC granted a lease of the development site to Thornfield before the commencement of construction rather than after the commencement of construction, as had originally been agreed.⁶¹ The purpose for this change was to reduce the Stamp Duty Land Tax (SDLT) that Thornfield would be required to pay on the basis of the value of the site on the grant of the lease, which, if assessed against the value of the development site, might have made the scheme 'unviable.'⁶² WCC's Chief Estates Officer noted that this meant that if the Council granted a lease to Thornfield but Thornfield did not commence construction, WCC would have to seek possession of the site through commencing forfeiture proceedings⁶³ but he deemed this 'risk' to be less significant than the risk that the scheme would not go ahead 'unless SDLT liability is minimised.'⁶⁴

Taken together, therefore, these changes to the required elements and the alteration to the mechanism for the grant of a lease made changes that would increase the profitability of the development proposition. WCC's Cabinet approved the proposed variations to the DA,⁶⁵ and WCC's planning officers approved the amendments proposed to the application for planning permission, observing that Thornfield's directors had provided evidence 'to suggest that the amount of affordable housing required may threaten the viability of the development.'⁶⁶ While the officers acknowledged that the 'provision of affordable housing is one of the Council's key priorities and should not normally be compromised,'⁶⁷ the Planning Committee concluded that the importance of the short-term need to preserve Winchester's place 'in the retail hierarchy' trumped the long-term need for affordable housing.⁶⁸

The variations that WCC and Thornfield made to the required elements had, therefore, allowed WCC's officers and Thornfield's directors to attend to the technical problems that would arise on grant of a planning permission that did not incorporate the previously agreed required elements. The variations also enabled WCC's officers and Thornfield's directors to

⁶¹ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 8.1.

⁶² *ibid*, paragraph 8.1.

⁶³ *ibid*, paragraph 8.2.

⁶⁴ *ibid*, paragraph 8.3.

⁶⁵ Winchester City Council, *Minutes of the meeting of the Cabinet held on 18 November 2008 (Appendix B, Document 1.19)*, item 17.

⁶⁶ Winchester City Council, PDC768. *Report of Head of Planning Control. 21 October 2008 (Appendix B, Document 1.18)*, paragraph 3.9.

⁶⁷ *ibid*, paragraph 3.9.

⁶⁸ *ibid*, paragraph 3.10.

postpone the scheduled Planning Long Stop Date to enable further changes to the required elements while sheltered from the possibility of termination. But, in common with other decisions I have discussed in this thesis, these amendments exacerbated stresses already locked-in to the DA. Thornfield's directors had, as I have indicated, sought the inclusion of 364 residential units in the DA to enable the company to achieve its profitability target. The 'disavowal'⁶⁹ of this required element did not come from a belief that a lower target would enable the same level of profitability, but out of necessity based on planning policy. WCC's Head of Estates'⁷⁰ report to Cabinet on 18 November 2008 suggests that this reduction in the number of residential units, alongside an overall decline in property values, undermined the overall profitability of the proposals, presumably on the basis of the reduced return that Thornfield would receive from the sale of those residential units.⁷¹ The ramifying effect of this change to the required elements was that Thornfield later sought other changes to the required elements to remove the entire affordable housing component of the proposed development to enable it to construct a sufficient quantum of units to be sold at 'market' value.

My analysis of the changes to the required elements in the DA in this section has demonstrated that a document that purports to possess a 'directive quality' has, in practice, a significant capacity to change. This capacity to change exists even where the impetus for change comes from the tension between what a developer perceives to be a 'workable' development proposition and what the planning branch of a local authority deems to be acceptable.

Moving through the conditional phase: site assembly and the making of a compulsory purchase order

In this section, I consider how the grant of planning permission in February 2009 did not facilitate the start of construction in accordance with the proposals agreed between WCC's planning officers and Thornfield's directors but did function as an important symbol of progress at the CPO inquiry that followed. Earlier in this chapter, I referred to comments that D1 made to indicate that he would usually approach the discharge of conditions in a DA in sequence by first addressing the planning condition before then supporting a local authority in its making of a CPO to enable the discharge of a site assembly condition. This suggests that a

⁶⁹ Mawani, 'Law's Archive', 354.

⁷⁰ This is the same individual as the Chief Estates Officer referred to earlier in this chapter. As I noted in chapter one, this individual's job title changed during the Winchester Development.

⁷¹ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 2.4.

conditional phase might, for a developer, involve what Grabham has called 'a sequential structuring of knowledge'⁷² as the developer gains understanding of its ability to put in place the conditions for the movement to unconditionality. But D1's comments, coupled to the way that the Winchester DA positioned discharge of the planning condition first and the viability condition last but grouped the other conditions together in between, suggests that there is also a looping back and forth. This looping combines a step-by-step approach to discharge of the conditions with repeated movements from the present to the future, and vice versa, as actions in pursuit of discharge of one condition intersect with actions required to discharge other conditions, and both feed into and are fed by concerns about future viability.⁷³

I explored some of this movement back and forth in the previous section of this chapter when I discussed the planning permission granted to Thornfield in February 2009. The focus of my discussion shifts here to consider how discharge of the planning condition enabled movement towards discharge of the site assembly condition. The distinction between making a CPO, receiving confirmation of its validity, and the exercise of a confirmed order is worth reiterating here so that I can analyse the site assembly condition. It is beyond the scope of this thesis to explore the 'technicalities'⁷⁴ in detail, although some explanation of these rules and principles is essential to understand the way that a DA provides a form of contractual underpinning for the making, confirmation and exercise of a CPO.

As I mentioned in chapter one, a local authority has the power to make a CPO to acquire land in its area if it can demonstrate both that doing so would 'facilitate' the 'development, redevelopment or improvement' of that land⁷⁵ and also that any such development, redevelopment or improvement 'is likely' to contribute social, economic or environmental benefits for the wider area.⁷⁶ To exercise those powers, a local authority must make a CPO authorising the compulsory purchase of identified land interests and must submit that CPO to the Secretary of State appointed to confirm the justification for and validity of it.⁷⁷ If any of the individuals or organisations whose land is to be acquired make objections to the CPO, the Secretary of State will 'cause a public inquiry to be held' to enable the local authority

⁷² Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016), 167.

⁷³ For a discussion of a similar arrangement in the knowledge production practices of the IMF, see Richard Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action* (Routledge 1998), 134.

⁷⁴ Riles, 'A new agenda for the cultural study of law: Taking on the technicalities'.

⁷⁵ Town and Country Planning Act 1990, s226(1)(a).

⁷⁶ *ibid*, s226(1A).

⁷⁷ Acquisition of Land Act 1981, s2(2).

to justify the CPO, the objectors to challenge it and, following consideration of the evidence, to enable the Secretary of State to confirm it.⁷⁸

Table 7.2 sets out some of the key events between the grant of planning permission and the conclusion of the Winchester CPO inquiry.

Table 7.2 Timeline illustrating some of the key events between the grant of planning permission and the confirmation of the CPO	
Date	Event
09.02.2009	WCC and Thornfield enter into section 106 agreement and planning permission granted Planning condition discharged
October 2009	WCC and Thornfield exchange letters changing Final Long Stop Date to 31 December 2012
09.12.2009	Deed of variation enacting variations to DA approved by Cabinet on 18 November 2008
24.11.2010	Cabinet approves change to Final Long Stop Date to 31 August 2014
10.12.2010	Henderson becomes 'the Developer' in the DA, replaces Thornfield Properties plc as Guarantor and 'standstill period' of six months and 10 days commences
18.11.2011	WCC and Henderson enter into Compulsory Purchase Order Indemnity Agreement and WCC makes CPO (on 21.11.11)
June – July 2012	Public inquiry leads to confirmation of the CPO Site assembly condition discharged on conclusion of challenge period

Discharge of the site assembly condition in the Winchester DA depended upon the confirmation of a CPO and, to that end, Thornfield could serve written notice on WCC requesting that WCC make a CPO.⁷⁹ Following receipt of a request from Thornfield, WCC's Cabinet approved the making of a CPO on 17 October 2007 subject to WCC and Thornfield first entering into a Compulsory Purchase Order Indemnity Agreement.⁸⁰ The DA states that the purpose of the CPOIA was to set out the terms on which the developer would reimburse WCC for costs that the latter incurred in making, seeking confirmation of and exercising a CPO.⁸¹ CON2 told me that a CPOIA is commonly utilised in a property-led development like that planned in Winchester to provide the local authority with the assurance that it would not incur

⁷⁸ Acquisition of Land Act 1981, s13(2).

⁷⁹ As stated in clause 10.1 of the DA.

⁸⁰ Hereafter referred to as a 'CPOIA.'

⁸¹ As stated in clause 1.1.35 of the DA. Appendix 3 to the DA then contained a template for the form of CPOIA that WCC and Thornfield expected to agree.

irrecoverable costs during the CPO process. A CPOIA was, therefore, a type of ‘plug-in’⁸² or enhancement to the DA that WCC and Thornfield anticipated at the time that they signed their DA.

I have already made the point that not all the bolt-ons and plug-ins to the DA were a response to contingencies, accidents and unexpected events, and that WCC and Thornfield scripted a contractual relationship that was ‘continuously being made and remade.’⁸³ But while WCC’s officers and Thornfield’s directors tried to deploy a CPOIA as a device designed to generate movement along the pre-agreed development trajectory, contingencies, accidents and unexpected events did disrupt that movement. For example, WCC’s Head of Estates had presented a ‘nearly legal’ form of the CPOIA to the Council’s Cabinet in November 2008, as justification for the extension of the Final Long Stop Date from December 2009 to December 2012, which I discussed in chapter six.⁸⁴ Thornfield then secured planning permission for the development on 9 February 2009⁸⁵ but did not enter into a ‘binding’ CPOIA with WCC, and WCC did not make a CPO, before Thornfield’s bank placed Thornfield’s parent company into administration in January 2010. A ‘legally binding’ version of the CPOIA did, eventually, play an important role in the making of the Winchester CPO because WCC and Henderson entered into a CPOIA on 18 November 2011⁸⁶ and WCC then made a CPO on 21 November 2011.⁸⁷ In practice, therefore, Henderson’s directors simply adopted the scripted expectation that was written into the DA. Given that Henderson had entered into a ‘binding’ CPOIA, the DA obliged WCC to make a CPO,⁸⁸ which the Council duly did.⁸⁹

Following the making of the Winchester CPO, WCC received 23 objections from owners, lessees and occupiers of land to be acquired.⁹⁰ The Secretary of State for Communities

⁸² Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 207.

⁸³ Nicholas Blomley, 'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133, 142.

⁸⁴ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 6.1.

⁸⁵ Winchester City Council, *Grant of Planning Permission. Case: 06/01901/FUL (Appendix B, Document 2.07)*.

⁸⁶ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 6.4.

⁸⁷ Winchester City Council, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 (Appendix B, Document 3.01)*.

⁸⁸ As stated in clause 10.1 of the DA.

⁸⁹ Winchester City Council, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Statement of Case. 22 March 2012 (Appendix B, Document 3.02)*, paragraph 2.1.

⁹⁰ Christine Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 1.2. The Inspector’s report also refers to four ‘non-qualifying objections,’ which were

and Local Government appointed a Planning Inspector to adjudicate at a public inquiry scheduled to commence on 25 June 2012 and that sat for eight days.⁹¹ At the time that the inquiry commenced, there were seven remaining objectors and three remaining non-qualifying objectors.⁹² The Inspector's report produced after the inquiry summarises the evidence that WCC provided to justify the making of the CPO, as well as the various grounds raised in objection to the making of the order.

I do not consider either all evidence for justification of the CPO or all the grounds for objection in this thesis. However, one of the grounds presented for objection was that the Winchester DA was not a legitimate basis for the making of the CPO because the original contract award had not been made following an open market tendering process. I discussed many of the issues that arose in relation to the making of the DA in chapter six and revisit these legal points in chapter 10. At the conclusion of the inquiry, the Inspector appointed to adjudicate stated her opinion that the DA was 'a lawful and valid document' because WCC's Cabinet decision to enter into the DA had neither been challenged nor overturned in legal proceedings at the time that the DA had been agreed or following any of the variations that had been made.⁹³ The Secretary of State, in confirming the CPO, agreed that, while no competitive tender had taken place, the lack of any legal challenge to the original grant of the DA meant that none of the objectors had 'established that it is not a legitimate document.'⁹⁴

Moving through the conditional phase: the confirmation of a compulsory purchase order

The 'Statement of Case' that WCC submitted to the CPO inquiry setting out its justification for the making of the CPO included a redacted copy of the DA as one of a bundle of accompanying documents.⁹⁵ The Statement pointed simply to the existence of the DA as an artefact⁹⁶ and did not elaborate on the DA's contents other than to state that the agreement

objections to the proposals made by individuals or organisations who were not owners, lessees or occupiers.

⁹¹ *ibid*, paragraph 1.1.

⁹² *ibid*, paragraph 5.1.

⁹³ *ibid*, paragraph 7.21.

⁹⁴ Department of Communities and Local Government and Department for Transport, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 - Confirmation Letter (20 March 2013) (Appendix B, Document 3.04)*, paragraph 8.

⁹⁵ Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 4.31.

⁹⁶ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*; Helen Carr, 'Legal Technology in an Age of Austerity: Documentation, "Functional" Incontinence and the Problem of Dignity' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 216.

had 'been put in place to enable the Development to proceed.'⁹⁷ Steve Tilbury, the Council's Corporate Director, elaborated slightly in evidence submitted to the inquiry in which he informed the Inspector that the existence of the DA demonstrated the closeness of the ties between WCC and Henderson, which was exemplified, he indicated, by the fact that '[t]o date, Henderson has fulfilled its obligations under the Development Agreement.'⁹⁸ In practice, however, the extent of the obligations that the DA imposed on Henderson was limited. As I have already pointed out, until the Unconditional Date, the DA contained only a conditional obligation on the developer to commence construction of the development. Having replaced Thornfield as the developer, Henderson was therefore obliged to use its reasonable endeavours 'to procure satisfaction' of the conditions in the DA,⁹⁹ to meet on a monthly basis with WCC's officers to discuss progress on the discharge of conditions¹⁰⁰ and to reimburse costs WCC incurred in instructing solicitors and consultants in connection with the development.¹⁰¹ Although these obligations were limited, WCC's Corporate Director seems to have made this point to indicate the seamlessness of the transition from Thornfield to Henderson.

WCC and Henderson also sought to emphasise the continuity between Thornfield and Henderson by pointing to the efforts that Henderson had been making to acquire land interests on the development site. Matthew Bodley, the chartered surveyor Henderson appointed to negotiate with affected landowners, informed the Inspector that these efforts had begun in 2011 following Henderson's acquisition of Thornfield¹⁰² and had continued up to the commencement of the inquiry.¹⁰³ It was important that Thornfield and Henderson had both tried, and failed, to acquire other landowners' interests, including those of John De Stefano,¹⁰⁴ because the Circular providing guidance on the making of a CPO that was applicable

⁹⁷ Winchester City Council, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Statement of Case. 22 March 2012 (Appendix B, Document 3.02)*, paragraph 12.1.

⁹⁸ Steve Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 5.3.1.

⁹⁹ As stated in schedule 2, paragraph 3.3 of the DA.

¹⁰⁰ As stated in schedule 2, paragraph 3.7 of the DA.

¹⁰¹ As stated in clause 26 of the DA.

¹⁰² Matthew Bodley, *Proof of Evidence of Matthew Bodley. On matters related to compulsory purchase. 25 May 2012 (Appendix B, Document 3.09)*, paragraph 6.3.

¹⁰³ *ibid*, paragraph 6.8.

¹⁰⁴ John De Stefano owned a group of companies that held interests on the earmarked Winchester Development site. In chapters four and five, I discussed negotiations between Thornfield and De Stefano in which Thornfield sought to acquire De Stefano's land as a precursor to entering into a DA with WCC. De Stefano's land formed a significant component of the land to be acquired through the exercise of WCC's CPO. His land interests are set out in the plan contained in Appendix C to this thesis.

at the time of the Winchester inquiry¹⁰⁵ stated that making a CPO should be ‘a last resort in the event that attempts to acquire by agreement fail.’¹⁰⁶ To support these land acquisition efforts, and to ensure that this aspect of the CPO guidance had been met, the Winchester DA contained a clause stating that ‘the developer shall use reasonable endeavours to negotiate’ with existing landowners throughout the conditional phase of the development process.¹⁰⁷

In practice, therefore, WCC’s officers and Thornfield’s directors, and then WCC’s officers and Henderson’s directors, had been pursuing the discharge of the site assembly condition from the date of the DA and throughout the conditional phase. As well as the episodes of correspondence between 1998 and 2002 that I discussed in chapter four, Michael Capocci, Thornfield’s managing director, and Nigel Wright, property director of De Stefano’s companies, exchanged correspondence between December 2005 and April 2006.¹⁰⁸ Similar correspondence circulated between September 2007 and July 2008 between Jason Marcus, Thornfield’s Chairman, Riccardo Mai, Thornfield’s Project Director for Winchester, Karen Hawes, who had previously worked for Thornfield but was now a director working on behalf of one of De Stefano’s companies, and Rob Hobson, who had replaced Nigel Wright as property director of De Stefano’s companies.¹⁰⁹ This correspondence is notable for the apparent

¹⁰⁵ The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Criche Down Rules* (2004). That guidance has since been consolidated, along with other guidance documents, into Department for Communities and Local Government, *Guidance on Compulsory purchase process and The Criche Down Rules for the disposal of surplus land by, or under threat of, compulsion* (2015). Where I refer in this chapter to sections of the 2004 circular, I also note comparable passages in the new guidance.

¹⁰⁶ The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Criche Down Rules*, paragraph 24; Department for Communities and Local Government, *Guidance on Compulsory purchase process and The Criche Down Rules for the disposal of surplus land by, or under threat of, compulsion*, paragraph 2.

¹⁰⁷ As stated in schedule 2, paragraph 4.2 of the DA.

¹⁰⁸ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letters from Nigel Wright to Michael Capocci (24 December 2005, 19 January 2006 and 12 April 2006) (Appendix B, Document 3.10.15)*; Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letters from Michael Capocci to Nigel Wright (11 January 2006, 8 February 2006 and 13 April 2006) (Appendix B, Document 3.10.16)*.

¹⁰⁹ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Karen Hawes to Jason Marcus (25 September 2007) (Appendix B, Document 3.10.17)*; Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Jason Marcus to Karen Hawes (9 October 2007) (Appendix B, Document 3.10.18)*; Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Riccardo Mai to Karen Hawes (26 November 2007, 17 December 2007, 12 February 2008, 7 March 2008 and 16 April 2008) (Appendix B, Document 3.10.19)*; Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letters from Karen Hawes to Riccardo Mai (21 December 2012 and 8 April 2008) (Appendix B, Document 3.10.20)*; Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and*

difference in intention between Capocci, Mai and Marcus and Wright, Hawes and Hobson. Throughout both episodes of correspondence, De Stefano's directors sought to encourage Thornfield's directors to allow De Stefano to develop his land as part of the overall development proposed for the site. On the other hand, Thornfield's directors used the correspondence to invite De Stefano's directors to re-open negotiations for the sale and purchase of De Stefano's land. Similarly, Martin Perry, Henderson's Director of Retail Development, took up these negotiations after Henderson succeeded Thornfield as developer, as evidenced in meetings and correspondence between Perry and John Strachan, a property development consultant acting on behalf of De Stefano, which began in June 2011 on the conclusion of the standstill period mentioned in chapter six.¹¹⁰ This correspondence continued until May 2012 in the form of telephone conversations between Matthew Bodley, Henderson's consultant surveyor, and Karen Hawes.¹¹¹ There is no record of any further correspondence after the commencement of the CPO inquiry.

Throughout these episodes of correspondence, each side remained resolutely unwilling to countenance the other's propositions but the correspondence presented an important paper record¹¹² or material artefact,¹¹³ which could be placed before the Inspector at the inquiry, of attempts made to acquire various landholdings by agreement, including those held by De Stefano. WCC's officers could thus argue that Henderson had been working towards the discharge of the site assembly condition and fulfilling their obligation to use reasonable endeavours to acquire land by agreement.

But Steve Tilbury, WCC's Corporate Director, did not just present the DA, and Henderson's commitment to its obligations contained in the DA, as evidence of the closeness of the ties between WCC and Henderson. He also sought to present the DA both as a script for the movement from conditionality to unconditionality and as a guarantee that that movement

Henley group of companies. Letters from Riccardo Mai to Rob Hobson (16 May 2008, 30 June 2008 and 25 July 2008) (Appendix B, Document 3.10.21); Matthew Bodley, Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Rob Hobson to Riccardo Mai (11 July 2008) (Appendix B, Document 3.10.22).

¹¹⁰ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Emails exchanged between Martin Perry and John Strachan (21 June 2011) (Appendix B, Document 3.10.23).*

¹¹¹ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Note of telephone conversation between Matthew Bodley and Karen Hawes (30 March 2012) (Appendix B, Document 3.10.24); Matthew Bodley, Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Matthew Bodley to Karen Hawes (25 May 2012) (Appendix B, Document 3.10.25).*

¹¹² David Dery, "'Papereality' and learning in bureaucratic organizations' (1998) 29 *Administration & Society* 677.

¹¹³ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan.*

would take place. His evidence to the inquiry explained that the DA contained conditions that needed to be discharged before the commitment to commence construction took binding effect.¹¹⁴ He also informed the Inspector that the DA contained a planning condition that required the developer to obtain planning permission for the development. He noted, however, that WCC had already granted planning permission and that this meant that '[a]t the time of writing this evidence the Planning Condition has been satisfied,'¹¹⁵ demonstrating why developers and local authority officers might favour a sequential approach to the discharge of conditions. Similarly, Martin Perry, Henderson's Director of Retail Development, giving evidence at the inquiry in support of the making of the CPO, informed the Inspector that the developer had carried out feasibility assessments indicating that the planning permission provided a sound basis for the development.¹¹⁶

The Inspector therefore noted that, 'with planning permission already in place, there are no [planning] impediments to the Scheme.'¹¹⁷ However, WCC also had to demonstrate that the development, redevelopment or improvement of the land would take place 'within a reasonable time-scale.'¹¹⁸ This was, of course, the reason that the Winchester DA existed but that DA contained only a conditional obligation imposed on the developer to commence construction on the development site. WCC's officers and Henderson's directors needed, therefore, to demonstrate to the Inspector that, notwithstanding this conditionality, development would soon take place. This provides an illuminating insight into one of the ways that the DA 'travelled'¹¹⁹ to some of the times and places at which progress on the development was discussed. The idea that a legal text can be a 'materialized object' that moves across various bureaucratic and technical networks¹²⁰ is important for considering this.

¹¹⁴ Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.2.9.

¹¹⁵ *ibid*, paragraph 3.2.10.

¹¹⁶ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 14.5.

¹¹⁷ Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 4.46.

¹¹⁸ The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Crichel Down Rules*, paragraph 19; Department for Communities and Local Government, *Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land by, or under threat of, compulsion*, paragraph 13

¹¹⁹ Catriona Rooke, Emilie Cloatre and Robert Dingwall, 'The Regulation of Nicotine in the United Kingdom: How Nicotine Gum Came to Be a Medicine, but Not a Drug' (2012) 39 *Journal of Law and Society* 39, 57.

¹²⁰ See Emilie Cloatre and Nick Wright, 'A Socio-legal Analysis of an Actor-world: The Case of Carbon Trading and the Clean Development Mechanism' (2012) 39 *Journal of Law and Society* 76, 81. See also John Law, 'On the methods of long-distance control - vessels, navigation and Portuguese route to India' in John Law (ed), *Power Action and Belief: A New Sociology of Knowledge? A Sociological Review*

Similarly important here are the ideas that an artefact can be used to enrol allies¹²¹ and that setting out the development trajectory in something that appears to be a 'coherent, unified and persuasive legal text'¹²² enables that trajectory, by extension, to appear coherent, unified, persuasive and legally binding.

WCC's officers and Henderson's directors and representatives all sought to demonstrate at the inquiry that the DA, notwithstanding its conditionality, plotted a trajectory to the development, redevelopment or improvement of the land. They also sought to demonstrate that the DA, notwithstanding its conditionality, made it likely that that development, redevelopment or improvement would actually happen because WCC and Henderson were following that trajectory. For that reason, Steve Tilbury, WCC's Corporate Director, presented evidence to the inquiry stating not only that the planning permission provided a sound basis for the proposed development but that the planning condition, as a first step towards reaching unconditionality, had been discharged. He explained that, following discharge of that planning condition, the 'Council has no reason to believe that any of the remaining conditions cannot be satisfied.'¹²³ He did not, however, mention that Thornfield had obtained that planning permission over two years after the Planning Long Stop Date in the DA had passed. Instead, he presented the planning permission as evidence of progress in the discharge of conditions in the DA.

This way of enacting the DA is akin to the concept of modularity that Star discusses.¹²⁴ But this is a selective performance of breaking down the DA into some of its constituent parts, demonstrating how those parts have worked and then reconstituting the DA as a single working 'unit'¹²⁵ or 'something that closely resembles an organised whole.'¹²⁶ The statement that Tilbury, WCC's Corporate Director, made regarding discharge of the planning condition, coupled to similar statements that Martin Perry, Henderson's Director of Retail Development,

Monograph (Routledge & Kegan Paul 1986) and Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*.

¹²¹ Law, 'On the methods of long-distance control - vessels, navigation and Portuguese route to India'. See also Michel Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay' in John Law (ed), *Power, action, and belief: a new sociology of knowledge? Sociological Review Monograph* (Routledge & Kegan Paul 1986).

¹²² Jonathan Murdoch, Simone Abram and Terry Marsden, 'Modalities of Planning: A Reflection on the Persuasive Powers of the Development Plan' (1999) 70 *The Town Planning Review* 191, 195.

¹²³ Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.2.10.

¹²⁴ Susan Leigh Star, 'This is Not a Boundary Object: Reflections on the Origin of a Concept' (2010) 35 *Science Technology & Human Values* 601, 603.

¹²⁵ Kyle McGee, *Bruno Latour: the normativity of networks* (Routledge 2014), 7.

¹²⁶ Bruno Latour, *Science in action: how to follow scientists and engineers through society* (Harvard University Press 1987), 131-2.

made to the inquiry, presented a justification for WCC's contention that the other conditions were 'nearly discharged,' that the DA was 'nearly unconditional' and that development, redevelopment and improvement would soon follow the confirmation of the CPO. These actions bring to mind Johns' discussion of the manner in which the parties to a public-private infrastructure project present their project as founded on a type of 'autonomous logic.'¹²⁷

Tilbury and Perry achieved this performance by reducing the complexity and indeterminacy of a conditional DA 'to a few well-defined parameters.'¹²⁸ For example, and as I have already stated, the DA contained an 'overriding' viability condition but Tilbury explained that, at the time that he submitted his evidence, 'the scheme is viable [...] and can meet the requirements set out in the Development Agreement.'¹²⁹ Similarly, Perry informed the inquiry that:

Henderson has demonstrated to WCC that the scheme as consented would currently be capable of satisfying the viability measure stipulated within the development agreement of 10% profit on cost.¹³⁰

These statements presented the discharge of the viability condition as something run-of-the-mill and as a mere matter of routine following site assembly. But despite these ostensibly optimistic statements, it is notable that Perry, Henderson's Director of Retail Development, caveated his statement by pointing out that this positive assessment only applied 'currently.' This left open the possibility that Henderson might later produce a further assessment that might not contain a similarly positive outlook. In fact, Henderson's directors exploited this possibility to seek further changes to the required elements in the DA after the CPO inquiry had concluded, although these changes form part of the subject matter to be analysed in chapters eight and nine.

Crafting a DA as a conditional agreement can, therefore, be seen to have advantages to a developer and a local authority alongside holding back a commitment to construct a particular type of development. By producing a DA that required a sequential approach to the discharge of conditions, WCC's officers could present satisfaction of the planning condition as evidence that WCC and Henderson were on course to discharge the other conditions. This means that the DA contained within it a mechanism for perpetuating its own usefulness

¹²⁷ Johns, 'Financing as Governance', 393.

¹²⁸ Michel Callon, 'The Sociology of an Actor-Network: The Case of the Electric Vehicle' in Michel Callon, John Law and Arie Rip (eds), *Mapping the dynamics of science and technology: sociology of science in the real world* (Macmillan 1986), 29.

¹²⁹ Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 5.3.3.

¹³⁰ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 14.8.

because discharge of the planning condition functioned to demonstrate the coherence of the DA as a whole. According to the arguments that WCC's officers and Henderson's directors presented at the inquiry, given that the planning condition had been discharged, discharge of the other conditions would inevitably follow, as long as landownership issues could be resolved. They needed to be able to demonstrate that no planning impediments existed to the proposals¹³¹ but, by incorporating this pre-requisite into the DA as a planning condition, they reframed that pre-requisite as a basis from which to generate a symbolic gesture pointing towards the imminent commencement of construction.

Lining things up or making things up: site assembly and discharging conditions

In this final section, I consider other ways in which WCC's officers and Henderson's directors presented the discharge of conditions in the DA as run-of-the-mill, and challenge aspects of this performance. In the previous section of this chapter, I explained how these people connected to the DA presented discharge of the planning condition as a precursor that would lead to discharge of the other conditions as soon as the CPO had been confirmed. Alongside professing confidence in the viability of the development proposals, Martin Perry, Henderson's Director of Retail Development, indicated that the Unconditional Date would occur in the month following confirmation of the CPO.¹³² He also informed the inquiry that one of the conditions requiring discharge was 'the pre-letting condition' and presented discharge of that condition as a matter of routine. The pre-letting condition stated that the DA would remain conditional until the developer had granted a sufficient quantity of agreements for lease with prospective tenants¹³³ to provide what D1 called 'a platform for a viable scheme.' The metaphor that D1 invoked shows that this is another example of staging. I have already noted the double meaning of the term, 'stage,' and D1's comment suggests that some developers think of a pre-letting condition as a stage on which they can perform the other actions required to bring a property-led development to completion.

The DA that WCC presented to the Winchester CPO inquiry did not reveal the quantity of 'pre-lettings' needed to discharge the pre-letting condition because the figure had been

¹³¹ Circular 06/2004 stated that a local authority making a CPO should be able to demonstrate that there were no 'planning impediments' to the proposals (The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Criche Down Rules*, paragraphs 22-23; as replaced by Department for Communities and Local Government, *Guidance on Compulsory purchase process and The Criche Down Rules for the disposal of surplus land by, or under threat of, compulsion*, paragraph 15). In practice, this could be demonstrated through showing that a planning permission was in existence authorising the commencement of construction.

¹³² Martin Robert Perry, *Proof of Evidence. Appendices. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.07)*, 28.

¹³³ As stated in schedule 2, paragraph 2.6 of the DA.

redacted. During my fieldwork, I asked D1 and CON5 why this information would have been redacted from a published DA. They explained that a developer might insist that a local authority concealed this information in a published DA to avoid revealing the minimum level of pre-lettings that the developer had requested because doing so might enable rival developers to undercut them and other local authorities with whom they might undertake developments to hold the developer to a bargain that they had struck elsewhere.

If this guarded approach mattered to Henderson in advance of the inquiry, it appears not to have mattered during the inquiry, however. Perry, Henderson's Director of Retail Development, informed the inquiry that discharge of the condition would be achieved through pre-lets amounting to 'not less than 70% of total agreed yearly rents of ground and first floor retail units.'¹³⁴ This means that Henderson's directors, or retail consultants that the directors appointed,¹³⁵ would have carried out a valuation to assess the income that they would receive if that retail space was let to tenants. By calculating 70% of that anticipated income, they would have reached the figure that would be the threshold beyond which the condition had been discharged. But while Perry informed the inquiry that this 70% figure represented the pre-lettings threshold for unconditionality, he also pointed out that he would require only '35% of retail space (by value) to be pre-let' before commencing with construction and that he was 'confident that [this figure] could be achieved' to enable construction to start 'once land interests are assembled.'¹³⁶ This statement suggests that Henderson's directors were prepared to make a significant concession on the amount of pre-lets required before the DA became unconditional.

This statement is, however, a device that 'stands in' for the messiness¹³⁷ of the range of interactions needed to secure this number of pre-lettings. For example, D4 pointed out that most retailers reach their own conclusion about the commercial prospects of an area, with consequence that achieving a pre-letting target is not entirely within the developer's control. This means that the extent of the concession that Perry purported to be offering by accepting a lower pre-lettings threshold was limited. Moreover, some of my interviewees also indicated

¹³⁴ Perry, *Proof of Evidence. Appendices. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.07)*, 24.

¹³⁵ Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, Annex A contains a list of the consultants who Henderson engaged, including a retail letting specialist. That retail letting specialist provided evidence to the CPO inquiry in support of confirmation of the CPO (see Nicholas Symons, *Proof of Evidence. Proposed Silver Hill Development, Winchester. June 2012 (Appendix B, Document 3.10B)*).

¹³⁶ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 16.2.

¹³⁷ McGee, *Bruno Latour: the normativity of networks*, 214.

that the presentation of a pre-letting condition as ‘nearly discharged’ should provide an Inspector and a local authority with limited confidence that unconditionality was imminent.

CON3 expressed this most clearly when he told me:

[M]ost of the conditions are actually matters that the developer raises to hold back their commitment until they’re ready. [...] So, the 40 per cent, which is quite common, pre-leasing rule [PAUSE]. At any point, the developer can say, “Well, I know I’ve only got 32 per cent but let’s start.” Or, he wants to hold that because he knows he could achieve 40 per cent on Thursday but he holds at 38 per cent and says, “Well, there’s no point concluding that last one because if I do that, my condition will be satisfied.” So, it is entirely a way for development companies to control and regulate the timetable. Because they are like a juggler. They have to get all these things up in the air and really come down precisely at the right time.

This emphasis on ‘control’¹³⁸ has been an underlying theme of this thesis. CON3’s statement suggests that, rather than lining up the discharge of conditions, a developer can line up conditions in a DA as a means to hold back unconditionality until the moment that the developer deems to be ‘precisely [...] the right time.’ In doing so, CON3’s portrayal of a developer as a ‘juggler’ indicates a belief that a developer must be a skilled performer who is unusually adept at coordinating the movement of different entities. CON4 made a similar point when he told me that, in a development in which he was acting as the developer’s agent, ‘actually, the analogy is that we are the conductors of an orchestra and we have to make sure that each part of the orchestra comes in at the right time.’ As he observed, ‘if the conductor said, “No, I’m having a breather,” it would be a bit disastrous.’

The images deployed here are intriguing. Most jugglers and conductors perform in public but practise in private. There is a juxtaposition in the work of a developer, though, between public displays of juggling or conducting, as seen in Martin Perry’s evidence to the CPO inquiry, and the ‘backroom,’¹³⁹ private meetings and email exchanges where the negotiations between a developer and individual retailers take place. The comments that CON3 and CON4 made also, indirectly, invoke the ‘image of projectness’ that Law has discussed.¹⁴⁰ This is the idea that technological development projects work best if they are performed as a sequence of linked actions that are closely controlled and carefully managed from behind-the-scenes. According to CON3, the way that a pre-letting condition affords a developer ‘control’ and the ability to ‘regulate the timetable’ is desirable because it is the developer that is best placed to assess ‘the right time’ for development to begin.

¹³⁸ The concept of ‘control at a distance’ is an important idea in ANT-inspired research, as I have already discussed (see Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 26; Latour, *Science in action: how to follow scientists and engineers through society*, 223; Law, ‘On the methods of long-distance control - vessels, navigation and Portuguese route to India’).

¹³⁹ Mariana Valverde, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012), 14.

¹⁴⁰ John Law, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002), 8.

D1 also argued that a 'pre-lettings threshold' can be a 'platform for a viable scheme' but that the way a developer puts that platform in place depends on that developer's priorities:

If you're keen to get on site, you might waive some of the key conditions. You might think that you can't get to the leasing threshold, the leasing percentage that you want. And invariably, the council will have a leasing percentage at our behest because we don't want to be forced into a situation where we're starting at a level below our target. But equally, if you waive it and get to a point where you think the market is just not working for us at the moment, we'll crack on and try to let it later, then that's fine. [...] But, if we're not comfortable, it's a pre-condition, which means we might never get on site. So it's a fundamental condition, but it's one in our control.

As well as discussing 'control,' D1 focuses here on the 'comfort' that a pre-lettings condition grants a developer. This suggests that he is perhaps more concerned about convincing himself of his capacity to control events. His focus is on the extent to which he can choose whether or not the pre-lettings condition is something to be disavowed or treated as fundamental.

These observations point to vulnerability but also reveal the lop-sidedness inherent to many DAs. At the inquiry into the making of the Winchester CPO, Martin Perry, Henderson's Director of Retail Development, informed the Inspector that he would waive the 70% pre-lettings threshold in the DA and commence construction if 35% of the retail space had been pre-let.¹⁴¹ But, objectors to the making of the CPO pointed out the extent of the 'control' that this type of condition grants to a developer. The Inspector's report summarises part of the evidence of Bruce Hartley-Raven, who was a planning consultant John De Stefano had used in relation to his Winchester landholdings since 2003.¹⁴² Hartley-Raven submitted evidence on behalf of De Stefano in opposition to the making of the order in which he stated:

Pre-letting conditions are also required to be met in the DA which put the start of the development entirely within the control of the developer. The consequence of all these conditions is that the DA is really no more than an option agreement. There can be no certainty that [Henderson] will proceed.¹⁴³

What is remarkable about this statement is that it uses language reminiscent of that CON2 and D1 deployed to set out the virtues of a pre-letting condition. CON2 summed this up most succinctly when he told me that a pre-letting condition is:

A protection. It's one of those things that makes a development agreement a bit of an option, really. It's just an additional form of protection to hide behind if things go badly wrong.

¹⁴¹ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 16.2.

¹⁴² Bruce Hartley-Raven, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Bruce Hartley-Raven. 6 June 2012 (Appendix B, Document 3.11)*, 4.

¹⁴³ Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 5.42.

From his point-of-view, it was important that developers who ‘have been frightened by what happened in the recession’ have that ‘protection’ so that they can avoid getting dragged into binding commitments before they are certain that they will achieve their profitability targets.

CON2’s comments highlighted a need for ‘protection’ that mirrored D1’s desire for ‘comfort,’ which I mentioned earlier in this section. In chapter eight, I note that a developer can use a local authority’s fear of losing a development opportunity as a technology of power¹⁴⁴ deployed to extract concessions from local authority officers. Here, D1 and CON2 were talking about a different type of fear but were, nonetheless, also deploying fear as a means to obtain control over property-led development processes. My research shows that developers and consultants both make the same observations about the purpose of a pre-letting condition. This type of condition appears to be acknowledged as a way for a developer to gain control ‘of the timetable.’

One way of balancing this apparent lop-sidedness might be to require a developer to have in place a certain quantum of pre-lets before the local authority is required to make a CPO. But even then, CON2 pointed out, a pre-lettings condition would provide an ‘illusory’ guarantee because ‘most retailers won’t sign up to something four years in advance.’ CON4 made the same point when he told me that ‘[y]ou may get some [retailers] to commit but even these have walk away options if the thing isn’t delivered on time.’ Moreover, he pointed out that, even if a local authority has obtained confirmation for its CPO at an inquiry, ‘you can get everything in a row’ but ‘if you lose all your pre-lets, you’re back to square one.’

The evidence submitted by WCC’s officers and Henderson’s directors and representatives to the CPO inquiry did not take account of these issues but was founded on two assumptions. They invited the Inspector to conclude, first, that discharge of the remaining conditions in the DA was a matter of routine and, second, that, with the appropriate inputs at the appropriate times, the DA would generate a successful development. This assumption was used to legitimise the making of the CPO because WCC and Henderson could assert that, once unconditionality had occurred, construction of the development would take place. And WCC and Henderson supported that assertion by suggesting that achieving unconditionality was a matter of routine that would follow closely after the confirmation of the CPO.

At the conclusion of the CPO proceedings, the Inspector recommended that the Secretary of State should confirm the CPO,¹⁴⁵ observing that ‘[p]lanning permission has been

¹⁴⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991), 215.

¹⁴⁵ Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 9.1.

secured and the DA, together with the Section 106 Planning obligations accompanying the permission, will ensure the comprehensive development of the Order Land.¹⁴⁶ The Secretary of State then confirmed the CPO on 20 March 2013.¹⁴⁷ The presentation of the Winchester DA as a nearly unconditional instrument for the development, redevelopment and improvement of the land to be acquired in the Winchester CPO had enabled WCC's Corporate Director and Henderson's Director of Retail Development to act 'as if' the DA guaranteed that development, redevelopment and improvement would take place.¹⁴⁸ The content of the conditions in the DA that were discussed in the inquiry invited this impression by suggesting that, while the DA contained various parts, with the inputs that WCC and Henderson promised to make, these parts would fit neatly together into a coherent whole that would enable construction to commence. What was not acknowledged at the inquiry was that the DA remained what CON3 called a 'hugely conditional' document that allowed the developer to control the movement to unconditionality. Similarly, there was no acknowledgement that resolving landownership issues does not lead automatically to the commencement of construction. Instead, what this case study demonstrates is that a local authority must make and seek confirmation of a CPO on the basis that doing so might incentivise a developer to commit to construction of a development. Chapter eight considers how useful this incentive was for WCC.

Conclusion

My analysis of the Winchester Development in this chapter has developed some of the themes that have underpinned my analysis throughout this thesis by asking what happens during the conditional phase of a property-led development process. I examined the planning permission and the CPO made for the purpose of this development, explored how the Winchester DA plotted the movement from conditionality to unconditionality and investigated

¹⁴⁶ *ibid*, paragraph 7.20. The Inspector's reports for other developments I looked at during my research reveal a similar tendency to assume that the existence of a DA means that construction of a development is likely to follow soon after the confirmation of a CPO. In Farnham, Surrey, for example, the Inspector appointed to adjudicate in a CPO inquiry in 2013 related to redevelopment of the town centre noted that the DA entered into between the local authority and the developer 'will ensure that comprehensive redevelopment of the Order land takes place' (CJ Ball, 'CPO Report to the Secretary of State for Communities and Local Government, The Waverley Borough Council (East Street Farnham) Compulsory Purchase Order 2012. 9 April 2013' <http://www.waverley.gov.uk/downloads/200165/major_developments> accessed 14 October 2015). The Inspector reached that conclusion notwithstanding that the DA remained conditional and construction had still not commenced in the summer of 2017 (Waverley Borough Council, 'Frequently Asked Questions on Brightwells Farnham Regeneration Scheme' <http://www.waverley.gov.uk/info/200349/view_and_comment/516/brightwells_farnham_regeneration_scheme/3> accessed 20 July 2017).

¹⁴⁷ Department of Communities and Local Government and Department for Transport, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 - Confirmation Letter (20 March 2013)* (Appendix B, Document 3.04).

¹⁴⁸ Riles, *Collateral knowledge: legal reasoning in the global financial markets*, 173.

the extent to which components of the DA imposed rules that governed that movement. My analysis here has enabled me to scrutinise the 'required elements' written into that DA that purported to stipulate the minimum specifications for the Winchester Development. I revealed how these became the site of contestations between Thornfield's directors and different branches of WCC. Moreover, these changes to the DA provide an important insight into the way that two contracting parties might attempt to preserve the internal cohesiveness of a DA. WCC's officers and Thornfield's directors did this by agreeing changes that enabled the grant of a planning permission that in turn made possible the discharge of the planning condition. However, they did this while attempting to accommodate planning policy requirements and Thornfield's profitability expectations. The consequent changes to the DA did not entail a series of bolt-ons similar to those that I described in chapter six but necessitated the rewriting of parts of it. I demonstrated how WCC's officers and Thornfield's directors sought to preserve the continuity of aspects of their original agreement while severing those aspects that would prevent the grant of a planning permission suitable for discharge of the planning condition. These insights set the scene for chapter eight, in which I investigate if this rewriting resolved stresses locked-in to the DA or created new tensions that disrupted the discharge of other conditions.

Having explored the rewriting of the DA, I then pointed out how WCC's officers and Thornfield's directors exploited the text of the DA to obtain shelter from the possibility of termination by postponing the Planning Long Stop Date. They did this after Thornfield's application for planning permission by delaying their entry into the section 106 agreement that would trigger the grant of planning permission. Doing so meant that they gained extra time to make further adjustments to the DA and for amendments to Thornfield's application for planning permission as they sought to balance the need to have a planning permission in place with the need for that planning permission to provide a basis for a profitable development. This is an important finding because it demonstrates how the text of the DA contained the potential for this scripted pause and that WCC's officers and Thornfield's directors took up that opportunity when it was advantageous to them to do so. Their actions to postpone the Planning Long Stop Date further undermines any sense of the effectiveness of a Long Stop Date to generate specific actions within a strict timeframe. Rather, the existence of a Planning Long Stop Date can be seen to have incentivised creative use of provisions in the DA to preserve a developer's preferred development trajectory.

The lop-sidedness that this discussion highlighted has been a significant theme of this chapter that also emerged in my discussion of the making and confirmation of the CPO that would discharge the site assembly condition. A consideration of the making and confirmation

of the CPO led me to analyse the way in which Henderson's directors took forward the work that Thornfield's directors had invested towards discharge of the planning condition, and I explored continuities between the time before the change of developer and the time after. I showed how WCC's Corporate Director and Henderson's Director of Retail Development presented the DA at the inquiry as a script for commencement of construction and as a guarantee that construction would soon commence notwithstanding the conditionality of the DA. Rather than providing any sort of guarantee of the inevitability of the commencement of construction, however, I revealed that the conditions in a DA shelter a developer from any sort of commitment to construct. While Henderson retained the benefit of the shelter that the Winchester DA afforded, I showed that WCC needed to make and confirm a CPO while hoping that discharge of the other conditions might follow. In chapter eight, I investigate the discharge of those other conditions.

Chapter 8

An instinct to extend and to amend: rewriting a Development Agreement

In this chapter, I continue to analyse the discharge of conditions in the Winchester Development Agreement.¹ By investigating the Winchester DA, I have explained how Winchester City Council,² Thornfield Properties (Winchester) Limited³ and, following the administration of Thornfield's parent company, Henderson UK Property Fund⁴ strove to make the DA unconditional. I draw again here on my interviews with developers, local authority officers, councillors and property development consultants⁵ and continue my analysis of the Winchester Development to consider how WCC and Henderson addressed the ongoing conditionality of the DA.⁶ I also analyse the extent to which they treated the DA as a script containing 'invariant principles'⁷ that governed the movement towards the 'Unconditional Date.'⁸

In this chapter, I revisit the Compulsory Purchase Order⁹ that WCC made on 21 November 2011¹⁰ to enable discharge of the site assembly condition and consider the ongoing

¹ Throughout this thesis I have been abbreviating this term to 'DA.' I continue to do so in this chapter.

² Throughout this thesis I have been referring to Winchester City Council as 'WCC.' I continue to do so in this chapter.

³ Thornfield Properties (Winchester) Limited was a special purpose company set up by Thornfield Properties plc to enter into a DA with WCC and carry out the Winchester Development. Thornfield Properties (Winchester) Limited was, therefore, 'the developer' for the purposes of the Winchester DA. I have referred to Thornfield Properties (Winchester) Limited throughout this thesis as 'Thornfield' and continue to do so in this chapter. After Thornfield Properties plc was placed into receivership, Henderson UK Property Fund acquired Thornfield and changed the name of the company to Silverhill Winchester No 1 Limited.

⁴ As I noted in chapter six, after Thornfield Properties plc was placed into administration Henderson UK Property Fund became the guarantor of 'the developer's' obligations in the DA. The developer in the DA became a wholly owned subsidiary of Henderson UK Property Fund. For the sake of brevity, I refer to the developer after Thornfield Properties plc's administration as 'Henderson.' Where it is necessary to distinguish between the Henderson entity acting as developer and the Henderson entity acting as guarantor, I make the distinction clear.

⁵ I discuss interviews with D1, D4, COU1, CON2 and CON3. Appendix D contains some limited biographical details explaining who these interviewees are and when I met them.

⁶ For a summary of the conditions in the Winchester DA, please see Table 6.2. Alongside the viability condition, the developer needed to discharge the planning, road closure, site survey, pre-letting, funding and affordable housing conditions. WCC needed to discharge the title, land appropriation and site assembly conditions.

⁷ David Scott, *Omens of adversity: tragedy, time, memory, justice* (Duke University Press 2014), 64.

⁸ In chapter six, I demonstrated that the DA anticipated an 'Unconditional Date' that would mark the moment at which the developer's conditional obligation to commence construction converted into an unconditional duty.

⁹ Throughout this thesis I have been abbreviating the term 'Compulsory Purchase Order' to 'CPO.' I continue to do so in this chapter.

¹⁰ For confirmation that WCC made the CPO on 21 November 2011, please see Winchester City Council, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Statement of Case. 22 March 2012 (Appendix B, Document 3.02)*, paragraph 2.1.

negotiations between WCC's officers, Henderson's directors and John De Stefano¹¹ to enable the acquisition of the latter's land interests on the Winchester Development site. Having done so, I point out that, while WCC's officers and Henderson's directors were negotiating with De Stefano, Henderson's directors were also seeking to reopen negotiations with the Council in order to rewrite the 'required elements'¹² set out in the DA. Analysing the rewriting of the required elements leads me to scrutinise the tension between continuity and change during the Winchester Development and in the Winchester DA.

I will ask if Henderson's directors, following confirmation of the CPO, approached the DA selectively, looking for elements of the DA to preserve and for parts of the DA to cast aside. Much of my analysis in this thesis has considered the way in which local authorities and developers present the discharge of conditions in a DA as a sequence of irreversible ratchets¹³ or acts of cumulative tightening¹⁴ as the parties move through a conditional phase and settle on a development proposition that they deem to be workable. In thinking through the selectiveness Henderson's directors exhibited, the basis for it and the implications of it, I reconsider the impression of property-led development as a linear process involving progression from the vagueness of conditionality through a series of events that solidify an overarching development trajectory.

Conceptualising the discharge of conditions as a process that operates through ratcheting suggests a sequence of actions that cannot be undone. In chapter seven, I explained that WCC and Henderson told the Inspector appointed to adjudicate at the Winchester CPO inquiry that the planning permission granted on 9 February 2009¹⁵ discharged the planning condition contained in the DA.¹⁶ I show that presenting the planning condition as discharged

¹¹ John De Stefano owned a group of companies that held interests on the earmarked Winchester Development site. In chapters four and five, I discussed negotiations between Thornfield and De Stefano in which Thornfield sought to acquire De Stefano's land as a precursor to entering into a DA with WCC. In chapter seven, I explained that Henderson had carried these negotiations forward after it replaced Thornfield as developer, and that De Stefano's land formed a significant component of the land to be acquired through the exercise of WCC's CPO.

¹² The DA listed the required elements in clause 5.3. These constituted the baseline specifications, agreed between WCC and Thornfield when they entered into the DA, for such things as the retail floor-space, the number of residential units, the number of parking spaces and the other built components of the development, including a new bus station.

¹³ Bruno Latour, *We have never been modern* (Harvard University Press 1993), 72.

¹⁴ Richard Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action* (Routledge 1998), 258-9.

¹⁵ Winchester City Council, *Grant of Planning Permission. Case: 06/01901/FUL (Appendix B, Document 2.07)*.

¹⁶ Steve Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.2.10.

did not, however, create an ‘irreversible situation’¹⁷ because Henderson sought changes to the required elements in the DA and a replacement for the planning permission granted in February 2009. I explain what those changes were and ask how WCC’s officers justified them. Doing so leads me to scrutinise the implications that those changes had for the provision of affordable housing and the construction of a bus station as part of the Winchester Development.

Discharging the site assembly condition: circulating drafts and extending Long Stop Dates

Table 8.1 sets out the key events between confirmation of the CPO and the approval of a new planning permission for the Winchester Development. The Secretary of State for Communities and Local Government confirmed the Winchester CPO on 20 March 2013,¹⁸ but WCC and Henderson did not complete the land assembly process immediately. Most notably, WCC’s officers and Henderson’s directors began a new stage of negotiations with John De Stefano, following confirmation of the CPO, for the transfer of the latter’s landholdings.¹⁹ The three parties agreed terms for the transfer in early November 2013, and WCC’s Cabinet and Council²⁰ respectively approved those terms on 4 and 6 November 2013.²¹ No public record²² of the negotiations between WCC, Henderson or De Stefano is available in Council documents. Subsequent records explain, however, that WCC’s officers, Henderson’s directors and De Stefano finalised the transfer on 30 January 2014²³ for a price of £5million.²⁴ The acquisition of

¹⁷ Bruno Latour, *The Pasteurization of France* (Harvard University Press 1988), 50.

¹⁸ Department of Communities and Local Government and Department for Transport, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 - Confirmation Letter (20 March 2013)* (Appendix B, Document 3.04).

¹⁹ Appendix C to this thesis contains a plan illustrating the site of the Winchester Development and highlighting De Stefano’s land. (See Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill* (Appendix B, Document 2.08), Appendix 4, 5).

²⁰ In chapter one, I explained the relationship between councillors and local authority officers and, in WCC, the relationship between the Council’s Cabinet, the Full Council and committees such as the Overview and Scrutiny Committee.

²¹ *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 4207 (Admin) at [8].

²² The minutes of the Cabinet or the Council meetings on 4 and 6 November 2013 stated that some discussions related to the sale and purchase agreement took place in private proceedings. As discussed in Winchester City Council, *Minutes of the special meeting of the Cabinet held on 4 November 2013* (Appendix B, Document 1.29); Winchester City Council, *Minutes of the meeting of the Council held on 6 November 2013* (Appendix B, Document 1.30).

²³ As stated in clause 1.1 of the Supplemental Deed to the DA between Winchester City Council, Silverhill Winchester No 1 Limited and Henderson UK Property Fund.

²⁴ Winchester City Council, *CAB2695. Silver Hill Update - Submission by Developer. Report of Silver Hill Project Team. 21 May 2015* (Appendix B, Document 1.52), paragraph 6.3. This price differs markedly from that which Thornfield had agreed as the basis for an option agreement to buy De Stefano’s land in 2002. Correspondence in 2002 suggests that the parties were discussing a purchase price of between £13m and £14.25m, depending on the extent of the land to be acquired (see Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Peter Dempster, Dempster Binning LLP (on behalf of Thornfield*

De Stefano's land still meant that WCC and Henderson had not completed assembly of the development site because there were other land interests identified in the CPO that remained to be acquired.²⁵ Nonetheless, and as I will show, the parties to the Winchester Development presented the acquisition of De Stefano's land as a 'monumental one-off event'²⁶ in the overarching development trajectory.

Table 8.1 Timeline illustrating some of the key events following confirmation of the CPO	
Date	Event
04.11.13	Negotiations between WCC's officers, Henderson's directors and John De Stefano lead to acquisition of De Stefano's land and decision to move the Final Long Stop Date to 1 June 2015
30.01.14	Supplemental deed to the Winchester DA incorporating De Stefano's land into the DA and amending provisions in the Compulsory Purchase Order Indemnity Agreement
10.07.14	Cabinet considers revisions to the DA to allow for an increase in retail floor-space, removal of a bus station from the 'required elements' and replacement with a new 'anchor' store, substitution of financial payment for on-site affordable housing and a reduction in residential units
16.07.14	Full Council resolution on provision of affordable housing recommends Cabinet reconsider removal of affordable housing component
06.08.14	Cabinet resolution to approve revisions to DA considered on 10.07.14
11.12.14	Planning Development Control Committee grant planning permission for increase in retail floor-space, removal of bus station, substitution of financial payment for on-site affordable housing and a reduction in residential units

In chapters four to seven, I demonstrated that De Stefano's opposition to the development process, and the way that the DA assumed the acquisition of De Stefano's land, was a 'locked-in stress.' Following the acquisition of De Stefano's land, the leader of WCC, Councillor Keith Wood, informed the local press that the transaction was 'a very significant milestone' that would enable construction to commence the following year.²⁷ Martin Perry, Henderson's Director of Retail Development, was similarly enthused and also told the local press that 'the deal' represented 'a significant milestone [...], opening the way for

Properties plc to John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) (28 May 2002) (Appendix B, Document 3.10.09)). That agreed price had induced WCC to agree 'in principle' to make a CPO to acquire De Stefano's land and other interests on the site.

²⁵ For a description of the land to be acquired, consider Winchester City Council, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Statement of Case. 22 March 2012* (Appendix B, Document 3.02), paragraph 4.

²⁶ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107, 110.

²⁷ Andrew Napier, 'All systems go for Winchester's £130m Silver Hill scheme' *Daily Echo* (6 February 2014).

development to commence.²⁸ These statements reinforced the impression of a relentlessly forward-facing temporal orientation²⁹ and suggested that the script for development that the DA purported to carry around³⁰ remained the basis for a workable development proposition.

The way WCC's leader and Henderson's director referred to the passing of milestones implied both that the acquisition process had been a merely transitory phase³¹ along the development trajectory and that purchase of De Stefano's land marked how far WCC and Henderson had travelled along the development trajectory. WCC's leader and Henderson's director both thus expressed a belief that the De Stefano land acquisition was the latest in a series of actions that would preclude backward steps in the progression of the development process. The rhetoric deployed here is consistent with other comments made throughout the Winchester Development. I have already explained why the metaphor of a ratchet³² is a rich way of thinking through the ways that local authority officers, councillors and private sector development directors seek to instil a sense of irreversible progression.³³ The comments that I have quoted convey the impression both that the development process had moved a stage further and, although that movement may have been slower than hoped, that the preceding stage of the development had been closed.

It is important to note, however, that the statements that Wood and Perry made also emphasised that WCC and Henderson still needed to do more to enable construction to commence. Their point seems to have been that the acquisition was an endpoint, in that it marked the closure of the protracted negotiations that Thornfield had begun with De Stefano in 1998. The 'temporal gridlock'³⁴ caused by De Stefano's refusal to part with his land interests had been eased by the confirmation that his land interests had been acquired. But while this meant that the negotiations with De Stefano could now be classed as a transitory, passing phase,³⁵ both Wood and Perry had sought to emphasise that this was a milestone. This shows

²⁸ *ibid.*

²⁹ Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016), 168; Mariana Valverde, 'Studying the governance of crime and security: Space, time and jurisdiction' (2014) 14 *Criminology & Criminal Justice* 379, 386.

³⁰ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 181.

³¹ Nick Lee and Steven D Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 263.

³² Latour, *We have never been modern*, 71-2.

³³ Carol J. Greenhouse, *A moment's notice: time politics across cultures* (Cornell University Press 1996).

³⁴ Annelise Riles, '[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis' in Annelise Riles (ed), *Documents: artifacts of modern knowledge* (University of Michigan Press 2006), 82.

³⁵ Lee and Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity', 263.

that they recognised that the development process was not complete and is a metaphor that suggested there was a distance that remains to be travelled.³⁶ Rather than suggesting a physical distance, however, these statements implied a temporal distance. There was no suggestion that construction would commence on a specific date in accordance with specific plans so this distancing was important because, while WCC's officers and Henderson's directors could show that they were en-route to creating a viable development proposition, they were careful to retain some room to manoeuvre even as they approached unconditionality and the commencement of construction.

Maintaining the unity of the DA

One of the actions to be addressed before the commencement of construction involved a 'technicality'.³⁷ As I have already indicated, the DA was a device that was carrying around a significant investment of time and money, as well as a mechanism for the exercise of the CPO and the transfer of the development site to Henderson. Following the negotiations between WCC's officers, Henderson's directors and De Stefano it was WCC, not Henderson, that had acquired De Stefano's land.³⁸ For that reason, having acquired De Stefano's land, WCC and Henderson needed to incorporate De Stefano's land into the DA. Incorporating De Stefano's land into the DA did not effect the transfer of the land from WCC to Henderson but it was a way of enclosing that land into the neatly assembled package that would later be granted to Henderson in a long leasehold of the development site.³⁹ In chapter six, I discussed the alluring internal cohesiveness of the way that the DA laid out a sequence of actions that would carry WCC and the developer to unconditionality. A similarly alluring internal cohesiveness also came from the way in which the DA packaged together the land interests that would form the development site. Combining De Stefano's land with other interests that WCC already held on the development site was also another way of lining things up for the

³⁶ As discussed by Bakhtin in his rendering of the 'chronotope of the road' (See Mikhail M. Bakhtin, *The dialogic imagination: four essays* (University of Texas Press, 1981), 243).

³⁷ Annelise Riles, 'A new agenda for the cultural study of law: Taking on the technicalities' (2005) 53 *Buffalo Law Review* 973.

³⁸ See Winchester City Council, CAB2700. *Silver Hill - Submissions by Silverhill Winchester No 1 Ltd and Council's Response. Report of Silver Hill Project Team. 13 July 2015 (Appendix B, Document 1.55)*, paragraph 16.1; Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 6.2.

³⁹ As I noted in chapter one, this a standard property-led development mechanism, as discussed, for example, by Layard (Antonia Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37 *Journal of Law and Society* 412, 416).

Unconditional Date and the commencement of construction. It was thus a 'means to an end'⁴⁰ that produced no material change in ownership but that warrants further investigation.

In chapter four, I described how, between entering into its Exclusivity Agreement with WCC and the date of the DA, Thornfield had 'concluded terms' for the purchase of a property on the development site called Coitbury House.⁴¹ The terms for this acquisition had envisaged that Thornfield would acquire the freehold title⁴² before transferring that title to the Council 'at cost' on the assumption that WCC would create a development site by combining that title with the land it already owned and the land that it would acquire through exercising a CPO. Following the exercise of the CPO and the commencement of construction, WCC would grant Thornfield a long leasehold out of the assembled development site.⁴³ Based on these assumptions, Thornfield had duly transferred the freehold title to Coitbury House to WCC before entering into the DA.⁴⁴ WCC and Thornfield then included the freehold title to Coitbury House as part of 'the Council's land' for the purposes of the DA.⁴⁵

By contrast, WCC and Henderson incorporated De Stefano's land into the DA through bolting on a supplemental deed.⁴⁶ I have already discussed the DA as a document that needed to be rewritten, adapted and reconstituted on the basis of relations that were 'continuously being made and remade.'⁴⁷ Prior to the acquisition of the De Stefano land and the incorporation of that land into the DA, WCC and Thornfield had bolted letters and collateral agreements on to the DA to extend the 'Final Long Stop Date' and prevent termination rights arising, and had rewritten the required elements to enable Thornfield to obtain a planning permission and move towards unconditionality. The supplemental deed that WCC and

⁴⁰ Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 68.

⁴¹ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 11. This property is marked on the plan in Appendix C.

⁴² *ibid*, paragraph 11.

⁴³ *ibid*, paragraph 15.

⁴⁴ As recorded at the Land Registry under title number HP654264, a copy of which I purchased and downloaded on 25 March 2017 at 11:18.59.

⁴⁵ As stated in schedule 1 of the DA.

⁴⁶ Entered into on 30 January 2014, the same date that WCC and De Stefano entered into their sale and purchase agreement.

⁴⁷ Nicholas Blomley, 'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133, 142 discusses contractual relations that are constantly in flux. In relation to rewriting the DA as the parties became more aware of what they were trying to express, I drew on ideas discussed in Michel Callon, 'Writing and (Re)writing Devices as Tools for Managing Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002). Latour's ideas of 'plug-ins' have helped my analysis of adjustments and adaptations to the DA (as discussed in Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 207).

Henderson used to incorporate De Stefano's land into the DA was another bolt-on intended to function as part of the 'summing up'⁴⁸ of the interactions required to produce a 'coherent, unified and persuasive legal text'⁴⁹ with clear instructions about what WCC and Henderson were going to do with the development site.

The mechanism contained in the DA for the grant of a long leasehold interest in the development site thus necessitated the purchase of De Stefano's land by WCC rather than Henderson. WCC has subsequently published a redacted copy of the supplemental deed that it bolted-on to the DA, which stated that Henderson would pay WCC an amount equivalent to the purchase price for De Stefano's land on the Unconditional Date.⁵⁰ To fund the acquisition of De Stefano's land, WCC had borrowed the amount equivalent to the purchase price and had funded the costs of that borrowing from its 'useable reserves.'⁵¹ When the Council later discussed termination of the DA, the consequent non-recovery of the amount paid to De Stefano, the ongoing costs of the borrowing and the additional estate management costs of the land that it had acquired were all factors that officers pointed out as weighing against any decision to terminate.⁵²

The 'technicalities'⁵³ for incorporating De Stefano's land into the DA were a means of consolidating disparate land interests into a neat package to be transferred to the developer as the process moved forward. But, as I have just pointed out, this assumed that the process *would* move forward. Consequently, at the same time as solving one problem, this land transfer mechanism stored up problems and locked-in stresses that WCC would have to resolve when the development process unravelled. I analyse this unravelling in more detail in chapter 10.

⁴⁸ Bruno Latour, 'On recalling ANT' in John Law and John Hassard (eds), *Actor network theory and after* (Blackwell 1999), 17.

⁴⁹ Jonathan Murdoch, Simone Abram and Terry Marsden, 'Modalities of Planning: A Reflection on the Persuasive Powers of the Development Plan' (1999) 70 *The Town Planning Review* 191, 195.

⁵⁰ As stated in clause 4.8 of the supplemental deed. Appendix A explains how I obtained a copy of this supplemental deed.

⁵¹ Winchester City Council, CAB2695. *Silver Hill Update - Submission by Developer. Report of Silver Hill Project Team. 21 May 2015 (Appendix B, Document 1.52)*, paragraph 6.3.

⁵² Winchester City Council, CAB2700. *Silver Hill - Submissions by Silverhill Winchester No 1 Ltd and Council's Response. Report of Silver Hill Project Team. 13 July 2015 (Appendix B, Document 1.55)*, Appendix 7 (Risk Management Table). I revisit these points in chapter 10.

⁵³ Annelise Riles, 'Introduction: in response' in Annelise Riles (ed), *Documents: artifacts of modern knowledge* (University of Michigan Press 2006); Riles, *Collateral knowledge: legal reasoning in the global financial markets*.

An instinct to extend: Henderson and a new Long Stop Date

Following confirmation of the CPO on 20 March 2013, WCC established a cross party group of councillors called the 'Silver Hill Informal Policy Group.'⁵⁴ The members of the Policy Group represented a small cross-section of the councillors elected to the Full Council. At the time of the first Policy Group meeting, WCC was a Conservative-controlled Council and three Conservative Cabinet members participated.⁵⁵ Alongside these Cabinet members in the Policy Group were a Labour councillor⁵⁶ and a Liberal Democrat councillor.⁵⁷ The final councillor was Councillor Kim Gottlieb, a Conservative Councillor elected in May 2011.⁵⁸ Councillor Gottlieb was a member of the Council's Overview and Scrutiny Committee but not a member of the Cabinet.⁵⁹ The Policy Group met on a monthly basis to 'discuss key issues arising from the development' and 'to advise Cabinet and other Members on the progress of the Scheme,' with the caveat that the group was 'not a decision-making body.'⁶⁰ Although these meetings took place in private, WCC has since published various 'notes' summarising proceedings.⁶¹

WCC's Corporate Director attended the first meeting of the Policy Group and informed the councillors present that:

⁵⁴ Hereafter referred to as 'the Policy Group.'

⁵⁵ These councillors were Councillor Keith Wood (Leader of the Council), Councillor Robert Humby (Deputy Leader and Portfolio Holder for Strategic Planning & Economic Development) and Councillor Stephen Godfrey (Portfolio Holder for Finance & Administration). For a list of the Cabinet members portfolios as of April 2013, see Winchester City Council, *Minutes of the meeting of the Cabinet held on 10 April 2013 (Appendix B, Document 1.25)*.

⁵⁶ Councillor Chris Pines, chairman of WCC's Overview and Scrutiny Committee (see Winchester City Council, *Minutes of the meeting of the Overview and Scrutiny Committee held on 18 March 2013 (Appendix B, Document 1.24)*).

⁵⁷ Councillor Kelsie Learney, also a member of the Overview and Scrutiny Committee (See, *ibid*).

⁵⁸ The Elections Centre, 'Winchester City Council. Election Results. 1973-2012'

<<http://www.electionscentre.co.uk/wp-content/uploads/2015/06/Winchester-1973-2012.pdf>>

accessed 31 July 2017, 17. Councillor Gottlieb will be an important figure in the remaining parts of this thesis. As well as serving as a councillor for the majority group in WCC, he was a 'leading member of the Winchester Deserves Better campaign,' a group set up to oppose the WCC-Henderson development trajectory (as discussed in as discussed in *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), [2015] ACD 74 at [3]). In addition to serving as a WCC councillor, Councillor Gottlieb worked as a property developer (see Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36), 2*).

⁵⁹ Winchester City Council, *Minutes of the meeting of the Overview and Scrutiny Committee held on 18 March 2013 (Appendix B, Document 1.24)*.

⁶⁰ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 12 April 2013 (Appendix B, Document 1.26)*. Emphasis in original. This emphasis is important because WCC officers and Cabinet members sought to preserve the function of the Cabinet as the principal decision-making body in WCC.

⁶¹ I have been unable to ascertain why WCC published these notes, and I have not found notes for all the meetings of the Policy Group. I located some of those notes by typing the name of the Policy Group and the date of the meeting into the search function on WCC's website.

There will be some changes required to the approved scheme, some necessitated by change outside of Henderson's control and others which Henderson feels will enhance the development.⁶²

At a subsequent meeting of the Policy Group, Henderson's directors attended to pitch proposals addressing 'issues' related to the provision of affordable housing, the incorporation of a bus station into the development, and the amount and layout of the proposed retail space.⁶³ None of the notes of these meetings explained the 'issues' or why 'change outside Henderson's control' necessitated alterations, although I will analyse Henderson's justifications for change later in this chapter. In doing so, I will also consider how WCC's officers and senior councillors translated these justifications into a form that they deemed appropriate for presentation to the Council's Cabinet.

Henderson's directors explained to the Policy Group that the alterations proposed to the required elements would also necessitate a new planning permission for the development.⁶⁴ A new planning permission would mean an unravelling of the planning permission that had formed the basis for discharge of the planning condition in the DA. To provide the time for both negotiations with officers regarding the variations to the DA and the application for planning permission, Henderson's directors asked WCC to agree to extend the Final Long Stop Date in the DA from 31 August 2014 to 1 June 2015.⁶⁵ In this thesis, I have already analysed the function of Long Stop Dates in the Winchester DA and have shown that they offered a form of scheduling, setting out the dates on which termination rights might arise in the event of the failure to discharge conditions in the DA.⁶⁶ WCC and Thornfield initially set the Final Long Stop Date to fall on 22 December 2009.⁶⁷ To avoid the Final Long Stop Date triggering termination rights, first WCC and Thornfield and then WCC and Henderson bolted extensions onto the DA moving the Final Long Stop Date to 31 December 2012 and then to 31 August 2014. I have already sought to challenge any presumption that Long Stop Dates form the basis for a strict programme of action and Henderson's request for a further extension to the Final Long Stop Date further demonstrates this.

⁶² Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 12 April 2013 (Appendix B, Document 1.26)*. This legal advice forms part of the subject matter discussed in chapter nine.

⁶³ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 9 July 2013 (Appendix B, Document 1.27)*. Henderson's directors in attendance included Michael Capocci, who was formerly a director acting on behalf of Thornfield in relation to the Winchester Development.

⁶⁴ *ibid.*

⁶⁵ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 24 October 2013 (Appendix B, Document 1.28)*.

⁶⁶ As stated in schedule 2, paragraph 15.2 of the DA.

⁶⁷ As stated in clause 1.1.50 of the DA.

This third proposed extension to the Final Long Stop Date also illustrates another important underlying theme to the Winchester Development. WCC's officers presented Henderson's request for a further extension to the development process as a desirable means through which Henderson's directors could improve the development proposition. By contrast, WCC's officers classed any 'delay' that might appear to be the fault of the Council as something that would inevitably undermine the development. This difference in attitude can be seen in relation to the extension to the Final Long Stop Date discussed here because the note of the Policy Group meeting on 24 October 2013 recorded that the councillors present 'felt that [extending the Final Long Stop Date] is necessary in order to [...] show good faith to Hendersons [sic] as the Council's development partners.'⁶⁸ As a result, and at the same time as incorporating De Stefano's land into the DA, WCC and Henderson bolted on this further extension.⁶⁹ The new Final Long Stop Date came with the proviso that Henderson needed to submit formal proposals for variations to the required elements in the DA to the Council for 'landlord approval' by 14 June 2014.⁷⁰ This proviso may have functioned as a concession from Henderson's directors to WCC to demonstrate willingness to proceed with finalising its intentions but it also imposed an obligation on WCC promptly to determine whether or not to approve the proposed variations. While WCC's officers and councillors might have had to wait for Henderson's new proposals, these officers and councillors were under time pressure to ensure that Henderson's directors did not have to wait for 'landlord approval.'

WCC's instinct 'to show good faith' is one of the 'repeated patterns of behaviour'⁷¹ running through the Winchester Development that afforded both Thornfield and Henderson a significant degree of flexibility in the way that they implemented the proposals set out in the DA. COU1 expressed a similar instinct when he told me that he felt that, as a senior cabinet

⁶⁸ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 24 October 2013 (Appendix B, Document 1.28)*.

⁶⁹ I cannot find, however, a published record of this extension in any WCC documents prior to the minutes of a Cabinet meeting that took place on 18 March 2015 (see Winchester City Council, *Minutes of the meeting of the Cabinet held on 18 March 2015 (Appendix B, Document 1.47)*, item 6). The earliest confirmation that I can find stating that WCC and Henderson changed the long stop date is in Lang J's judgment in the judicial review that followed a subsequent variation to the DA later in 2014 (as discussed in *R (Gottlieb) v Winchester City Council* n58 at [109]). It is unusual that WCC did not announce this extension because officers had sought approval for the prior extensions in public Cabinet meetings. For approval of the extension of the long stop date from 22 December 2009 to 31 December 2012, see Winchester City Council, *Minutes of the meeting of the Cabinet held on 18 November 2008 (Appendix B, Document 1.19)*, item 17. For approval of the extension of the long stop date from 31 December 2012 to 31 August 2014, see Winchester City Council, *Minutes of the meeting of the Cabinet held on 24 November 2010 (Appendix B, Document 1.22)*, item 3.

⁷⁰ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 5 February 2014 (Appendix B, Document 1.31)*, item 4.

⁷¹ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 107.

member, his role in discussions with a developer was to demonstrate that his council would support a developer's needs. He recalled a development that his council had promoted but on which the council's development partner had sought significant changes to the development proposal while the DA for that development remained conditional. Despite the extent of those changes, he explained that the developer had a 'track record of delivering when they've moved forward on schemes so we, kind of, have felt it was worth exploring if we could make it work with them.' These points suggest that some local authorities assume a developer will only 'move forward' if a local authority can be accommodating towards a developer's demands.

The actions that WCC's officers took to accommodate Henderson's demands, and the comments that COU1 made, are also indicative of the lop-sidedness of local authorities' relations with the business world of developers. This lop-sidedness seems to be a product of some developers' successful use of local authorities' fear that a developer will go elsewhere. This is a use of fear as a technology of power⁷² and COU1 spoke to this fear when he emphasised that his role was to ensure his development partners that he and his colleagues were committed to accommodating variations to a DA that the developer requested. When discussing a recently completed property-led development project in his area, he recalled Cabinet meetings where he would be required to impress upon councillors the 'direction of travel' for alterations to the DA. In meetings with developers, by contrast, he would seek to assure the council's development partner that it would not face 'blockages' in the journey from a conditional DA to a DA made unconditional on the developer's terms:

You know, businesses want certainty. So they don't want to know that they're going to do all these great things with officers or whatever and then come to a blockage politically. So it's important that I'm there to say, "This is something that the city is backing." You know, "We are absolutely determined that the scheme will happen," you know. And this is our, kind of, attitude to business, to investment.

These points suggest that COU1 was aware of both the way he performed⁷³ and the way that he was expected to perform in discussions with officers and developers. He also suggested that he approached these meetings with a pre-prepared script to enable him to deliver a sufficiently compelling illustration of his council's development credentials. The perception of a need to project a particular 'attitude to business [and] to investment' has been an underlying theme of this thesis and produces the type of deferential outlook in which WCC's Cabinet members and officers appear not to have questioned Henderson's proposed variations but willingly embraced them.

⁷² Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991), 215.

⁷³ Judith Butler, *Gender trouble: feminism and the subversion of identity* (Routledge 1990).

D4 provided an interesting insight into his relationship with senior local authority officers when he told me:

If there's an issue with how [a development] is going, you need to be able to talk to a Chief Executive and say, "Look, you want this development agreement sorting out. We've got an issue with a third party," [PAUSE] or something. It's then all about the Chief Executive getting all the ducks in a row at the local authority end.

His point, like COU1's, was that senior officers or senior members of a council's cabinet should be configuring processes within the local authority to ensure that the developer was able to use a DA in a way that satisfied its demands. D1 spoke to a similar expectation when he commented that:

I've found that the most successful development partnerships have been where [the local authority] has got a strong Chief Executive who cuts through the morass of red tape and everything else. Someone who's generally "can do."

My research has suggested that local authority cabinet members and officers are aware of this need to be seen to be 'can do.' For WCC, this manifested in a desire to accommodate Henderson's requests and in a fear of being seen to be obstructive rather than 'can do.'

In discussing large-scale infrastructure projects involving public bodies and private companies, Johns has talked about the 'deal-oriented configuration' that generates 'sources of momentum [...], trajectories for change and paths for negotiation.'⁷⁴ This configuration materialised in the Winchester Development in an assumption that momentum came from proposals that the developer made to change the nature of the 'deal.' Developer-led change was deemed desirable while Council-led change was undesirable. WCC's officers and Henderson's directors had begun negotiating changes to the required elements in the DA as soon as the Secretary of State for Communities and Local Government confirmed the CPO.⁷⁵ Henderson had then started 'pre-planning' discussions with planning officers before the acquisition of De Stefano's land.⁷⁶ Extending the Final Long Stop Date in the DA gave Henderson extra time to seek approval from WCC's Cabinet for the rewriting of parts of the DA and to prepare an application for the replacement of the existing planning permission for the development.⁷⁷ Henderson's new proposals envisaged, among other things, an increase in retail floor-space from 90,000 sq ft to 148,000 sq ft, the removal of the requirement for a new bus station and its replacement with a single retail unit with floor-space of 60,000 sq ft, a

⁷⁴ Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391, 398.

⁷⁵ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 12 April 2013* (Appendix B, Document 1.26).

⁷⁶ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 24 October 2013* (Appendix B, Document 1.28), item 5.

⁷⁷ As discussed in Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 5 February 2014* (Appendix B, Document 1.31).

reduction in the number of residential units from 287 to 184 and the removal of the requirement for either the on-site or off-site provision of affordable housing, or a financial contribution equivalent to the cost of that affordable housing.⁷⁸

After a brief public exhibition,⁷⁹ Cameron Fraser, a Henderson director, submitted proposals to Howard Bone, WCC's Head of Legal and Democratic Services, for approval.⁸⁰ WCC's officers then arranged for a quick succession of meetings of the Overview and Scrutiny Committee, Cabinet and the Full Council to enable consideration of the variations by councillors. At a meeting of the Overview and Scrutiny Committee, on 7 July 2014, at which councillors discussed the proposals and considered a report that Councillor Gottlieb presented criticising the Council's negotiating stance with Henderson,⁸¹ the committee members agreed eleven points regarding Henderson's proposals that it suggested that the Cabinet should debate.⁸² When the Cabinet met three days later, its members nonetheless voted to approve Henderson's proposals for the development, albeit that the members agreed that the officers should not finalise the necessary variations until the Full Council had expressed its support.⁸³ Although the Full Council, on 16 July, passed a motion asking the Cabinet to reconsider its decision to accept Henderson's proposals with relation to affordable housing,⁸⁴ on 6 August 2014, Cabinet affirmed its earlier decision to approve Henderson's proposed variations, on the basis that the changes were necessary if the DA was to become unconditional.⁸⁵

This decision involved a turning away from many of the components that had been assembled in the DA that WCC had originally agreed with Thornfield. I have already discussed

⁷⁸ Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 2.4.

⁷⁹ *ibid*, paragraph 1.7.

⁸⁰ Winchester City Council, CAB2603. *Appendix 1. Letter from Cameron Fraser to Howard Bone (12 June 2014) (Appendix B, Document 1.34)*.

⁸¹ Winchester City Council, OS104. *Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*. I will discuss Councillor Gottlieb's criticisms in more detail in chapter nine. He also criticised the proposals for the Winchester Development based on what he deemed to be a lack of architectural merit (see Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, 7; Winchester City Council, *Minutes of the meeting of the Planning Committee held on 11 December 2014 (Appendix B, Document 1.43A)*, 5.).

⁸² Winchester City Council, *Minutes of the meeting of the Overview and Scrutiny Committee held on 7 July 2014 (Appendix B, Document 1.35)*, 13-4. These points ranged from concerns that the development should 'integrate' with the 'existing town centre' to concerns that WCC had not maximised its proposed share in any profits accruing from the development.

⁸³ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 15.

⁸⁴ Winchester City Council, *Minutes of the meeting of the Council held on 16 July 2014 (Appendix B, Document 1.39)*, 8.

⁸⁵ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, 12. In doing so, they approved a small amendment to the proposals that would reduce the overall number of residential units further to 177 units.

how Latour's portrayal of the 'modern' sense of progress assumes that, 'as we advance in time, each stage outstrips the preceding one.'⁸⁶ To enable the confirmation of the CPO, Henderson's directors had deployed the DA negotiated between WCC's officers and Thornfield's directors. The purchase of De Stefano's land meant that this stage of the Winchester Development had then been closed, although this was merely another in a series of 'means to an end.'⁸⁷ After De Stefano's land interests had been secured, Henderson's directors presented the existing required elements as relics of a previous stage of the development and 'enrolled'⁸⁸ WCC's officers and Cabinet members as advocates for change.

An instinct to amend: affordable housing or an affordable development

In this section, I analyse how Henderson's directors convinced WCC's officers and Cabinet members to treat changes to the 'required elements' in the DA as an example of advancement and a necessary stripping away of outdated ideas. Henderson's directors did so by presenting the existing required elements as a potential obstacle to unconditionality. The linear structure of the DA and the way it scripted transition from conditionality to unconditionality made flattening this obstacle a compelling reason for rewriting the required elements. That script envisaged that the obligation to commence construction would become 'fully unconditional' on the date that 'the last' condition in the DA had been satisfied or waived.⁸⁹ The viability condition was scheduled to be the last condition to be discharged, and will be considered in more detail in chapter nine.⁹⁰ The DA permitted Henderson to waive the

⁸⁶ Michel Serres and Bruno Latour, *Conversations on science, culture, and time* (University of Michigan Press 1995), 49.

⁸⁷ Riles, *Collateral knowledge: legal reasoning in the global financial markets*, 68.

⁸⁸ Michel Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay' in John Law (ed), *Power, action, and belief: a new sociology of knowledge? Sociological Review Monograph* (Routledge & Kegan Paul 1986), 211.

⁸⁹ As stated in Schedule 2, paragraph 3.2 of the DA.

⁹⁰ As stated in Schedule 2, paragraph 2.9 of the DA.

title,⁹¹ site survey,⁹² pre-letting⁹³ and road closure⁹⁴ conditions but did not permit waiver of the funding and affordable housing conditions, which are the focus of my analysis in this section.

A brief recap on the relationship between the conditions in the DA and the 'required elements' in the DA is necessary here. The conditions in the DA were the matters that WCC's officers and Thornfield's directors had initially agreed needed to be in place before both unconditionality and the moment that the developer's obligation to commence construction would take effect. The required elements in the DA had also been agreed by WCC's officers and Thornfield's directors when the parties had negotiated the DA. These required elements referred to the baseline specifications of the development that would be built if the DA became unconditional and were the matters on which Henderson's directors had secured Cabinet approval.

Discharge of the funding condition in the DA would occur on the entry by the developer into 'a legally binding agreement' with a financial institution in which that institution agreed to fund acquisition of the land interests and the costs of construction.⁹⁵ To be 'legally binding,' the funding agreement required a commitment from the funder to the developer that would be enforceable if the funder failed to provide the agreed capital. At the CPO inquiry, Martin Perry, Henderson's Director of Retail Development had informed the Inspector that, to discharge the funding condition, Henderson would 'assemble a specific funding package' from one of the 'multiple alternative funding sources' available to it.⁹⁶ Based on this

⁹¹ Schedule 2, paragraph 2.4 of the DA is partially redacted but stated that unconditionality was subject to the Council 'deducing good and marketable title' to the land that it owned or had acquired on the development site and demonstrating that nothing in that title precluded the grant of a lease of the development site to the developer.

⁹² Schedule 2, paragraph 2.5 of the DA stated that unconditionality would not occur until the developer had obtained 'satisfactory' geotechnical, environmental, flooding and archaeological surveys of the site (clause 1.1.22 of the DA set out the list of surveys relevant to the condition). The DA contained minimal guidance as to the meaning of the term, 'satisfactory.' However, I assume that, among other things, unsatisfactory geotechnical, environmental and flooding surveys would present findings that might prevent the developer obtaining insurance for the completed development or selling the completed development. An unsatisfactory archaeological survey might present findings indicating that the development potential of the site was reduced by the discovery of items of historic significance.

⁹³ I discussed the pre-letting condition in detail in chapter seven. In summary, schedule 2, paragraph 2.6 of the DA stated that unconditionality was subject to the developer entering into agreements for lease with prospective retail tenants to cover 70% of the retail floor-space (the percentage figure was redacted in the published version of the DA but disclosed in Martin Robert Perry, *Proof of Evidence. Appendices. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.07)*, 24).

⁹⁴ Schedule 2, paragraph 2.2 of the DA set out the road closure condition, which required a 'road closure order' enabling any stopping up or temporary closure of highways on the development site required as part of the construction process.

⁹⁵ As stated in schedule 2, paragraph 2.7 of the DA.

⁹⁶ Martin Robert Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 13.2.

evidence, the Inspector expressed her confidence that Henderson would be able to fund the full costs of development and recommended confirmation of the CPO.⁹⁷

While Henderson utilised the availability of funding as an instrument to move the Inspector towards confirmation of the CPO, Henderson's directors later also deployed a lack of finance as a 'generative mechanism.'⁹⁸ Following confirmation of the CPO, WCC's officers informed the Council's Cabinet that Henderson had identified a prospective but unnamed 'project funder.'⁹⁹ However, Henderson's directors also informed officers that this funder felt that the existing required elements neither equated to a proposition that satisfied 'the requirements of the market'¹⁰⁰ nor would produce 'an adequate return on capital employed.'¹⁰¹ Without changes to the required elements, WCC's officers informed the Cabinet, the development would 'not go ahead.'¹⁰²

Labelling the unnamed bank, pension fund or insurance company that was interested in financing the development as simply 'the project funder' effected a kind of distancing that suggested that the 'funder' was operating according to rules that councillors, officers and the people of Winchester could not understand. This played to a perception of private finance as ubiquitous but unanchored and able to make demands that had scant regard for pre-existing commitments between WCC and Henderson.¹⁰³ For Henderson's purposes, this was part of the pitch advocating a re-writing of the DA that would release it from an undesirable development proposition. The suggestion that changes to the required elements were necessary to satisfy this nameless, absent funder provided a screen onto which Henderson's director could project their vision for the Winchester Development. For WCC's officers, on the other hand, the demands of an unknown and unknowable funder offered a way to absolve themselves of responsibility for the changes. The officers thus advocated a turning away from the same proposals that Henderson, at the CPO inquiry, had professed to support. Underlying this was an entirely market-driven logic and an assumption that, if a set of proposals could be shown to produce a sub-optimal rate of return, those proposals were unacceptable and carried the potential only for delay and inaction. The presence of the funding condition compelled WCC's

⁹⁷ Christine Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 7.24.

⁹⁸ Stewart Smyth, 'The privatization of council housing: Stock transfer and the struggle for accountable housing' (2013) 33 *Critical Social Policy* 37, 49.

⁹⁹ Winchester City Council, CAB2607. *Silver Hill Affordable Housing Review. Report of Head of Estates and Head of Legal & Democratic Services. 6 August 2014 (Appendix B, Document 1.41)*, paragraph 3.5.

¹⁰⁰ *ibid*, paragraph 3.5.

¹⁰¹ *ibid*, paragraph 5.2.

¹⁰² *ibid*, paragraph 5.2.

¹⁰³ Johns, 'Financing as Governance'.

officers to advocate market-driven changes to the required elements because construction could not commence without a funding agreement in place.

The affordable housing condition similarly meant that construction could not commence unless the developer had entered into a 'legally binding agreement' with a housing association for the sale and management of the affordable housing to be constructed on or off-site.¹⁰⁴ Unlike the funding and other conditions in the DA, however, the affordable housing condition was linked directly to the affordable housing required element. WCC's officers thus promoted changes to the required elements in the DA and sought to bypass the affordable housing condition entirely.

I have already pointed out that Thornfield's proposals for the development, as set out in the existing required elements, initially envisaged that 35% of the residential units to be constructed would be so-called affordable housing.¹⁰⁵ In November 2008, WCC's Head of Estates had reported to Cabinet that the originally proposed level of affordable housing rendered the whole scheme 'unviable.'¹⁰⁶ As a result, WCC's Cabinet had approved successive variations to the DA, first allowing the developer to construct the same quantity of affordable housing off-site and then allowing the developer to make a financial contribution to off-site construction of affordable housing instead of itself constructing affordable housing.¹⁰⁷ These Thornfield-led rewritings of the DA had gradually cut away the affordable housing required element but Henderson had carried forward the reduced requirement when it took on the DA.

At the CPO inquiry, representatives of both WCC and Henderson had argued that the pre-existing required elements, including the requirement to construct on or off-site affordable housing or to finance off-site construction of affordable housing, formed the basis for a viable development.¹⁰⁸ Using the acronym, 'HPF,' to refer to Henderson, Martin Perry, Henderson's Director of Retail Development, had stated that the proposals incorporating the existing required elements were 'viable to HPF at the current time and [have] been since it

¹⁰⁴ As stated in schedule 2, paragraph 2.8 of the DA. The DA refers to the 'Social Housing Condition.' I refer to the 'affordable housing condition' to make it easier to follow the discussion in Council meetings and documents that referred to 'affordable housing.'

¹⁰⁵ See clause 5.3.1.2 of the DA.

¹⁰⁶ Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 3.4.

¹⁰⁷ Winchester City Council, *Minutes of the meeting of the Cabinet held on 18 November 2008 (Appendix B, Document 1.19)*, item 17, resolution 5.

¹⁰⁸ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 14.1; Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 5.3.3.

decided to take up the development opportunity.¹⁰⁹ During the inquiry, objectors to the CPO challenged these claims and argued that the existing required elements did not form the basis for a 'viable' scheme and would be changed immediately after confirmation.¹¹⁰ To rebut these assertions, Perry sought to legitimise his company's viability assessments by placing its deliberations within the context of standard property-led development practice and by pointing out that 'leading expert consultants' had affirmed the accuracy of Henderson's calculations.¹¹¹ Invoking the input of a 'leading expert' suggested that Henderson and its advisers were dependable and consistent.¹¹² As an extension of that logic, Perry sought also to assure the Inspector that Henderson's positivity towards the existing required elements meant that it could be relied upon to commence construction in a timely and predictable manner.¹¹³

The Inspector noted this evidence and recognised that, while there was 'some uncertainty over the amount of affordable housing that will be delivered' through on-site construction, Henderson was nonetheless committed to a financial contribution in lieu of construction.¹¹⁴ She concluded, moreover, that 'there was no reason to doubt the developer's ability [...] to proceed with the Scheme for which the CPO is sought.'¹¹⁵ After confirmation of the CPO, however, and as I have stated above, Henderson sought not only to remove the requirement for on or off-site construction of affordable housing but also to remove the requirement to make a financial contribution to the construction of off-site affordable housing. This was the logical conclusion of the continual cutting away of the affordable housing component and reflected an ongoing trend in property-led development practice in which developers seek first to reduce and then to remove any obligation to construct or fund the construction of affordable housing.¹¹⁶ For Henderson, moreover, this constituted not only a

¹⁰⁹ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 14.1.

¹¹⁰ Bruce Hartley-Raven, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Bruce Hartley-Raven. 6 June 2012 (Appendix B, Document 3.11)*, paragraph 1.8.

¹¹¹ Martin Robert Perry, *Proof of Evidence Financial Viability Rebuttal. Silverhill, Winchester. 15 June 2012 (Appendix B, Document 3.08)*, paragraph 1.5.

¹¹² This presentation of consultants as a source of independent, objective and specialist advice is a point I return in more detail in chapter nine.

¹¹³ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 14.8

¹¹⁴ Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 7.15.

¹¹⁵ *ibid*, paragraph 7.23.

¹¹⁶ Brett Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 *International Journal of Urban and Regional Research* 79; Tony Crook and Sarah Monk, 'Planning Gains, Providing Homes' (2011) 26 *Housing Studies* 997; Nicky Morrison and Gemma Burgess, 'Inclusionary housing policy in England: the impact of the downturn on the delivery of affordable housing through Section 106' (2014) 29 *Journal of Housing and the Built Environment* 423.

turning away from the Thornfield proposals for the Winchester Development but also a turning away from the evidence that its own Director of Retail Development gave at the CPO inquiry. My research has already suggested that commencement of construction on land to be acquired through a CPO is not inevitable so long as a DA remains conditional. The manoeuvrings around the provision of affordable housing as a required element of the Winchester Development also show that there can be good reason to doubt a developer's self-professed ability to construct a particular set of buildings.

At the Cabinet and Full Council meetings on 10 July and 6 August 2014, WCC's officers received criticism from members of the public for recommending removal of the affordable housing required element.¹¹⁷ The solution that Henderson's directors and WCC's officers proposed to address this public opposition was an attempt to 'bracket' that controversy.¹¹⁸ They agreed that, instead of either constructing on or off-site affordable housing or contributing to the construction of off-site affordable housing, Henderson would make a one-off payment to the Council of an unstated amount if the built development achieved certain unspecified profitability levels.¹¹⁹ This payment would not be a required element in the DA but a matter to be negotiated with WCC's planning officers as a component of a new section 106 agreement.¹²⁰ A decision on the amount of the payment and the profitability level that would trigger it was, therefore, postponed until WCC's planning officers and Henderson's representatives began discussions for a new planning permission after the varied required elements had been approved.¹²¹ This meant moving the controversy to a different meeting on a different date, potentially giving the controversy time to cool.¹²² Meanwhile, Henderson's directors could strip away any reference to affordable housing in the DA so that Henderson would no longer be tied either to the affordable housing required element or the affordable housing condition. The rationale behind this change was that the affordable housing required element rendered the Winchester Development unviable, with the effect that unconditionality

¹¹⁷ See, for example, criticism from local residents at Council meetings reported in Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 2-3 and Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, 4-6.

¹¹⁸ Riles, '[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis'.

¹¹⁹ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, item 6, resolution 1(ii).

¹²⁰ Winchester City Council, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 5.6.

¹²¹ As discussed in Winchester City Council, *PDC1012 - Item 1 - Section 73 Application - 14/01912/FUL. 11 December 2014 (Appendix B, Document 1.44)*, paragraphs 20.1-20.42.

¹²² Kyle McGee, *Bruno Latour: the normativity of networks* (Routledge 2014), 180. See also Annemarie Mol, *The body multiple: ontology in medical practice* (Duke University Press 2002), 165, on the distribution of 'messiness.'

would not occur and construction would not go ahead if Henderson had remained tethered to that requirement.

Bus stations or retail: finding strong anchors

WCC's officers agreed to remove the affordable housing component from the Winchester Development because of viability concerns. I examine viability modelling techniques in more detail in chapter nine but first consider other changes to the required elements in the DA that Henderson's directors sought after WCC acquired John De Stefano's land. Alongside removing the affordable housing as a required element in the DA, Henderson's directors sought also to remove the requirement for a new bus station from the DA.¹²³ In recommending that the Cabinet approved this proposal, WCC's officers informed the Cabinet that Stagecoach (South) Limited,¹²⁴ the bus operating company managing the existing bus station on the site, had indicated that it did 'not want a direct replacement of its bus station facility.'¹²⁵ When WCC's officers presented Henderson's proposals for discussion, one of the officers informed the councillors about a letter from Stagecoach to Henderson reputedly stating that on-street bus stops instead of an off-street bus station would enable Stagecoach to fulfil its timetabled services.¹²⁶ In place of the bus station, a single large retail unit would enable the inclusion of a 'department store type retailer' as a 'strong anchor which would attract other retailers, and generate footfall which would benefit the town centre overall.'¹²⁷ This change provided, according to WCC's officers, 'an improvement in the commercial prospects of the scheme'¹²⁸ but was not part of the development proposals originally prescribed in the DA. The commercial prospects of the development were an important factor for WCC's officers because, as I have stated, the viability condition in the DA was the last hurdle that would need to be crossed to enable the DA to become unconditional.

A problem with achieving an improvement in the commercial prospects arose because, as I have also already explained, the DA incorporated the construction of a bus station as a required element. The longstanding relationship between Thornfield and Stagecoach had

¹²³ Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 2.4.

¹²⁴ Hereafter referred to as 'Stagecoach.'

¹²⁵ Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 3.12.

¹²⁶ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 6.

¹²⁷ *ibid*, 10.

¹²⁸ Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 3.16.

formed the basis for Thornfield's original pitch to WCC¹²⁹ and had been incorporated into the DA through a cross-reference to a document described as 'the Stagecoach Agreement.'¹³⁰ Thornfield and Stagecoach had entered into the SA on 16 June 2003, while WCC and Thornfield had been negotiating their Heads of Terms for the DA.¹³¹ When WCC and Thornfield then entered into the DA on 22 December 2004, WCC and Thornfield agreed that the specifications for the bus station to be constructed on the development site would match those set out in the SA.¹³² The DA summarised the content of the SA and stated that the bus station to be built as a required element needed to include 12 bus bays, three 'layover bays,'¹³³ public toilets and unnamed 'other facilities.'¹³⁴ Incorporating the specifications in the SA into the DA anchored WCC and its development partner to a precise bus station design.

I have already discussed the way that WCC, Thornfield and Henderson bolted collateral agreements and other documents onto the DA. This SA seems different, however. The first point to note is that WCC appears not to have been a party to the SA. Moreover, the DA was not designed to facilitate the acquisition of Stagecoach's land because Thornfield and Stagecoach entered into a separate option agreement to that end after WCC and Thornfield signed the DA.¹³⁵ The option agreement between Thornfield and Stagecoach stated that Stagecoach would only transfer title to the existing bus station when a new bus station had been built,¹³⁶ which meant that Stagecoach would retain a land interest in the development site even if the CPO had been exercised. If either Thornfield or Henderson had then constructed the new bus station, the terms of the SA and the DA would then intervene and WCC would be obliged to grant a lease of the new bus station to Stagecoach for a term of 30

¹²⁹ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*. As discussed in chapter four.

¹³⁰ As described in clause 1.1.72 of the DA. This appears to be a different agreement to the Thornfield Stagecoach Agreement, which the parties Thornfield and Stagecoach had entered into before Thornfield's initial pitch, in 1997, to WCC. I examined the TSA in chapter four. In the remainder of this chapter, I will refer to the Stagecoach Agreement as the 'SA.'

¹³¹ Winchester City Council, *Minutes of the meeting of the Cabinet held on 25 May 2004 (Appendix B, Document 1.05)*.

¹³² As stated in clause 5.3.1.5 of the DA.

¹³³ The terms and conditions for the use of Falkirk bus station indicate that a layover bay is a place where a driver can park a bus while the bus is not in use (see FirstGroup, 'Falkirk Bus Station Conditions of Use' <https://www.firstgroup.com/uploads/node_images/Falkirk_Bus_Station.pdf> accessed 3 August 2017, paragraph 3).

¹³⁴ As stated in clause 5.3.1.5 of the DA.

¹³⁵ Winchester City Council, *Appendix to CAB1030. Broadway Friarsgate - Development Agreement. Report of Chief Estates Officer. 8 February 2005 (Appendix B, Document 1.12)*, paragraph 4.

¹³⁶ *ibid*, paragraph 4.

years, although, because Stagecoach was not a party to the DA, there was no obligation in the DA on Stagecoach to accept the grant of that lease.¹³⁷

Stagecoach's land constituted a significant component of the development site and its expectations for a bus station represented one of the required elements in the DA. But the DA was carrying around requirements for a bus station based on the relationship between Thornfield and Stagecoach as of June 2003. This arrangement produced a form of 'temporal and analytical gridlock'¹³⁸ that emerged when Stagecoach informed WCC and Henderson that it no longer required the bus station that Henderson was required to build. The way WCC and Thornfield had formulated the DA meant that WCC and whichever organisation took on the role of developer under the DA were hostages to Stagecoach's operating preferences. This apparent absurdity is one of the reasons why CON3 told me that a DA without an effective mechanism for change to the basic specifications of a development proposition is a 'fundamentally misconceived' document.

The opportunity to replace the bus station was not, however, an entirely fortuitous or unexpected turn of events for WCC and Henderson.¹³⁹ When WCC's officers presented Henderson's proposals for discussion at the Cabinet meeting on 10 July 2014, the Council's Corporate Director presented the replacement of the bus station with another use as an opportunity that had not been appreciated at the time of the CPO inquiry in 2012 and that was the product of Stagecoach 'firming up on' the facilities that it required.¹⁴⁰ Henderson and Stagecoach had, in fact, entered into a variation to the SA on 3 April 2014 in which they agreed that the development would incorporate 'an updated linear bus station design and facilities as indicated on attached drawings.'¹⁴¹ This 'linear bus station design' would replace the requirement for a more traditional bus station described above.¹⁴²

¹³⁷ As stated in clause 11.3.3 of the DA. The SA is not a publicly available document so I have been unable to confirm whether or not the SA or any other agreement did compel Stagecoach to accept the grant of a lease of a new bus station.

¹³⁸ Riles, '[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis', 82.

¹³⁹ See Winchester City Council, CAB2603. *Appendix 1. Letter from Cameron Fraser to Howard Bone (12 June 2014) (Appendix B, Document 1.34)*, which set out Henderson's formal request for changes to the required elements. The letter made reference to negotiations that had taken place between Henderson and Stagecoach following confirmation of the CPO.

¹⁴⁰ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 14.

¹⁴¹ Winchester City Council, CAB2603. *Appendix 1. Letter from Cameron Fraser to Howard Bone (12 June 2014) (Appendix B, Document 1.34)*.

¹⁴² Winchester City Council, *Minutes of the meeting of the Overview and Scrutiny Committee held on 7 July 2014 (Appendix B, Document 1.35)*, 10.

This means that the then-unresolved negotiations for the acquisition of De Stefano's land interests, which I have already mentioned, and the requirement for certainty of land acquisition had not stopped negotiations between Henderson's directors and Stagecoach's representatives regarding the bus station. In addition, neither the protracted land assembly process nor the fact that a new bus station was a required element in the DA prevented Henderson's directors from lining up the site earmarked for the new bus station as the location for a department store. In some ways, this is not surprising. Over 25 years ago, Turok noted the allure of flagship department stores to property-led development.¹⁴³ Similarly, Steven Henderson has explained that large property-led developments carry an 'investment risk' that can be mitigated by accommodating one of these flagships.¹⁴⁴ Consequently, he points out, 'a characteristic is the desire for department store anchors that will attract consumer footfall and entice other retailers to support the development.'¹⁴⁵

To accommodate a department store, however, Henderson's directors had to secure variations to the DA. Following confirmation of the CPO, Henderson entered into an agreement with Stagecoach to provide bus stop facilities that were incompatible with the facilities required in the DA. This was an important device in aligning WCC's officers with the need for variations to the required elements because Henderson's directors needed the Council's acquiescence to the variation to the DA that would rewrite the required elements. If Henderson's directors presumed that WCC's officers and, by extension, WCC's Cabinet would approve the variations, this suggests both that the directors assumed an entitlement to change the terms of the DA in a way that suited them and that they expected to be able to rely upon officer-level and Cabinet-level approval.¹⁴⁶

If Henderson's directors did assume that WCC's officers would acquiesce to their requests and that WCC's officers would enrol the support of the Cabinet, that assumption would have had strong grounding. The reports that WCC's officers presented to the Overview and Scrutiny Committee and to Cabinet in July 2014, and the comments that officers made in those meetings, enacted Henderson's proposals as a one-off opportunity and gave voice to the Council's fears of losing that opportunity. For example, the Council's Chief Executive informed the Overview and Scrutiny Committee on 7 July 2014 that rejecting or even seeking changes to

¹⁴³ Ivan Turok, 'Property-led urban regeneration - panacea or placebo' (1992) 24 *Environment and Planning A* 361, 375.

¹⁴⁴ Steven R. Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes' (2011) 42 *Geoforum* 592, 593.

¹⁴⁵ *ibid*, 593.

¹⁴⁶ In chapter 10, I demonstrate that the question of the lawfulness of these proposed variations was far from straightforward.

Henderson's proposals 'would raise concerns' regarding the Council's ability to have exercised the CPO by March 2016.¹⁴⁷ He also expressed a fear of 'reputational damage' if the Council appeared to be holding out for variations that favoured it or if the Council appeared to be acting in an otherwise confrontational manner.¹⁴⁸ In addition, he pointed to the fear that if the Council could not provide 'proper reasons' for rejecting Henderson's proposals, it could be 'subject to litigation,' presumably brought by Henderson on the basis of the Council's failure to comply with its basic public law duty not to act irrationally.¹⁴⁹

With those points in mind, I looked for a record of a moment during the Winchester Development at which Council officers or councillors queried the substitution of a single large retail unit for the originally required bus station. As I have already observed, Henderson's directors interpreted this change as an opportunity to incorporate a 'department store type retailer'¹⁵⁰ and WCC's officers seem to have treated this as a change to be celebrated. The perception that a department store would 'anchor'¹⁵¹ a successful development, suggests that it may have been straightforward for Henderson's directors to pitch this to WCC's officers on the basis that incorporating a department store aligned the Winchester Development more closely with standard property-led development practice and enhanced the prospect of the commencement of construction.

CON2 explained some of the ways that a developer can harness this 'sense of the forthcoming.'¹⁵² He pointed out that the prospect of a well-known department store as a component of a development provides a developer with significant leverage in negotiations with a local authority. According to CON2, this might enable the developer to pressure the local authority regarding the timing of an Unconditional Date and the price for which the developer would acquire the local authority's land. A department store would have this effect, CON2 believed, because local authority officers would know that a department store draws other retailers to a development and can build confidence in the wider area as a dynamic commercial centre. Incorporating a department store was also important, CON3 explained, in

¹⁴⁷ Winchester City Council, *Minutes of the meeting of the Overview and Scrutiny Committee held on 7 July 2014 (Appendix B, Document 1.35)*, 14. The Council's Chief Executive did not corroborate this point and the only plausible basis for this contention is that Henderson would have wanted to enter into some form of funding agreement with a bank, pension fund or other institutional investor to finance the exercise of the CPO. It is possible, though perhaps unlikely, that Henderson would have required some time to negotiate this type of funding arrangement.

¹⁴⁸ *ibid*, 14.

¹⁴⁹ *ibid*, 14.

¹⁵⁰ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 10.

¹⁵¹ *ibid*, 10.

¹⁵² Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 113.

convincing investors that the proposal was viable and would secure strong returns. Those investors would know that a 'premier department store [...] will add half a point on to your yield and 25 per cent to your value. So, absolutely essential.' The uplift in projected yield and estimated land values would solidify the viability case and hasten unconditionality in a way, according to CON3, that meant, 'no department store, no scheme.'

A preoccupation with improving the viability of a set of property-led development proposals and with making a development proposition attractive to institutional investors is an underlying theme of this thesis.¹⁵³ CON3's comments reflect that preoccupation and suggest that incorporating a department store into a development proposition might make that development more attractive to investors. What is important about the pursuit of an anchor tenant for the Winchester Development is that Henderson's desire to incorporate a department store pulled the parties away from the required elements that WCC had sought and that had formed the basis for the original DA that WCC and Thornfield had agreed. From WCC's point-of-view, however, developer-led change to the DA that might improve the potential profitability of the development proposition was desirable and to be embraced. WCC's officers looked, therefore, for ways to present those changes as acceptable.

Underlying the tension between continuity and discontinuity in the DA was a desire to hold onto the existing contractual arrangements while simultaneously improving upon them. This desire assumed that aspects of the Winchester DA related to the mechanism for the transfer of land remained an attractive basis on which to continue with the development process. Moreover, the DA was carrying around a series of bolt-ons, extensions and adjustments, as well as a confirmed CPO and a significant investment of time and money. Presented with a choice of accepting the changes proposed by an established partner who they believed would improve the viability of the development or starting again with a different partner, it is not surprising that WCC's officers did what they thought they needed to do to enable unconditionality to happen. In chapter nine I examine the viability assumptions underpinning these variations and, in chapter 10, I explain why these proposed changes caused WCC and Henderson to fall foul of a judicial review brought to consider alleged breaches of EU procurement law.

Conclusion

By analysing the Winchester Development following confirmation of the CPO, I have scrutinised the actions that both parties took to move through the conditional phase to

¹⁵³ For a discussion of property redevelopment projects as 'investment assets,' see Antoine Guironnet, Katia Attuyer and Ludovic Halbert, 'Building cities on financial assets: The financialisation of property markets and its implications for city governments in the Paris city-region' (2016) 53 *Urban Studies* 1442.

prepare for the commencement of construction. Doing so has enabled me to develop recurring themes and to introduce new areas of analysis. I have also revealed interesting continuities and discontinuities in the Winchester Development, which I scrutinised throughout this chapter. For example, when WCC and Henderson acquired De Stefano's land, the contracting parties used a type of bolt-on to preserve the unity of the DA and to ensure that all the land to be acquired to create the development site was accounted for in the DA. This indicates that WCC and Henderson saw the land acquisition and transfer mechanism carried around in the DA as a desirable basis for progression along the pre-agreed development trajectory.

But there was also a stark discontinuity in the form of the DA before and after the variations that Henderson proposed after confirmation of the CPO. WCC's officers acted as advocates for these changes because doing so enabled them and WCC's councillors to be seen to project a 'can do' attitude towards business and investment. A preoccupation with putting in place a framework that would enable unconditionality has thus been shown to be the overriding concern not only for developers but also for their local authority partners. This manifested in the Winchester Development in an assumption that any changes that Henderson's directors proposed to make to the DA were positive and would improve the overall development proposition. Similarly, I have demonstrated that any delays that Henderson's directors proposed to the progression along the pre-agreed development trajectory were seen as opportunities to address 'issues' that warranted extensions to the Final Long Stop Date. The instinct to extend the Final Long Stop Date in the Winchester DA and to accommodate viability concerns appears only to have applied, however, where Thornfield or Henderson sought more time to reconsider the course that the development was taking or to re-evaluate the components of the proposed development. I have shown how WCC's officers classed changes or challenges that councillors suggested to Henderson's proposals as unworthy of extended consideration, a potential source of reputational damage and detrimental to the Council's performance as a proactive, entrepreneurial and market-driven organisation.

BLANK PAGE

Chapter 9

Viability appraisals and property-led development

In this chapter, I continue my analysis of a property-led development project proposed for a development site in Winchester¹ and elaborate upon points that I have raised throughout this thesis in relation to ‘viability.’ Pinning down a precise definition of what it is that makes a property-led development project ‘viable’ is difficult but research in this field indicates that ‘viability’ measures the financial prospects of a development proposition.² I examine the data that I obtained in my interviews with local authority officers, property developers and consultants³ to expand my understanding of how viability works in property-led development.

Those interviews proved helpful in clarifying what those local authority officers, property developers and consultants mean when they refer to viability. For example, CON2 told me that property-led development projects will usually contain ‘a viability test’ and that that test:

[W]ould often say [that a development proposition] has to show one, two, or three: An IRR⁴ of X, profit on cost of X, or return on cost of X, so a development yield.⁵ And sometimes you’d say that it needs to show all three. And then, that would be, theoretically, setting out what the developers’ hurdle rates are.

This means that there are, typically, three measures that a developer might use to assess viability and, depending on the measure or combination of measures chosen, this is a ‘hurdle’ that the development proposition must cross before the conditional obligation to commence construction, imposed on a developer in a Development Agreement,⁶ can take effect.

¹ I have been referring to this project as the ‘Winchester Development’ and continue to do so in this chapter.

² Alastair Adair, Jim Berry and Stanley McGreal, ‘Financing property’s contribution to regeneration’ (2003) 40 *Urban Studies* 1065, 1075-6; Ingrid Nappi-Choulet, ‘The role and behaviour of commercial property investors and developers in French urban regeneration: The experience of the Paris region’ (2006) 43 *Urban Studies* 1511, 1513.

³ I refer to material obtained in interviews with D1, D2, D4, CON2, CON3, CON4, CON5, LA2 and LA4. Appendix D contains some limited biographical details explaining who these interviewees are and when I met them.

⁴ This is the acronym used to refer to an ‘internal rate of return.’ The notion of an ‘internal rate of return’ assesses the yield a developer receives from a development over a specific duration and compares that to the developer’s desired rate of return (See Nappi-Choulet, ‘The role and behaviour of commercial property investors and developers in French urban regeneration: The experience of the Paris region’, 1513. Also discussed in Simon Guy, John Henneberry and Steven Rowley, ‘Development Cultures and Urban Regeneration’ (2002) 39 *Urban Studies* 1181, 1186). If the prospective internal rate of return exceeds the desired rate, the development would be viable.

⁵ A guidance note produced by the Royal Institute for Chartered Surveyors states that a ‘development yield,’ which CON2 also referred to as a return on cost, is calculated from the ‘[r]ental income divided by the actual cost incurred in realising the development’ (Royal Institute of Chartered Surveyors, ‘Financial viability in planning. RICS guidance note’ 2012) <<http://www.rics.org/uk/knowledge/professional-guidance/guidance-notes/financial-viability-in-planning-1st-edition/>> accessed 26 February 2018, 46).

⁶ Throughout this thesis I have been abbreviating this term to ‘DA.’ I continue to do so in this chapter.

'Profit on cost' is the viability measure that was 'carried around'⁷ in the Winchester DA in the viability condition that I discussed in chapters six, seven and eight. That condition stated that the Winchester Development would be deemed viable if the developer's 'anticipated profit' could be shown to be equal to or more than '10% of anticipated Development Costs.'⁸ By referring to documents presented as evidence to the Winchester Compulsory Purchase Order⁹ inquiry and produced for consideration in Winchester City Council's¹⁰ committee meetings, I scrutinise how directors working on behalf of Henderson UK Property Fund¹¹ and their consultants estimated these Development Costs and measured the likely profitability of the Winchester Development.¹²

The valuation and future recovery of costs has been a theme of this thesis. I continue to examine those themes in this chapter and my analysis of viability modelling techniques also produces insights that contribute to other themes of this thesis. In particular, I examine the way that viability appraisals affect the emergence of a DA as a 'legally binding' agreement and consider why local authority officers, developers and their consultants invoke mechanical metaphors to explain how they assess viability. In doing so, I address the imbalances of expertise that condition the way that these individuals utilise the outputs from viability appraisals. I then consider the performance of viability modelling techniques over time, reflecting on the use of viability appraisals throughout a property-led development process and analysing the manner in which viability appraisals can be used to reinforce a sense of progression along a development trajectory. In addition, I show how viability can be deployed as a driver of change and, in doing so, expand upon points that I made in chapters four to eight. Finally, I examine the complex temporalities of viability assessment.

Viability Appraisals: Exploring the 'complex inner workings'

In this section, I review what my interviewees told me about the viability modelling techniques that they, or the consultants who they employed, used for the purposes of property-led development projects. I analyse these statements alongside the references to

⁷ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 181.

⁸ As stated in schedule 2, paragraph 2.9 of the Winchester DA.

⁹ I have been abbreviating the term Compulsory Purchase Order to 'CPO' throughout this thesis and continue to do so in this chapter.

¹⁰ I have been abbreviating the name of the Council to 'WCC' throughout this thesis and so the same here.

¹¹ Throughout this thesis I have been referring to Henderson UK Property Fund, and its subsidiary acting as 'the developer' for the purposes of the Winchester DA, as 'Henderson.' I continue to do so in this chapter.

¹² Appendix B to this thesis is a list of the primary source documents produced during the Winchester Development that I use in this thesis.

viability modelling in the Winchester DA to better understand how viability appraisals were produced during the Winchester Development and to enable me to show how those appraisals performed a specific type of development into being.

The relationship between a DA, a set of development proposals and viability modelling is complex. In chapters four and five, I provided an exposition of the way that directors working on behalf of Thornfield Properties (Winchester) Limited¹³ used 'feasibility' testing at an early stage in the Winchester Development to, among other things, establish the extent of the land interests they deemed necessary to make their development proposition profitable. But this testing also functioned as a device through which Thornfield's directors could 'enrol'¹⁴ WCC in a property-led development project and, once that enrolment had taken place, extract concessions from WCC's officers on the basis that the intentions that those officers had for the development were incompatible with a 'feasible' proposition.

My observations in chapters four and five related specifically, however, to the 'time-before' WCC and Thornfield entered into their DA. Financial modelling of the likely profitability of a project continues throughout a property-led development process, as D4 explained when he told me that he would expect to produce financial appraisals before starting on a project, during the development process and after construction had been completed.¹⁵ In chapters seven and eight, I explained that 'viability concerns' led to both Thornfield's directors and Henderson's directors seeking changes to the 'required elements' in the DA to enable unconditionality to occur. These viability concerns thus performed a particular property-led development dynamic into being, in which developers sought changes to the agreed terms of a development proposition, and local authority officers acquiesced to these demands. These changes occurred after the parties had entered into their DA, so happened in the 'time-in-between' the date of the DA and the anticipated moment on which unconditionality would occur.

¹³ Thornfield Properties (Winchester) Limited was a special purpose company set up by Thornfield Properties plc to enter into a DA with WCC and carry out the Winchester development. Thornfield Properties (Winchester) Limited was, therefore, 'the developer' for the purposes of the Winchester DA and was the entity that Henderson UK Property Fund later acquired. I have referred to Thornfield Properties (Winchester) Limited throughout this thesis as 'Thornfield' and continue to do so here.

¹⁴ Michel Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay' in John Law (ed), *Power, action, and belief: a new sociology of knowledge? Sociological Review Monograph* (Routledge & Kegan Paul 1986), 211.

¹⁵ An appraisal produced after construction had been completed, D4 explained, would be used to determine the precise amount of rent to be paid by a developer to a local authority for a lease of a development site and to assess the amount of any 'profit' that the developer would share with the local authority. The interplay between viability, rent for the lease of a development site and profit-sharing was important in relation to the Winchester Development and I revisit this later in this chapter.

Although there appears to be a shift, after a local authority and a developer sign their DA, from a preoccupation with ‘feasibility’ to concerns with ‘viability,’ there is an overlap in the modelling techniques used. At the outset, the approach would be sequential. For example, LA4 explained that he would negotiate with a developer as to the baseline components that would be incorporated into the development proposition before he sought councillor approval for a DA. These baseline specifications would have been things like the quantum of retail floorspace to be constructed, the number of residential units, the extent of any office floorspace, the amount of restaurant or leisure floorspace, and so on. These baseline specifications would, therefore, have been akin to the ‘required elements’ in the Winchester DA.¹⁶ But at the same time as negotiating these baseline specifications, LA4 would instruct consultants to work with the developer’s consultants to:

Do a lot of open book assessments and valuations because that’s the steer in terms of the value of the land uses and in terms of the profit margin that goes in because, for your development agreement, you’ve got to agree costs, and sharing costs.

Costs, for these purposes, are ‘agreed’ in so far as a developer and a local authority identify the expenses that the developer will pay and that will figure in their subsequent profitability calculations.¹⁷

These costs assessments, land valuations and profit margins, using LA4’s phrase, ‘go into’ a DA, and the text of the Winchester DA demonstrates how these things materialise. For example, the costs payable by the developer were defined in the Winchester DA as ‘Development Costs.’¹⁸ Typically, the major items of expenditure deemed relevant for an estimate of ‘Development Costs’ payable by a developer are land acquisition costs, together with ancillary expenses such as stamp duty land tax, and the costs of designing and

¹⁶ Clause 5.3 of the DA set these out in detail and the original required elements were 90,000 square feet of retail floor-space, 364 residential units of which 35% were to be affordable homes, 279 public car parking spaces, a new civic square, a new bus station, premises for WCC’s CCTV equipment, a new shop mobility and dial a ride service, a new market space and a financial contribution to public art provision. In chapters seven and eight, I explained how these changed during the conditional phase of the Winchester Development.

¹⁷ An assessment of the amount of the costs payable by the developer would also be important in informing the content of the funding agreement required to discharge the funding condition. The purpose of this funding agreement was to secure a ‘legally binding’ commitment from a funder to provide some or all of capital required to meet land acquisition and construction costs.

¹⁸ Schedule 3 to the DA defined the items to be considered as Development Costs. This schedule has been redacted, however, from the version of the DA published. Based on assumptions drawn from guidance outlining the suggested components of viability appraisals produced in conjunction with planning applications and viability appraisals published in relation to viability conditions in DAs elsewhere, I will go on to suggest the likely components of the ‘Development Costs’ in the Winchester DA.

constructing a development.¹⁹ There are, however, many items that make up the costs of designing and constructing a development, some of which are harder to capture in a neat definition. The Winchester DA classified 'Development Costs' by reference to a broad category of 'proper costs that are properly incurred by the Developer,'²⁰ which is a phrase that contains an interesting tautology. It is, of course, possible to imagine circumstances in which 'proper costs,' such as the costs incurred in preparing and submitting planning applications, are 'improperly' incurred if, for example, a developer submitted a planning application without first obtaining approval required in a DA from a local authority's estates team for the contents of the plans. The repetition of the word 'proper' in the Winchester DA seems unnecessary though and the consequence is that the clause reads as an excessive attempt to impress upon a reader that the developer can justifiably seek recovery of the costs to be claimed.

Alongside costs to be expended on the preparation and submission of a planning application, 'proper costs' might have included fees payable to consultants instructed during the development process,²¹ financial contributions required pursuant to a section 106 agreement, costs incurred as a result of any challenges to the grant of planning permission or the making of a CPO, and any inducements payable to prospective tenants of the constructed

¹⁹ The Royal Institute of Chartered Surveyors guidance, to which I referred earlier in this chapter, on the operation of viability modelling in planning decision-making. That guidance includes an 'indicative outline of what to include in a viability assessment' (see Royal Institute of Chartered Surveyors, 'Financial viability in planning. RICS guidance note', 36). The RICS indicative outline lists the same components as those present in viability appraisals produced in conjunction with a DA for the 'Silk Street' development in Macclesfield (see Wilson Bowden Developments Ltd, 'Silk Street, Macclesfield viability appraisals: February 2014 - May 2014' <<http://wakeupmacc.org.uk/wp-content/uploads/2015/02/Silk-Street-viability-assessment-May-2014.pdf>> accessed 30 August 2017).

²⁰ Schedule 3 to the Winchester DA contains the definition of 'Development Costs' but this has been redacted in the electronic copy that the council published. A report to Cabinet of the Council's 'Silver Hill Officers Project Team' has reproduced parts of the definition, however (see Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 10.2).

²¹ In addition to instructing solicitors, Henderson instructed architects, archaeologists, an engineering consultant to carry out site survey work, town planning consultants, a quantity surveyor, a chartered surveyor to advise on the marketing of the residential property and an 'historic building adviser' (as listed in Henderson, *Winchester Silver Hill. A Vibrant City Centre. September 2014 (Appendix B, Document 2.15)*, 10). Henderson also instructed a retail consultant to advise on the letting and marketing of the retail units (Nicholas Symons, *Proof of Evidence. Proposed Silver Hill Development, Winchester. June 2012 (Appendix B, Document 3.10B)*), a transport consultant (see Stuart Jenkins, *Proof of Evidence of Stuart Jenkins (Appendix B, Document 3.10A)*), a chartered surveyor to negotiate land acquisitions, carry out land valuations and advise on the CPO process (see Matthew Bodley, *Proof of Evidence of Matthew Bodley. On matters related to compulsory purchase. 25 May 2012 (Appendix B, Document 3.09)*, paragraph 1.8) and two other chartered surveyors to advise on viability modelling (as discussed in Christine Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraph 4.39). The costs figure based on consultant's fees would also include, D4 explained, the fees that WCC incurred in instructing solicitors, surveyors, retail consultants and so on.

development.²² In addition, D4 indicated that some developers agree to pay the costs of any consultants that a local authority appoints during a property-led development process, although he remarked that while ‘a developer might pay, those costs would be put into the pot as Development Costs,’ thus creating an incentive for the local authority to minimise its use of any such consultancy services.

Alongside agreeing the items of expenditure payable by the developer, PS1 and D4 pointed out, a developer and a local authority will also agree the expenses that the local authority will pay. The local authority’s costs would not be collated under a general heading such as ‘Development Costs,’ so would not materialise in a DA in the same way and would, they told me, be disregarded from a profitability estimate. This provides an opportunity for cost engineering and PS1 further explained the relationship between a developer’s costs and a local authority’s costs when he observed that a local authority might help a developer improve the viability case for a development by moving items previously defined as a developer’s costs away from the DA and the corresponding viability appraisal and into unrelated categories of the local authority’s general expenditure.

Moving costs from one party to another is not the only way to make a viability case, however, and D4 told me that he had been involved in property-led development projects in which, to engineer a profitable proposition, the local authority has ‘to find ways to help the developer cut costs.’ There might be various ways to do that but the most obvious would be by the local authority reducing either its demands for unprofitable community buildings or the ground rent payable on the grant of a long leasehold of a development site to a developer.

To enable Henderson’s directors, WCC’s officers and their respective consultants to calculate the income required to generate sufficient profitability, Henderson’s consultants assembled estimates of the total Development Costs in viability appraisals produced episodically during the development process.²³ This reliance on consultants is a manifestation of the ‘image of projectness’²⁴ in which property-led development takes place. LA4 provided a summation of the role of consultants when he told me that:

How you get to a DA is you both know roughly where you are going but you have two independent specialist consultants who value everything and bring that value together, which informs the appraisal.

²² These items featured in both the RICS indicative outline for viability appraisals and the Silk Street, Macclesfield appraisals to which I referred above (see Royal Institute of Chartered Surveyors, ‘Financial viability in planning. RICS guidance note’; Wilson Bowden Developments Ltd, ‘Silk Street, Macclesfield viability appraisals: February 2014 - May 2014’).

²³ As discussed, for example, in Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*.

²⁴ John Law, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002), 8.

CON3 made similar observations regarding valuation when he explained the role two firms of property surveyors took in estimating land acquisition, construction and other costs that formed the basis for viability appraisals:

Classically, on these scenarios, the council would use [*Firm A*] to do the valuations and the developer would use [*Firm B*] to do the valuations. If they know their job, which they truly do, they're in the same place. So, then it tends to be an argument that, "That's alright today, John, but what with John Lewis and a bigger catchment, rents will go up a bit." And then, "Mmmm. No, I'm not sure they'll go up that far." That's the debate. And there's rarely disagreement on the key parameters.

He went on to explain that his firm had also carried out viability exercises on behalf of developers to model the effect of changes in estimated costs and rental proceeds on overall profitability. He told me that:

We run spreadsheets of ginormous size and debatable meaningfulness [*PAUSE*] but [*PAUSE*]. All to explore the impact on the rate of return. And if you get a large-scale scheme, you just breathe on these numbers a bit here [*pointing to a piece of paper*] and it goes [*mimicking a breeze*]. You know [*PAUSE*]. The numbers start changing. And it's more and more the financial modelling of viability that counts. And that's getting to be an exotic art, to say the least.

In a report that Councillor Kim Gottlieb presented to WCC's Overview and Scrutiny Committee encouraging thorough examination of Henderson's viability appraisals, he referred to his professional experience as a property developer²⁵ and explained, for the benefit of the councillors present, his view of the malleability of the data that viability appraisals generate:

[Viability appraisals] are time sensitive so that you can see the cost of interest and again, for example, if you extend the construction period or the time you anticipate it will take to let the shops, you can see [*sic*] the effect on the bottom line.²⁶

Taken together, these observations point to both a consultant's ability to manipulate conclusions, the perceived importance of 'valuing' everything and an assumption that these 'specialist consultants' are the only people who 'know' how to do so. The consequent reliance on this knowledge means that, using Christophers' phrase, viability testing and the way that these consultants manipulate lines in a viability appraisal comes to 'format' urban spaces in ways that are often unseen.²⁷

²⁵ Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 2. I introduced Councillor Gottlieb in chapter eight. He is a Conservative Councillor who was elected to the council in May 2011. As well as serving as a member of the council's Overview and Scrutiny Committee, he was a member of the council's 'Silver Hill Informal Policy Group,' which I also introduced in chapter eight and mention again later in this chapter.

²⁶ *ibid*, 5.

²⁷ Brett Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 *International Journal of Urban and Regional Research* 79, 95.

Viability modelling is, therefore, a way of documenting the anticipated financial costs of a property-led development project alongside expected profitability in a way that has concrete effects. These effects materialise in the way that viability outputs determine the buildings constructed during a development. These modelling techniques also have similarly important social and political effects by determining how people use and experience these places. But these effects appear after a property-led development project has been completed. It is also important, therefore, to examine how these appraisals determine the capacity for action of the legal technologies, like DAs, CPOs and planning permissions, generated during a development process. In addition, there is a question to be asked regarding the way that viability appraisals condition the relations between local authority officers and councillors and between local authority officers and developers.

The primary means through which local authority officers and their private sector development partners seek to control the way that legal technologies work is through incorporating a 'viability condition' into the DAs that they negotiate. All my developer interviewees referred to DAs that contained viability conditions, and my five interviewees who were property development consultants each also discussed the importance of a viability condition. These conditions appear, therefore, to be ubiquitous. Incorporating some form of viability modelling techniques into a DA is thus another example of the 'routinized' behaviours²⁸ that I have been discussing in this thesis.

But while it is predictable that viability modelling will take place as a contractual requirement stipulating some form of comparison between anticipated costs and desired profitability, there can be small differences in the underlying methodologies, as Christophers demonstrates.²⁹ These methodologies take the form of closely-guarded, 'proprietary' information that developers and their consultants endeavour to keep secret.³⁰ Nevertheless, these techniques are both dynamic and mobile in that they can be transported to different settings and manipulated in accordance with the wants and needs of a particular developer or local authority officer.³¹

²⁸ Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 65; Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 103; Emilie Cloatre and Martyn Pickersgill, 'International law, public health, and the meanings of pharmaceuticalization' (2014) 33 *New Genetics and Society* 434, 440.

²⁹ Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models'.

³⁰ This is a point that Johns makes by reference to the suite of documents that underpin a public-private infrastructure project (see Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391, 399).

³¹ Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models'.

There are, as a result, many interesting tensions running through the use of these viability appraisals as a tool of property-led development. On the one hand, these techniques are treated as a run-of-the-mill, mundane component of property-led development to be completed out of necessity. Modelling techniques and valuation practices are thus a type of technology that is simultaneously taken for granted and afforded credibility simply because the same practices have been deployed in other places at other times.³² On the other hand, as I have shown, developers and local authority officers place significant weight on viability appraisals and treat these practices as ‘a sophisticated decision-making technique’ likely to produce objective and trustworthy outputs.³³ Finally, however, Adams *et al* have noted that choosing a ‘fortuitous economic moment’³⁴ is often the key indicator of success in a property-led development, and this seems to be the case whether or not developers engage in the production of numerous viability appraisals.

In chapter seven, I noted that CON4 had presented himself as a conductor leading an orchestra and tasked with ensuring ‘that each part of the orchestra comes in at the right time.’ I put it to him that the difference between a property development consultant and a conductor is that property-led development involves ‘an element luck.’ He agreed, and stated:

Yes, that’s true. If you’ve been trying to conduct an orchestra for a number of years, timing would come into it for different reasons. But, yes, we’re subject to all sorts of extraneous influences. It’s financial markets, even government initiatives, be they central or local.

He also used the image of lining up the elements of a development proposition when he explained that a viable development, in which a developer or a consultant needs to get ‘all your ducks in a row to coincide at the right time, requires an element of luck as well as skill.’ His point was that a developer or a consultant who has gained experience of how property-led development works has the expertise both to make the most of any good fortune that arises and to know ‘the right time’³⁵ to produce a viability appraisal.

ANT-inspired research provides ways to help think through the juxtaposition between something that is simultaneously run-of-the-mill, apparently highly sophisticated but also a

³² Yvonne Rydin, ‘Using Actor-Network Theory to understand planning practice: Exploring relationships between actants in regulating low-carbon commercial development’ (2013) 12 *Planning Theory* 23, 39.

³³ Guy *et al* question the ‘objectivity’ of these appraisals when they point out that decision-making based on viability modelling is more likely to be a product of preconceived prejudices than clear-headed analysis of the numbers on a spreadsheet (Guy, Henneberry and Rowley, ‘Development Cultures and Urban Regeneration’, 1186).

³⁴ David Adams, Alan Disberry and Norman Hutchison, ‘Still vacant after all these years - Evaluating the efficiency of property-led urban regeneration’ (2017) 32 *Local Economy* 505, 520.

³⁵ This is a phrase also used by Henderson (see Steven Henderson, ‘Developer collaboration in urban land development: partnership working in Paddington, London’ (2010) 28 *Environment and Planning C - Government and Policy* 165, 180) to explain that a developer usually achieves profitability on a development by bringing the development to the market ‘at the right time.’

product of luck. In particular, Latour's ideas regarding 'black boxes' are instructive.³⁶ Earlier in this section, I quoted comments that CON3 made during my interview with him in which he described two consultants in a meeting room debating the finer details of the land valuations and estimated rental proceeds that would go into a viability appraisal. His portrayal of the discussions between these two individuals envisaged two men, clearly familiar with each other and comfortable in each other's company, having a conversation about the contents of a viability appraisal.

This familiarity was also a feature of an anecdote that CON2 told me about his negotiations regarding the inducements to be paid to a specific anchor tenant. He explained that he had negotiated with representatives of that anchor tenant on many occasions, with the consequence that 'there aren't many people that have done deals with [that anchor tenant],' meaning that 'it tends to be me' who leads the negotiations if a developer wanted to incorporate that anchor tenant into a development. CON2 went on to explain that he imagines that the individuals on the other side of the negotiations 'groan inwardly, I think, you know, "Not him again," because I'm the only person that has done the deals with them [...] and therefore they know that I know what the deals are.'

The idea that 'they know that I know' is an important one and suggests that there is limited room for manoeuvre for two consultants engaged in 'backroom'³⁷ negotiations. Both CON2 and CON3 depicted two individuals who are so familiar and comfortable in their roles that they are doing the same thing each time they meet. Nonetheless, and as I noted earlier, CON3 observed that 'the financial modelling of viability' has become 'an exotic art' and he highlighted the importance of 'the spreadsheet' that generates the figures on which the direction of property-led development depends. By contrast, LA4 lacked the insider knowledge that CON2 and CON3 possessed and he admitted that he relied upon his consultants to use their spreadsheets to value 'everything.' Neither LA4, CON2 nor CON3 talked in detail about the formulae or instructions embedded within the spreadsheet, although the two consultants both alluded to 'the complex inner workings.'³⁸ My point, though, is that the inner workings do not seem to matter to the developers and local authority officers whose organisations are the parties to a DA as long as they believe that the outputs are both credible and in alignment with their objectives. But this means that the workings of viability modelling are just as far from public scrutiny as the 'backroom' meetings at which consultants value the incentives payable

³⁶ Bruno Latour, *Science in action: how to follow scientists and engineers through society* (Harvard University Press 1987), 3; Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010), 272.

³⁷ Mariana Valverde, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012), 14.

³⁸ Latour, *Science in action: how to follow scientists and engineers through society*, 3.

to anchor tenants, the likely rental proceeds of a specific combination of buildings, and so on. Inputs generated in backroom discussions are processed according to a model that is drawn up in another place and at another time and that is firmly 'black boxed.' The hidden work that these models do, however, performs a significant role in the way that property-led development processes play out.

Viability Appraisals: How a spreadsheet becomes the 'primum movens'

In addition to the concept of a black box, there are other ideas that ANT researchers have developed that illuminate the workings of viability modelling techniques. The work that Callon has done on 'enrolment' and 'translation'³⁹ highlights network building processes and the 'battles'⁴⁰ that define and redefine identities, connections and relations within a networked situation. Of particular significance, he suggests, are the 'multilateral negotiations, trials of strength and tricks'⁴¹ that enable one actor to become both an 'obligatory passage point'⁴² and a spokesperson able to state what other actors 'want and need.'⁴³

A straightforward application of these ideas to property-led development and viability modelling suggests that the negotiations between a developer and a local authority officer, or between their respective consultants, leads to a viability appraisal taking the form of an obligatory passage point that compels the parties to consider the viability consequences of every action carried out during a development process. This finding is valuable, particularly when placed alongside material from my interviews with D1 and D2. In those interviews, D1 and D2 each explained that any viability appraisal that their companies carried out or that they commissioned from their consultants would be designed to assess likely profitability of a development proposition against a pre-determined benchmark that their respective company boards had set. D1 and D2 held different positions in their respective companies, so provided alternative but complementary insights into the interplay between a project-specific appraisal and a universal board benchmark. D1 was a development director in his firm but he explained that he needed to report to his firm's board before the board would release funds for one of his projects and, if he could not convince the board that his project would attain the board benchmark for profitability, the board would not provide its support. By contrast, D2 had been a development director but had more recently been the managing director of his company, so was a board member who approved project proposals prepared by development directors. He

³⁹ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay'.

⁴⁰ *ibid*, 212.

⁴¹ *ibid*, 211.

⁴² *ibid*, 205.

⁴³ *ibid*, 224.

confirmed that his board's benchmark had been so firmly embedded as a pre-requisite to board approval that development directors knew not to approach the board unless they had viability figures that 'worked.' Local authority officers are compelled to share in a developer's need to produce figures that 'work' when those figures are necessary to initiate the chain of interactions that lead to a developer's board approving progress on a project.

These points thus go some way to explaining why a viability appraisal is both central to property-led development decision-making and an obligatory passage point for the interactions taking place. This, however, is only a partial reading of the way that a viability appraisal performs a specific type of development process into being because a viability appraisal also creates various other interlocking connections. I have already explained that a viability appraisal enables a developer to tell a local authority officer what he or she should 'want or need' if a development is to take place. A consultant that a local authority has engaged can, in theory, also tell that officer what he or she should want or need in a development. In addition, however, CON2 told me that his role in property-led development is often to produce and interpret viability outputs on behalf of developers who are inexperienced in the application of these techniques or the way that they are used in negotiations with a local authority. In that sense, a consultant becomes able to say what a developer wants or needs, possibly before a developer is aware of what he or she should want. The use of viability modelling techniques thus means that it is not necessarily the developer who is the 'primum movens'⁴⁴ in property-led development but the consultant, or the consultant's computer, that is the obligatory passage point that all action must flow through and that conditions all the subsequent actions that take place during a development process. I did not put this observation directly to my developer interviewees, and D1, D2 and D4 each expressed familiarity with the viability modelling techniques deployed on their developments, albeit without going into the detail of these processes. Each would, I think, have nonetheless thought of themselves or their firm as the 'primum movens' in their project. But, even though D1, D2 and D4 each spoke of their ability to interpret and manipulate 'the figures,' they still talked about using consultants during their projects.

Although I cannot point to a comment from one of my interviews to this effect, it occurred to me in the final days of editing this chapter that some developers might use consultants when they are not actually seeking advice. Rather, it may be possible that developers might simply require the production of reports and appraisals that bolster their case on an issue. This appeared to occur in the Winchester Development when Martin Perry,

⁴⁴ *ibid*, 203.

Henderson's Director of Retail Development, informed the Winchester CPO inquiry that 'leading expert consultants' had affirmed the accuracy of Henderson's viability appraisals.⁴⁵ This type of practice might be particularly prevalent if a developer and a consultancy already have a close relationship, and if consultants have familiarised themselves with a developer's decision-making processes and targets in a way that means that they are already aware of what the developer wants. In such circumstances, the objectivity or independence of any advice would become questionable. This, however, is an area for further research.

Regardless, however, of whether the 'primum movens' in these situations is a developer, a consultant or a computer, and whether or not viability outputs are objective and impartial, viability appraisals do generate and sustain a 'coordinated perspective'⁴⁶ among developers, local authority officers and their respective consultants on what needs to be done to make a project viable. The goals of cost minimisation and recovery are, as Langstrup has put it, the type of 'more or less unambiguous goals'⁴⁷ that characterise project-oriented networks, even if the exact method of achieving those ends is the subject of 'negotiations, trials of strength and tricks.'⁴⁸ The reproduction of viability modelling techniques that appear to have worked in other places at other times is a way of creating the impression of a 'succession of deals'⁴⁹ that generates 'momentum' and 'loyalty'⁵⁰ towards these techniques. But these techniques are also a way to 'inscribe'⁵¹ assumptions onto both a property-led development project and a DA about the conditions in which that project will play out and the ways that those technologies will work. These assumptions then 'prescribe'⁵² the actions of a local authority officer or a developer who picks up and uses a DA or any of the web of interlinked documents connected to a DA.

⁴⁵ Martin Robert Perry, *Proof of Evidence Financial Viability Rebuttal. Silverhill, Winchester. 15 June 2012 (Appendix B, Document 3.08)*, paragraph 1.5.

⁴⁶ John Law and Valerie Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity' (2000) 41 *Technology and Culture* 765, 768.

⁴⁷ Henriette Langstrup, 'Interpellating Patients as Users: Patient Associations and the Project-Ness of Stem Cell Research' (2011) 36 *Science Technology & Human Values* 573, 577.

⁴⁸ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay', 211.

⁴⁹ Johns, 'Financing as Governance', 398.

⁵⁰ *ibid*, 398-9.

⁵¹ Madeleine Akrich, 'The De-Description of Technical Objects' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992), 208.

⁵² *ibid*, 208.

Viability appraisals: A 'legally' important document?

One of the themes of this thesis has been an investigation into 'the way that law and legality emerge'⁵³ in property-led development. Current research into the provision of affordable housing as a component of large scale property-led development has shown viability appraisals to be manipulable instruments that developers use to limit or reduce their commitment to provide or contribute to projects potentially beneficial to the wider community.⁵⁴ In particular, scholarship has analysed the deployment of viability modelling techniques to enable developers to avoid obligations ostensibly imposed upon them to incorporate affordable housing into their developments.⁵⁵ In that respect, the Winchester Development is nothing new, as I showed in chapter eight. But these campaigners and academics have focused on the operation of viability testing in relation to the formation of district-wide planning policy and site-specific planning applications. My findings demonstrate, by contrast, that viability testing is not merely a matter of planning decision-making. By incorporating a viability test into the Winchester DA, WCC allowed the developer's desired level of profitability and the consultants' land valuations and costs estimates to underpin every aspect of the development process. LA4 expressed this pithily when he told me that the most important document in property-led development is a viability appraisal and a DA is simply 'the legal document attached to that.'

There are three observations that I want to make in relation to LA4's comment. The first is that a viability appraisal needs a DA if it is to have effect as the basis of a development project because, without a DA, a developer will not be able to assemble the land interests required to construct a 'viable' development. The second point emerging from LA4's comment is that a DA is a necessary document because its 'legality' adds credibility to the existence of a viability appraisal. Finally, LA4's comment also suggests that a DA has some kind of pre-existing 'legal' essence that marks it out as different from a document like a viability appraisal.

Each of these points is important and I analyse the interplay between a DA and a viability appraisal throughout this section. My reading of the 'legality' of a DA is different to LA4's, however. My research shows that a viability appraisal is one of the web of networked

⁵³ David Cowan, 'Housing and Property' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010), 332.

⁵⁴ See, for example, Neil Crosby, Patrick McAllister and Paul Wyatt, 'Fit for planning? An evaluation of the application of development viability appraisal models in the UK planning system' (2013) 40 *Environment and Planning B - Planning & Design* 3; Patrick McAllister, Emma Street and Peter Wyatt, 'Governing calculative practices: An investigation of development viability modelling in the English planning system' (2016) 53 *Urban Studies* 2363.

⁵⁵ See, for example, Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models'; Jerry Flynn, 'Complete control: Developers, financial viability and regeneration at the Elephant and Castle' (2016) 20 *City* 278; Paul Watt and Anna Minton, 'London's housing crisis and its activists: Introduction' (2016) 20 *City* 204.

and interlinked documents required to enable a DA to have 'binding' effect. This finding is one of the important contributions to knowledge that this thesis makes. In chapter seven, I focused on the planning permission and the CPO that were also necessary to enable the obligation imposed in the Winchester DA on the developer to commence construction to take effect. The Winchester DA, like the DAs my developer and consultant interviewees discussed, depended for its effects on these documents. But the planning permission, CPO and other documents referred to in the DA also depended for their effects on the numbers that a consultant's computer generates and the way that those outputs are captured in a viability appraisal. Similarly, the DA would not take effect as a 'legally binding' agreement without the numbers in a viability appraisal that would allow this to happen. This demonstrates how, paraphrasing Latour, the process of making an unconditional DA occurs over time and requires inputs from a variety of sources.⁵⁶ It also shows how a binding DA is an instantiation of 'law' that depends on multiple connections for its effects and that is thus a fluid and precarious assemblage.⁵⁷

These findings emerge from the ways that developers and consultants attempt to foreground viability as a non-negotiable aspect of property-led development even while other aspects of a development proposition are negotiable. They place great emphasis on a viability appraisal and do so by 'engineering its outputs into contracts.'⁵⁸ These outputs become, as a result, part of the 'socio-legal architecture'⁵⁹ of property-led development. Consequently, the need to attain a prescribed level of profitability operates as an 'unceasing' disciplinary technique⁶⁰ because local authority officers recognise that it is desirable that a conditional DA becomes an unconditional, fully-formed and 'legally binding' DA. The need to attain a prescribed level of profitability is, therefore, carried around and sustained in the text of a DA, in a way that conditions the actions of the parties to it.

Treating a viability appraisal as a legally important document had implications for the Winchester Development that manifested in the changes to the required elements in the DA that Henderson's directors demanded after the CPO Inquiry. I touched upon these changes in chapters seven and eight, where I pointed out that Henderson's Director of Retail Development informed the Inspector chairing the Inquiry that the required elements agreed

⁵⁶ Latour, *The making of law: an ethnography of the Conseil d'Etat*, 75.

⁵⁷ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 181.

⁵⁸ Johns, 'Financing as Governance', 395.

⁵⁹ *ibid*, 399.

⁶⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991), 236.

between WCC and Thornfield formed the basis for a 'viable' development.⁶¹ WCC's officers similarly informed the Inspector that their review of Henderson's viability appraisals meant that '[t]he Council has satisfied itself that the Scheme is viable.'⁶²

The report that officers then presented to WCC's Cabinet on 6 August 2014, recommending approval for Henderson's proposed changes, described a reversal of opinion. It addressed the criticism that the Council received from local residents regarding the proposed removal of the affordable housing requirement⁶³ and explained that the appraisals that had formed the basis for the evidence at the CPO inquiry were no longer appropriate because they had evaluated a scheme that could not be funded:

Much comment has been made about how the latest proposals for treating affordable housing compare with earlier schemes. Thornfield did secure planning permission for a development of the site in 2009, but were unable to secure funding and eventually went into administration. While appraisals might have been produced in the past demonstrating that on site affordable [*sic*] provision was possible, in reality they were only illustrative and in the absence of funding came to nothing. In the absence of evidence that an alternative scheme can be funded, valid comparisons between a proposed scheme and an alternative (earlier) scheme are impossible.⁶⁴

There are significant gaps in this reasoning, however. Henderson's Director of Retail Development had emphasised at the CPO inquiry that funding was available for the existing proposals and had provided evidence to that effect.⁶⁵ Moreover, it is not clear what the officers meant by referring to the impossibility of 'valid comparisons' because the officers were themselves engaged in drawing a comparison between the existing required elements and the proposed required elements. Characterising past appraisals as 'only illustrative' was a way of describing Thornfield's proposals for the development as no more than a 'passing phase.'⁶⁶ WCC's officers were pointing to the momentary nature of viability modelling and

⁶¹ Martin Robert Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 18.8. To avoid any doubt that this statement in his proof of evidence was a clear expression of his belief that the development proposition was 'viable,' Perry submitted a supplementary proof of evidence to the inquiry rebutting evidence from objectors that had suggested that the scheme was not viable (see Perry, *Proof of Evidence Financial Viability Rebuttal. Silverhill, Winchester. 15 June 2012 (Appendix B, Document 3.08)*).

⁶² Winchester City Council, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Statement of Case. 22 March 2012 (Appendix B, Document 3.02)*, paragraph 12.

⁶³ In chapter eight, I referred to criticisms reported in Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 2-3 and Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, 4-6.

⁶⁴ Winchester City Council, *CAB2607. Silver Hill Affordable Housing Review. Report of Head of Estates and Head of Legal & Democratic Services. 6 August 2014 (Appendix B, Document 1.41)*, paragraph 3.1.

⁶⁵ Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 13.8.

⁶⁶ Nick Lee and Steven D Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 263.

used this as a basis on which to cast aside documents that had been inconveniently connected to the DA. If everything is a mere 'snapshot,' though, the problem is that this re-characterisation of past appraisals would seem also to undermine the utility of current and future viability appraisals as comparative tools as well.

One way of reading the officers' statement is that WCC's officers were simply saying that the most reliable benchmark of viability was the willingness of a funder to finance land acquisition and construction. On the other hand, though, the viability condition in the DA, to be discharged on the production of a positive viability appraisal, was the last condition to be discharged before unconditionality. This sequencing suggests that making comparisons is part of the purpose of viability modelling. The incoherence of the officers' statement may have been a product of the situation in which WCC found itself, with a development proposition that it's officers had previously defended now deemed indefensible. In trying to extricate themselves from this tangle, WCC's officers sought to discredit past assumptions without inadvertently acknowledging that a developer and its consultants can make a viability appraisal 'illustrate' whatever they want.

A challenge to the 'projectisation' of property-led development?

One of the reasons that developers and local authority officers can sustain these practices is, as I have pointed out, because viability modelling techniques are poorly understood. But another reason lies in the way that scrutiny of these practices tends to be part of the projectisation of property-led development. Johns has made similar observations in relation to public-private infrastructure projects in which, she explains:

Regulatory oversight of such financial architecture tends to be administered through accounting standards and audit functions rather than through more explicitly deliberative and accessible governmental technologies.⁶⁷

Prior to the Winchester CPO Inquiry, there appear to have been few attempts by WCC Cabinet members or officers to use local government scrutiny, accountability or transparency mechanisms to examine the viability assumptions underpinning the Winchester Development. One way of interpreting this lack of scrutiny is by concluding that WCC's councillors and officers failed to open the 'black box' that had been drawn around Henderson's viability modelling techniques. This unwillingness to challenge viability modelling comes, as I have

⁶⁷ Johns, 'Financing as Governance', 407.

shown, from a tendency to accept inputs as impartial and objective and outputs as facts,⁶⁸ even where some of inputs have long been recognised as a source of controversy.⁶⁹

The Winchester Development is notable, however, because a sustained challenge to Henderson's viability assumptions did emerge. As I pointed out in chapter eight, Councillor Kim Gottlieb was a member of the 'Silver Hill Informal Policy Group'⁷⁰ that met on a monthly basis between 20 March 2013 and 9 April 2014 to 'discuss key issues arising from the development.'⁷¹ In his capacity as a member of the Policy Group, Councillor Gottlieb was able to question senior officers and Henderson's directors on the financial merits of the development proposals, and to scrutinise both Henderson's viability appraisals and the advice that officers and Cabinet members received from a firm of property development consultants in relation to those appraisals.⁷² Councillor Gottlieb's membership of the Policy Group meant that he was, initially, an insider with 'privileged access'⁷³ to documents usually presented to councillors in abridged form⁷⁴ but he also presented himself as a type of opportunistic 'local champion'⁷⁵ able to trade on his experience as a property developer to challenge the Council's decision-making processes.⁷⁶

⁶⁸ Rydin, 'Using Actor-Network Theory to understand planning practice: Exploring relationships between actants in regulating low-carbon commercial development'.

⁶⁹ As I noted earlier in this chapter, Adair *et al* point specifically to the lack of precision in the land valuations used in viability modelling (see Adair, Berry and McGreal, 'Financing property's contribution to regeneration').

⁷⁰ In chapter eight, I abbreviated the title of this group to 'the Policy Group' and continue to do so here.

⁷¹ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 12 April 2013 (Appendix B, Document 1.26)*.

⁷² As recorded in Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 24 October 2013 (Appendix B, Document 1.28)* and Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 9 April 2014 (Appendix B, Document 1.32)*.

⁷³ Valverde, *Everyday law on the street: city governance in an age of diversity*, 14.

⁷⁴ In a later report that he submitted to the council's Overview and Scrutiny Committee, Councillor Gottlieb described how he had looked at Henderson appraisals during the Policy Group meetings. By comparison, non-Cabinet councillors received only those details that officers deemed to be the 'key output figures' from Henderson appraisals (see, for example, Winchester City Council, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 5.3).

⁷⁵ Valverde, *Everyday law on the street: city governance in an age of diversity*, 88. See also Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012), 128.

⁷⁶ There are many examples of this but perhaps the most striking is his leading role in the 'Winchester Deserves Better Campaign,' a grassroots campaign group established to challenge the development proposition put forward for the Winchester Development. His role in the campaign group is discussed in *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), [2015] ACD 74 at [3]. The group operates a website (<http://winchesterdeservesbetter.com/>) which, as of 27 February 2018, states that the group 'was begun in June 2014 to stop the Henderson proposals for [the Winchester Development]. However, it also wanted to ensure that the eventual development of the site was of the kind that enhanced the historic character, culture and reputation of the city.'

Councillor Gottlieb's role in the Winchester Development was thus a performance. It was a type of performance made possible, as Valverde has noted, by the convergence of legal technologies and bureaucratic processes:

The combination of opaque bureaucratic processes and a hopelessly byzantine legal structure thus creates opportunities for both self-appointed civic leaders and local politicians to seize the position of local champion.⁷⁷

Valverde's point in identifying this type of figure is slightly different to mine because she shows how the emergence of a 'local champion' might lead a local government body to bring forward one-off, incremental development projects to placate the 'local champion' rather than 'whole city' solutions to urban problems.⁷⁸ My point differs because Winchester is a small city and the Winchester Development was a large-scale project designed to have a 'whole city' effect. It was this 'whole city' effect that Councillor Gottlieb professed to be challenging though.⁷⁹

Regardless of this difference, the emergence of this type of figure is, as Valverde shows, not unusual. Councillor Gottlieb's challenge was, however, unusually detailed, sustained and well-funded, as I show in the remainder of this chapter and in chapter 10.

Although Councillor Gottlieb had acquired insider status through his membership of the Policy Group, he lost his 'privileged access' to the documents that the Group considered when the leader of the Council disbanded the Policy Group following local elections in May 2014.⁸⁰ Councillor Gottlieb remained, however, a member of WCC's Overview and Scrutiny Committee and, in July 2014 presented the committee members with a report cataloguing his criticisms of the Winchester Development. Calling on his experience as a property developer and evaluating the function of viability modelling, Councillor Gottlieb explained that:

[An] appraisal is to a developer like a stethoscope is to a doctor or a spanner to a mechanic. It is the most basic tool of the trade, and without one no proper diagnosis of where we are or where we've been, or where we might be going to next can be undertaken.⁸¹

⁷⁷ Valverde, *Everyday law on the street: city governance in an age of diversity*, 88.

⁷⁸ *ibid*, 88.

⁷⁹ As noted in various fora but see, for example, Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, 7. Councillor Gottlieb was not alone in voicing these criticisms. The minutes of WCC council and Cabinet meetings in 2014 contain various references to members of the public attending the meetings and speaking out against proposals that they felt were 'out of scale' when compared with existing buildings in Winchester (see, for example, Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 3; Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, 6).

⁸⁰ Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 3.

⁸¹ *ibid*, 5.

These comments are another expression of the engineering and travel metaphors that I have been highlighting throughout this thesis. They are also points that demonstrate that Councillor Gottlieb deemed a viability appraisal to be indispensable to property-led development.

His criticisms of WCC's officers addressed a perceived inability to hold Henderson's directors to account for their viability assumptions. The consequence, as Councillor Gottlieb saw it, was technical, and linked viability modelling and the Council's statutory duty to obtain 'best consideration.'⁸² A network of interlinked statutory provisions relate to this duty to obtain best consideration. Section 233(1) of the Town and Country Planning Act 1990⁸³ refers to land that a local authority has acquired or appropriated for planning purposes. This includes land that a local authority has appropriated through the exercise of its compulsory purchase powers. If a local authority intends to dispose of such land, it has a wide discretion to dispose of that land in a way that it deems would 'secure the best use of that or other land.'⁸⁴ Section 233(3) of the TCPA 1990 then states, however, that a local authority should not dispose of the land at anything other than the best consideration 'that can be reasonably obtained.'⁸⁵

Part of the 'consideration' that WCC stood to receive came from the land interests it held or would acquire on the development site. When the Winchester DA had become unconditional, the grant of a licence from WCC to Henderson, allowing the latter access to the development site, would have taken effect.⁸⁶ The DA stipulated an annual licence fee, payable by Henderson to the Council, of £240,000 when the licence became operative.⁸⁷ As construction progressed, the DA envisaged that the Council would grant a lease to the

⁸² *ibid*, 6-7.

⁸³ Hereafter referred to as 'the TCPA 1990.'

⁸⁴ As stated in section 233(1)(a) of the TCPA 1990. *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437 considered a 'back-to-back arrangement,' similar to that envisaged for the Winchester Development, whereby a local authority intended to acquire land and then to transfer it to a private sector developer. The Supreme Court concluded that this type of arrangement can be consistent with section 233(1) of the TCPA 1990.

⁸⁵ The only circumstances in which a local authority can dispose of such land at anything other than best consideration is when it first obtains central government permission to do so (s233(3) TCPA 1990). A similar provision applies to land not acquired or appropriated for planning purposes but that a local authority nevertheless intends to dispose of (see section 123(2) of the Local Government Act 1972). Case law on the section 123 requirement indicates that a local authority will discharge its duty to obtain best consideration if it can show that it kept its duty 'well in mind' and that it instructed consultants to confirm that the proposed transaction is at the best price reasonably obtainable (as discussed in *R (Faraday Development Limited) v West Berkshire Council* [2016] EWHC 2166 (Admin), 168 Con LR 131 at [30]; see also *R (Midlands Co-Operative Society Ltd v Birmingham City Council* [2012] EWHC 620 (Admin), [2012] All ER (D) 181 at [124], which states that the 'best price reasonably obtainable' will 'be the same' as the 'best price achievable in the open market'). It seems likely that the courts would reach similar conclusions in relation to the duty contained in section 233 of the TCPA 1990.

⁸⁶ As stated in clause 9.1-9.3 of the Winchester DA.

⁸⁷ As discussed in *R (Gottlieb) v Winchester City Council* (n76) at [22]. See also clause 9.3 of the Winchester DA.

developer,⁸⁸ in return for which it would receive an annual rent in the amount equivalent to 7.56% of the rental proceeds that the developer received from the letting of individual units constructed on the site.⁸⁹ The DA specified a minimum for this annual rent, set at £250,000.⁹⁰ The licence fee and the rent thus enabled the Council to look forward to a share in the developer's income from the development.

This was not the only consideration that the DA envisaged that the Council would receive from the development, however. The other part of the consideration payable to the Council came in the form of one-off 'overage' payments, entitling the Council to share in the developer's profits from the completed development. WCC would receive 50% of the first £2m profit above 110% of Development Costs⁹¹ and 50% of any profits above 115% of Development Costs.⁹² The valuation of Development Costs was thus important both for an analysis of the affordable housing component of the development⁹³ or the amount of rent that Henderson could afford and for the profit that WCC would make from the development. If Henderson's directors could establish a high value for Development Costs, doing so might have meant that they could not only avoid expensive commitments to components such as affordable housing but that they could also minimise the need to share any profit with the Council.

Councillor Gottlieb used his self-professed facility with the 'tools of the trade' to allege that WCC's officers had been unable to secure 'best consideration' for the use of the Council's land because they had failed to properly scrutinise Henderson's viability appraisals:

The fundamental point is that, in the absence of a comprehensive and transparent examination of all the possibilities presented by the prospect of the scheme being changed by the developer, the Council could not possibly know that Best Consideration was being received.⁹⁴

To explain why he felt that the Council's examination of the financial basis for Henderson's proposals was insufficient, Councillor Gottlieb outlined the scrutiny that had taken place. He

⁸⁸ As stated in clause 11.2.1 of the DA.

⁸⁹ *R (Gottlieb) v Winchester City Council* (n76) at [22].

⁹⁰ *ibid* at [22]. See also Winchester City Council, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 6.7. I can find no record of a proposed payment in addition to the annual licence fee and the annual rent payable to the Council on the grant of the licence or the lease.

⁹¹ I discussed the items that made up the 'Development Costs' in the DA and the methods for recording them in chapter eight.

⁹² As set out in Winchester City Council, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 10.2 and Winchester City Council, *CAB2607. Silver Hill Affordable Housing Review. Report of Head of Estates and Head of Legal & Democratic Services. 6 August 2014 (Appendix B, Document 1.41)*, paragraph 2.4.

⁹³ In chapter eight, I explained how Henderson's directors obtained concessions related to their obligation to include construction of affordable housing as part of the development.

⁹⁴ Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 4.

noted that the July 2013 meeting of the Policy Group had received a report from WCC's consultants that compared a 2008 Thornfield appraisal with a 2011 Henderson appraisal.⁹⁵ WCC's consultants produced the report in November 2011⁹⁶ meaning that the Policy Group was only able to examine it 18 months after the event. Councillor Gottlieb nonetheless noted that the report had identified the possibility of inflated assumptions regarding Henderson's anticipated Development Costs⁹⁷ and had recommended questions that officers should put to Henderson's directors regarding these costs estimates.⁹⁸ He alleged, however, that WCC's officers had failed to interrogate Henderson's directors or their consultants accordingly.⁹⁹

Councillor Gottlieb's report to the Overview and Scrutiny Committee then also commented upon two subsequent Henderson viability appraisals. The first dated from August 2013,¹⁰⁰ while Henderson's directors and WCC's officers were negotiating with John De Stefano¹⁰¹ for the purchase of the latter's land following the confirmation of the Winchester CPO. The second appraisal that Councillor Gottlieb considered was produced in May 2014, immediately before Henderson's directors formally submitted their proposals for variations to the required elements.¹⁰² These variations included the removal of the affordable housing required element from the DA and the replacement of the bus station required element with a new retail unit.¹⁰³

Councillor Gottlieb's principal concerns with Henderson's 2011 viability appraisal were the amounts that the company proposed to spend on a 'management fee' and in interest on costs incurred, and the carrying forward of Thornfield's expenditure on the Winchester Development prior to Thornfield's parent company being placed into administration.¹⁰⁴ He explained that the management fee and the interest on costs incurred were items that Henderson had included in their calculation of Development Costs and so, if they were over-

⁹⁵ *ibid*, 5.

⁹⁶ *ibid*, 5.

⁹⁷ *ibid*, 5.

⁹⁸ *ibid*, 5.

⁹⁹ *ibid*, 6.

¹⁰⁰ *ibid*, 6.

¹⁰¹ John De Stefano owned a group of companies that held interests on the earmarked Winchester Development site. In chapters four and five, I discussed negotiations between Thornfield and De Stefano in which Thornfield sought to acquire De Stefano's land as a precursor to entering into a DA with WCC. In chapter seven, I explained that Henderson had carried these negotiations forward after it replaced Thornfield as developer, and that De Stefano's land formed a significant component of the land to be acquired through the exercise of WCC's CPO.

¹⁰² Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 7.

¹⁰³ I discussed these variations in detail in chapter eight.

¹⁰⁴ Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 6. I have not seen any of the appraisals to which Councillor Gottlieb referred, and so cannot confirm the accuracy of his criticisms.

valued, would affect the amount and timing of the overage that the Council would receive, as well as the potential satisfaction of the viability condition in the DA. Similarly, Councillor Gottlieb argued that, if the costs that Thornfield had incurred prior to the administration of Thornfield Properties plc were afforded a line in a viability appraisal and treated as the part of the 'Development Costs' defined in the DA, Henderson's directors could use those costs to present an artificially diminished viability case. His contention, on this latter point, was that it was improper for Henderson's directors and their consultants to incorporate into their viability appraisal costs incurred by Henderson's predecessor.

As regards the 2013 and 2014 viability appraisals, Councillor Gottlieb pointed out that the 2013 appraisal estimated the profitability of the development based on the existing required elements, as agreed between WCC and Thornfield.¹⁰⁵ The 2014 viability appraisal, Councillor Gottlieb explained, had estimated profitability based on the variations that Henderson sought to the required elements.¹⁰⁶ He observed, however, that the profit margin derived from the existing required elements was the same as the profit margin derived from the amended required elements, a figure that he found to be 'not plausible'¹⁰⁷ and possibly contrived to enable the developer to avoid any obligation to contribute to the construction of affordable housing.¹⁰⁸

Councillor Gottlieb's report, however, was critical not of Henderson's directors or their consultants for the 'tricks'¹⁰⁹ that they used when producing these figures. He seems, instead, to have treated these things as part of the commercial reality of property-led development. Instead, he directed his criticism at the Council's officers for failing to understand the advice that their consultants provided and for asking the wrong questions of those consultants.¹¹⁰ For Councillor Gottlieb, the Council's unwillingness or inability to ask the 'appropriate' questions of its own consultants had allowed Henderson's directors and their consultants to manufacture these appraisals without challenge. Underlying this view was an assumption that, if the Council had acted more like a developer, it would have obtained a larger profit share. Councillor Gottlieb's litany of criticisms did not, therefore, challenge the existing paradigm of viability-led

¹⁰⁵ These required elements included the provision of a bus station and the construction of affordable housing on or off-site or an equivalent financial contribution.

¹⁰⁶ These required elements anticipated the substitution of a department store for the bus station and the removal of any affordable housing requirement.

¹⁰⁷ Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 7.

¹⁰⁸ *ibid*, 14.

¹⁰⁹ Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay', 211.

¹¹⁰ Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 9.

property development but provided his version of the 'rules' of viability modelling while pointing to gaps in officers' understanding.

Aspects of Councillor Gottlieb's report do, nonetheless, raise compelling points about the way that WCC was ill-equipped to partake in a viability-led development process. They are also illustrative of the imbalance in expertise between local authority officers and developers to which I have been referring throughout this thesis. Some of the points that Councillor Gottlieb raised also emerged in my interviews, particularly when CON3 gave me his perspective on the proficiency of local authority officers in this area. For example, when I asked about the way that local authorities he had worked with had scrutinised some of his clients' viability appraisals, CON3 told me:

I've seen officers read them upside down. And I don't mean any disrespect to them. It's simply not their core expertise or experience. It really isn't. But people assume enormous authority on these models. You know, "That's the answer. It's come out of the computer. It must be right."

While CON3's statement that he had seen 'officers read them upside down' should presumably be taken figuratively rather than literally, it points to important issues concerning viability modelling, particularly the faith placed in computer-generated outputs. LA4 expressed this faith in the comment that I quoted in chapter five, in which he referred to spreadsheets 'the size of a snooker table' and the 'huge big matrices that work all this out.' He was talking about the initial feasibility exercises that developers and local authority officers use to decide whether or not to enter into a DA. CON3 made his comments in relation to the viability appraisals that a developer might deploy to determine the time to move from conditionality to unconditionality or, alternatively, to determine whether or not to continue on a specific development trajectory. At both times, and in both circumstances, there is a childish naivety to the assumption that the size of these spreadsheets equates to their utility and LA4's naivety chimes with CON3's more cynical observation that people place 'enormous authority' on these appraisals.

At least LA4 and the officers CON3 described attempted to read the appraisals in question, however. LA2 recalled his experience of arriving at a local authority to take up a new role as the officer responsible for a large property-led development project that was hovering, because of viability concerns, in a state of suspension. He explained that, soon after arriving at the local authority, he had asked to see the latest copy of the developer's viability appraisal. His account, which was critical of the local authority, also revealed his unease about sharing this information in an interview¹¹¹ and his watchfulness when revealing what he felt was behind-the-scenes information:

¹¹¹ I made other observations regarding the willingness of LA2 and some of my other interviewees to share information about property-led development practices in chapter three.

[O]ne of the things that surprised me [PAUSE]. How confidential is this [LENGHTY PAUSE]? Ahh, what the heck [PAUSE]. I mean, one of the things that surprised me was, under the arrangement with DevCo [PAUSE], there were obviously meetings and there were, they had to update us but we weren't really around the same table in any sense, I don't think, as a joint venture. Because we said, "We need a developer to do this. We've chosen a developer. There you are. You go and do it, and come and tell us how you're getting on." So, to my knowledge, the first time we saw DevCo's development appraisal was about 18 months ago. I might be wrong but I believe that that is the first time that it was ever asked for and produced. And I was a developer in a former life, so it's kind of [PAUSE]. The starting point is always the development appraisal. How's that looking. So, you know, to enter into such a long-term commitment where you have ceded control [PAUSE], you haven't wanted to or haven't had the ability to ask for that key bit of paper until 13 years after the event?¹¹²

In these comments, LA2 expressed his exasperation with the haplessness of colleagues who, he felt, understood too little about property-led development and so placed too much trust in the developer to act in the Council's best interests. He acknowledged that a local authority allows a developer to control the pace of a property-led development process by entering into a DA but felt that his local authority's powerlessness had been worsened by its officer's inability or, as he put it, 'unwillingness,' to challenge the developer's viability assumptions.

LA2 was not an officer at WCC but there are marked similarities in his account and the criticisms that Councillor Gottlieb directed towards WCC. Councillor Gottlieb argued that it was 'almost certain' that if he had not challenged Henderson's viability assumptions, nobody else in the Council would have done so.¹¹³ Both accounts thus lamented the respective local authorities' failure to understand 'the deal-centred configuration of work and decision-making' in this property-led development context, and a corresponding failure to act 'like a deal-maker, deal-seller or deal-consumer.'¹¹⁴ These criticisms supplement the points that I have been making about the projectisation of property-led development because LA2 and Councillor Gottlieb both argued that, if the local authorities in question had been more able to act like a developer, they would have been better able to challenge developer and consultant assumptions regarding profit-sharing and rental proceeds.

But LA2's comment on the unwillingness of local authority officers to challenge these assumptions raises a more important issue. My findings suggest that some local authorities, including WCC, have been in awe of a developer's access to finance, ability to attract

¹¹² The 'event' in question here was the signing of the DA. According to LA2's account, 13 years elapsed between the date of the DA and the local authority's first sight of the developer's viability appraisal.

¹¹³ Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*, 6.

¹¹⁴ Johns, 'Financing as Governance', 398.

prospective tenants and proficiency with spreadsheets to such an extent that they dare not disrupt a developer's script for property-led development.

Councillor Gottlieb's ability to access and scrutinise Henderson's viability appraisals enabled him to 'turn them against'¹¹⁵ WCC and Henderson. His efforts represented an attempt to open the 'black box' that had been formed around Henderson's viability modelling techniques. Callon has pointed out that opening a black box can 'give rise to a swarm of new actors'¹¹⁶ and can lead to a loss of control over those black boxed processes. Councillor Gottlieb's challenge did introduce a 'swarm of new actors' to the Winchester Development, in that other opponents to the development process seem to have combined their criticisms with his.¹¹⁷ As I will show in chapter 10, Councillor Gottlieb's actions also drew a range of legal actors into the Winchester Development when he sought legal advice on the possibility of a judicial review of the Council's failure to obtain 'best consideration.' Finally, Councillor Gottlieb's challenge was also an attempt to make viability modelling techniques 'visible'¹¹⁸ in a development process. As I have shown, viability is ever-present as a partially concealed actor in property-led development. Councillor Gottlieb's challenge made that action plainer.

In response to Councillor Gottlieb's challenge, WCC's officers insisted that the profit-sharing and rental calculation methodology in the DA would enable the Council to obtain 'best consideration'¹¹⁹ and presented the Council's Cabinet with a confidential report detailing the advice received from their consultants, the current valuations of the development and the return to be generated from them.¹²⁰ These were, of course, different issues to those that Councillor Gottlieb had raised because he argued that the methodologies deployed for calculating viability were not, of themselves, problematic. The issue, from his point-of-view, was that the inputs into the appraisals, and the Council's interrogation of those inputs, was

¹¹⁵ Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 128.

¹¹⁶ Michel Callon, 'The Sociology of an Actor-Network: The Case of the Electric Vehicle' in Michel Callon, John Law and Arie Rip (eds), *Mapping the dynamics of science and technology: sociology of science in the real world* (Macmillan 1986), 29.

¹¹⁷ As most clearly evidenced in the criticisms addressed towards councillors and officers in Council and Cabinet meetings in July and August 2014, referred to earlier in this chapter (see Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*; Winchester City Council, *Minutes of the meeting of the Council held on 16 July 2014 (Appendix B, Document 1.39)*; and Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*).

¹¹⁸ Valverde, *Everyday law on the street: city governance in an age of diversity*, 193. Valverde refers specifically to making capital 'visible' in local government processes.

¹¹⁹ Winchester City Council, CAB2607. *Silver Hill Affordable Housing Review. Report of Head of Estates and Head of Legal & Democratic Services. 6 August 2014 (Appendix B, Document 1.41)*, paragraph 6.1.

¹²⁰ Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*. The report is referred to in exempt appendix 7, presented to the Cabinet members alongside CAB2603.

insufficiently robust to ensure that the Council would receive the profit and rental proceeds to which it was entitled.

Following Councillor Gottlieb's criticisms, Henderson's directors did agree to increase the annual licence fee payable to the Council during the construction period for access to the development site from £240,000 to £295,000.¹²¹ Henderson's directors also agreed to increase the minimum annual rent that would be payable to the Council following grant of the lease of the development site from £250,000 to £305,000.¹²² As I explained in chapter eight, Henderson's directors also offered to make a share of the company's profits from the development available in lieu of an affordable housing contribution.¹²³ These manoeuvrings on the licence fee, the annual rent and the profit-sharing proposals indicate that WCC's officers may have been able to obtain a better financial deal from Henderson. This suggests that there may exist circumstances in which local authorities such as WCC fail to obtain best consideration when they struggle to challenge a developer's viability assumptions, or to act upon advice from their own consultants.

The Temporality of Viability Assessments

The points I have raised so far in this chapter have developed themes that have emerged throughout this thesis. In particular, I have discussed processes of 'highly moderated change'¹²⁴ in property-led development processes, the manner in which legal technologies depend for their effects on the emergence of a web of connections and associations, and the imbalance of expertise between developers and local authority officers that underpins property-led development. In the final analytical section of this chapter, I turn my attention to one of the other key themes of this thesis and analyse the temporality of viability assessments.

My examination of viability modelling techniques illustrates how a viability appraisal enables developers, consultants and local authority officers to 'glimpse the future'¹²⁵ and to assess their movement towards a 'desired future state.'¹²⁶ Viability appraisals are, as these points demonstrate, inherently forward-looking. But the temporality of viability modelling is

¹²¹ As discussed in *R (Gottlieb) v Winchester City Council* (n76) at [22], [38]. See also clause 9.3 of the DA.

¹²² *R (Gottlieb) v Winchester City Council* (n76) at [22], [38]. See also Winchester City Council, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 6.7. I can find no references to these increases in published WCC documents.

¹²³ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, item 6, resolution 1(ii).

¹²⁴ Johns, 'Financing as Governance', 401.

¹²⁵ Richard Harper, *Inside the IMF: an ethnography of documents, technology, and organisational action* (Routledge 1998), 134.

¹²⁶ Steven R. Henderson, 'City centre retail development in England: Land assembly and business experiences of area change processes' (2011) 42 *Geoforum* 592, 601.

more complex than this. Earlier in this chapter, I quoted part of a report that WCC's Head of Estates and Head of Legal Services jointly presented to a meeting of the Council's Cabinet. In the section of that report that I quoted, these senior officers discussed viability appraisals produced during the Winchester Development and noted that:

While appraisals might have been produced in the past demonstrating that on site affordable [*sic*] provision was possible, in reality they were only illustrative and in the absence of funding came to nothing.¹²⁷

This statement refers to viability appraisals produced during the conditional phase of the Winchester Development. It is also a statement that constructs that 'time-in-between' the date of the DA and the anticipated moment on which unconditionality would occur as an episodic period consisting of a sequence of 'nows',¹²⁸ beginning and ending with the production of a new viability appraisal. In this rendering of the action of viability modelling, there is a 'rush to turn the page'¹²⁹ and to consign each 'old' viability appraisal to history. On the other hand, each 'new' viability appraisal provides a 'new point of origin.'¹³⁰

I have already shown how the time-in-between the various viability appraisals provides opportunities for a developer to use viability outputs as an instrument of change, with the effect that Thornfield's directors and Henderson's directors each used viability appraisals to secure changes to the Long Stop Dates¹³¹ and the required elements¹³² written into the Winchester DA. Local authority officers and councillors, however, seem to have approached this aspect of property-led development by doing things to enhance a developer's viability case while simultaneously avoiding difficult questions and waiting for a developer to produce a positive appraisal. As I noted earlier, research into property-led development has suggested that a profitable development is very often a product of luck¹³³ and a consequence of constructing the development 'at the right time.'¹³⁴ Waiting for 'the right time' thus produces a more 'ambiguous state'¹³⁵ for these officers and councillors who must either anticipate or wait to be told what a developer will want. Moreover, and regardless of the existence of negative

¹²⁷ Winchester City Council, CAB2607. *Silver Hill Affordable Housing Review. Report of Head of Estates and Head of Legal & Democratic Services. 6 August 2014 (Appendix B, Document 1.41)*, paragraph 3.1.

¹²⁸ Michelle Bastian, 'Political Apologies and the Question of a "Shared Time" in the Australian Context' (2013) 30 *Theory Culture & Society* 94, 110.

¹²⁹ *ibid*, 113.

¹³⁰ *ibid*, 104.

¹³¹ As discussed in chapter six.

¹³² As discussed in chapters seven and eight, and in this chapter.

¹³³ Adams, Disberry and Hutchison, 'Still vacant after all these years - Evaluating the efficiency of property-led urban regeneration', 520.

¹³⁴ Henderson, 'Developer collaboration in urban land development: partnership working in Paddington, London', 180.

¹³⁵ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107, 108.

viability appraisals, local authority officers and councillors must continue to act 'as if'¹³⁶ a positive viability appraisal will emerge later in the process. Consequently, a local authority must proceed with securing land assembly for a development during this time-in-between even if it has no assurance that unconditionality will ever occur.

Viability appraisals are, therefore, both one-off, take-it-or-leave-it outputs and 'unceasing'¹³⁷ technologies of power used by repeat players¹³⁸ to impose control at a distance.¹³⁹ The outcome of the use of viability modelling techniques is, invariably, that a developer gets what they want. D1 told me that, in 'every single scheme I've been involved in,' the inputs to the viability appraisal produced before signing a DA had been different to the inputs during the conditional phase, which had been different to the inputs after unconditionality. The reasons for these differences might range, he explained, from fluctuating land valuations to changes to the incentives to be paid to anchor tenants to variations in the anticipated price of the raw materials to be used in the construction of the development. But, in terms of the developer's ability to hit its board benchmark for profitability, he remarked that 'you've invariably got there or thereabouts.' This last point is a significant one, and reflects the theme of travel running through this thesis. For a developer, it would appear, getting to the point at which a DA becomes unconditional is important but a DA will not become unconditional unless a developer has first got 'there or thereabouts' on viability.

Conclusion

Chapters four and five of this thesis showed how viability modelling formed both part of Thornfield's pitch enrolling WCC as a development partner and the basis for a set of required elements for what Thornfield believed would be a profitable development. Thereafter, chapters six, seven and eight demonstrated how viability modelling legitimised changes to the required elements when first Thornfield's and then Henderson's directors sought to remove less profitable parts of the proposals for the Winchester Development. This chapter has examined that trend in more detail. Setting out a series of required elements in the Winchester DA presented something literally and figuratively concrete that would come out of the development process. But these required elements were subject to intangible, poorly understood and abstract concepts such as 'anticipated profit' and 'anticipated Development Costs.' The way that WCC's officers and Henderson's directors presented the

¹³⁶ Riles, *Collateral knowledge: legal reasoning in the global financial markets*, 173.

¹³⁷ Foucault, *Discipline and Punish: The Birth of the Prison*, 236.

¹³⁸ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95, 125.

¹³⁹ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 26.

required elements in the DA as a basis for a viable development before refuting those conclusions soon afterwards exposes the way that viability modelling often appears to be insufficiently interrogated and can be made to measure viability in a way that suits a developer.

Alongside the fluidity of the required elements, the profitability figure in the Winchester DA was an unchanging, invariant principle underpinning the process. The contractual entitlement to a profit that the DA bestowed on Henderson in the viability condition compelled WCC to assent to changes that moved the Council away from its earlier expectations for the development. But I have also revealed how it is not just local authority officers who look to consultants to tell them what to do, because private sector development directors often use consultants in the same way. An imbalance seems to exist, however, in the way that developers and local authority officers use the outputs that viability modelling generates, with evidence of local authority officers who are either unwilling or unable to challenge viability appraisals that developers and their consultants present as objective, trustworthy and rigorous demonstrations of the financial prospects of a development proposition.

Investigating the way in which developers, property development consultants and local authority officers use and scrutinise viability modelling techniques has raised some classic ANT issues. In particular, I have examined the interplay between human actors and nonhuman actors. In developing an understanding of the working of viability appraisals, I have scrutinised the way in which consultants monitor the lines in a spreadsheet, the inputs to and the outputs from complex calculations, and the figures in mathematical formulae. While these things point to the 'complex inner workings'¹⁴⁰ of viability modelling, I have demonstrated how a skilled outsider can open the 'black box' formed around these workings and disrupt orderly progress along a development trajectory. In the Winchester Development, the individual who brought this challenge was Councillor Kim Gottlieb, and I consider the consequences of his challenge in more detail in chapter 10.

¹⁴⁰ Latour, *Science in action: how to follow scientists and engineers through society*, 3.

Chapter 10

Legal 'action' as a strategy of property-led development

In the final analytical chapter of this thesis, I ask if the preoccupation with 'viability' in the Winchester Development¹ led Winchester City Council's² officers to agree to change their Development Agreement³ with Henderson UK Property Fund⁴ in a way that exceeded the limits that EU procurement law set on the scope of the variations permissible to this type of agreement. WCC had first entered into the DA with Thornfield Properties (Winchester) Limited,⁵ but Henderson had taken the development forward following the administration of Thornfield's parent company.

An underlying point of analysis in this chapter is how 'law and legality emerge'⁶ in a property-led development project. In referring to 'legality,' I start from the approach that Silbey advocates, and analyse 'the meanings, sources of authority, and cultural practices that are commonly recognised as legal, regardless of who employs them and for what purpose.'⁷ The emergence of law and legality has been a theme throughout this thesis and, here, I examine the uses made of legal processes and legal technologies by different parties and at different times.

I take a chronological approach, first examining the way that EU procurement law requirements affected progress by WCC and Thornfield towards unconditionality. In doing so, I discuss case law from the European Court of Justice,⁸ and its effect on the Winchester Development. I scrutinise legal advice that WCC's officers obtained from external solicitors and

¹ The 'Winchester Development' is the phrase that I have been using to refer to the property-led development project that forms the basis of my case study in this thesis.

² Throughout this chapter I refer to Winchester City Council as 'WCC.'

³ Throughout this chapter I abbreviate this term to 'DA.'

⁴ As I noted in chapter six, after Thornfield Properties plc was placed into administration, Henderson UK Property Fund became the guarantor of 'the developer's' obligations in the DA. The developer in the DA became a wholly owned subsidiary of Henderson UK Property Fund. For the sake of brevity, I refer to the developer after Thornfield Properties plc's administration as 'Henderson.' Where it is necessary to distinguish between the Henderson entity acting as developer and the Henderson entity acting as guarantor, I make the distinction clear.

⁵ Thornfield Properties (Winchester) Limited was a special purpose company set up by Thornfield Properties plc to enter into a DA with WCC and carry out the Winchester development. Thornfield Properties (Winchester) Limited was, initially, 'the developer' for the purposes of the Winchester DA until later 2010. I have referred to Thornfield Properties (Winchester) Limited throughout this thesis as 'Thornfield' and continue to do so in this chapter. Where it is necessary to refer to Thornfield Properties plc, I make the distinction clear.

⁶ David Cowan, 'Housing and Property' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010), 332.

⁷ Susan S. Silbey, 'After legal consciousness' (2005) 1 *Annual Review of Law and Social Science* 323, 347.

⁸ Hereafter abbreviated to 'ECJ.'

barristers to confirm that proposed changes to the Winchester DA satisfied these procurement requirements. I then examine various threatened and actual court challenges to the Winchester Development trajectory, and explain how these challenges affected the trajectory that WCC's officers and Henderson's directors adopted after Henderson replaced Thornfield. Finally, I analyse two different types of 'legal technology',⁹ the 'script'¹⁰ that the Winchester DA contained for the exercise of WCC's compulsory purchase powers after the DA became unconditional¹¹ and the 'time pressure'¹² that a statutorily-imposed deadline for exercise of the CPO created.

My analysis here considers documents produced for WCC's committee meetings¹³ and the High Court judgment in *R (Gottlieb) v Winchester City Council*,¹⁴ a judicial review claim brought by Councillor Kim Gottlieb¹⁵ to challenge a decision by WCC's Cabinet to approve variations to the DA. Alongside these documents, I examine the Independent Review¹⁶ that the Council commissioned following the High Court's decision in *Gottlieb*.¹⁷ The Independent Review helps me piece together details related to the legal advice that the Council's officers obtained throughout the development process. Finally, I call upon my interviews¹⁸ with local authority officers, councillors, developers and property development consultants to examine the factors that a local authority might consider when facing legal proceedings and trying to determine whether or not to terminate a DA.

⁹ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 45.

¹⁰ Madeleine Akrich, 'The De-Description of Technical Objects' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992), 208.

¹¹ In chapter six, I explained that the DA anticipated an 'Unconditional Date' that would mark the moment at which the developer's conditional obligation to commence construction converted into an unconditional duty.

¹² Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107.

¹³ Appendix B to this thesis is a list of the primary source documents produced during the Winchester Development that I use in this thesis.

¹⁴ [2015] EWHC 231 (Admin), [2015] ACD 74.

¹⁵ As I pointed out in chapters eight and nine, Councillor Gottlieb was a Conservative member of WCC and a property developer who was opposed to the proposals for the Winchester Development based on their architectural merit. He also, as I particularly explained in chapter nine, criticised WCC's officers for failings he perceived in relation to the officers' scrutiny of the viability assumptions underpinning the Henderson development proposals.

¹⁶ Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*.

¹⁷ *R (Gottlieb) v Winchester City Council* (n14).

¹⁸ I refer to material obtained in interviews with D1, D4, CON2, LA4, PS1 and COU1. Appendix D contains some limited biographical details explaining who these interviewees are and when I met them.

Bending without breaking: did changing the required elements create a new DA?

Table 10.1 illustrates the key legal ‘events’ in the Winchester Development between 2008 and 2016, illustrating, among other things, the changes proposed to the DA during that period and the legal advice that WCC’s officers obtained in relation to those changes.

Table 10.1 Legal ‘events’ during the Winchester Development between 2008 and 2016		
Date	Source	Issue
March 2008	WCC seek legal advice from James Goudie QC	Effect of recent ECJ jurisprudence on decision to award DA to Thornfield without first carrying out a tendering competition
October 2008 and August 2009	WCC seek legal advice from James Goudie QC	Confirmation that the changes Thornfield proposed to the Winchester DA in 2008 and 2009 would not trigger the need for a tendering competition
March and November 2010	WCC seek legal advice from Nigel Giffin QC	Implications of the administration of Thornfield Properties plc and the possibility that Henderson become the developer and the guarantor for the purposes of the Winchester DA
June – July 2012	David Elvin QC represents WCC at the inquiry held to consider the CPO made for the Winchester Development	
May 2013	WCC seek legal advice from David Elvin QC	Advice on John De Stefano’s judicial review challenging the Secretary of State for Communities and Local Government’s confirmation of the Winchester CPO
November 2013	John De Stefano agrees to discontinue his judicial review action challenging confirmation of the CPO	
January 2013	WCC seek legal advice from David Elvin QC	Planning strategy following Henderson’s application for a new planning permission for the Winchester Development
June 2014	WCC seek legal advice from Paul Nicholls QC	Confirmation that changes Henderson proposed to the Winchester DA in 2013 would not trigger the need for a tendering competition. WCC’s officers initially sought to instruct Nigel Giffin QC but Mr Giffin was unavailable

August 2014	Councillor Kim Gottlieb seeks permission to commence judicial review of WCC's Cabinet decision to approve Henderson's 2013 changes to the Winchester DA	
August 2014	WCC seek legal advice from David Elvin QC	Strategy to defend WCC's decision-making following Councillor Gottlieb's judicial review action
October 2014	Dove J refuses to grant Councillor Gottlieb permission to pursue his judicial review action at the High Court	
October 2014	WCC seek legal advice from David Elvin QC	Further advice on planning strategy following Henderson's application for a new planning permission for the Winchester Development
November 2014	Lindblom J grants Councillor Gottlieb permission to pursue his judicial review action at the High Court	
December 2014 and January 2015	WCC seek legal advice from Nigel Giffin QC	Procurement points to be raised in the judicial review action in defence of WCC's decision-making following Henderson's proposed changes to the Winchester DA
February 2015	Lang J delivers her judgment in the High Court in <i>Gottlieb</i>¹⁹ and deems that the proposed changes to the Winchester DA amounted to 'material' variations that should have triggered a tendering competition	
March 2015	WCC seek legal advice from Nigel Giffin QC	Likelihood of a successful appeal against Lang J's decision Status of the Winchester DA following Lang J's decision
1 June 2015	Final Long Stop Date in the Winchester DA passes and triggers termination rights	
November 2015	Hogan Lovells LLP (solicitors acting on behalf of Henderson) obtain permission from Lewison LJ to appeal Lang J's decision	
10 February 2016	WCC's Cabinet decides to terminate the Winchester DA	
19 March 2016	CPO Exercise Date passes without WCC exercising the Winchester CPO	

¹⁹ *R (Gottlieb) v Winchester City Council* (n14).

The changes that Henderson's directors sought to the DA after Henderson replaced Thornfield, in circumstances that I discussed in chapter nine, were the latest in a sequence of changes to the 'required elements.'²⁰ I have tracked these changes throughout this thesis, and briefly considered the circumstances in which WCC's officers sought external legal advice to confirm if the changes would cause the Council to breach the requirements of EU procurement law. But, as I pointed out in chapters four, five and six, the effect of EU procurement law on the award of DAs and variations to DAs was somewhat uncertain between the date of the Winchester DA and the date on which Henderson replaced Thornfield as developer in the DA. Case law from the ECJ had 'emerged'²¹ that suggested that the Winchester DA was a type of 'public works contract' subject to EU procurement rules.²² Further ECJ jurisprudence had also indicated that variations to a DA of this type might create a duty, imposed upon a local authority, to carry out a tendering competition if changes proposed to the DA would alter the agreement so substantially as, in essence, to amount to the formation of an entirely new agreement.²³ This might happen if, for example, variations to a DA altered the 'economic balance' of the agreement in favour of a developer.²⁴

This ECJ jurisprudence emerged while WCC's officers and Thornfield's directors were negotiating amendments to the planning permission and variations to the DA that I discussed in chapter seven. These negotiations took place between 2004 and 2009, so the Winchester DA provides a case study of the way that an organisation responds to an emerging area of law.²⁵ WCC's internal legal team and its appointed external solicitors, Berwin Leighton Paisner

²⁰ The DA listed the required elements in clause 5.3. These constituted the baseline specifications, agreed between WCC and Thornfield, when they entered into the DA, for such things as the retail floor-space, the number of residential units, the number of parking spaces and the other built components of the development, including a new bus station and the number of 'affordable housing' units to be constructed. Henderson sought the removal from the required elements of the bus station and the affordable housing, an overall increase in the retail area of the development, the incorporation of additional land into the development site, the removal of the requirement for a 'Shop Mobility Centre,' 'Dial a Ride' premises and a 'Market Store,' reductions to the car parking and residential provision, and authorisation to procure construction of the development 'from a construction company with a house building subsidiary' (see Winchester City Council, *CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 2.4).

²¹ Cowan, 'Housing and Property', 332.

²² Case C-220/05 *Auroux v Commune de Roanne* [2007] ECR I-385.

²³ Case C-454/06 *Pressetext Nachrichtenagentur GmbH v Austria* [2008] ECR I-4401.

²⁴ Regulation 72 of the Public Contracts Regulations 2015, SI 2015/152 (implementing Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (2014) OJ L94/65) states the current law in this area, partly replicating the *Pressetext* (ibid) principles on contract modification. The Public Contracts Regulations 2006, SI 2006/5 (hereafter referred to as 'the PCR 2006') contained no equivalent provisions related to contract modification.

²⁵ Between 2004 and 2009, the PCR 2006 was the domestic legislation relevant to the procurement of 'public works contracts.' The 2006 Regulations revoked the Public Works Contracts Regulations 1991, SI 1991/2680 and were themselves revoked by the Public Contracts Regulations 2015, SI 2015/102. The

LLP,²⁶ agreed in March 2008 that the Council's Head of Legal and Democratic Services²⁷ should seek advice on these points from James Goudie QC, a barrister specialising in EU procurement law.²⁸ In obtaining that advice, WCC's Head of Legal and BLP both sought to address concerns that they had identified given that WCC's officers had not advertised their intention to enter into a DA for the purpose of the Winchester Development, invited proposals from developers other than Thornfield, or carried out a competitive tender when they awarded the DA to Thornfield.²⁹ The recent ECJ jurisprudence³⁰ meant that each of these omissions might have amounted to a breach of EU procurement law that might have exposed the Cabinet's decision to enter into the DA to the risk of challenge.

This was not, however, the only point on which WCC's Head of Legal and BLP sought Mr Goudie's advice. They also sought confirmation, in October 2008 and March 2009, that the variations to the required elements in the DA, agreed between WCC's officers and Thornfield's directors, did not alter the DA so substantially as to amount to the formation of an entirely new agreement.³¹ Following receipt of Mr Goudie's advice, WCC's Head of Estates justified Thornfield's proposed variations to the Winchester DA on the basis that 'the turmoil that has affected financial markets and property values' meant that the Winchester Development would not go ahead unless the Council's Cabinet agreed to the proposed changes.³² The Head of Estates report made no reference to the content of Mr Goudie's advice but he had advised that the variations would 'probably' not amount to the creation of a new agreement, so would 'probably' not trigger the requirement for a competitive tender. He did note, however, that 'there is a contrary view' and that there was a realistic chance of a procurement challenge following confirmation of the variation if no competitive tender took place.³³ He advised that

PCR 2006 transposed into domestic law Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ [2004] L134/14. That directive was itself superseded by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (2014) OJ L94/65.

²⁶ Hereafter abbreviated to 'BLP.'

²⁷ Referred to hereafter as the 'Head of Legal.'

²⁸ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 1-3. Mr Goudie's profile refers to his experience in dealing with public procurement cases (see <<https://www.11kbw.com/barristers/james-goudie/>> accessed 2 March 2018). I have already discussed aspects of Mr Goudie's advice in chapter six, where I noted that he advised that the DA was, for the purposes of the PCR 2006, a 'public works contract' that should have originally been awarded on the basis of a competitive tender.

²⁹ *ibid*, Appendix 4, 1.

³⁰ Case C-220/05 *Auroux v Commune de Roanne* (n22).

³¹ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 2.

³² Winchester City Council, *CAB1739. Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*, paragraph 2.4.

³³ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 2.

WCC's officers should avoid further variations to the DA that exceeded a '*de minimis*' level without first carrying out an open market tendering process to enable other developers to bid for the contract.³⁴ The Independent Review suggests that the Council's Cabinet received a summary of Mr Goudie's advice in closed proceedings of a Cabinet meeting on 18 November 2008,³⁵ meaning that there is no public record of the discussion available. WCC's officers appear to have made no recommendation to the Cabinet advising it to commence a tendering process so the Cabinet duly approved the proposed variations to the DA.³⁶

I have discussed this phase of the Winchester Development here, and revisited changes to the DA that I have already analysed, because the use of legal advice as a property-led development strategy is an important theme of this chapter. The way that both WCC's Head of Legal and WCC's Head of Estates used Mr Goudie's advice raises important questions about continuity and discontinuity in property-led development. WCC's officers presented Mr Goudie's legal advice as an indication that the changes to the DA did not undermine the essence of the original agreement. There is a tension, however, between this concept and the apparent need for a document that can endure if its contents are, using Brothman's phrase, 'quickly replaceable.'³⁷ Another way of expressing this is by returning to the point I made in chapter seven that a DA must be 'plastic enough'³⁸ to respond to the changing wants and needs of a local authority and a developer. Such plasticity is often necessary, as I showed, if a DA is ever to become a 'legally binding' agreement. But a team of local authority officers and their private sector development partners must limit their desire to bend the contents of a DA to ensure that the agreement remains 'robust enough'³⁹ to satisfy an external set of legal requirements. It was, therefore, important for WCC's officers to ask if the changes that they proposed to make to the Winchester DA were part of a necessary 'ripening'⁴⁰ process or amounted to a 'disavowal'⁴¹ of the original DA. If two contracting parties use a DA as a device to enable themselves to become more aware of what they are trying to express in a set of

³⁴ *ibid*, Appendix 4, 1.

³⁵ *ibid*, Appendix 4, 1-2.

³⁶ Winchester City Council, *Minutes of the meeting of the Cabinet held on 18 November 2008 (Appendix B, Document 1.19)*, item 17.

³⁷ Brien Brothman, 'Perfect present, perfect gift: Finding a place for archival consciousness in social theory' (2010) 10 *Archival Science* 141, 148.

³⁸ Susan Leigh Star and James R. Griesemer, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 *Social Studies of Science* 387, 393.

³⁹ *ibid*, 393.

⁴⁰ Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010), 82.

⁴¹ Renisa Mawani, 'Law's Archive' (2012) 8 *Annual Review of Law and Social Science* 337, 354.

development proposals, 'rewriting'⁴² that DA is a perilous task. Balancing flexibility with external rules governed by ECJ jurisprudence proved problematic for WCC, created recurring challenges and locked stresses into the DA. The legal advice that WCC's officers had obtained from Mr Goudie had short-term benefits, however, because the variations to the DA and the subsequent grant of planning permission on 9 February 2009 enabled Thornfield to discharge the planning condition in the DA.⁴³

An actual or a threatened legal action? John De Stefano's challenge to confirmation of the Winchester CPO

While WCC's planning committee granted planning permission to Thornfield in February 2009, Thornfield's bank placed Thornfield's parent company into administration in January 2010⁴⁴ and Henderson replaced Thornfield as 'the developer' in the DA from 10 December 2010.⁴⁵ In chapter six, I explained that WCC's officers instructed Nigel Giffin QC⁴⁶ during this period to advise if either Henderson's acquisition of Thornfield or its replacement of Thornfield's parent company as guarantor of the developer's obligations in the DA amounted to a material variation of the DA.⁴⁷ Mr Giffin's advice was that this change was not a material variation,⁴⁸ but this was another episode in the Winchester Development during which WCC's officers, including the Council's Head of Legal, and BLP, the Council's external solicitors, sought reassurance that their actions did not infringe EU procurement law requirements.

But WCC's Head of Legal and BLP's solicitors did not only instruct barristers to provide expert legal advice when they were concerned that variations to the Winchester DA might have caused a breach of procurement law and might thus have led to a risk of a challenge to a Cabinet decision to approve those variations. They also sought legal advice from a barrister

⁴² Michel Callon, 'Writing and (Re)writing Devices as Tools for Managing Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 192.

⁴³ As discussed in chapter seven.

⁴⁴ As discussed in Winchester City Council, CAB2085. *Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*.

⁴⁵ Martin Robert Perry, *Proof of Evidence. Silverhill, Winchester. 6 June 2012 (Appendix B, Document 3.06)*, paragraph 6.1.

⁴⁶ Mr Giffin's profile refers to his specialisms in local government law and public procurement law (see <<https://www.11kbw.com/barristers/nigel-giffin/>> accessed 3 March 2018).

⁴⁷ Winchester City Council, CAB2085. *Silver Hill Regeneration Project - Latest Developments. Report of Chief Executive. 24 November 2010 (Appendix B, Document 1.23)*, paragraph 4.1.

⁴⁸ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 3-5.

when John De Stefano⁴⁹ issued a challenge to the Secretary of State for Communities and Local Government's 20 March 2013 decision to confirm the Winchester CPO.

Section 23(1) of the Acquisition of Land Act 1981 enables 'any person aggrieved' to apply to the High Court to challenge the confirmation of a CPO. De Stefano was advised in bringing this action by Dentons, a firm of solicitors, who issued this challenge in the name of the five companies that De Stefano controlled that held land interests to be acquired by the exercise of the CPO.⁵⁰ The Council instructed BLP and David Elvin QC⁵¹ to represent it.⁵² None of the documents that I have seen state the basis on which De Stefano sought to challenge confirmation of the CPO, although it seems likely his grounds were similar to those raised on his behalf at the CPO inquiry.⁵³ It is possible that De Stefano's challenge may have been designed to compel WCC's officers and Henderson's directors to strike a swift and potentially expensive deal for the former's land. Alternatively, it is possible that De Stefano was adamant that he would not sell his land and wanted to pursue every option available to him to challenge the CPO. I can find no evidence to prove either supposition, however.

While De Stefano's challenge to confirmation was in progress, WCC's officers, Henderson's directors and De Stefano's representatives had continued the negotiations for the transfer of De Stefano's land, which I analysed in chapter eight. The three parties agreed terms for the transfer in November 2013⁵⁴ but, during the 'time-in-between' De Stefano's challenge

⁴⁹ John De Stefano owned a group of companies that held interests on the earmarked Winchester Development site. In chapters four and five, I discussed negotiations between Thornfield and De Stefano in which Thornfield sought to acquire De Stefano's land as a precursor to entering into a DA with WCC. In chapter seven, I explained that Henderson had carried these negotiations forward after it replaced Thornfield as developer, and that De Stefano's land formed a significant component of the land to be acquired through the exercise of WCC's CPO.

⁵⁰ *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 4207 (Admin).

⁵¹ Mr Elvin's profile refers to his specialisms on planning, environmental and compulsory purchase law (see <http://www.landmarkchambers.co.uk/david_elvin> accessed 2 March 2018). The Inspector's report produced at the conclusion of the CPO inquiry states that Mr Elvin had represented the Council at the inquiry (Christine Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, Annex A).

⁵² As noted in the law report of *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* (n50).

⁵³ The principal grounds were that the DA had been procured in contravention of EU procurement law and rules on state aid. I consider the state aid point briefly later in this chapter. In addition, De Stefano's representatives had argued at the CPO inquiry that WCC had made insufficient efforts to acquire land on the development site by negotiation and that the proposals set out in the DA would not form the basis of a 'viable' development. For a summary of the grounds raised on behalf of De Stefano at the CPO inquiry, see Thorby, *CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport. 17 December 2012 (Appendix B, Document 3.03)*, paragraphs 5.26-5.49.

⁵⁴ As discussed in *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* (n50) at [9].

and the date that the parties agreed the transfer, De Stefano had maintained his challenge to confirmation of the CPO. This shows that local authority officers and private sector developers are not the only participants in property-led development who deploy legal resources as a strategy. De Stefano's challenge was disruptive for both WCC and Henderson because it meant that confirmation of the CPO did not, of itself, discharge the site assembly condition in the Winchester DA. The site assembly condition would only be discharged when De Stefano's action concluded and no further challenge to confirmation of the CPO was possible.⁵⁵ More fundamentally, of course, a challenge to the legitimacy of the CPO threatened the usefulness of the principal instrument of land assembly.

To alleviate this threat, WCC's Head of Legal instructed Mr Elvin on 20 May 2013 to advise on the likelihood that De Stefano's challenge would be successful.⁵⁶ The Independent Review states that the Council's legal team did not report the details of Mr Elvin's advice to the Council's Cabinet but there are various possibilities as to how officers used his advice. If his advice had indicated that De Stefano had a good prospect of successfully challenging confirmation of the CPO, the Council's officers and Henderson's directors would have been compelled to strike a bargain for De Stefano's land on whatever terms were available. Alternatively, if Mr Elvin had indicated that De Stefano had a poor prospect of success, WCC's officers and Henderson's directors would have been able to hold out for a bargain for as long as they felt able to do so before needing to proceed with exercise of the CPO.

I have no information to indicate how Mr Elvin rated De Stefano's prospects of success, and do not want to dwell on this point because De Stefano eventually withdrew his challenge. A landowner who stands to lose their land following the confirmation of a CPO automatically qualifies as a person able to challenge confirmation,⁵⁷ although Denyer-Green suggests that there is 'considerable doubt' whether an individual who does not stand to lose any land can challenge confirmation.⁵⁸ It is therefore unlikely that, having agreed terms for the sale of his land,⁵⁹ De Stefano would have been successful had he continued his High Court action. The solicitors acting for De Stefano thus applied to the High Court on 29 October 2013 seeking an order adjourning his challenge.⁶⁰ Lindblom J, the High Court judge appointed to

⁵⁵ Schedule 2, paragraph 2.3 of the DA stated that the site assembly condition would be discharged when a CPO enabling the purchase of all the land interests required for the development had been confirmed and with 'any judicial challenge having been Finally Determined.'

⁵⁶ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 5.

⁵⁷ Barry Denyer-Green, *Compulsory purchase and compensation* (10th edn, Routledge 2014), 46.

⁵⁸ *ibid*, 46.

⁵⁹ As discussed in chapter eight.

⁶⁰ *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* (n50) at [5].

consider the application for an adjournment, initially rejected the application because of the proximity in time between the date of the application and the hearing of the matter, which was scheduled to take place on 14 and 15 November 2013.⁶¹

WCC's solicitors renewed the application for adjournment, however, supported by De Stefano's solicitors, at which point Lindblom J agreed to the adjournment⁶² because:

There are now draft sale and purchase agreements involving all of the parties. In those draft agreements both the principles of settlement and the relevant amounts of money have been agreed. The drafts are all in circulation. There is also a draft option agreement. That too is circulating between the parties.⁶³

The 'circulation' of these drafts is, therefore, indicative of a 'repeated pattern'⁶⁴ to the use of 'nearly legal' contractual documentation in the Winchester Development. The notion that these drafts were circulating is another example of a 'vehicular idea' that moves a process forward.⁶⁵ But Lindblom J was critical of the way that the three parties had used the court's resources. He pointed out that WCC's officers, Henderson's directors and De Stefano's representatives had concluded terms for the sale and purchase of De Stefano's land 'virtually at the last minute' before the court proceedings began⁶⁶ and that the adjournment would be 'damaging' to other parties with proceedings before the court because the court would be idle during the time set aside for the De Stefano challenge.⁶⁷ This suggests a 'sense of racing against the clock'⁶⁸ to get the transfer agreement into a state in which it was 'robust enough' to travel⁶⁹ to WCC's Cabinet and Council and to the court.

In addition, WCC, Henderson and De Stefano were racing against the clock to convince Lindblom J that travel from a 'nearly legal' state to a 'legally binding' state would be sufficiently likely to ensure that the parties would not seek to reopen proceedings. There was a clear financial imperative for WCC, Henderson and De Stefano in doing so because the costs of a court hearing, including the attendant costs of paying for barristers and solicitors to appear at court, would have escalated rapidly had court proceedings commenced. This provides

⁶¹ *ibid* at [2].

⁶² *ibid* at [18].

⁶³ *ibid* at [8].

⁶⁴ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 107.

⁶⁵ David Cowan and Daniel Wincott, 'Exploring the 'Legal'' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 26.

⁶⁶ *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* (n50) at [15].

⁶⁷ *ibid* at [14].

⁶⁸ Annelise Riles, '[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis' in Annelise Riles (ed), *Documents: artifacts of modern knowledge* (University of Michigan Press 2006), 86.

⁶⁹ Star and Griesemer, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39', 393.

another perspective on the way that ‘law’ creates time pressure in property-led development. Lindblom J’s emphasis on the circulating drafts evokes a sense of the contracting parties moving closer to a legally binding agreement but those parties were also using the draft documents to move the court to adjourn proceedings before the scheduled hearing took place.

Legal advice: Continuum or difference?

In this section, I revisit the changes to the Winchester DA that Henderson’s directors and WCC’s officers were negotiating while John De Stefano’s challenge to the CPO was in progress. In doing so, I examine how WCC’s preoccupation with achieving unconditionality on Henderson’s terms in time for the CPO Exercise Date exposed it to the threat of judicial review proceedings. I analyse the legal advice that WCC’s Head of Legal obtained to legitimise the proposed changes, and the grounds for the judicial review brought to challenge the changes.

The fear of litigation is an underlying theme of this chapter. At the first meeting of the ‘Silver Hill Informal Policy Group,’⁷⁰ on 12 April 2013, WCC’s Corporate Director informed the councillors present that ‘[l]egal advice will be sought at every stage to ensure that these [proposed changes] do not prejudice the Development Agreement.’⁷¹ The first external legal advice that WCC’s officers sought in relation to the proposed changes came from David Elvin QC on 13 January 2014.⁷² Mr Elvin’s advice did not refer to procurement issues but instead instructed the Council’s officers on the planning strategy to be adopted to enable the Council to support Henderson’s application for a new planning permission for the Winchester Development.⁷³ This advice did not, therefore, relate specifically to variations to the DA, so I do not propose to dwell on it here.

Of more interest here is advice that the Council obtained on procurement issues arising in relation to those variations. When WCC acquired De Stefano’s land, WCC’s officers and Henderson’s directors had agreed that the former would submit its official proposals for the variations to be made to the DA to the Council by 14 June 2014.⁷⁴ Cameron Fraser, one of Henderson’s directors, duly submitted those variations to Howard Bone, WCC’s Head of Legal,

⁷⁰ I introduced the Silver Hill Informal Policy Group in chapter eight. It was a group of WCC councillors appointed to advise on the Winchester Development. I refer to the group as ‘the Policy Group’ throughout the remainder of this chapter.

⁷¹ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 12 April 2013* (Appendix B, Document 1.26).

⁷² Lloyd-Jones, *A Perfect Storm - Report on Silver Hill* (Appendix B, Document 2.08), Appendix 4, 6.

⁷³ *ibid*, Appendix 4, 6.

⁷⁴ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 5 February 2014* (Appendix B, Document 1.31), item 4. Clause 5.1.3.1 of the DA required Henderson to make a formal application to the Council for approval to changes to the required elements in the DA.

on 12 June 2014.⁷⁵ WCC's Head of Legal then sought external advice from a barrister on the legal ramifications of these proposals, focussing upon questions whether the variations created 'any issue over state aid,'⁷⁶ would enable the Council to receive 'best consideration'⁷⁷ for the transfer of the development site to Henderson or, if the Council's Cabinet approved the variations, there would be a claim that the Council had contravened EU procurement law requirements.⁷⁸

When seeking that advice, as the Independent Review points out, WCC's Head of Legal had initially sought to instruct Nigel Giffin QC, the same barrister they had asked to advise them in 2010 when Henderson replaced Thornfield as developer and Thornfield Properties as guarantor in the DA.⁷⁹ But the author of the Independent Review raised concerns about the timeliness of the 2014 request that WCC's officers made to Mr Giffin.⁸⁰ I have already mentioned that, when WCC acquired De Stefano's land, WCC's officers and Henderson's directors agreed that Henderson would submit its proposals for variations to the DA by 14 June 2014.⁸¹ They had been discussing the variations necessary to the DA in advance of that submission but WCC's officers did not seek legal advice from Mr Giffin on the procurement law implications of the proposed variations until 25 May 2014.⁸² Mr Giffin was not available at such 'short notice,'⁸³ however, so WCC's officers turned to Paul Nicholls QC⁸⁴ instead and received his advice on 9 June 2014,⁸⁵ three days before Henderson submitted its finalised proposals for the Council's Cabinet to approve.⁸⁶ It is possible that WCC's officers left the moment at which they sought Mr Giffin's advice until late in the process because they were waiting for

⁷⁵ Winchester City Council, CAB2603. *Appendix 1. Letter from Cameron Fraser to Howard Bone (12 June 2014) (Appendix B, Document 1.34).*

⁷⁶ Winchester City Council, CAB2665. *Appendix 5. Notes of Conference with Leading Counsel. 9 June 2014 (Appendix B, Document 1.33)*, paragraph 23. Article 107(1) of the Consolidated Version of the Treaty of the Functioning of the European Union [2012] OJ C326/47 states that 'any aid granted by a Member State or through State resources' that favours one economic operator over others and that thus distorts competition will be incompatible with EU law. A transfer of local authority land at less than best consideration might, therefore, infringe this principle

⁷⁷ *ibid.*

⁷⁸ *ibid.*, paragraph 4.

⁷⁹ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 32.

⁸⁰ *ibid.*, 32.

⁸¹ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 5 February 2014 (Appendix B, Document 1.31)*, item 4.

⁸² Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 20.

⁸³ *ibid.*, 32.

⁸⁴ Mr Nicholls' profile explains that he specialises in employment, commercial and public law cases, including procurement cases (see <<https://www.matrixlaw.co.uk/member/paul-nicholls/>> accessed 2 March 2018).

⁸⁵ Winchester City Council, CAB2665. *Appendix 5. Notes of Conference with Leading Counsel. 9 June 2014 (Appendix B, Document 1.33).*

⁸⁶ Winchester City Council, CAB2603. *Appendix 1. Letter from Cameron Fraser to Howard Bone (12 June 2014) (Appendix B, Document 1.34).*

Henderson's directors to clarify aspects of their proposition. In such circumstances, it might be understandable to wait to ensure that the questions asked of a barrister are as comprehensive as possible. On the other hand, the sense of pressure before an impending deadline is not a novel idea and, in these circumstances, WCC's officers seem to have lost control of time, with the consequence that they also lost the opportunity to obtain advice from a barrister with detailed knowledge of the Winchester Development.

Regarding the state aid and best consideration points on which WCC's officers sought advice, Mr Nicholls advised that, 'provided appropriate consultants could certify that the scheme continued to provide "best consideration" [...], there was no issue over state aid.'⁸⁷ In doing so, Mr Nicholls was speaking the language of 'projectisation' that I have been analysing throughout this thesis. He did not examine the questions that WCC's officers asked of their consultants, or the way in which they used their consultants' advice, because, he explained, legal precedent merely required the Council's officers to have sought advice from specialist consultants.⁸⁸ As I pointed out in chapter nine, however, these were aspects of the Winchester Development to which Councillor Kim Gottlieb addressed strong criticism.⁸⁹ From Mr Nicholls' perspective, though, WCC's officers had discharged their duty to obtain best consideration and had not provided unlawful state aid to Henderson because they had a consultant's report certifying these things.

While Mr Nicholls' advice to WCC on the best consideration and state aid points was clear, his advice was more complex on the need for a competitive tender if WCC approved Henderson's required elements. Mr Nicholls advised that the removal of the bus station and affordable housing component from the DA would constitute 'material changes' for the purpose of procurement law⁹⁰ and so might trigger the need for a competitive tendering process by altering the original DA so substantially as to create an entirely new contract.⁹¹ Despite the materiality of the removal of the bus station and the affordable housing required elements, however, Mr Nicholls informed the Council that no tender was necessary because

⁸⁷ Winchester City Council, CAB2665. *Appendix 5. Notes of Conference with Leading Counsel. 9 June 2014 (Appendix B, Document 1.33)*, paragraph 23.

⁸⁸ As I pointed out in chapter nine, the recent High Court judgment in *R (Faraday Development Limited) v West Berkshire Council* [2016] EWHC 2166 (Admin), 168 Con LR 131 has indicated that a local authority will discharge its obligation to obtain 'best consideration' if it keeps that obligation 'well in mind' and instructs consultants to confirm that it has done so (at [30]).

⁸⁹ Winchester City Council, OS104. *Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*.

⁹⁰ Winchester City Council, CAB2665. *Appendix 5. Notes of Conference with Leading Counsel. 9 June 2014 (Appendix B, Document 1.33)*, paragraphs 8 and 10. I explained the significance of the term, 'material,' in chapter six.

⁹¹ *ibid*, paragraph 4. His advice on the other points was that those changes would not amount to 'material' alterations triggering a tendering process.

the variations clause, written into the DA at the time that the agreement was made, envisaged the possibility of this type of change to the required elements.⁹² Any such changes would, in Mr Nicholls's view, be deemed to be part of the performance of the DA, rather than an act creating a new DA.⁹³

On the specific question of the removal of the bus station from the required elements, Mr Nicholls advised that '[i]t would clearly be absurd to require the developer to provide something that the end-user did not want.'⁹⁴ Here, the end-user that Mr Nicholls had in mind was Stagecoach (South) Limited,⁹⁵ which had previously stated that it would operate a new bus station from the development site. Stagecoach had, however, subsequently informed Henderson's directors that it no longer wished to do so.⁹⁶ Mr Nicholl's reached these conclusions notwithstanding Henderson's earlier statement that removing the bus station, and so freeing space for a new anchor retail store, clearly made the DA more economically favourable to Henderson.⁹⁷

The author of the Independent Review has pointed out that Mr Nicholls's advice was 'out of step' with earlier advice that WCC's officers had received.⁹⁸ For example, when James Goudie QC advised WCC's legal team in relation to variations proposed in 2008 and 2009,⁹⁹ his advice did not present 'the variations clause as the savior [sic] of the variations issue for the Council.'¹⁰⁰ The phrase here is taken from the Independent Review and is awkwardly expressed but the point seems to be that Mr Goudie felt that the variations clause provided only limited scope for variations. If my interpretation is correct, this is in keeping with the tone of the advice that Nigel Giffin QC, in 2010, provided when he recommended that WCC and Henderson should 'standstill' for six months following Henderson's acquisition of Thornfield.¹⁰¹

⁹² Clause 5.1.3 of the DA stated that WCC had 'absolute discretion' whether or not to approve any changes to the required elements.

⁹³ Winchester City Council, CAB2665. *Appendix 5. Notes of Conference with Leading Counsel. 9 June 2014 (Appendix B, Document 1.33)*, paragraph 5.

⁹⁴ *ibid*, paragraph 9.

⁹⁵ Hereafter referred to as 'Stagecoach.'

⁹⁶ As discussed, for example, in Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 1.5.

⁹⁷ As noted in Winchester City Council, PDC1012 - *Item 2 - Drop-In Application - 14/01913/FUL. 11 December 2014 (Appendix B, Document 1.45)*, paragraph 20.1.

⁹⁸ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 20.

⁹⁹ *ibid*, 20 and Appendix 4. This advice referred to the variations that I described in chapter seven. Using a series of supplemental agreements, WCC and Thornfield rewrote the mechanism for the grant of a lease to the developer on the development site and replaced the obligation to build affordable housing with an option to make a financial contribution to off-site provision of affordable housing (see Winchester City Council, CAB1739. *Silver Hill Winchester - Compulsory Purchase Order. Report of Head of Estates. 18 November 2008 (Appendix B, Document 1.20)*).

¹⁰⁰ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 20.

¹⁰¹ As discussed in chapter six.

In doing so, Mr Giffin noted that the lack of any tendering exercise before the selection of Thornfield as developer ‘might make it harder to rely upon contract change mechanisms [...] in the original DA.’¹⁰²

The advice that WCC’s officers obtained between 2008 and 2010 indicated that the bolt-ons and adjustments then proposed to the DA would not trigger a tendering exercise because the changes did not amount to the formation of an entirely new agreement. In those circumstances, the ineffectiveness of the variations clause as a mechanism governing the changes had little practical significance if the changes amounted only to ‘immaterial’ amendments to the original DA. By contrast, the advice the Council received in 2014 from Paul Nicholls QC was that the changes proposed to the DA would create a new contract that would trigger a tendering competition but for the operation of the variations clause as a legitimising device.

Discontinuity in the legal advice that WCC received introduces a new and unexpected temporality to the Winchester Development. The lack of a competitive tender was, as I have indicated, a stress locked-in to the DA by the circumstances of its production. Procurement law requirements produced additional, episodic tension whenever WCC sought to rewrite the DA. WCC’s officers had, therefore, been repeatedly forced to open the content of the DA and changes proposed to it to external inspection. It is important to ask, therefore, why officers waited before obtaining advice on Henderson’s proposed changes, why they overlooked inconsistency in the 2014 advice compared with that obtained between 2008 and 2010, and how they used the advice to move the development process forward.

While the author of the Independent Review felt that WCC should have maintained the continuity of advice that it received in relation to the DA, WCC’s officers sought to preserve the continuity of its relationship with Henderson. At the special meeting of the Cabinet held to consider Henderson’s proposals, the Council’s Head of Legal made it clear that Henderson ‘would not go ahead’ with construction unless the Cabinet approved the changes.¹⁰³ BLP, the Council’s external solicitors, who were also present at that Cabinet meeting, advised that, if Henderson did not go ahead, WCC would have to ‘go back to the drawing board,’ tender for a new developer and make a new CPO.¹⁰⁴ Preserving the continuity of its relationship with

¹⁰² Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 4. I take the reference to ‘contract change mechanisms’ to refer to the variations clause.

¹⁰³ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 10 July 2014 (Appendix B, Document 1.38)*, 12.

¹⁰⁴ *ibid*, 11. The rationale for this statement was that a local authority must exercise a CPO within three years of the confirmation of a CPO (section 4, Compulsory Purchase Act 1965). If WCC had chosen to reject Henderson’s proposals and sought to terminate the DA on 1 June 2015, the Council would then have had only until March 2016 to find another developer to fund the exercise of the CPO.

Henderson was important to WCC because the DA was carrying around a significant investment of time and money as well as the mechanism for the exercise of the hard-won CPO. But it was also carrying around the burden of a set of required elements that Henderson deemed unworkable, a flawed procurement process and a deadline for WCC to consider and approve Henderson's proposed changes. This was the context in which WCC's officers sought Paul Nicholls QC's advice. These officers opened the proposals out to external expert analysis to confirm the legitimacy of proposals that Henderson's directors informed them would make the DA 'workable.'

Once Mr Nicholls's advice could be seen to confirm the 'legitimacy' of the Council's approach, WCC officers had an artefact¹⁰⁵ that they believed that they could use to move the development process forward. Despite the discrepancy between the earlier advice and that obtained in 2014, WCC's officers presented the latest advice as part of an assemblage¹⁰⁶ that, if taken together, justified changes to the DA and legitimised their recommendation that the Cabinet should approve Henderson's proposed variations.¹⁰⁷ But while the officers' emphasised the continuity in their recourse to legal advice, they did not acknowledge the discontinuity in the content of that advice. Given the time pressure created by seeking that advice close to the date on which the Cabinet would meet to consider Henderson's proposals, however, and given that WCC's officers were concerned not to lose the time and money invested in the Winchester Development to that point, it is not surprising that those officers recommended that the Cabinet should follow the advice that appeared most advantageous.

Falling foul of procurement law

In chapter nine, I provided a detailed analysis of the ways in which Councillor Kim Gottlieb sought to challenge the decision-making that led to WCC's officers recommending that the Council's Cabinet should approve the Henderson-led variations to the DA. Prior to Cabinet approval, granted on 6 August 2014,¹⁰⁸ Councillor Gottlieb's opposition had been

¹⁰⁵ Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012).

¹⁰⁶ Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 204; Nicholas Blomley, 'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133; Catriona Rooke, Emilie Cloatre and Robert Dingwall, 'The Regulation of Nicotine in the United Kingdom: How Nicotine Gum Came to Be a Medicine, but Not a Drug' (2012) 39 *Journal of Law and Society* 39, 43.

¹⁰⁷ Winchester City Council, CAB2603. *Silver Hill Regeneration. Report of the Silver Hill Officers Project Team. 7 July 2014 (Appendix B, Document 1.37)*, paragraph 7.2.

¹⁰⁸ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*.

voiced in internal Council proceedings,¹⁰⁹ the local press¹¹⁰ and online through the website his campaign group had established. Following Cabinet approval for the Henderson-led variations, however, Councillor Gottlieb's opposition became a 'legal' action.

There were two unusual features of Councillor Gottlieb's legal action. The first was that he was a representative of the majority group of councillors in WCC but challenged the decisions of a Cabinet led by his party colleagues.¹¹¹ The second, more significant, feature of Councillor Gottlieb's legal action was that he instructed the same solicitors as John De Stefano had used in his challenge to confirmation of the CPO.¹¹² These solicitors were, therefore, 'repeat players' in the Winchester Development, able to draw upon work previously carried out in challenging the WCC-Henderson development trajectory.¹¹³ Councillor Gottlieb's use of these solicitors was 'opportunistic'¹¹⁴ and enabled him to challenge non-compliance with procurement law as a means to prevent what he saw as a poorly negotiated deal for a development lacking architectural merit.¹¹⁵ His solicitors' ability to call upon existing work meant that they could revive pre-prepared arguments, with significant financial advantages for Councillor Gottlieb, who funded the costs of his legal action himself.¹¹⁶

This legal action took the form of an application to the High Court for a judicial review of the Cabinet decision of 6 August 2014, based on three grounds. Councillor Gottlieb was the claimant in the proceedings, WCC was the defendant and Henderson was joined to the proceedings as an 'Interested Party.'¹¹⁷ Councillor Gottlieb's application argued, mirroring the

¹⁰⁹ See, for example, Winchester City Council, *OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36)*.

¹¹⁰ As quoted, for example, in Duncan Geddes, 'Silver Hill developer TH Real Estate could be ditched by Winchester City Council at crunch vote tonight' *Hampshire Chronicle* (18 June 2015) <http://www.hampshirechronicle.co.uk/news/politics/13337919.Council_set_for_key_Silver_Hill_vote/> accessed 4 September 2017.

¹¹¹ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 26.

¹¹² *The R (Gottlieb) v Winchester City Council* (n14) and *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* (n50) law reports both list 'Dentons' as the respective claimants' solicitors.

¹¹³ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95, 125; Silbey, 'After legal consciousness', 325.

¹¹⁴ Mariana Valverde, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012), 88; Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 128.

¹¹⁵ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 6 August 2014 (Appendix B, Document 1.40)*, 7; Winchester City Council, *Minutes of the meeting of the Planning Committee held on 11 December 2014 (Appendix B, Document 1.43A)*, 5.

¹¹⁶ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 26.

¹¹⁷ Part 54 of the Ministry of Justice's Civil Procedure Rules (hereafter abbreviated to as the 'CPR') sets out the court rules for an application for judicial review and CPR 54.7 states that the claim form initiating a judicial review action must be served on both the claimant and any interested party. Henderson was joined to the proceedings through its ownership of Silverhill Winchester No 1 Limited, the developer for the purposes of the DA. An interested party intending to participate in a judicial

criticisms he presented to the Council's Overview and Scrutiny Committee on 7 July 2014¹¹⁸ and contrary to Paul Nicholls QC's advice,¹¹⁹ that the Council had not obtained 'appropriate' advice from its consultants and could not, therefore, show that the proposed variations enabled it to obtain best consideration for the transfer of its land.¹²⁰ If the Council could not show that the variations enabled it to obtain best consideration, Councillor Gottlieb argued, there was also a possibility that the contractual arrangements constituted state aid.¹²¹ These two grounds were founded on his personal criticisms of the decisions that WCC's officers had made. His third ground seems to have been the work of Dentons, his solicitors, and concentrated on procurement issues arising from the Cabinet decision of 6 April 2014.¹²²

A judicial review application consists of two stages. The second stage addresses the substantive issues raised in an application. The first stage, by contrast, involves a determination as to whether or not an applicant has 'permission' entitling them to have their application heard in the High Court.¹²³ Such permission will usually be granted or refused 'on the papers,'¹²⁴ meaning that a High Court judge will usually 'consider the question of permission without a hearing.'¹²⁵ The grounds for declining permission are generally that the

review action must serve an acknowledgement of service within 21 days (CPR 54.8). I can find no record of an acknowledgement of service by Henderson, although they did remain a party to the case heard at the High Court. The defendant to the action remained Winchester City Council, who instructed David Elvin QC to advise them in advance of the hearing and to represent them at the hearing. Henderson was not represented at the hearing (see *R (Gottlieb) v Winchester City Council* (n14)).

¹¹⁸ Winchester City Council, OS104. *Silver Hill Development Proposal. Report of Cllr Kim Gottlieb. 7 July 2014 (Appendix B, Document 1.36).*

¹¹⁹ Winchester City Council, CAB2665. *Appendix 5. Notes of Conference with Leading Counsel. 9 June 2014 (Appendix B, Document 1.33).*

¹²⁰ As stated in Winchester City Council, CAB2665. *Appendix 1. Order of Mr Justice Dove. CO/4150/2014. Undated (Appendix B, Document 1.42).*

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ CPR 54.4 states that a High Court judge must give 'permission' before a substantive hearing of a judicial review application can occur. Section 31(3) of the Senior Courts Act 1981 similarly states that '[n]o application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.' The use of the word 'leave' here serves the same purpose as the use of the word 'permission' in CPR 54.4.

¹²⁴ In *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 (HL) at 643-4, Lord Diplock explained that this involves 'a quick perusal of the material then available.'

¹²⁵ CPR Practice Direction 54A 8.2.

claim has no 'realistic prospect of success',¹²⁶ the claimant does not have 'sufficient interest' or standing to bring a claim¹²⁷ or that the claimant has filed their claim too late.¹²⁸

In August 2014, immediately after Councillor Gottlieb initiated proceedings, BLP, the Council's external solicitors, obtained advice from David Elvin QC on the Council's ability to defend its decision-making if Councillor Gottlieb's claim reached a substantive hearing.¹²⁹ The Council's Head of Legal reported the contents of that advice to Cabinet members in a meeting on 10 September 2014 and informed the members that a 'robust response, drafted by Leading Counsel, had been given by the Council to [...] Councillor Gottlieb's solicitors.'¹³⁰

Dove J, a High Court judge, considered the documents submitted pursuant to Councillor Gottlieb's application and, on 8 October 2014, refused to grant him permission to continue his application at a substantive hearing.¹³¹ Dove J did so because the documents submitted to the High Court indicated that WCC's officers had obtained 'professional advice' that was sufficient to discharge their duty to obtain best consideration and there was 'no identified evidential basis' that suggested that the variations to the DA amounted to state aid in favour of Henderson.¹³² On the procurement point advanced by Councillor Gottlieb, Dove J took a similar view to Paul Nicholls QC and concluded that the documents submitted to the High Court indicated that the variations agreed to the DA did substantially alter the original DA but were variations of a type that had been envisaged when WCC and Thornfield entered into the DA and were within the ambit of the variations clause in the agreement.¹³³ Consequentially, Dove J concluded that the variations did not trigger the need for a tendering exercise and that Councillor Gottlieb's claim had a low prospect of success.¹³⁴

On 15 October 2014, after Dove J had refused to grant Councillor Gottlieb permission to continue with his High Court action, BLP sought further advice from Mr Elvin to determine how the Council should proceed with the Winchester Development in light of a new

¹²⁶ *Sharma v Browne-Antoine* [2006] UKPC 57, [2007] 1 WLR 780 per Lords Bingham and Walker.

¹²⁷ See section 31(3) of the Senior Courts Act 1981. In the substantive hearing of Councillor Gottlieb's claim, Lang J concluded that Councillor Gottlieb had 'sufficient interest' in WCC's decision-making to warrant a High court hearing of his claim (see *R (Gottlieb) v Winchester City Council* (n14) at [151]-[152]). I will revisit this point, however, later in this chapter when I consider the aftermath of the *Gottlieb* judgment.

¹²⁸ CPR 54.4(1)(b) contains a general rule that a judicial review claim must be filed within three months. There was no question that Councillor Gottlieb's claim was out of time.

¹²⁹ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 8.

¹³⁰ Winchester City Council, *Minutes of the meeting of the Cabinet held on 10 September 2014 (Appendix B, Document 1.41A)*, item 11.

¹³¹ See Winchester City Council, *CAB2665. Appendix 1. Order of Mr Justice Dove. CO/4150/2014. Undated (Appendix B, Document 1.42)*.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.*

application for planning permission from Henderson.¹³⁵ Dove J's conclusion did not, however, defeat Councillor Gottlieb's application because CPR 54.12(3) allows an applicant who is refused permission 'on the papers' to request that the decision on permission be reconsidered in an oral, face-to-face hearing with a High Court judge. At that hearing, which took place on 24 November 2014, Lindblom J confirmed Dove J's refusal to grant Councillor Gottlieb permission to pursue his best consideration and state aid points but did grant Councillor Gottlieb permission to pursue the procurement point in a substantive hearing.¹³⁶ The substantive hearing of the procurement grounds raised in Councillor Gottlieb's application for judicial review were considered by Lang J in the High Court on 28 and 29 January 2015.¹³⁷ Lang J delivered her judgment on 11 February 2015.¹³⁸

The advice that Mr Elvin provided following Councillor Gottlieb's application for judicial review does not appear to have addressed the procurement issue that Councillor Gottlieb's application raised.¹³⁹ Following Lindblom J's decision to grant Councillor Gottlieb permission to pursue his judicial review action at a substantive hearing on the procurement point, BLP, the Council's external solicitors, recommended that the Council's legal team should seek the advice of Nigel Giffin QC, in his capacity as a procurement specialist.¹⁴⁰ WCC's Head of Legal did so, first on 5 December 2014 and secondly on 9 January 2015. In his advice, Mr Giffin warned that the case on the procurement ground was 'finely balanced' but that the Council 'still [had] an arguable case.'¹⁴¹ WCC's Head of Legal and BLP's solicitors had chosen to seek Mr Giffin's advice despite having instructed Paul Nicholls QC on the procurement point earlier in the year. Although they treated Mr Giffin as their preferred procurement adviser, however, the Council instructed Mr Elvin to represent them at the judicial review hearing,¹⁴² with Mr Giffin's advice intended to supplement the case that Mr Elvin would present to the court.¹⁴³

In her judgment following the High Court hearing, Lang J deemed that the Winchester DA was, at the time that WCC and Thornfield had entered into the DA, a 'public works contract' and a 'public works concession contract.'¹⁴⁴ Regarding the substitution of a

¹³⁵ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 9.

¹³⁶ Winchester City Council, CAB2665. *Appendix 2. Order of Mr Justice Lindblom. CO/4150/2140. 24 November 2014 (Appendix B, Document 1.43)*.

¹³⁷ *R (Gottlieb) v Winchester City Council* (n14).

¹³⁸ *Ibid.*

¹³⁹ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, Appendix 4, 9-11.

¹⁴⁰ *ibid.*, Appendix 4, 9.

¹⁴¹ *ibid.*, Appendix 4, 9.

¹⁴² *ibid.*, 24.

¹⁴³ *ibid.*, Appendix 4, 10-11.

¹⁴⁴ *R (Gottlieb) v Winchester City Council* (n14) at [40]-[44]. As I noted in chapter five, the relevant legislation at the time WCC and Thornfield agreed their DA was Council Directive 93/37/EEC of 14 June

department store for the provision of a bus station, Mr Elvin had submitted on behalf of the Council that this change would actually produce a 'negative' financial outcome for Henderson as a result of the costs of incentives to the likely tenant and so should not, therefore, be deemed to be a material variation to the original DA.¹⁴⁵ In dismissing this point, Lang J concluded that, notwithstanding the inducements that a developer pays to attract an anchor store, which I discussed in chapter eight, substituting a large department store for the bus station would have been likely to have had commercial advantages for a developer, and so constituted a material change to the DA.¹⁴⁶ As to the proposed changes to the affordable housing required elements, Mr Elvin submitted that these changes were a result of a request from planning officers in the Council rather than a developer-led change.¹⁴⁷ Lang J rejected this assertion and concluded that:

These terms were not varied at the behest of the planning authority. In reality, the position was that the Developer negotiated a reduction in the affordable housing requirements with the Council, both in its capacity as contracting party and planning authority.¹⁴⁸

Given that the removal of the required elements contributed to a reduction in Henderson's anticipated costs and an increase in its forecast profits, Lang J concluded that the change amounted to a material variation.¹⁴⁹

When asked to consider the 'materiality' of the extension to the Final Long Stop Date from 31 August 2014 to 1 June 2015,¹⁵⁰ however, Lang J differentiated between extensions bolted-on to a DA to move a Long Stop Date and rewritings of a DA to alter a 'terminations clause.' She noted that, while WCC's officers and Henderson's directors had moved the Final Long Stop Date in a way that undoubtedly 'benefited' Henderson by giving it more time to discharge the conditions, because the termination clause remained unamended, WCC retained a theoretical right to terminate the DA.¹⁵¹ My analysis of property-led development practice, as set out in chapter six, demonstrates that local authority officers and developers do agree Long Stop Dates with the expectation that those dates will change so, in that sense, Lang J's understanding of the operation of Long Stop Dates seems consistent with practice. However, the optional nature of the right to terminate means that a local authority must weigh the

1993 concerning the coordination of procedures for the award of public works contracts OJ [1993] L199/54 and the Public Works Contracts Regulations 1991 SI 1991/2680.

¹⁴⁵ *ibid* at [81].

¹⁴⁶ *ibid* at [82].

¹⁴⁷ *ibid* at [95].

¹⁴⁸ *ibid* at [95].

¹⁴⁹ *ibid* at [140].

¹⁵⁰ As discussed in chapter eight.

¹⁵¹ *R (Gottlieb) v Winchester City Council* (n14) at [110].

implications of severing a longstanding relationship against the costs of starting again. That is a balancing act to which I will return in the final section of this chapter.

Notwithstanding the ‘non-materiality’ of the extension to the Final Long Stop Date, Lang J stated that the combined effect of the Henderson-led variations to the DA meant that, while ‘the subject-matter of the contract remains the same, [...] the varied contract is materially different in character to the original contract.’¹⁵² On the scope of the variations clause as a mechanism justifying such extensive changes, she explained that a variations clause would only obviate the need for a tendering exercise if the clause in the original DA was sufficiently precise as to delineate the circumstances in which changes could be made and the range of possible modifications that were possible.¹⁵³ A variations clause of this type would, Lang J pointed out, enable a hypothetical bidder to understand the options that were available to it in the event that it was awarded the contract and it then sought to rewrite the terms of the original agreement. Even if the variations clause in the Winchester DA had provided for precisely defined adjustments, however, Lang J noted that variations that changed ‘the nature’ of an agreement would require a ‘fresh procurement process.’¹⁵⁴ In the absence of any such procurement process, Lang J determined that the Cabinet’s approval for Henderson’s variations was ‘unlawful.’¹⁵⁵

The time limits of technicalities: The CPO Exercise Date, the *Gottlieb* decision and the pursuit of unconditionality

A few weeks prior to the *Gottlieb* judicial review hearing, WCC’s planning committee had granted planning permission authorising construction of a development incorporating Henderson’s required elements.¹⁵⁶ WCC’s officers had, therefore, been continuing along the Henderson-led development trajectory notwithstanding the imminent hearing and Nigel Giffin QC’s warning that the case was ‘finely balanced.’ After Lang J’s decision, however, the Leader and the Deputy Leader of the Council resigned¹⁵⁷ and the new Leader, on 10 March 2015, commissioned the Independent Review into WCC’s decision-making processes.¹⁵⁸ At the same time, BLP, the Council’s external solicitors, sought Mr Giffin’s advice again, at which point he

¹⁵² *ibid* at [70].

¹⁵³ *ibid* at [117].

¹⁵⁴ *ibid* at [115].

¹⁵⁵ *ibid* at [142].

¹⁵⁶ As discussed in Winchester City Council, *Minutes of the meeting of the Planning Committee held on 11 December 2014 (Appendix B, Document 1.43A)*.

¹⁵⁷ Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*, 28.

¹⁵⁸ *ibid*, 3. I have touched upon criticisms that the independent review made throughout this thesis.

advised that the prospects of a successful appeal were between 30-40%,¹⁵⁹ which led the Council's Cabinet to decide not to seek to reopen proceedings.¹⁶⁰ Mr Giffin also advised, however, that the original DA remained in force despite the *Gottlieb* decision. This was because, Mr Giffin explained, the effect of Lang J's *Gottlieb* judgment was confined to the Cabinet's August 2014 decision to approve Henderson's variations.¹⁶¹

WCC's full Council passed a motion on 1 April 2015 recommending that the Cabinet instructed officers to terminate the DA on the passing of the Final Long Stop Date on 1 June 2015¹⁶² but Cabinet instead, on 15 April 2015, instructed the Council's officers to work with Henderson to make the pre-existing DA unconditional.¹⁶³ As a result, WCC's officers and Henderson's directors chose to act 'as if'¹⁶⁴ the DA in existence prior to those variations contained a programme of action enabling unconditionality to occur before the CPO Exercise Date. In justifying this approach, Cabinet members noted that Henderson's directors had informed officers that, following the *Gottlieb* judgment, it had reviewed its plans for the development and now felt that the 2009 planning permission and the required elements in the original DA did, after all, form the basis for a viable development.¹⁶⁵

Various statutorily-imposed deadlines, as well as deadlines internal to the DA, complicated the movement from the conditional phase of the development into unconditionality. The Secretary of State for Communities and Local Government had confirmed the Winchester CPO on 20 March 2013,¹⁶⁶ and WCC completed the acquisition of

¹⁵⁹ *ibid*, Appendix 4, 11.

¹⁶⁰ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 3 March 2015 (Appendix B, Document 1.45A)*, item 4 resolution 1.

¹⁶¹ Winchester City Council, CAB2700. *Silver Hill - Submissions by Silverhill Winchester No 1 Ltd and Council's Response. Report of Silver Hill Project Team. 13 July 2015 (Appendix B, Document 1.55)*, Appendix 5, 'Counsel Opinion – Nigel Giffin QC 15 May 2015.'

¹⁶² Winchester City Council, CAB2688. *Silver Hill - Notice of Motion from Council of 1 April 2015. Report of Corporate Director. 15 April 2015 (Appendix B, Document 1.50)*.

¹⁶³ Winchester City Council, *Minutes of the meeting of the Cabinet held on 15 April 2015 (Appendix B, Document 1.49)*, item 5 resolution 2.

¹⁶⁴ Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 173.

¹⁶⁵ Winchester City Council, CAB2695. *Silver Hill Update - Submission by Developer. Report of Silver Hill Project Team. 21 May 2015 (Appendix B, Document 1.52)*, paragraph 1.4.

¹⁶⁶ Department of Communities and Local Government and Department for Transport, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 - Confirmation Letter (20 March 2013) (Appendix B, Document 3.04)*. In chapter one, I explained the important distinction between a CPO that has been made, a CPO that has been confirmed and a CPO that has been or is being exercised.

John De Stefano's land¹⁶⁷ on 30 January 2014.¹⁶⁸ At the same time, WCC's officers and Henderson's directors agreed to move the Final Long Stop Date in the DA from 30 August 2014 to 1 June 2015.¹⁶⁹ While I have argued that a Long Stop Date in a DA functions less as a deadline and more as a moveable guideline for the desired Unconditional Date, I will now show that the date on which the Secretary of State confirmed the CPO created a different kind of time pressure.¹⁷⁰

The imposition of this deadline reveals some of law's temporalities, illustrating the way that legal rules might control the way local authority officers, councillors and developers experience the passage of time. The time limit for exercise of the CPO¹⁷¹ was, like the CPO itself, an 'artefact' of a legal process¹⁷² and a 'technicality.'¹⁷³ Its statutory underpinnings, however, meant that there was no scope for WCC's officers and Henderson's directors to bolt extensions on to the time limit for the exercise of the CPO.¹⁷⁴ By comparison, WCC and Henderson had agreed various extensions to the conditional phase of the Winchester Development, each effected through changes to the Final Long Stop Date in the DA. The time pressure of a statutory deadline fed the forward-facing temporal orientation¹⁷⁵ of the Winchester Development and generated actions from WCC's officers and Henderson's directors following Lang J's decision in *Gottlieb*.¹⁷⁶

In thinking through the temporality of the exercise of a CPO, it is helpful to recall Ricoeur's discussion of a narrative as a mechanism that guides 'complex action from an initial situation to a terminal one by means of rule-governed transformations.'¹⁷⁷ The CPO Exercise

¹⁶⁷ John De Stefano owned a group of companies that held interests on the earmarked Winchester Development site, set out in the plan contained in Appendix C to this thesis. In chapters four and five, I discussed negotiations between Thornfield and De Stefano in which Thornfield sought to acquire De Stefano's land as a precursor to entering into a DA with WCC. In chapter seven, I explained that Henderson had carried these negotiations forward after it replaced Thornfield as developer, and that De Stefano's land formed a significant component of the land to be acquired through the exercise of WCC's CPO.

¹⁶⁸ Winchester City Council, *Note of Silver Hill Members Informal Policy Group held on 24 October 2013* (Appendix B, Document 1.28).

¹⁶⁹ *ibid.*

¹⁷⁰ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act'.

¹⁷¹ I will call this the 'CPO Exercise Date.'

¹⁷² Helen Carr, 'Legal Technology in an Age of Austerity: Documentation, "Functional" Incontinence and the Problem of Dignity' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 216.

¹⁷³ Annelise Riles, 'A new agenda for the cultural study of law: Taking on the technicalities' (2005) 53 *Buffalo Law Review* 973.

¹⁷⁴ I mentioned these changes in chapters six, seven and eight of this thesis.

¹⁷⁵ Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016), 168; Mariana Valverde, 'Studying the governance of crime and security: Space, time and jurisdiction' (2014) 14 *Criminology & Criminal Justice* 379, 386.

¹⁷⁶ *R (Gottlieb) v Winchester City Council* (n14).

¹⁷⁷ Paul Ricoeur, *Memory, history, forgetting* (University of Chicago Press 2004), 243.

Date loomed over the action following Lang J's decision as a 'terminal' event that was both unrepeatable and governed by rules both internal to and outside the Winchester DA. This meant that WCC's officers and Henderson's directors could not 'decouple activities'¹⁷⁸ from the passing of time in the way that they had done when extending the conditional phase or when initiating the 'standstill period' that followed Henderson's replacement of Thornfield as 'the developer' for the purposes of the DA.

A local authority that chooses to exercise a CPO, must use one of two methods for doing so. Separate 'rules' govern each method. The first method is through service of a 'Notice to Treat' on each owner or occupier of the land to be acquired,¹⁷⁹ asking the owner or occupier to commence negotiations for compensation. Clause 10.2 of the Winchester DA 'carried around'¹⁸⁰ a script for the exercise of the CPO, favouring the second method, which is through a 'General Vesting Declaration.' The internal rules in the DA thus mingled with the statutory requirements for the making of a GVD.

The effect of the statutory rules is that a local authority seeking to acquire land by making a GVD must first serve notice of its intention to do so on all owners and occupiers of the land to be acquired.¹⁸¹ After a period of two months has elapsed from the date of service of the notice, the local authority can then make a GVD, at which point it must serve notice of the making of the GVD on all owners and occupiers.¹⁸² The GVD can then take effect no earlier than 28 days from the service of notice.¹⁸³ This requirement for pauses between the production of documents constructs the GVD procedure as a sequence of 'passing phases' designed to guide the GVD process to maturation.¹⁸⁴ If WCC and Henderson made a GVD, these hesitations would have had to be factored in to calculations around the exercise of the CPO before the CPO Exercise Date because there is conflicting case law as to whether or not a notice of intention to make a GVD will amount to the exercise of a CPO within the three year time limit imposed in section 4 of the Compulsory Purchase Act 1965.¹⁸⁵ On the basis of this inconsistency, it would appear to be prudent for a local authority to make a GVD before the

¹⁷⁸ Kevin K. Birth, *Objects of time: how things shape temporality* (Palgrave Macmillan 2012), 107.

¹⁷⁹ As set out in section 5, Compulsory Purchase Act 1965.

¹⁸⁰ Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 181.

¹⁸¹ See section 5, General Vesting Declaration Act 1981.

¹⁸² See section 6, General Vesting Declaration Act 1981.

¹⁸³ See section 4, General Vesting Declaration Act 1981.

¹⁸⁴ Nick Lee and Steven D Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 263. This is also akin to the 'ripening' process that Latour has described (Latour, *The making of law: an ethnography of the Conseil d'Etat*, 82.

¹⁸⁵ For a full discussion of this inconsistency in the case law, consider Denyer-Green, *Compulsory purchase and compensation*, 86.

passage of three years from the date of confirmation of the CPO. The Secretary of State for Communities and Local Government confirmed the Winchester CPO on 20 March 2013¹⁸⁶ so, if WCC assumed that the service of notice did not amount to exercise of the CPO, the Council needed to serve notice no later than 19 January 2016, before making the GVD in time for the 19 March 2016 deadline. If it failed to do so, the power to exercise the CPO would lapse.

Clause 10.2 of the Winchester DA was also important here, however, because it stated that Henderson could not compel WCC to make a GVD until the DA had become unconditional and, even if the Unconditional Date had occurred, until Henderson had deposited with the Council the funds required for the purchase of the land. The CPO Exercise Date was thus another of the 'unceasing' disciplinary techniques¹⁸⁷ at work during the Winchester Development. A CPO Exercise Date presents the possibility of a 'moment of accession'¹⁸⁸ at which WCC could take possession of the entire development site and, by the operation of the DA, at which Henderson could enter the site to commence construction.¹⁸⁹ To avoid the possibility that the CPO Exercise Date would pass, with the consequent loss, on that date, of the power to compulsorily purchase the land, Henderson's directors and WCC's officers had sought to revive the pre-existing required elements as the basis for a viable development proposition.

There was an element of farce to this performance, however. In advance of the judicial review hearing, three months prior to the Cabinet decision on 15 April 2015 to pursue unconditionality based on the pre-existing required elements, WCC's officers and Henderson's directors had insisted that those required elements were out-of-date and offered no workable basis for a completed development. Presenting a new and alternative view of the 'viability' of the pre-existing required elements served a short-term purpose for both WCC's officers and Henderson's directors, however. For Henderson's directors, a positive viability appraisal might have worked pre-emptively to stall any action by WCC to terminate the DA on the passing of the Final Long Stop Date, which stood at 1 June 2015. In addition, Henderson's directors sought to assure officers and councillors that they were proceeding with unconditionality based on the pre-existing DA.

¹⁸⁶ Department of Communities and Local Government and Department for Transport, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 - Confirmation Letter (20 March 2013)* (Appendix B, Document 3.04).

¹⁸⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991), 236.

¹⁸⁸ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 108.

¹⁸⁹ The grant of a long lease to the developer would only occur, as I pointed out in chapter six, on completion of construction. Once the site had been assembled and the DA had become unconditional, a licence from WCC to the developer would automatically take effect allowing the developer to enter WCC's newly-acquired land to commence construction.

In chapter seven, I explained that the ‘last’ condition to be discharged prior to unconditionality was the viability condition.¹⁹⁰ Prior to that, however, the developer could waive any other outstanding conditions,¹⁹¹ with the exception of the affordable housing and funding conditions.¹⁹² In July 2015, Henderson’s directors thus informed the Council of their intention to enter into a ‘legally binding’ agreement with a housing association¹⁹³ and a ‘legally binding’ agreement with a funder¹⁹⁴ as precursors to discharge of both conditions. To support this assertion, Henderson’s directors provided documents detailing the agreed heads of terms for the prospective agreements and exemplifying the ‘nearly legal’ status of them.¹⁹⁵ Henderson’s directors sought to strengthen their newly-adopted position further by obtaining a ‘draft letter’ from Stagecoach, the intended operator of the bus station now being planned, stating that Stagecoach would, notwithstanding contrary evidence submitted to the *Gottlieb* hearing,¹⁹⁶ run its services out of the bus station required in the original DA.¹⁹⁷ Alongside these submissions, Henderson’s directors also informed the Council that the pre-existing DA offered a workable basis for unconditionality because a viability appraisal obtained in May 2015 now indicated that a development incorporating the affordable housing, no department store and a smaller retail area would generate the requisite level of profitability to satisfy the viability condition.¹⁹⁸

The impending CPO Exercise Date caused a sense of time compression and a hint of desperation, forcing Henderson’s directors to attempt to pack a series of actions into a short timeframe.¹⁹⁹ WCC’s Cabinet had already ruled out an extension to the Final Long Stop Date as

¹⁹⁰ As stated in Schedule 2, paragraph 2.9 of the Winchester DA.

¹⁹¹ As stated in Schedule 2, paragraph of the Winchester DA.

¹⁹² In chapter eight, I explained that Henderson could not waive the affordable housing and funding conditions. Discharge of these conditions would only occur when, respectively, WCC approved the terms of the affordable housing agreement (as stated in schedule 2, paragraph 2.8 of the DA) and the funding agreement (as stated in schedule 2, paragraph 2.7 of the DA). The viability condition could only be discharged following discharge of the affordable housing and funding conditions (as stated in schedule 2, paragraph 2.9 of the DA).

¹⁹³ Winchester City Council, CAB2700. *Silver Hill - Submissions by Silverhill Winchester No 1 Ltd and Council's Response. Report of Silver Hill Project Team. 13 July 2015 (Appendix B, Document 1.55)*, paragraph 4.7.

¹⁹⁴ *ibid*, paragraph 5.4.

¹⁹⁵ Winchester City Council, CAB2695. *Silver Hill Update - Submission by Developer. Report of Silver Hill Project Team. 21 May 2015 (Appendix B, Document 1.52)*, paragraph 1.2.

¹⁹⁶ *R (Gottlieb) v Winchester City Council* (n14) at [77].

¹⁹⁷ Geddes, 'Silver Hill developer TH Real Estate could be ditched by Winchester City Council at crunch vote tonight'.

¹⁹⁸ Winchester City Council, CAB2695. *Silver Hill Update - Submission by Developer. Report of Silver Hill Project Team. 21 May 2015 (Appendix B, Document 1.52)*, paragraph 1.4.

¹⁹⁹ A concept that Grabham discusses in relation to a ‘compressed workweek’ (see Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law*, 145).

politically impossible²⁰⁰ but considered Henderson's submissions in relation to the affordable housing, funding and viability conditions and the bus station in a meeting on 13 July 2015, over six weeks after the passing of the Final Long Stop Date. Henderson had, therefore, successfully stalled any decision to terminate the DA. Given the enhanced scrutiny of Henderson's viability assumptions generated by Councillor Gottlieb's actions²⁰¹ and Councillor Gottlieb's own ongoing scepticism,²⁰² WCC's Cabinet agreed to appoint two consultancy firms to examine Henderson's viability appraisals.²⁰³ WCC documents suggest, however, that officers only asked these consultants to confirm that the appraisals demonstrated that the viability condition would be discharged.²⁰⁴ In such circumstances, there was little to be gained by instructing two consultants rather than one. Despite the obvious inconsistency in Henderson's positions on the question of viability, both consultants confirmed that the appraisal demonstrated potential profitability that would enable discharge of the viability condition.²⁰⁵

In addition to these submissions, from WCC's point of view a variety of factors mitigated against termination, particularly the inevitable passing of the CPO Exercise Date before the Council could find a new development partner, the loss of income from the licence fee that would follow unconditionality, the cost of maintaining buildings that the Council had acquired and a prolonged delay to regeneration of the development site.²⁰⁶ To gain an insight into a local authority's decision-making after the passing of a Long Stop Date, I asked some of my interviewees about termination of a DA. COU1 told me about a development that his local authority had worked on in which a developer had sought more time and the input of the local authority's money to alleviate viability concerns and to enable unconditionality to occur. The local authority had, COU1 explained, first sought to accommodate the developer by

²⁰⁰ See Winchester City Council, *Minutes of the meeting of the Cabinet held on 21 May 2015 (Appendix B, Document 1.51)*, item 12 resolution 4.

²⁰¹ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 13 July 2015 (Appendix B, Document 1.54)*, item 3 records submissions from members of the public querying the legitimacy of Henderson's latest viability assumptions.

²⁰² The officers' report to the Cabinet meeting on 13 July 2015 contained, as an appendix, a letter dated 10 July 2015 from Councillor Gottlieb's solicitors to WCC's Head of Legal seeking disclosure of Henderson's viability appraisal and threatening court proceedings to prevent WCC from expressing satisfaction with Henderson's viability assumptions or exercising the CPO (see Winchester City Council, *CAB2700. Appendix 3A. Letter from Dentons LLP to Howard Bone (10 July 2015) (Appendix B, Document 1.53)*).

²⁰³ Winchester City Council, *Minutes of the meeting of the Cabinet held on 15 April 2015 (Appendix B, Document 1.49)*, item 5 resolution 4.

²⁰⁴ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 13 July 2015 (Appendix B, Document 1.54)*, item 3.

²⁰⁵ *ibid*, item 3.

²⁰⁶ Winchester City Council, *CAB2700. Silver Hill - Submissions by Silverhill Winchester No 1 Ltd and Council's Response. Report of Silver Hill Project Team. 13 July 2015 (Appendix B, Document 1.55)*, 'Appendix 7 – Risk Management Table.' In total, the Council's 'risk register' listed 13 negative outcomes that were either 'likely' or 'highly likely' to emerge on termination of the DA.

assembling the necessary funds and extending the Long Stop Date but it then obtained the viability appraisal that the developer had cited as justification for the ongoing delay. The local authority instructed a consultant to review the developer's viability appraisal and that consultant concluded that the assumptions underpinning the developer's appraisal were unnecessarily pessimistic and designed to buy the developer time before unconditionality occurred. COU1 explained that officers challenged the developer on its assumptions and, when the developer refused to alter its conclusions, the local authority decided to terminate the DA.

According to PS1, termination is, however, always a 'brave decision' for a local authority. CON2, D1 and D4 each indicated that they would expect a local authority, using D4's phrase, to 'work very hard' to preserve an existing development relationship because most local authorities are reluctant to restart a development process that is already underway. COU1's description of termination stood out as an instance in which a local authority had decided, as he put it, that it had become 'unacceptable to wait.' By comparison, LA4 expressed incredulity in response to a question about termination and described a hypothetical exchange that might follow a decision to terminate:

When you've got a big developer, are you really going to actually insist that they've breached a condition and challenge them? Because you're going to be in court and you're going to spend a lot of lawyer's money and then the developers who might come in are going to think, "I'm not going to touch that _____ site because look what happened to DevCo." You won't get a developer if they know that the Council is going to be aggressive. So there'll be situations where you've got a breach but the harsh reality is that you won't enforce that.

WCC's officers had already spent 'a lot of lawyer's money' on the Winchester Development but warnings from BLP, the Council's external solicitors, outlined this 'harsh reality' to the Council's Cabinet. The minutes of the Cabinet meeting at which councillors considered Henderson's submissions on the viability of the pre-existing required elements record that one of BLP's solicitors advised that 'termination would be a significant and serious step'²⁰⁷ and that:

In light of the time and monies already invested in the scheme, his assessment was that the risk of litigation was high. Any litigation was likely to take a considerable period of time and involve significant costs.²⁰⁸

There is an interesting repetition of both time and money in this warning. Investing time and money in the Winchester Development was, according to WCC's solicitor, a desirable course of action unless that time and money was directed towards litigation challenging a developer's

²⁰⁷ Winchester City Council, *Minutes of the special meeting of the Cabinet held on 13 July 2015 (Appendix B, Document 1.54)*, item 3.

²⁰⁸ *ibid*, item 3. In their report to Cabinet on 6 August 2014, WCC's officers pointed also to the 'time delay and adverse property management implications' that would accrue from having to 'find another developer' (see Winchester City Council, *CAB2607. Silver Hill Affordable Housing Review. Report of Head of Estates and Head of Legal & Democratic Services. 6 August 2014 (Appendix B, Document 1.41)*, paragraph 5.2).

failure to progress with development according to a pre-agreed temporal framework. The same sense of foreboding about excessive cost and loss of an opportunity ran through LA4's cautionary tale, coupled to alarm about the prospects of restarting a development if the Council challenged its existing development partner. These factors all played into WCC's Cabinet's decision to support Henderson's promise to make the DA unconditional.

Out of time: termination of the Winchester DA

Before the Winchester DA could become unconditional, however, there was one more twist in the development trajectory. The Civil Procedure Rules enable an individual or organisation to seek permission to appeal a High Court judgment in a judicial review action.²⁰⁹ Earlier in this chapter, I mentioned that Henderson, through its ownership of Silverhill Winchester No1 Limited, was an 'interested party' to the *Gottlieb* judicial review.²¹⁰ Before the deadline for appeal, which fell on 4 March 2015,²¹¹ Hogan Lovells LLP, Henderson's solicitor, applied for and, on 11 November 2015, received permission to commence an appeal against Lang J's decision in a substantive Court of Appeal hearing.²¹² In granting permission, Lewison LJ, a Court of Appeal judge, noted that the practical consequences of Lang J's decision were 'obscure, to say the least.'²¹³ Amongst other things, Henderson's legal representatives had argued in their application to the Court of Appeal that Lang J's judgment had made it impossible for them to ascertain the extent of the changes to the DA that would be permissible if, for example, compliance with minimum standards for the design and construction of new buildings compelled alterations to the development proposals.²¹⁴ In addition, Lewison LJ noted

²⁰⁹ CPR 52.3(1).

²¹⁰ Henderson was thus entitled to appeal the High Court judgment because it could show that it was adversely affected by that judgment (see *MA Holdings Ltd v George Wimpey UK Ltd* [2008] EWCA Civ 12, [2008] 1 WLR 1649).

²¹¹ As reported in Winchester City Council, CAB2675. *Silver Hill - Review of Project Position. Report of Corporate Management Team, Head of Estates and Head of Legal & Democratic Services. 18 March 2015 (Appendix B, Document 1.48)*. A party seeking to appeal a judicial review decision must generally commence their appeal within 21 days from the date of the High Court's original judgment (see CPR 52.12(2)(b)).

²¹² Winchester City Council, CAB2752. *Silver Hill, Winchester - Situation Report and Assessment. Report of Corporate Director. 2 December 2015 (Appendix B, Document 1.57)*, paragraph 3.3; Winchester City Council, CAB2784. *Appendix 1. Letter from Hogan Lovells LLP to Berwin Leighton Paisner LLP (19 February 2016) (Appendix B, Document 1.62)*, paragraph 6.13.

²¹³ As quoted in Winchester City Council, CAB2784. *Appendix 1. Letter from Hogan Lovells LLP to Berwin Leighton Paisner LLP (19 February 2016) (Appendix B, Document 1.62)*, paragraph 6.13.

²¹⁴ Winchester City Council, CAB2755. *Silver Hill Regeneration - Status Report. Report of Silver Hill Project Management Team. 13 January 2016 (Appendix B, Document 1.60)*, paragraph 3.13. This report pointed out, however, that WCC's officers and legal advisers felt that Lang J's judgment in *R (Gottlieb) v Winchester City Council* (n14) did enable this type of change to the development proposals, suggesting that Henderson may have overstated their inability to ascertain the scope of change permissible to the DA. They may have done so to justify their reluctance to proceed with making the DA containing the pre-existing required elements unconditional.

that the question as to ‘whether Mr Gottlieb has a sufficient interest to bring the challenge at all is a serious point and is worthy of consideration by the full court.’²¹⁵ I discussed this sufficient interest issue earlier in this chapter and, following *R (Wylde) v Waverley Borough Council*,²¹⁶ Henderson’s legal representatives may have been successful in overturning Lang J’s decision in *Gottlieb* on that basis.²¹⁷

The possibility of a successful appeal placed the Cabinet decision of 6 August 2014, which had been overturned in the High Court, in a state of suspension but assisted Henderson because its directors had been unable to secure discharge of the affordable housing, funding and viability conditions in the DA. After presenting its proposals for discharge of the affordable housing and funding conditions to WCC in July 2015, Henderson’s directors had sought to maintain the currency of the DA by informing officers that it would take ‘6-10 weeks’ to convert the arrangements they had with the housing association and the funder into legally binding agreements capable of satisfying the conditions.²¹⁸ By the time Henderson obtained leave to appeal the *Gottlieb* decision, on 11 November 2015, those conditions had still not been discharged.²¹⁹ Henderson’s directors did, nonetheless, inform the Council that the affordable housing agreement was in a nearly legal state, requiring only the input of ‘lawyers [...] to finalise.’²²⁰ By comparison, however, getting the funding agreement to a nearly legal state had proven ‘more difficult,’²²¹ meaning that Henderson’s directors then informed WCC’s

²¹⁵ As quoted in Colin Ricciardiello, ‘Is There a Place for Judicial Review in Procurement Challenges?’ <<http://www.sharpepritchard.co.uk/files/resources/LCR%20procurement.pdf>> accessed 4 September 2017 and Winchester City Council, CAB2784. Appendix 1. Letter from Hogan Lovells LLP to Berwin Leighton Paisner LLP (19 February 2016) (Appendix B, Document 1.62), paragraph 6.13.

²¹⁶ [2017] EWHC 466 (Admin), [2017] ACD 57.

²¹⁷ In *R (Gottlieb) v Winchester City Council* (n14), Lang J had concluded that Councillor Gottlieb had sufficient interest in WCC’s decision-making because he was a ‘resident, council tax payer, and City Councillor’ who had expressed longstanding reservations about the way that WCC had conducted the development process (at [151]-[152]). *R (Wylde) v Waverley Borough Council* (n216) was a case that involved similar issues to those addressed in *Gottlieb* and considered Waverley Borough Council’s decision to amend a DA with a private sector developer without carrying out a tendering exercise. There were five claimants in *Wylde*, two of whom were members of the defendant council and the remainder of whom were local to the area and were council tax payers (at [9]). Dove J, the High Court judge considering the *Wylde* claim, suggested that Lang J had erred on the sufficient interest question in *Gottlieb* because only ‘economic operators,’ claimants who were ‘approximate to an economic operator’ and claimants who were ‘akin to or a proxy for [...] an economic operator’ could obtain permission to pursue a judicial review of a procurement issue (at [44]). Dove J thus concluded that none of the claimants in *Wylde* could be deemed to have a sufficient interest to be granted permission to have their case heard in the High Court (at [45]).

²¹⁸ Winchester City Council, *Minutes of the meeting of the Cabinet held on 13 January 2016* (Appendix B, Document 1.59), item 7.

²¹⁹ Winchester City Council, *Minutes of the meeting of the Cabinet held on 2 December 2015* (Appendix B, Document 1.56), item 8.

²²⁰ Winchester City Council, CAB2752. *Silver Hill, Winchester - Situation Report and Assessment. Report of Corporate Director. 2 December 2015* (Appendix B, Document 1.57), paragraph 1.3.

²²¹ *ibid*, paragraph 1.4.

officers that ‘they weren’t sure that they would be able to go unconditional in the near future’ on the basis of a DA containing the pre-existing required elements.²²²

With this in point in mind, and apparently hoping that its appeal would succeed, Henderson’s directors had effected another change in position and stated that it intended now to construct a development in line with the variations it had proposed to the required elements²²³ that Lang J had ruled unlawful.²²⁴ To facilitate this, in December 2015, Mike Sales, Henderson’s Managing Director, requested another pause or standstill in the Winchester Development, in the form of confirmation that WCC’s officers would agree not to recommend termination for a period of nine months while the *Gottlieb* appeal ran its course.²²⁵ A pause for nine months would have meant that unconditionality would not occur until August or September 2016. In addition, however, this would mean that unconditionality would not happen before the CPO Exercise Date, scheduled to fall on 19 March 2016. To prevent the loss of the opportunity to exercise the CPO, Mr Sales offered to enter into a series of agreements supplemental to the DA and the existing Compulsory Purchase Order Indemnity Agreement²²⁶ through which Henderson would agree to ‘underwrite all the costs and claims’ that the Council incurred in exercising the CPO, even if the Council incurred these costs prior to the Unconditional Date.²²⁷

The CPO Exercise Date, and the actions required to exercise the CPO before this cut-off point, was a legal technology that played a significant role in guiding decision-making at this point in the Winchester Development. On 10 February 2016, WCC’s Cabinet, however, took what PS1 called the ‘brave decision’ and resolved to terminate the DA on the grounds that

²²² Duncan Geddes, ‘More delays likely for Silver Hill scheme in Winchester as developer comes under fire’ *Hampshire Chronicle* (3 December 2015) <http://www.hampshirechronicle.co.uk/news/14122526.Silver_Hill__more_likely_to_be_delivered_by_Father_Christmas_than_Henderson_/?commentSort=score>.

²²³ As recorded in a letter from Henderson’s solicitors to the Council’s solicitor Winchester City Council, OS137. *Silver Hill Regeneration - Status Report. Report of Silver Hill Project Management Team. Appendix B. Letter from Hogan Lovells LLP to Berwin Leighton Paisner LLP (12 January 2016) (Appendix B, Document 1.58)*.

²²⁴ *R (Gottlieb) v Winchester City Council* at (n14) at [142].

²²⁵ Winchester City Council, CAB2755. *Silver Hill Regeneration - Status Report. Report of Silver Hill Project Management Team. 13 January 2016 (Appendix B, Document 1.60)*.

²²⁶ I discussed the Compulsory Purchase Order Indemnity Agreement in chapter seven. The purpose of this agreement was to set out the terms on which the developer would reimburse WCC for costs that the latter incurred in making, seeking confirmation of and exercising a CPO.

²²⁷ Winchester City Council, CAB2700. *Appendix 2. Letter from Mike Sales to Cllr Stephen Godfrey (22 December 2015) (Appendix B, Document 1.57A)*. In this letter, Sales also proposed that the Council utilised the notice to treat procedure that I described at the beginning of this chapter for exercise of the CPO, rather than the GVD procedure stipulated by the DA.

unconditionality had not occurred by 1 June 2015²²⁸ and that there was ‘no guarantee’ that either Henderson’s appeal would succeed or that the development would go ahead after the conclusion of the appeal.²²⁹ In addition, the Council had again sought and obtained legal advice from BLP, its external solicitors, suggesting that the risk of successful legal action challenging its decision to terminate was low because the Council had acted in ‘good faith’ in allowing Henderson additional time after the Final Long Stop Date to make the DA unconditional.²³⁰ On the basis that the Council had obtained land valuations indicating that the cost of exercising the CPO would be in the region of £35million and because it felt unable to fund the necessary compensation,²³¹ the Cabinet resolved also to allow the CPO to lapse.²³² In response, Hogan Lovells, Henderson’s solicitors, wrote to WCC’s solicitors threatening legal proceedings against the Council if the Council failed either to withdraw its notice to terminate the DA or to exercise the CPO before 19 March 2016.²³³ WCC did not, however, revoke its notice to terminate and did not exercise the CPO. After the CPO Exercise Date had passed, Henderson’s directors withdrew their challenge to the *Gottlieb* decision and their threat to seek a judicial review of WCC’s Cabinet decision to terminate the DA.²³⁴

Conclusion

The title of this chapter plays on the concept of legal action and I have considered the ways that individuals and groups acted with, and were acted upon by, ‘law.’ The role of law and legality is an undertheorized aspect of property-led development. My examination of legal

²²⁸ Winchester City Council, *Minutes of the meeting of the Cabinet held on 10 February 2016 (Appendix B, Document 1.61)*, item 5 resolution 1. Clause 24.1.1 of the DA stated that the notice period prior to termination taking effect was three months, meaning that the DA would remain in force until May 2015.

²²⁹ Winchester City Council, *CAB2755. Silver Hill Regeneration - Status Report. Report of Silver Hill Project Management Team. 13 January 2016 (Appendix B, Document 1.60)*, paragraph 8.3.

²³⁰ *ibid*, paragraph 10.4.

²³¹ Winchester City Council, *Minutes of the meeting of the Cabinet held on 13 January 2016 (Appendix B, Document 1.59)*, item 7.

²³² Winchester City Council, *Minutes of the meeting of the Cabinet held on 10 February 2016 (Appendix B, Document 1.61)*, item 5 resolution 2.

²³³ Winchester City Council, *CAB2784. Appendix 1. Letter from Hogan Lovells LLP to Berwin Leighton Paisner LLP (19 February 2016) (Appendix B, Document 1.62)*.

²³⁴ Winchester City Council, *Withdrawal of Silver Hill appeal by developer. Press release: 07/04/2016. (Appendix B, Document 2.8A)*. Since termination, WCC has sought to recover costs allegedly owed to it by Henderson (see Andrew Napier, ‘Council chasing £700,000 Silver Hill debt from developer’ *Hampshire Chronicle* (11 November 2016)

<http://www.hampshirechronicle.co.uk/news/indepth/silverhill/14881425.Council_chasing___700_000_Silver_Hill_debt_from_developer/> accessed 4 September 2017), retained the De Stefano land it acquired with Henderson (see Winchester City Council, *Minutes of the special meeting of the Cabinet held on 29 March 2016 (Appendix B, Document 1.63)*, item 7) and initiated development in the area around the Winchester bus station (see Winchester City Council, *Minutes of the Central Winchester Regeneration Informal Policy Group held on 8 November 2016 (Appendix B, Document 1.64)*).

processes in this chapter has shown how law and legality instil and sustain a sense of a development trajectory and are a component of the 'projectisation' of a development process.

At each stage in the Winchester Development at which the Council's development partner proposed changes to the Winchester DA, WCC's officers sought advice to confirm the legal consequences of the proposals. As the development progressed, WCC's officers presented that advice as, if taken together, a legitimising assemblage that validated their decision-making. There is a comparison that can be drawn here between the use of legal advisors and the use of property development consultants. In chapters seven and nine, I pointed out that a developer might use a consultant to produce a report legitimising changes proposed to a DA based on 'viability concerns.' My analysis in chapter nine also suggested that there might be circumstances in which developers and local authority officers seek advice from consultants when they want somebody to tell them what to think about property-led development. Legal advice in this chapter can be seen to serve a similar purpose, illustrated most clearly in the way that WCC's officers instructed third-party experts to provide assurance that they were doing the 'appropriate' thing and that their decisions would not face an external challenge. I noted, however, that these officers did not act upon inconsistencies in the legal advice that they received, and appear to have been unwilling to use legal advisors to challenge a developer's proposed development trajectory.

This chapter has also shown that some local authority officers struggle to determine the extent to which change in a property-led development process is permissible. But my research has demonstrated that expert legal professionals also struggle to specify the extent of permissible change. It appears that some developers might seek to exploit that uncertainty to secure changes to a development proposition that might amount to 'material' changes. In addition, and perhaps more unexpectedly, the Winchester Development shows how the role of law can be governed, at least in part, by the actions of outsiders. While Councillor Gottlieb's judicial review interrupted progress along the Henderson-led development trajectory, for example, Lang J's decision merely suspended Henderson's pursuit of unconditionality on its own terms. It did, however, preclude unconditionality before the CPO Exercise Date and this, eventually, rendered the DA useless for WCC and Henderson. No matter how much WCC and Henderson sought to reorder the content and temporal framework of their contractual arrangements prior to the CPO Exercise Date, the inevitable passage of time unravelled the cumulative acts of tightening that had preserved and perpetuated the currency of the DA.

The aftermath of the *Gottlieb* decision showcases the unravelling of a property-led development proposition. It reveals how a well-resourced, well-informed outsider, like Councillor Gottlieb, can challenge the assumptions underpinning a development process. But

the unravelling of the Winchester Development is also a case study of uncertainty. Following confirmation that the Henderson-led changes to the DA were unlawful, WCC had to choose whether to terminate the DA on the passing of the Final Long Stop Date, or to carry on with the pre-existing DA regardless of the attempts that the Council and Henderson had made to undermine its terms. WCC's officers again sought legal advice on this point, and that advice recommended that the pre-existing DA offered a 'lawful' basis on which to continue with the Winchester Development. However, the Council's eventual decision not to terminate, while simultaneously refusing to extend the Final Long Stop Date in the DA, laid bare the uncertainty that beset the Council.

Henderson, on the other hand, sought to preserve the DA and the land acquisition mechanism that it was carrying around and to recover the costs it had expended on the development.²³⁵ This suggests that Henderson's directors were desperate to proceed and anxious about the loss of a potentially profitable opportunity, and goes some way to overturning the assumption, most clearly demonstrated in their control over viability modelling techniques, that all the power in property-led development lies with the developers. Preserving the Winchester Development opportunity required a scarcely believable reversal of opinion by Henderson's directors that exposed the malleability of viability modelling. This change of direction involved a short-lived revival of the pre-existing required elements and, ultimately, a scrambling for position. After reaffirming their preference for the still unlawful variations to the DA, Henderson's directors sought to mobilise their company's ability to fund the land acquisitions required for the development to steer WCC towards exercise of the CPO. These manoeuvres occurred after the passing of the Final Long Stop Date in the Winchester DA but it was the passing of the CPO Exercise Date that triggered termination, not the highly fluid temporal arrangement of the DA. The passing of the CPO Exercise Date meant that, for both WCC and Henderson, the costs of preserving the currency of the DA exceeded the costs of terminating it. In a property-led development process driven by land acquisitions, viability concerns and the prospect of cost recovery, this meant that the Winchester DA was out of time.

²³⁵ Winchester City Council, CAB2700. Appendix 2. Letter from Mike Sales to Cllr Stephen Godfrey (22 December 2015) (Appendix B, Document 1.57A). The letter referred to costs amounting to £10million that Henderson had incurred in the Winchester development to that point.

Chapter 11

Conclusions

In this chapter, I draw my thesis to a close by answering the research questions that I raised in chapter one. When I began this research, I aimed to examine the contractual arrangements that local authorities and private sector developers deploy to facilitate property-led development. During my research, I refined my research design, methodology and research questions while retaining the same overall aim. The Actor-Network Theory (ANT) inspired research design¹ that I followed entailed a mixing of methods, incorporating a case study of a property-led development project in Winchester,² a small city located in the southeast of England, alongside 18 semi-structured interviews with property development professionals and local authority councillors.³ My case study involved an examination of the text of the Development Agreement⁴ that Winchester City Council⁵ entered into with its private sector development partner, an analysis of the wider network of contractual arrangements within which the Winchester DA was situated, extensive archival research and detailed documentary analysis of WCC committee meeting minutes and reports, correspondence and other materials produced in conjunction with the Winchester Development.⁶

I eventually settled upon four specific research questions, which were:

1. How did the contracting parties use the Winchester DA and the other contractual arrangements to assemble a development site, and what does this tell us about the role of law and legal technologies in property-led development?
2. Does 'time' function as an ordering device in property-led development and to what extent did the temporal framework set out in the Winchester DA and the other contractual arrangements shape the relations between the developer, the local authority and third-parties involved in or affected by the development process?
3. Were there other ways in which the Winchester DA plotted a trajectory for or otherwise scripted actions in the development process, and what does this reveal about the

¹ I explained my understanding of ANT in chapter two and my research approach in chapter three.

² For ease of reference, I have been referring to this development as 'the Winchester Development.' Appendix C to this thesis is a plan illustrating the site that Winchester City Council and its private sector development partner earmarked for the Winchester Development.

³ Appendix D is a table containing brief biographical details of my interviewees and the dates on which I met with them.

⁴ I have been abbreviating the term, Development Agreement, to 'DA' and continue to do so here. Appendix A explains how I obtained a copy of the Winchester DA.

⁵ Hereafter abbreviated to 'WCC.'

⁶ Appendix B is a numbered list of the primary source documents produced in conjunction with the Winchester Development to which I refer in this thesis.

approaches that developers, local authority officers, councillors and property development consultants take to property-led development?

4. How do developers, local authority officers, councillors and property development consultants regulate change within a property-led development project, and how did the development trajectory anticipated in the Winchester DA, and the temporal framework that the DA purported to impose, change during the development process?

I have presented the answers to these questions throughout this thesis, and have demonstrated why a developer and a local authority might use a DA to assemble a development site, and how a development trajectory anticipated in a DA might change.

The points that I discuss in this chapter offer a form of summation of the research project. The sections of this chapter revisit contractual arrangements, property-led development practices and socio-legal concepts discussed throughout this thesis. It is impossible, however, to recapture the complexity or the richness of the interactions, associations and connections formed, reshaped or severed during property-led development. What this chapter seeks to provide, therefore, is a brief restatement of the key findings. What this chapter seeks to avoid is too great a simplification of the complexities inherent to the network of contractual arrangements deployed in property-led development.

With these important caveats in mind, the first three parts of this chapter thus provide a succinct summary of the answers to the research questions. The fourth part then discusses my contributions to knowledge related to property-led development, ANT-inspired work on law and legal technologies, socio-legal research and law and time. The final part of this chapter considers the way that I carried out my research, explains why it was important to have carried out the project and discusses an agenda for future research.

Legal technologies in property-led development

My first research question asked how the Winchester DA and the other contractual arrangements deployed during the Winchester Development functioned as instruments of land assembly and what this tells us about law and legal technologies. The first issue to consider concerns land assembly, and my research has shown that, while the Winchester DA was an essential component of land assembly, the DA was merely one of a 'succession of a deals.'⁷ This network of contractual arrangements involved a complex interplay between both 'nearly legal' and 'legally binding' agreements. Although the purpose, content, form and effect of nearly legal and legally binding agreements varies greatly in property-led development, an

⁷ Fleur Johns, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391, 398.

example from the Winchester Development of each type of contractual arrangement is helpful to offer a flavour of my findings.

The land assembly process for the Winchester Development began with a ‘binding commercial agreement’⁸ between Thornfield Properties plc⁹ and Stagecoach (South) Limited,¹⁰ a major landowner on the site eventually earmarked for development. I obtained no definitive evidence indicating what it was that made this agreement ‘binding’ but took this to mean that the parties believed that it contained reciprocal obligations that would be enforceable in court. An examination of the way that Thornfield’s directors used its agreement with Stagecoach formed part of my discussion in chapters four and five, where I explained how this type of purportedly legally binding contractual arrangement might form part of a ‘pitch’ from a developer to a local authority to move the local authority first towards an Exclusivity Agreement¹¹ and then towards a DA with a developer. In those chapters, I referred to the theatricality of some of these pitches, and the points that I made highlighted the importance in property-led development of performances sustained through ‘signs and other discursive means.’¹²

Conceptualising legal technologies as part of a performance illuminates aspects of the role of a network of contractual arrangements. The sense of various performances taking place simultaneously was one of the recurring themes of my discussion, and provides an important insight into the way that local authority officers, private sector developers, councillors and property development consultants understood their role. Particularly striking was the way in which CON2 suggested that a developer must act like a ‘juggler,’ coordinating various moving parts and arranging their synchronised arrival at a chosen destination or event. CON4 conceptualised these moving parts slightly differently, and suggested that a developer is a ‘conductor’ tasked with arranging the performance of an entire orchestra.

Thinking about property-led development in these ways is helpful because it shows the importance of attending to the performance of the components of the property-led

⁸ Steve Tilbury, *The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council. 30 May 2012 (Appendix B, Document 3.05)*, paragraph 3.1.4.

⁹ As I explained in chapter one, Thornfield Properties plc was a property development company set up to pursue the development opportunity that Stagecoach (South) Limited presented when it sought a development partner to lead the redevelopment of a bus station in central Winchester. A subsidiary of Thornfield Properties plc, Thornfield Properties (Winchester) Limited, then entered a network of contractual arrangements with WCC to facilitate a property-led development project on the Winchester bus station and surrounding land. I refer to the development company as ‘Thornfield’ throughout this chapter.

¹⁰ Hereafter referred to as ‘Stagecoach.’

¹¹ Hereafter abbreviated to ‘EA.’

¹² Judith Butler, *Gender trouble: feminism and the subversion of identity* (Routledge 1990), 185.

development assemblage, including the network of legally binding and nearly legal contractual arrangements I described and analysed in this thesis. By examining this network of contractual arrangements, I demonstrated that some nearly legal land acquisition agreements operate as a type of 'vehicular idea'¹³ introduced to move a local authority towards an EA and a DA. This was a key finding because I repeatedly encountered imagery mixing temporal and spatial metaphors that invoked the concept of a 'journey' and the notion that property-led development involves 'transit' from one moment in property-led development to the next. Underpinning this imagery was another recurring theme, revealed in comments from some of my interviewees indicating that the developer is the 'driver' of the process, with nearly legal and legally binding contractual arrangements functioning both as stopping off points, moments for reappraising past actions and catalysts for further movement. By referring to interviews with D1, CON2 and LA4, I showed that this approach to generating actions from a local authority by lining up nearly legal and legally binding contractual arrangements is commonplace in property-led development practice.

In addition to the images of performance and movement that I discussed in the previous paragraphs, the impression of a developer and a local authority 'lining things up' appeared repeatedly during my research. For example, LA4 told me that an EA is simply 'the way you get to your Development Agreements' and D1 explained that an EA is a way of filling time between a decision to work with a local authority and the moment that the local authority agrees to a DA. Some of these interactions were initially hidden from view while I was conducting my research, like the phase of the Winchester Development during which Thornfield's directors repeatedly presented WCC's officers with nearly legal land acquisition agreements relating to land on the development site in the ownership of John De Stefano. Part of the reason for this performance was that Thornfield's directors appeared to have believed that these nearly legal agreements might provide the basis from which WCC's officers could obtain approval from the Council's Cabinet for a legally binding EA between WCC and Thornfield, to be entered into 'with a view to [then] entering into a Development Agreement.'¹⁴

The concept of a nearly legal agreement was thus important in this thesis. It was a term that I introduced in chapter four to refer to a contractual arrangement that has been the subject of negotiations and that one or other of the parties to the negotiations has presented

¹³ David Cowan and Daniel Wincott, 'Exploring the 'Legal'' in David Cowan and Daniel Wincott (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016), 26.

¹⁴ Matthew Bodley, *Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies. Letter from Michael Capocci to Steven Bee (28 May 2002) (Appendix B, Document 3.10.10).*

as on the threshold of becoming legally binding. The way that WCC's officers and Thornfield's directors used nearly legal agreements to instil a sense of an emerging development trajectory was striking, as was the way that they lined up nearly legal agreements to preserve that development trajectory later in the development process. Each new nearly legal or legally binding agreement that I encountered in this research was the product of land assembly efforts, as well as an instrument used to move land assembly efforts forward, and the Winchester DA was part of this continuum.

The Winchester Development and my interviews with D1, D4, CON2 and LA4 illustrate that a local authority and a developer will often only enter into a DA if parts of a planning framework are in place for development and if the developer has made some progress on land acquisitions. In addition, my analysis of the Winchester Development has demonstrated that a DA is usually a legal technology deployed both to compel a local authority to make a Compulsory Purchase Order¹⁵ and to enable that local authority to obtain confirmation at a public inquiry of the validity of that CPO. Consequently, a local authority intending to make and seek confirmation for a CPO needs, prior to entering into a DA, to be assured of a developer's commitment to fund the exercise of a CPO and either to commence or to fund the costs of construction on a development site.

However, interviews with D1, D2, D3, D4, CON2, CON3, LA2, LA4 and PS1 informed me that most DAs impose only a conditional obligation on a developer to fund the exercise of a CPO and either to commence or to fund the costs of construction. This conditional arrangement also existed for the purposes of the Winchester Development. The Winchester DA arranged the conditions to be discharged to enable these obligations to become 'binding' in a sequence necessitating, first, that the developer obtained a planning permission authorising the construction of various 'required elements.'¹⁶ To move through the sequence of conditions in the Winchester DA, WCC needed then to complete the land acquisitions deemed necessary to create a development site. To that end, the DA stipulated that the obligation to be imposed upon the developer to fund exercise of the CPO and either to commence or fund the costs of construction would not become unconditional until WCC had obtained confirmation for its CPO and could guarantee that it could transfer 'good title' to the land bundled together as the development site.¹⁷ Thereafter, the obligation on the developer to fund the exercise of the CPO and either to commence or fund the costs of construction was

¹⁵ Hereafter abbreviated to a 'CPO.'

¹⁶ 'The planning condition.'

¹⁷ Encapsulated in 'the site assembly condition,' 'the land appropriation condition' and 'the title condition.'

conditional on the developer producing a viability appraisal confirming that the development proposition would attain an agreed level of profitability.¹⁸ In between discharging these conditions, the developer needed to obtain a sufficient quantum of agreements for lease with prospective retail tenants of the retail units to be constructed,¹⁹ an order enabling the stopping up or rerouting of highways crossing the development site,²⁰ site surveys from consultant engineers confirming that no geological or environmental impediments existed on the site²¹ and agreements with a funding institution and an affordable housing provider to the effect that the former would finance parts of the costs of development and that the latter would manage the affordable housing to be constructed as part of the required elements.²²

D1 indicated that conditions such as the pre-letting condition in the Winchester DA would be included in a DA at the behest of a developer and are not always an essential component of a DA. He also explained that the quantum of retail space to be 'pre-let' would be determined by the developer and I showed that this figure is one that a developer often guards closely. Unless the pre-letting and other conditions had been discharged, however, the Winchester DA would not become unconditional, although it was open to the developer to waive the pre-letting, road closure, site survey, land appropriation and title conditions as precursors to unconditionality.

D1, CON2 and CON3 each discussed similar conditional DAs, and CON2 told me that these conditions mean that a DA 'is a bit of an option' for a developer in that the developer chooses whether or not to waive these conditions and can utilise the content of the conditions to control the rate of progress towards unconditionality. CON3 explained that most DAs are 'hugely conditional' and these comments revealed a lop-sidedness in the way that the contracting parties use the conditions in a DA. For the purposes of the Winchester Development, Thornfield's directors obtained a planning permission that Henderson UK Property Fund's²³ directors used, after their company replaced Thornfield as developer, to signify discharge of the planning condition and to help WCC's officers obtain confirmation for the Council's CPO. This was a significant finding because it enabled me to show the sense of progression through a succession of deals and pre-arranged actions that WCC's officers and

¹⁸ 'The viability condition.'

¹⁹ 'The pre-letting condition.'

²⁰ 'The road closure condition.'

²¹ 'The site survey condition.'

²² Respectively, 'the funding condition' and 'the affordable housing condition.'

²³ Henderson UK Property Fund replaced Thornfield as developer in 2010 after Halifax Bank of Scotland had placed Thornfield Properties plc into administration. Henderson UK Property Fund replaced Thornfield Properties plc as guarantor of the developer's obligations in the DA and acquired and changed the name of Thornfield. I use the shorthand, 'Henderson,' to refer to the developer after the demise of Thornfield's parent company.

Henderson's directors used to give the Planning Inspector appointed to confirm the CPO an important assurance. This assurance took the form of a series of statements to the effect that the Inspector could assume that the Winchester DA meant that construction would begin and that she could act 'as if'²⁴ Henderson's directors would both fund the exercise of the CPO and either commence construction or fund the costs of construction, despite the 'hugely conditional' nature of the DA.

My research shows, however, that Planning Inspectors should not always treat a conditional DA as a guarantee either that a local authority will exercise a CPO or that a developer will commence, or fund the costs of, construction. WCC did not complete the land assembly process in Winchester, and Henderson did not commence construction. Instead, what my analysis has revealed is that the movement towards unconditionality is something that a developer often seeks to delay if unconditionality would create expensive commitments to land assembly and construction that the developer judges to be excessively onerous.

What this also shows is that documents like planning permissions, CPOs and the viability appraisals used to measure likely profitability are a type of 'quasi-legal' technology in the sense that they are 'capable of producing law.'²⁵ By extension, the individual agreements for lease with individual tenants necessary to discharge the pre-letting condition, as well as the site survey reports to be produced in conjunction with the site survey condition, were 'quasi-legal' technologies. This is notable because a conditional DA will not generate a set of legally binding commitments unless 'suitable' planning permissions, CPOs, viability appraisals, and so on, have been produced. This demonstrates that the process through which a conditional DA becomes legally binding is contingent upon a developer's choices. A DA like the Winchester DA does not automatically become unconditional if a developer has obtained a suitable planning permission or if the local authority has obtained confirmation for a CPO, for example. Instead, my research has shown how a developer might exploit a pre-letting condition or manipulate a viability appraisal to delay the moment at which unconditionality occurs. This provides a new perspective on the 'emergence' of law and legality.²⁶

To what extent is 'time' a device used to order property-led development?

In the previous section, I addressed some of the metaphors that emerged in my analysis of property-led development. These metaphors help to illustrate how some local authority officers, councillors, developers and consultants understand property-led

²⁴ Annelise Riles, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011), 173; Johns, 'Financing as Governance', 399.

²⁵ Bruno Latour, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010), 75.

²⁶ David Cowan, 'Housing and Property' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010), 332.

development, and what they perceive to be the best way to do property-led development. One of those metaphors is the idea of 'transit.' In addition, my thesis has addressed ideas related to 'transition.' The concept of transit suggests a journey from one point to another, as discussed earlier in this chapter, while 'transition' suggests a process of change. In this thesis, I explained how local authority officers, councillors, developers and consultants understood the phases of property-led development as interlinked periods of transition during which aspects of a development proposition 'matured.' These findings applied particularly to the form, purpose and effects of the type of DA deployed for the Winchester Development.

Despite the inherent flexibility in the conditional nature of the agreement, which I discussed in the preceding section of this chapter, the Winchester DA anticipated the transition from conditionality to unconditionality through the concept of 'the Unconditional Date.' By incorporating a reference to a moment at which unconditionality would occur, the Winchester DA acquired some of 'the qualities' of time,²⁷ constructed the period between the date of the DA and the anticipated Unconditional Date as a 'passing phase,'²⁸ generated a 'sense of the forthcoming'²⁹ and promised imminent 'arrival.'³⁰ While my research has challenged the extent to which a DA actually does these things, these points relate to my second research question, which referred to the temporal framework in the Winchester DA and the function of 'time' as an ordering device.

My research showed that the temporal framework in the Winchester DA was complex, merging the sense of expectation surrounding the Unconditional Date and the function of a series of Long Stop Dates. These Long Stop Dates ostensibly served an instrumental purpose, confirming, for example, that the planning condition in the DA, to be discharged through the grant of a planning permission, was the 'first' condition to be discharged in that it needed to be discharged before the passing of a 'Planning Long Stop Date.' If the developer had not discharged the planning condition by the Planning Long Stop Date, the passage of time would have triggered a right in favour of both WCC and the developer to terminate the DA.

The Planning Long Stop Date was not the only Long Stop Date in the Winchester DA. The Winchester DA also contained a Final Long Stop Date, and the passing of that date would have triggered a right, in favour of both WCC and its development partner, to terminate the DA if the Unconditional Date had not occurred. D1, D2, D4, CON2 and CON3 each talked about

²⁷ Matthew S. Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012), 258.

²⁸ Nick Lee and Steven D Brown, 'The Disposal of Fear: Childhood, Trauma and Complexity' in John Law and Annemarie Mol (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002), 263.

²⁹ Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107, 113.

³⁰ *ibid*, 123.

DAs containing this type of Long Stop Date, and CON2 made comments that revealed the inherent inexactness to the way in which developers, local authority officers and their respective consultants set these Long Stop Dates. In chapters six to 10, I also examined the numerous circumstances in which WCC's officers, Thornfield's directors and Henderson's directors changed the Final Long Stop Date in the Winchester DA, with the effect that the Final Long Stop Date moved from 22 December 2009 to 1 June 2015. This suggests that the impression that some local authority officers, developers and consultants might try to convey of a carefully ordered process might not match the reality. In particular, these findings suggest that, rather than lining things up, the participants in a property-led development project are often making things up as they go along.

These points illustrated several important issues. First, my interviews with D1, D2, D4, CON2 and CON3 demonstrated that this form of fluid temporal framework is a common feature of this type of DA. Secondly, my examination of WCC committee meeting minutes and reports, and my discussions with D1, D4, CON2 and CON3 showed how willing some local authorities are to allow a developer more time to discharge conditions in a DA. This willingness seems often to arise out of a fear, expressed in some of WCC's committee meeting documents and in my interviews with LA4 and PS1, that a local authority that chooses to terminate a DA will thus present itself as unsympathetic to business and an investment risk. My analysis of the Winchester Development and my interviews with D1, D4, CON2 and CON3 revealed that developers and property development consultants consequently often assume that a developer will be allowed more time to make a DA unconditional because they know that most local authorities will be willing to wait.

Despite the fluidity inherent to the concept of being allowed more time, my findings have also shown that the temporal framework 'carried around'³¹ in a DA is an outcome of the tendency to perform property-led development in the 'image of projectness.'³² This is the idea that most types of development project should follow a sequence of chronologically chained actions and a predefined, linear trajectory encompassing segments and intervals during which important actions play out. As a function of this, some of my interviewees used engineering or mechanical metaphors to explain property-led development processes. For example, CON3 talked vividly about a DA as 'a governor on change,' which I understood to mean that a developer can use a DA to control the pace of the transition from conditionality to unconditionality. The impression of mechanical and automatic processes was strong throughout my analysis, and LA4 talked about 'a sort of standard template' for property-led

³¹ Emilie Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013), 181.

³² John Law, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002), 8.

development. The network of contractual arrangements that I encountered in this thesis was a component of these mechanical processes and a device to instil a sense of an 'autonomous logic'³³ to property-led development practice.

The contractual arrangements deployed in the Winchester Development also ostensibly divided these processes into a series of segments. The first segment consisted of an initial phase of feasibility testing and land acquisition before the parties signed an EA. The signing of an EA then initiated a 'legally binding' exclusivity period, the negotiation of a DA and further land acquisitions. A conditional phase followed the signing of the DA and an unconditional phase, during which construction took place, would have followed the Unconditional Date had that event occurred. This ordering produces an impression of property-led development arranged according to a sequence of milestones and 'monumental' events.³⁴

This neat subdivision is, however, only a partial reflection of what happens in property-led development. During the Winchester Development, there were significant overlaps in the action taking place before and after these apparent dividing lines, which suggest that it makes little sense to attempt to separate a property-led development into neat segments. For example, I explained that some of WCC's officers considered Thornfield to be 'the developer' before the two parties signed their EA. Similarly, I noted that WCC's officers had sought and obtained Cabinet approval for the use of compulsory purchase powers in support for the Winchester Development before they entered into their DA with Thornfield. Moreover, at the CPO inquiry in 2012, WCC's officers explained that the planning permission that Thornfield had obtained in 2009 provided the basis for a viable development project and presented that planning permission as if it had discharged the planning condition in the DA. This suggested that negotiations around the planning framework for the development had closed. After the CPO inquiry concluded, however, Henderson's directors sought to reopen that segment of the conditional phase. These points reflect the discrepancy between appearance and reality that ran through the Winchester Development.

Despite this discrepancy, the Winchester DA, the grant of a planning permission, confirmation of the CPO, and so on, did each offer a type of temporal marker signifying both the progress that had been made on the Winchester Development and the action that was still to come. Each of these sequential events had a 'ratcheting' effect³⁵ by making a reversal of progress through the phases seem impossible, although I have alluded to some of the ways that a developer might loosen that ratchet if they deemed it to be beneficial to do so.

³³ Johns, 'Financing as Governance', 393.

³⁴ Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act', 110.

³⁵ Bruno Latour, *We have never been modern* (Harvard University Press 1993), 71-2.

Nonetheless, this sequential alignment of contractual arrangements and quasi-legal technologies helps to address aspects of my third research question, which asked about the ways in which a DA 'plots'³⁶ or 'scripts'³⁷ action during property-led development. My observations in this thesis have shown that the Winchester DA reproduced the 'autonomous logic'³⁸ to which I have already referred and that the nearly legal and legally binding precursors had generated. D1 told me that a developer will seek to set the 'ground rules' for a DA and a property-led development process before entering into a DA, and these preliminary agreements help to do that. Thereafter, however, the temporal framework in a DA, heightening the sense of an 'all-encompassing flow'³⁹ and generating actions directed towards land acquisitions and the commencement of construction, can exacerbate the lop-sidedness inherent to property-led development. This could be seen most vividly in this research in the way that a developer can use the positioning of a viability condition as the 'last' condition to be discharged. In the Winchester Development, Henderson's directors used 'viability concerns' and their control of viability modelling techniques to threaten that unconditionality would not occur and so compel WCC's officers to seek Cabinet approval for the removal of affordable housing and a new bus station as a required element in the Winchester DA.

To complete my answers to the first, second and third research questions, I want to address another lop-sidedness apparent in the way that a DA like the Winchester DA plots or scripts action. This relates to the way that a DA might require a local authority to obtain confirmation of a CPO before unconditionality occurs. This arrangement enables a developer to gain the assurance that it will be able to assemble the land that it requires so long as it successfully obtains the funding needed to finance the exercise of a CPO. Confirmation of a CPO might thus be expected to function as a 'vehicular'⁴⁰ event, in the sense that it could be expected to move the development process forward. But my research has shown that this is not the case. After securing confirmation of a CPO, a local authority must often wait for a developer to assure itself that the development proposition is viable. At that point, a developer will tell its local authority partner whether or not to exercise the CPO. Until then, third-party landowners whose land will be taken through the operation of a CPO must also wait for the developer to decide if, and when, the local authority should exercise the CPO. These points illustrate the toothlessness of local authorities that are either unable to use their

³⁶ Paul Ricoeur, *Memory, history, forgetting* (University of Chicago Press 2004), 243.

³⁷ Madeleine Akrich, 'The De-Description of Technical Objects' in Wiebe E. Bijker and John Law (eds), *Shaping technology/building society : studies in sociotechnical change* (MIT Press 1992), 208; Riles, *Collateral knowledge: legal reasoning in the global financial markets*, 65.

³⁸ Johns, 'Financing as Governance', 393.

³⁹ Michelle Bastian, 'Political Apologies and the Question of a "Shared Time" in the Australian Context' (2013) 30 *Theory Culture & Society* 94, 110.

⁴⁰ Cowan and Wincott, 'Exploring the 'Legal'', 26.

own funds to finance land acquisitions or unwilling to take what PS1 called the 'brave decision' to terminate a DA. But these points also show how a DA can provide a form of comfort for a developer that is seeking to control the pace of property-led development processes.

Law and legal 'action'

My fourth research question asked specifically about change in a property-led development process, and how developers, local authority officers, councillors and property development consultants 'regulate' change. The discussion in the preceding paragraphs set out some of my findings in this regard, although this question also speaks to the interplay between internal and external rules. One aspect of 'change' in property-led development that I encountered in this thesis emerged in the way that a DA might be designed to allow the contracting parties to vary the terms of their contractual arrangements. Such changes have a clear temporal dimension when they involve the rewriting of past agreements and the rerouting of expected actions. But the perceived need for mechanisms enabling 'change' can produce a conflict between a DA that is 'plastic enough'⁴¹ to be adapted and 'robust enough'⁴² to fulfil the requirements of EU procurement law. A variations clause in the Winchester DA envisaged the possibility of adaptation but, when Thornfield's directors and then Henderson's directors sought to deploy these change mechanisms, WCC's officers had to instruct external lawyers to advise them on the extent of the adaptation that the clause allowed.

PS1 confirmed that the scope of change permitted by a variations clause is something that he would 'get the lawyers' to resolve. My research has shown, however, that 'legal action,' in whatever form it manifests, is protracted and expensive. One of the ways in which 'legal action' emerges in property-led development involves the interventions of human legal actors. In the Winchester Development, these interventions included reports that WCC's Head of Legal and Democratic Services presented to Council committee meetings, the correspondence related to land acquisitions between solicitors acting for Thornfield and John De Stefano, the advice that QCs provided to WCC's officers on EU procurement law, and the decisions of High Court judges in relation to court challenges in *R (Gottlieb) v Winchester City Council*⁴³ and *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government*.⁴⁴ Alongside these instances of law and legality emerging, there were various other outcomes of legal action, including, for example, the pauses that a QC

⁴¹ Susan Leigh Star and James R. Griesemer, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 *Social Studies of Science* 387, 393.

⁴² *ibid*, 393.

⁴³ [2015] EWHC 231 (Admin), [2015] ACD 74.

⁴⁴ [2013] EWHC 4207 (Admin).

introduced to the Winchester Development trajectory to reduce the perceived threat of a potential court challenge to the Winchester DA based on a possible breach of EU procurement law.

This previously unscripted pause reveals one of the ways that legal action can have a temporal dimension. A different but equally notable temporality emerged in the way that WCC's officers were forced continually to return to specialist lawyers to advise on the legality of changes to the DA that Thornfield's directors and Henderson's directors repeatedly proposed. WCC's officers also sought and obtained ongoing advice on the seriousness of 'stresses' locked into and carried around in the DA. There was a marked discontinuity, however, in the content of the advice that different QCs gave to WCC's officers and, in chapter 10, I explained how that discontinuity may have exposed the Council to the High Court decision against it in *Gottlieb*.⁴⁵

Legal action, and legal outcomes, did not flow solely from the interventions of human legal actors, however. The statutorily-imposed 'CPO Exercise Date,' which I discussed in chapter 10, was a form of 'legal action' and produced significant effects in the Winchester Development.⁴⁶ The CPO Exercise Date was the date by which WCC had to exercise its CPO. If it had not done so, it would lose its capacity to do so. This created a different temporal dynamic to that created by the Long Stop Dates in the Winchester DA because it was a deadline imposed by external statutory rules. Many of my findings have shown how a developer seeks to control a property-led development process but the action of these statutory rules and the concept of a CPO Exercise Date reveal why a developer is not omnipotent. In combination with the court-based 'legal action' initiated by Councillor Kim Gottlieb, a well-resourced 'opportunist'⁴⁷ and 'repeat player,'⁴⁸ the passing of the CPO Exercise Date rendered further progress on the Winchester Development unworkable. This suggests that successful disruption to an established development trajectory often depends on an alignment of circumstance and an opponent's capacity to marshal an unusual array of resources. But it also shows that a DA is, after all, predominantly an instrument that enables, and relies upon, the prospect of land

⁴⁵ *R (Gottlieb) v Winchester City Council* (n43).

⁴⁶ The ANT notion of an 'actor' incorporates any entity that makes a difference to a state of affairs or an ordering of associations (see, for example, John Law and Annemarie Mol, 'The Actor-Enacted: Cumbrian Sheep in 2001' in Carl Knappett and Lambros Malafouris (eds), *Material agency: towards a non-anthropocentric approach* (Springer 2008); Annemarie Mol, 'Actor-network theory: Sensitive terms and enduring tensions' (2010) *Kölner Zeitschrift Für Soziologie Und Sozialpsychologie* 253).

⁴⁷ Mariana Valverde, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012), 88; Hull, *Government of paper: the materiality of bureaucracy in urban Pakistan*, 128.

⁴⁸ Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95, 125; Susan S. Silbey, 'After legal consciousness' (2005) 1 *Annual Review of Law and Social Science* 323, 325.

assembly. The Winchester Development reveals that, if land assembly is no longer possible, a development opportunity encapsulated in a DA is no longer worth fighting for.

Contributions to knowledge: new encounters with a network of contractual arrangements

The findings summarised in the preceding section offer contributions to existing literature on property-led development, ANT and socio-legal studies. The most important contribution that my research makes is by addressing a gap in those literatures. In chapters one and two, I discussed socio-legal, town planning and urban studies research that has analysed property-led development. That scholarship has considered the processes through which a local authority and its private sector development partner go about assembling a development site out of the disparate land interests that exist in a given location.⁴⁹ My study of the Winchester Development, as well as the observations of my interviewees, adds a new perspective on land assembly.

Existing work on property-led development has also demonstrated how a local authority might collaborate with a private sector developer to instil 'a developer-led' sense of place upon a development site by granting planning permission, agreeing to exercise its compulsory purchase powers and transferring a long leasehold title to the land on a development site to a developer.⁵⁰ My research confirms that this model is still prevalent and, by analysing the Winchester Development and interviewing local authority officers, councillors, developers and property development consultants, I examined the interplay between planning permissions and CPOs, in particular. In doing so, I obtained novel findings about the way in which a planning permission functions as a precursor to a CPO and about the performance of both these things as 'quasi-legal' technologies.

Of more importance, however, is the way that my research scrutinised the expanding network of contractual arrangements, including a DA, brought into existence during property-led development. Opening these contractual arrangements to scrutiny offers a contribution to existing knowledge because I conducted a detailed analysis of a DA in a way that has not been done before. Valverde has called for scholars to devise strategies to 'pry' details of these contractual arrangements from local authority officers and developers.⁵¹ My research shows that a mixed methods research design can be effective in analysing the content of the network

⁴⁹ See Anna Minton, *Ground control: fear and happiness in the twenty-first-century city* (Penguin Books 2009); Antonia Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37 *Journal of Law and Society* 412; Debbie Becher, *Private property and public power: eminent domain in Philadelphia* (OUP 2014).

⁵⁰ Layard, 'Shopping in the Public Realm: A Law of Place', 415.

⁵¹ Valverde, *Everyday law on the street: city governance in an age of diversity*, 14.

of contractual arrangements commonly deployed in property-led development and in interrogating the way these contents work in practice.

My research offers more than just an examination of the content of a DA or an example of a strategy for conducting research into property-led development, however. I also examine the 'multilateral negotiations, trials of strength and tricks'⁵² that take place before and after a local authority and a developer enter into a DA. These elements of my research have enabled me to analyse the connections, associations and interactions that go into producing a 'legal' agreement. In doing so, my work supplements existing work in socio-legal studies, inspired by ANT, that has shown that law, and manifestations of law, are often contingent outcomes of gatherings of connections.⁵³

One of the connections to which I have pointed in my research is the connection between a conditional DA and a viability appraisal. I have examined the way that a DA is dependent for part of its 'legal' effect on documents such as viability appraisals and I have thus been able to add to the currently topical discussion on viability-led property development.⁵⁴ I have also used the work of John Law⁵⁵ to introduce the concept of 'projectisation' to explain the role of property development consultants in determining both when a property-led development project is 'viable' and when a DA is ready to become unconditional. This notion of a DA that becomes legally binding through a series of staged adaptations, bolt-ons, 'plugins'⁵⁶ and rewritings provides a new slant on Latour's examination of the way that 'legal' documents must sometimes be left to 'ripen.'⁵⁷

In addition to providing a greater understanding of the role of the viability appraisal and the transition from a conditional DA to an unconditional DA, this research has also

⁵² Michel Callon, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay' in John Law (ed), *Power, action, and belief: a new sociology of knowledge? Sociological Review Monograph* (Routledge & Kegan Paul 1986), 211.

⁵³ See, particularly, Cloatre, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa*, 29.

⁵⁴ Neil Crosby, Patrick McAllister and Paul Wyatt, 'Fit for planning? An evaluation of the application of development viability appraisal models in the UK planning system' (2013) 40 *Environment and Planning B - Planning & Design* 3; Brett Christophers, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 *International Journal of Urban and Regional Research* 79; Paul Watt and Anna Minton, 'London's housing crisis and its activism: Introduction' (2016) 20 *City* 204; Jerry Flynn, 'Complete control: Developers, financial viability and regeneration at the Elephant and Castle' (2016) 20 *City* 278; Patrick McAllister, Emma Street and Peter Wyatt, 'Governing calculative practices: An investigation of development viability modelling in the English planning system' (2016) 53 *Urban Studies* 2363.

⁵⁵ Law, *Aircraft stories: decentering the object in technoscience*. See also John Law and Valerie Singleton, 'Performing technology's stories - On social constructivism, performance, and performativity' (2000) 41 *Technology and Culture* 765.

⁵⁶ Bruno Latour, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005), 207.

⁵⁷ Latour, *The making of law: an ethnography of the Conseil d'Etat*, 82.

explored the general acceptance, seen most clearly in accounts of the manipulation of viability modelling techniques, that all the power in property-led development lies with the developers. Many of my findings have shown how developers might exert control over property-led development processes, and how the network of contractual arrangements might compel a local authority to project a 'can do' attitude towards a developer's requests. However, and somewhat unexpectedly, my examination of the Winchester Development revealed that there are moments that a developer becomes anxious, fears the loss of a development opportunity and becomes desperate for unconditionality to occur. My discussions with developers and property development consultants suggest that this loss of control, or at least a sense of a loss of control, might manifest more often than is expected.

My other contribution to existing literature is through my examination of temporal dynamics in property-led development. Anthropological and ANT-inspired studies of time have explained that the 'Western notion of time' rests upon an assumption that time flows from some form of originating moment and a complementary sense of humanity's progression towards a specific though temporally undefined endpoint.⁵⁸ I have studied the ways that the Winchester Development replicated a conception of linear progress from an originating moment along a carefully plotted development trajectory, encompassing a series of anticipated events, and culminating, at an undesignated future moment, in a constructed development. One of my contributions to research into property-led development and socio-legal studies comes from challenging the sense of a single originating moment in the Winchester Development, opening the 'time-in-between' anticipated events on the development trajectory, and questioning the extent to which progress along that trajectory is a matter that a developer or a local authority can control through the strategic deployment of legal technologies.

Another contribution that these findings offer to knowledge regarding law and time has been my demonstration that the network of contractual arrangements deployed in a property-led development process might produce a temporal scheme into which events can be absorbed through a series of scripted and, where necessary, unscripted pauses designed to allow contingencies, unexpected circumstances and actual or perceived threats to play out. A factor in this management of messiness was the way that the Winchester DA, in common with other DAs, enacted unresolved issues as a set of conditions to be addressed during a designated phase of the development process. Significantly, however, I showed that it will not always be possible for developers and local authorities to harness 'time,' conditionality,

⁵⁸ Carol J. Greenhouse, *A moment's notice: time politics across cultures* (Cornell University Press 1996), 35; David Scott, *Omens of adversity: tragedy, time, memory, justice* (Duke University Press 2014), 5; Latour, *We have never been modern*, 71-2.

transition and change to their advantage. The Winchester Development shows that a network of contractual arrangements will break apart when the passing of time triggers events that neither a developer, a local authority or their legal technologies can contain.

Reflections on an ANT-inspired research approach

In the final section of this chapter, I reflect on the methods that I chose and on the benefits of an ANT-inspired approach. The most notable feature of my approach was that my research involved a single case study. Moreover, the Winchester DA did not become unconditional and the Winchester Development did not culminate in a completed development. My focus on a single case study of a failed property-led development project might thus be perceived as a shortcoming of my approach. However, a detailed examination of a development that was not completed provided an opportunity to study the ways that human actors might attempt to keep a property-led development project moving. In addition, studying a failed development project meant that I could analyse the fluidity and capacity for change inherent to the legal technologies often deployed in property-led development as a matter of routine.

An ANT-inspired research approach requires in-depth scrutiny of the connections, associations and interactions out of which 'action' emerges. At the outset of my research, I intended to consider two case study examples and the DAs deployed in those settings. As I pointed out in chapter three, however, the richness and complexity of the nearly legal and legally binding contractual arrangements that I encountered while studying the Winchester Development meant that an analysis of the Winchester Development alongside another property-led development project would have exceeded the temporal and spatial constraints of a PhD thesis. This was partly a consequence of the detail available in relation to the Winchester Development. It was also partly a consequence of an ANT-inspired approach that compelled me to 'follow the actors' by examining the many and various inputs that went into the way the Winchester DA worked, what people did with the Winchester DA, and how the Winchester DA affected the materials, devices and processes active in the Winchester Development.

In chapters two and three, I explained that an ANT-inspired methodology favours an empirical approach to research questions, and I sought to achieve 'generalisable' findings through combining the knowledge that I gained from studying the Winchester Development with insights drawn from the transcripts of interviews that I carried out with property development professionals. This meant that the findings from my case study could be placed within a broader context. I was able to mine the data obtained from my interviews for revelatory insights about the way that the 'things' of property-led development shape the

behaviours of human actors. These interviews also complemented my case study because, even though the Winchester Development was a failed property-led development project, the developers, local authority officers, councillors and property development consultants who I interviewed had all been involved in projects in which the local authority and its development partner had completed the construction and land assembly process. This meant that the things I discovered about the Winchester Development could be compared with and analysed alongside practitioner accounts of standard property-led development practice.

The findings that I discussed throughout this thesis demonstrate that my mixed methods approach was successful in enabling me to draw out original contributions to knowledge about property-led development, the emergence of law and legality, the role of viability appraisals and the interplay between nearly legal and legally binding contractual arrangements. It is important to note, however, that the particular circumstances of the Winchester Development played a role in the extent to which information was available about that project. If Councillor Kim Gottlieb had not voiced his criticism of WCC's decision-making in Council meetings and, ultimately, in the High Court, it is unlikely that there would have been such rich information available to a researcher without access to the 'backrooms.'⁵⁹ Councillor Gottlieb's judicial review claim against the Council led directly to the commissioning of the Independent Review⁶⁰ into the Council's decision-making throughout the entire development process. That Independent Review proved to be a valuable source of information unlikely to be available in relation to all property-led development projects.

While serendipity thus undoubtedly played a part in this research, a realistic agenda for future research might involve a case study of a property-led development project that has recently concluded with a built development. This type of case study could serve a comparative purpose and provide an opportunity for further analysis of the temporal dynamics, the interplay of a network of nearly legal and legally binding contractual arrangements and the use of law and legal technologies to produce, perpetuate and sustain a development trajectory. An alternative, but nonetheless complementary, avenue for further research would be to conduct a more detailed analysis of the role of consultants in ordering relations between local authority officers, councillors and private sector property developers. This might examine the 'projectisation' of parts of a property-led development process in more detail. The findings that would be generated from either a case study of a completed development or a detailed examination of the role of consultants would add to the insights generated in this research because the interplay of human and nonhuman actors in property-

⁵⁹ Valverde, *Everyday law on the street: city governance in an age of diversity*, 14.

⁶⁰ Claer Lloyd-Jones, *A Perfect Storm - Report on Silver Hill (Appendix B, Document 2.08)*.

led development is an under-researched and under-theorised aspect of a highly topical issue. My case study is the only work of which I am aware that offers a detailed analysis of the temporal dynamics, the interplay of a network of nearly legal and legally binding contractual arrangements and the uses of law and legal technologies that form the underpinning for this type of project.

BLANK PAGE

Appendix A

Accessing copies of the Winchester Development Agreement

In chapter three of this thesis, I explained that I originally obtained a copy of the Winchester Development Agreement ('DA'), two deeds of variation and a supplemental deed used to amend the text of the DA from a webpage on Winchester City Council's website. That webpage provided a link to the Compulsory Purchase Order that the Council had made to facilitate land assembly for the Winchester Development. It also provided links to the documents that the Council submitted to the public inquiry held to consider the validity of that order. This included a link to the DA, the deeds of variation and the supplemental deed that I mentioned above.

The Council has since removed that webpage. However, the DA and the deeds of variation are still available for public access because the Council disclosed the documents in response to a request from a member of the public. That request, made on 12 August 2014, can be seen using the following link (https://www.whatdotheyknow.com/request/a_copy_of_the_contract_between_h), which I last accessed on 27 March 2018. The DA, each of the deeds of variation and the supplemental deed can be accessed through clicking links on that webpage. Details of the agreements and the URLs of the webpages on which they are available are set out in Appendix A. I have retained hard copies of these documents on file.

Table A.1

List of webpages providing copies of the Winchester DA, two deeds of variation and a supplemental deed [all last accessed 27 March 2018]

Development Agreement between (1) Winchester City Council (2) Thornfield Properties (Winchester) Limited (3) Thornfield Properties plc dated 22 December 2004

Part 1 <https://www.whatdotheyknow.com/request/224614/response/571513/attach/4/Development%20Agreement%20Part%201%202014%20redacted%20version.pdf>

Part 2 <https://www.whatdotheyknow.com/request/224614/response/571527/attach/3/Development%20Agreement%20Part%202%202014%20redacted%20version.pdf>

Part 3 <https://www.whatdotheyknow.com/request/224614/response/571527/attach/4/Development%20Agreement%20Part%203%202014%20redacted.pdf>

Part 4 <https://www.whatdotheyknow.com/request/224614/response/571530/attach/3/Development%20Agreement%20Part%204%202014%20redacted.pdf>

Deed of Variation to Development Agreement between (1) Winchester City Council (2) Thornfield Properties (Winchester) Limited (3) Thornfield Properties plc dated 22 October 2009

https://www.whatdotheyknow.com/request/224614/response/571531/attach/3/Deed%20of%20Variation%20to%20Development%20Agreement%201%20Redacted.pdf?cookie_passthrough=1

Deed of Variation to Development Agreement between (1) Winchester City Council (2) Thornfield Properties (Winchester) Limited (3) BNP Paribas Jersey Trust Corporation Limited and Anley Trustees Limited as trustees of the Henderson UK Property Fund dated 10 December 2010

<https://www.whatdotheyknow.com/request/224614/response/571531/attach/4/Deed%20of%20Variation%20to%20Development%20Agreement%202%20Redacted.pdf>

Supplemental Deed to Development Agreement between (1) Winchester City Council (2) Silverhill Winchester No 1 Limited (3) BNP Paribas Jersey Trust Corporation Limited and Anley Trustees Limited as trustees of the Henderson UK Property Fund dated 30 January 2014

https://www.whatdotheyknow.com/request/224614/response/571533/attach/3/Supplemental%20Deed%20to%20Development%20Agreement%20300114%20Redacted.pdf?cookie_passthrough=1

Appendix B

List of Winchester City Council committee meeting minutes and reports, other Winchester City Council documents and Compulsory Order documents referred to in this thesis

Table B.1 Winchester City Council committee meeting minutes and reports		
Document Number	Document Title	Date produced
1.01	'WDLP15. Broadway Friarsgate Planning Brief. Report of Director Development Services'	15 January 2003
1.02	'WDLP21. Broadway Friarsgate Planning Brief. Report of Director of Development Services'	29 May 2003
1.03	'Minutes of the meeting of the Cabinet held on 1 October 2003'	1 October 2003
1.04	'Minutes of the meeting of the Cabinet held on 11 February 2004'	11 February 2004
1.05	'Minutes of the meeting of the Cabinet held on 25 May 2004'	25 May 2004
1.05A	'Minutes of the meeting of the Cabinet held on 27 July 2004'	27 July 2004
1.06	'Minutes of the meeting of the Principal Scrutiny Committee held on 27 September 2004'	27 September 2004
1.07	'Minutes of the meeting of the Cabinet held on 6 October 2004'	6 October 2004
1.08	'CAB938. Broadway Friarsgate Development. Report of the Chief Estates Officer'	6 October 2004
1.09	'Minutes of the meeting of the Cabinet held on 15 December 2004'	15 December 2004
1.10	'CAB984. Broadway Friarsgate – Extension of Exclusivity Agreement. Report of Chief Estates Officer'	15 December 2004
1.11	'CAB1030. Broadway Friarsgate – Development Agreement. Report of Chief Estates Officer'	8 February 2005
1.12	'Appendix to CAB1030. Broadway Friarsgate – Development Agreement. Report of Chief Estates Officer'	8 February 2005
1.13	'PS202. Silver Hill Development Update Report. Report of Chief Estates Officer'	17 October 2005

1.14	'Minutes of the meeting of the Cabinet held on 12 December 2005'	12 December 2005
1.15	'CAB1179. Silver Hill Development Landowner's Approval. Report of Chief Estates Officer'	12 December 2005
1.16	'Minutes of the meeting of the Cabinet held on 13 April 2006'	13 April 2006
1.17	'Minutes of the meeting of the Planning Development Control Committee held on 27 March 2007'	27 March 2007
1.17A	'CAB1534. Silver Hill Winchester – Proposed Use of Compulsory Purchase Powers. Report of Head of Estates'	17 October 2007
1.18	'PDC768. Report of Head of Planning Control'	21 October 2008
1.19	'Minutes of the meeting of the Cabinet held on 18 November 2008'	18 November 2008
1.20	'CAB1739. Silver Hill Winchester – Compulsory Purchase Order. Report of Head of Estates'	18 November 2008
1.21	<i>Blank</i>	<i>Blank</i>
1.22	'Minutes of the meeting of the Cabinet held on 24 November 2010'	24 November 2010
1.23	'CAB2085. Silver Hill Regeneration Project – Latest Developments. Report of Chief Executive'	24 November 2010
1.24	'Minutes of the meeting of the Overview and Scrutiny Committee held on 18 March 2013'	18 March 2013
1.25	'Minutes of the meeting of the Cabinet held on 10 April 2013'	10 April 2013
1.26	'Note of Silver Hill Members Informal Policy Group held on 12 April 2013'	12 April 2013
1.27	'Note of Silver Hill Members Informal Policy Group held on 9 July 2013'	9 July 2013
1.28	'Note of Silver Hill Members Informal Policy Group held on 24 October 2013'	24 October 2013
1.29	'Minutes of the special meeting of the Cabinet held on 4 November 2013'	4 November 2013

1.30	'Minutes of the meeting of the Council held on 6 November 2013'	6 November 2013
1.31	'Note of Silver Hill Members Informal Policy Group held on 5 February 2014'	5 February 2014
1.32	'Note of Silver Hill Members Informal Policy Group held on 9 April 2014'	9 April 2014
1.33	'CAB2665. Appendix 5. Notes of Conference with Leading Counsel'	9 June 2014
1.34	'CAB2603. Appendix 1. Letter from Cameron Fraser to Howard Bone'	12 June 2014
1.35	'Minutes of the meeting of the Overview and Scrutiny Committee held on 7 July 2014'	7 July 2014
1.36	'OS104. Silver Hill Development Proposal. Report of Cllr Kim Gottlieb'	7 July 2014
1.37	'CAB2603. Silver Hill Regeneration. Report of the Silver Hill Officers Project Team'	7 July 2014
1.38	'Minutes of the special meeting of the Cabinet held on 10 July 2014'	10 July 2014
1.39	'Minutes of the meeting of the Council held on 16 July 2014'	16 July 2014
1.40	'Minutes of the special meeting of the Cabinet held on 6 August 2014'	6 August 2014
1.41	'CAB2607. Silver Hill Affordable Housing Review. Report of Head of Estates and Head of Legal and Democratic Services'	6 August 2014
1.41A	'Minutes of the meeting of the Cabinet held on 10 September 2014'	10 September 2014
1.42	'CAB2665. Appendix 1. Order of Mr Justice Dove. CO/41500/2014'	October 2014
1.43	'CAB2665. Appendix 2. Order of Mr Justice Lindblom. CO/4150/2140'	24 November 2014
1.43A	'Minutes of the meeting of the Planning Committee held on 11 December 2014'	11 December 2014
1.44	'PDC1012 – Item 1 – Section 73 Application – 14/01912/FUL'	11 December 2014
1.45	'PDC1012 - Item 2 - Drop-In Application - 14/01913/FUL'	11 December 2014

1.45A	'Minutes of the Special Meeting of the Cabinet held on 3 March 2015'	3 March 2015
1.46	'CAB2665. Silver Hill – Judicial Review Decision. Report of Chief Operating Officer – As Monitoring Office'	3 March 2015
1.47	'Minutes of the meeting of the Cabinet held on 18 March 2015'	18 March 2015
1.48	'CAB2675. Silver Hill – Review of Project Position. Report of Corporate Management Team, Head of Estates and Head of Legal and Democratic Services'	18 March 2015
1.49	'Minutes of the meeting of the Cabinet held on 15 April 2015'	15 April 2015
1.50	'CAB2688. Silver Hill – Notice of Motion from Council of 1 April 2015. Report of Corporate Director'	15 April 2015
1.51	'Minutes of the meeting of the Cabinet held on 21 May 2015'	21 May 2015
1.52	'CAB2695. Silver Hill Update – Submission by Developer. Report of Silver Hill Project Team'	21 May 2015
1.53	'CAB2700. Appendix 3A. Letter from Dentons LLP to Howard Bone'	10 July 2015
1.54	'Minutes of the special meeting of the Cabinet held on 13 July 2015'	13 July 2015
1.55	'CAB2700. Silver Hill Update – Submission by Developer. Report of Silver Hill Project Team'	13 July 2015
1.56	'Minutes of the meeting of the Cabinet held on 2 December 2015'	2 December 2015
1.57	'CAB2752. Silver Hill, Winchester – Situation Report and Assessment. Report of Corporate Director'	2 December 2015
1.57A	'CAB2755. Appendix 2. Letter from Mike Sales to Cllr Stephen Godfrey'	22 December 2015
1.58	'OS137. Silver Hill Regeneration – Status Report. Report of Silver Hill Project Management Team. Appendix B. Letter from Hogan Lovells LLP to Berwin Leighton Paisner LLP'	12 January 2016
1.59	'Minutes of the meeting of the Cabinet held on 13 January 2016'	13 January 2016
1.60	'CAB2755. Silver Hill Regeneration – Status Report. Report of Silver Hill Project Management Team'	13 January 2016

1.61	'Minutes of the meeting of the Cabinet held on 10 February 2016'	10 February 2016
1.62	'CAB2784. Appendix 1. Letter from Hogan Lovells LLP to Berwin Leighton Paisner LLP'	19 February 2016
1.63	'Minutes of the special meeting of the Cabinet held on 29 March 2016'	29 March 2016
1.64	'Minutes of the Central Winchester Regeneration Informal Policy Group held on 8 November 2016'	8 November 2016

Table B.2 Other Winchester City Council documents and miscellaneous documents		
Document Number	Document Title	Date produced
2.01	'Central Winchester Study. Final Report' (referred to as 'the Llewelyn-Davies Report')	November 1997
2.02	'Draft Broadway Friarsgate Planning Brief'	2003
2.03	'Adopted Broadway Friarsgate Planning Brief. Part 1 – Development Objectives'	Undated (published 2003)
2.04	'Adopted Broadway Friarsgate Planning Brief. Part 2A – Background and Analysis'	Undated (published 2003)
2.05	'Adopted Broadway Friarsgate Planning Brief. Part 2B – Background and Analysis Cont'd'	Undated (published 2003)
2.06	'Adopted Broadway Friarsgate Planning Brief. Part 3 – Design Framework'	Undated (published 2003)
2.07	'Grant of Planning Permission. Case: 06/01901/FUL'	9 February 2009
2.08	'A Perfect Storm – Report on Silver Hill' (referred to as 'the Independent Review')	January 2016
2.08A	'Withdrawal of Silver Hill appeal by developer. Press release: 07/04/2016'	7 July 2016
2.09	'Constitution of the City Council – Part 1 – Summary and Explanation'	26 February 2018
2.10	'Constitution of the City Council – Part 2 – Articles of the Constitution'	26 February 2018
2.11	'Constitution of the City Council – Part 3A – Responsibility for Functions'	26 February 2018
2.12	'Constitution of the City Council – Part 3B – Scheme of Delegation to Officers'	26 February 2018
2.13	'Constitution of the City Council – Part 4 – Overview and Scrutiny Procedure Rules'	26 February 2018
2.14	'Constitution of the City Council – Part 7 – Management Structure'	26 February 2018
2.15	'Winchester Silver Hill. A Vibrant City Centre' – Henderson publicity brochure	September 2014

Table B.3 Documents produced in conjunction with the Winchester Compulsory Purchase Order		
Document Number	Document Title	Date produced
3.01	'The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011'	21 November 2011
3.01A	'Map referred to in the Winchester City Council (Silver Hill) Compulsory Purchase Order 2011'	21 November 2011
3.02	'The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Statement of Case'	22 March 2012
3.03	'CPO Report to the Secretary of State for Communities and Local Government; SUO Report to the Secretary of State for Transport'	17 December 2012
3.04	'The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011 – Confirmation Letter'	20 March 2013
Proofs of Evidence presented to the CPO Inquiry		
3.05	'The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Steve Tilbury, Corporate Director, Winchester City Council'	30 May 2012
3.06	'Proof of Evidence of Martin Perry. Silverhill, Winchester'	6 June 2012
3.07	'Proof of Evidence of Martin Perry. Appendices. Silverhill, Winchester'	6 June 2012
3.08	'Proof of Evidence of Martin Perry. Financial Viability Rebuttal. Silverhill, Winchester'	15 June 2012
3.09	'Proof of Evidence of Matthew Bodley. On matters related to compulsory purchase'	25 May 2012
3.10	'Proof of Evidence of Matthew Bodley. Appendix 10. Extracts of correspondence relating to London and Henley group of companies'	25 May 2012
3.10.01	Letter from John De Stefano to Karen Hawes (22 May 1998)	
3.10.02	Letter from Karen Hawes to John De Stefano (26 August 1998)	
3.10.03	Letter from Karen Hawes to John De Stefano (2 December 1998)	
3.10.04	Letter from Karen Hawes to John De Stefano (26 February 1999)	
3.10.05	Letter from John De Stefano to Karen Hawes (3 March 1999)	

3.10.06	Letter from Bond Pearce Solicitors (on behalf of Thornfield Properties plc) to John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) (31 March 1999)
3.10.07	Letter from John De Stefano to Andrew Sanderson (15 December 2000)
3.10.08	Letter from Andrew Sanderson to John De Stefano (20 July 2001)
3.10.08A	Letter from Michael Capocci to John De Stefano (9 May 2002)
3.10.09	Email from Peter Dempster, Dempster Binning LLP (on behalf of Thornfield Properties plc) to John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) (28 May 2002)
3.10.10	Letter from Michael Capocci to Steven Bee (28 May 2002)
3.10.11	Letter from John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) to Peter Dempster, Dempster Binning LLP (on behalf of Thornfield Properties plc) (6 June 2002)
3.10.12	Letter from Steven Bee to Michael Capocci (6 June 2002)
3.10.13	Note to File by Mike Capocci (6 June 2002)
3.10.14	Letter from John Summers, John Summers & Co Solicitors (on behalf of John De Stefano) to Peter Dempster, Dempster Binning LLP (on behalf of Thornfield Properties plc) (5 July 2002)
3.10.15	Letters from Nigel Wright to Michael Capocci (24 December 2005, 19 January 2006 and 12 April 2006)
3.10.16	Letters from Michael Capocci to Nigel Wright (11 January 2006, 8 February 2006 and 13 April 2006)
3.10.17	Letter from Karen Hawes to Jason Marcus (25 September 2007)
3.10.18	Letter from Jason Marcus to Karen Hawes (9 October 2007)
3.10.19	Letters from Riccardo Mai to Karen Hawes (26 November 2007, 17 December 2007, 12 February 2008, 7 March 2008 and 16 April 2008)
3.10.20	Letters from Karen Hawes to Riccardo Mai (21 December 2007 and 8 April 2008)
3.10.21	Letters from Riccardo Mai to Rob Hobson (16 May 2008, 30 June 2008 and 25 July 2008)
3.10.22	Letter from Rob Hobson to Riccardo Mai (11 July 2008)
3.10.23	Emails exchanged between Martin Perry and John Strachan (21 June 2011)
3.10.24	Note of telephone conversation between Matthew Bodley and Karen Hawes (30 March 2012)
3.10.25	Letter from Matthew Bodley to Karen Hawes (25 May 2012)

3.10A	Stuart Jenkins, 'Proof of Evidence of Stuart Jenkins'	31 May 2012
3.10B	Nick Symons, 'Proof of Evidence. Proposed Silver Hill Development, Winchester'	June 2012
3.11	'The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Bruce Hartley-Raven'	6 June 2012
3.11.01	'The Winchester City Council (Silver Hill) Compulsory Purchase Order 2011. Proof of Evidence of Bruce Hartley-Raven. Appendix 2.' Letter from John De Stefano to Steven Bee (15 November 2002)	

BLANK PAGE

Appendix C

Plan illustrating the approximate footprint of the Winchester Development site and showing significant landholdings

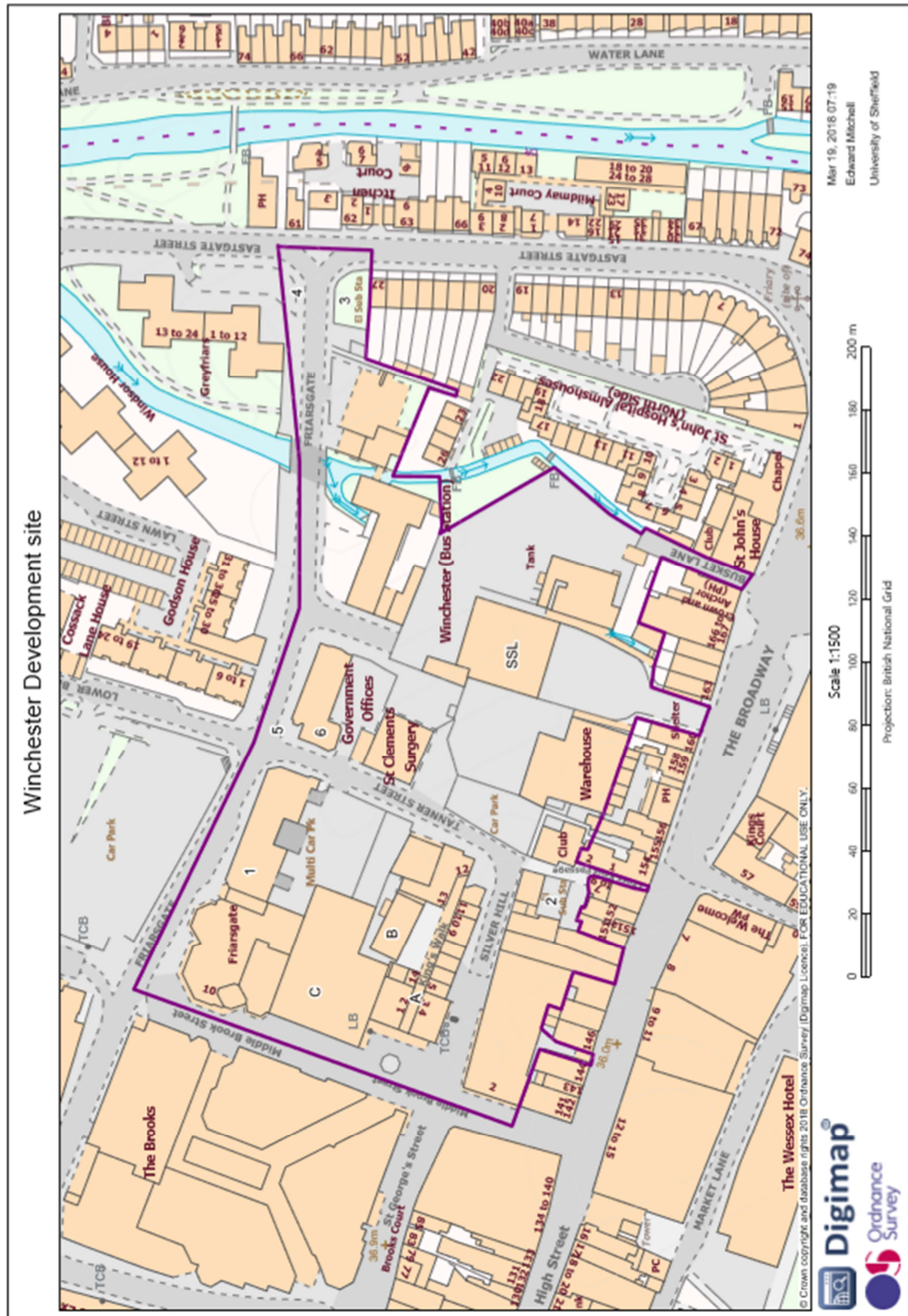
The plan on the following page shows an approximation of the site earmarked for the Winchester Development and significant landholdings referred to throughout this thesis. The outline roughly corresponds to the outline marked on the map that Winchester City Council produced to accompany the Compulsory Purchase Order ('CPO') it made for the purposes of the Winchester Development. That map marked the land to be acquired using the Council's compulsory purchase powers, and included the Council's own land. The CPO included the Council's own land because, as I pointed out in chapter five of this thesis, a developer will expect to obtain a 'clean' title to the land and a CPO enables a local authority to 'cleanse' its land of potentially onerous third-party interests, such as easements or restrictive covenants.

The map accompanying the Winchester CPO contained numerical cross-references to a appended table. That table listed the owners of individual plots. I have a copy of both the map (see Appendix B, Document 3.01A) and the Compulsory Purchase Order on file (see Appendix B, Document 3.01).

The key to the plan on the following page is as follows:

Key	
Land shown edged purple	Approximate outline of the Winchester Development site
Land in the ownership and control of Winchester City Council	Plots 1, 2, 3, 4, 5 and 6 (Coitbury House)
Land in the ownership and control of John De Stefano and his companies	Plots A, B and C
Land in the ownership of Stagecoach (South) Limited	Plot SSL (Winchester Bus Station)

Figure C.1 Plan of the Winchester Development Site



Appendix D

List of interviewees consulted during this research

Interviewee	Background	Date of Interview	Taped
Consultants			
CON1	Property development consultant with experience working for local authorities on land assembly, contract negotiation and contract implementation	15 April 2015	✘
CON2	Property development consultant with experience working for developers on tendering, land assembly, contract negotiation, discharge of conditions, contract variation, negotiation with prospective retail tenants, viability modelling and contract termination	10 December 2014	✓
CON3	Property development consultant with experience working for developers on tendering, land assembly, contract negotiation, discharge of conditions, viability modelling and contract variation	13 May 2015	✓
CON4	Property development consultant with experience working for developers on contract negotiation, discharge of conditions, contract variation, negotiation with prospective retail tenants and contract termination	1 December 2014	✓
CON5	Property development consultant with experience working for developers on contract negotiation, contract variation and viability modelling	7 October 2016	✓
Councillors			
COU1	Councillor representing the majority political party in a metropolitan local authority. Cabinet member responsible for property development and regeneration. Discussed experience of working on two major property-led development projects in the area	26 January 2015	✓
COU2	Councillor representing the majority political party in a metropolitan local authority. Formerly Cabinet member responsible for property development and regeneration. Discussed experience of working on a major property-led development project in the area	19 January 2015	✓
COU3	Councillor representing an opposition political party in a metropolitan local authority. Discussed experience scrutinising the Cabinet on decisions made in relation to a major property-led development project	4 December 2014	✓

Interviewee	Background	Date of Interview	Taped
Developers			
D1	Development director at a national property development company with experience working on property-led development projects in a number of towns and cities	3 December 2014	✓
D2	Managing director at a national property development company with experience working on property-led development projects in a number of towns and cities	16 October 2014	✗
D3	Development director at a regional property development company with experience working on property-led development projects in a number of towns and cities	29 January 2015	✗
D4	Development director at a regional property development company with experience working on property-led development projects in a small number of towns and cities	8 December 2014	✓
Local authority officers			
LA1	Senior officer in a metropolitan local authority who discussed experiences of a major property-led development project in his area	22 April 2015	✗
LA2	Senior officer in a metropolitan local authority who discussed experiences of two major property-led development projects in his area	1 December 2014	✓
LA3	Senior officer in a metropolitan local authority who discussed experiences of two major property-led development projects in her area. Recommended that I should speak to LA4 on the same day	6 November 2014	✓
LA4	Officer for a metropolitan local authority who discussed day-to-day experiences of specific property development projects	6 November 2014	✓
LA5	Senior officer in a metropolitan local authority who discussed experiences of various property-led development projects in his area	24 November 2014	✗
PS1	Former officer at a metropolitan local authority who discussed experiences of a major property-led development project and other smaller projects	22 December 2014	✓

Bibliography

- Adair A, Berry J and McGreal S, 'Financing property's contribution to regeneration' (2003) 40 *Urban Studies* 1065
- Adams D, Croudace R and Tiesdell S, 'Exploring the 'Notional Property Developer' as a Policy Construct' (2012) 49 *Urban Studies* 2577
- Adams D, Disberry A and Hutchison N, 'Still vacant after all these years - Evaluating the efficiency of property-led urban regeneration' (2017) 32 *Local Economy* 505
- Akrich M, 'The De-Description of Technical Objects' in Bijker WE and Law J (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992)
- Arrowsmith S, 'The implications of Brexit for public procurement law and policy in the United Kingdom' (2017) 26 *Public Procurement Law Review* 1
- Atkinson P and Coffey A, 'Analysing documentary realities' in Silverman D (ed), *Qualitative research: theory, method and practice* (2nd edn, SAGE 2004)
- Austin JL, *How to do things with words* (2nd edn, Clarendon Press 1975)
- Bakhtin MM, *The dialogic imagination: four essays* (University of Texas Press, 1981)
- Ball C, 'CPO Report to the Secretary of State for Communities and Local Government, The Waverley Borough Council (East Street Farnham) Compulsory Purchase Order 2012. 9 April 2013' (<http://www.waverley.gov.uk/downloads/200165/major_developments> accessed 14 October 2015)
- Bassett M, 'Timely delivery for regeneration projects' (*Solicitors Journal*, <<https://www.solicitorsjournal.com/comment/timely-delivery-regeneration-projects>> accessed 7 July 2017)
- Bastian M, 'Political Apologies and the Question of a "Shared Time" in the Australian Context' (2013) 30 *Theory Culture & Society* 94
- Beale H and Dugdale T, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 *British Journal of Law and Society* 45
- Becher D, *Private property and public power: eminent domain in Philadelphia* (OUP 2014)
- Bellanova R and Duez D, 'A Different View on the 'Making' of European Security: The EU Passenger Name Record System as a Socio-Technical Assemblage' (2012) 17 *European Foreign Affairs Review* 109
- Beresford P and Boyd S, 'The Sunday Times Rich List 2008. Rankings 841-915' *The Sunday Times* (27 April 2008)
- Biddulph M, 'Urban design, regeneration and the entrepreneurial city' (2011) 76 *Progress in Planning* 63
- Bijker WE, Hughes TP and Pinch TJ, *The social construction of technological systems: new directions in the sociology and history of technology: Workshop: Papers* (MIT Press 1987)
- Birth KK, *Objects of time: how things shape temporality* (Palgrave Macmillan 2012)
- Blackhall JC, *Planning law and practice* (3rd edn, Cavendish 2003)
- Blandy S, 'Socio-legal Approaches to Property Law Research' in Bright S and Blandy S (eds), *Researching property law* (Palgrave 2016)
- Blomley N, 'Disentangling Law: The Practice of Bracketing' (2014) 10 *Annual Review of Law and Social Science* 133

- Brothman B, 'Perfect present, perfect gift: Finding a place for archival consciousness in social theory' (2010) 10 *Archival Science* 141
- Bryman A, *Social research methods* (5th edn, Oxford University Press 2016)
- Butler J, *Gender trouble: feminism and the subversion of identity* (Routledge 1990)
- Callon M, 'Some elements of a sociology of translation - domestication of the scallops and the fishermen of St-Brieuc Bay' in Law J (ed), *Power, action, and belief: A new sociology of knowledge? Sociological Review Monograph* (Routledge & Kegan Paul 1986)
- Callon M, 'The Sociology of an Actor-Network: The Case of the Electric Vehicle' in Callon M, Law J and Rip A (eds), *Mapping the dynamics of science and technology: sociology of science in the real world* (Macmillan 1986)
- Callon M, 'Techno-economic Networks and Irreversibility' in Law J (ed), *A Sociology of monsters: essays on power, technology and domination* (Routledge 1991)
- Callon M, 'An Essay on Framing and Overflowing: Economic Externalities Revisited by Sociology' in Callon M (ed), *The laws of the markets* (Blackwell Publishers 1998)
- Callon M, 'Writing and (Re)writing Devices as Tools for Managing Complexity' in Law J and Mol A (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002)
- Callon M, Lascoumes P and Barthe Y, *Acting in an uncertain world: an essay on technical democracy* (Inside technology, MIT 2009)
- Campbell D, 'Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones' (2007) 14 *Indiana Journal of Global Legal Studies* 279
- Cane P and Kritzer HM, 'Introduction' in Cane P and Kritzer HM (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010)
- Carr H, 'Legal Technology in an Age of Austerity: Documentation, "Functional" Incontinence and the Problem of Dignity' in Cowan D and Wincott D (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016)
- CBRE, 'EU Procurement Regulations. The Impact on Joint Venture Proposals. January 2008' (<http://www.cbre.co.uk/portal/page/portal/emea_en/services/public_sector/public_sector_content/public_sector_leftcol/eu_public_procurement_regulations_impact_on_jv%20Proposals.pdf> accessed 7 July 2017)
- Christophers B, 'Geographical knowledges and neoliberal tensions: compulsory land purchase in the context of contemporary urban redevelopment' (2010) 42 *Environment and Planning A* 856
- Christophers B, 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-making of Economic Models' (2014) 38 *International Journal of Urban and Regional Research* 79
- Cloatre E, 'Trips and pharmaceutical patents in Djibouti: An ANT analysis of socio-legal objects' (2008) 17 *Social & Legal Studies* 263
- Cloatre E, *Pills for the poorest: an exploration of TRIPS and access to medication in Sub-Saharan Africa* (Palgrave 2013)
- Cloatre E, 'Fluid Legal Labels and the Circulation of Socio-technical Objects: the Multiple Lives of 'Fake' Medicines' in Cowan D and Wincott D (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016)
- Cloatre E and Dingwall R, "'Embedded regulation": The migration of objects, scripts, and governance' (2013) 7 *Regulation & Governance* 365
- Cloatre E and Pickersgill M, 'International law, public health, and the meanings of pharmaceuticalization' (2014) 33 *New Genetics and Society* 434

- Cloate E and Wright N, 'A Socio-legal Analysis of an Actor-world: The Case of Carbon Trading and the Clean Development Mechanism' (2012) 39 *Journal of Law and Society* 76
- Cluttons, 'East Street Area of Opportunity, Farnham. Development Brief. Waverley Borough Council. April 2002' (<http://www.waverley.gov.uk/downloads/file/3323/brightwells_development_plan_2002> accessed 12 November 2017)
- Cochrane A, *Understanding urban policy: a critical approach* (Blackwell 2007)
- Cooper D, 'Time against time: Normative temporalities and the failure of community labour in Local Exchange Trading Schemes' (2013) 22 *Time & Society* 31
- Cooper D, *Everyday Utopias: the conceptual life of promising spaces* (Duke University Press 2014)
- Cotterrell R, 'Subverting orthodoxy, making law central: A view of sociolegal studies' (2002) 29 *Journal of Law and Society* 632
- Coulson A, 'Scrutiny in English Local Government and the Role of Councillors' (2011) 82 *Political Quarterly* 102
- Coulson A and Whiteman P, 'Holding politicians to account? Overview and scrutiny in English local government' (2012) 32 *Public Money & Management* 185
- Cowan D, 'Housing and Property' in Cane P and Kritzer HM (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010)
- Cowan D, 'Territory and Human Rights: Mandatory Possession Proceedings' in Cowan D and Wincott D (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016)
- Cowan D and Carr H, 'Actor-network theory, implementation, and the private landlord' (2008) 35 *Journal of Law and Society* 149
- Cowan D and Wincott D, 'Exploring the "Legal" in Cowan D and Wincott D (eds), *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2016)
- Coxon I, 'The Sunday Times Rich List 2004. Rankings 568=' *The Sunday Times* (18 April 2004)
- Crook T and Monk S, 'Planning Gains, Providing Homes' (2011) 26 *Housing Studies* 997
- Crosby N, McAllister P and Wyatt P, 'Fit for planning? An evaluation of the application of development viability appraisal models in the UK planning system' (2013) 40 *Environment and Planning B - Planning & Design* 3
- Cullingworth B and Nadin V, *Town and country planning in the UK* (14th edn, Routledge 2006)
- de Laet M and Mol A, 'The Zimbabwe Bush Pump: Mechanics of a fluid technology' (2000) 30 *Social Studies of Science* 225
- Denyer-Green B, *Compulsory purchase and compensation* (10th edn, Routledge 2014)
- Department for Communities and Local Government, *Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land by, or under threat of, compulsion* (2015)
- Dery D, "'Papereality" and learning in bureaucratic organizations' (1998) 29 *Administration & Society* 677
- DTZ and BCSC, 'Retail-led Regeneration: Why it matters to our communities' (<https://www.bitc.org.uk/system/files/retail-led_regeneration_study.pdf> accessed 17 September 2017)
- Elvin D and Banner C, 'The application of the Public Contracts Directive to development agreements and planning agreements following *Auroux v Roanne*' (2008) 8 *Journal of Planning and Environmental Law* 1072

- Ewick P and Silbey SS, *The common place of law: stories from everyday life* (Language and legal discourse, University of Chicago Press 1998)
- Exeter City Council, 'Executive Committee. 19 March 2002. Item 10. Economic Development Plan 2002/2003' (<<http://committees.exeter.gov.uk/CeListDocuments.aspx?CommitteeId=112&MeetingId=391&DF=19%2f03%2f2002&Ver=2>> accessed 25 March 2017)
- Faulkner A, 'Law's performativities: Shaping the emergence of regenerative medicine through European Union legislation' (2012) 42 *Social Studies of Science* 753
- Finnegan R, 'Using Documents' in Sapsford R and Jupp V (eds), *Data collection and analysis* (2nd edn, SAGE 2006)
- FirstGroup, 'Falkirk Bus Station Conditions of Use' (<https://www.firstgroup.com/uploads/node_images/Falkirk_Bus_Station.pdf> accessed 3 August 2017)
- Flynn J, 'Complete control: Developers, financial viability and regeneration at the Elephant and Castle' (2016) 20 *City* 278
- Flyvbjerg B, 'Five misunderstandings about case-study research' (2006) 12 *Qualitative Inquiry* 219
- Forsters LLP, 'Buying and selling a property SPV: An overview of the key considerations for property investors' ((2015) <http://www.forsters.co.uk/sites/default/files/What%20to%20consider%20when%20buying%20and%20selling%20a%20property%20SPV,%202016_0.pdf> accessed 5 September 2017)
- Foucault M, *Discipline and Punish: The Birth of the Prison* (Penguin 1991)
- Galanter M, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95
- Geddes D, 'More delays likely for Silver Hill scheme in Winchester as developer comes under fire' *Hampshire Chronicle* (3 December 2015) <http://www.hampshirechronicle.co.uk/news/14122526.Silver_Hill_more_likely_to_be_delivered_by_Father_Christmas_than_Henderson_/?commentSort=score>
- Geddes D, 'Silver Hill developer TH Real Estate could be ditched by Winchester City Council at crunch vote tonight' *Hampshire Chronicle* (18 June 2015) <http://www.hampshirechronicle.co.uk/news/politics/13337919.Council_set_for_key_Silver_Hill_vote/> accessed 4 September 2017
- Grabham E, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107
- Grabham E, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016)
- Gray N and Porter L, 'By Any Means Necessary: Urban Regeneration and the "State of Exception" in Glasgow's Commonwealth Games 2014' (2015) 47 *Antipode* 380
- Greenhouse CJ, *A moment's notice: time politics across cultures* (Cornell University Press 1996)
- Grosz E, *The nick of time: politics, evolution, and the untimely* (Duke University Press 2004)
- Guironnet A, Attuyer K and Halbert L, 'Building cities on financial assets: The financialisation of property markets and its implications for city governments in the Paris city-region' (2016) 53 *Urban Studies* 1442
- Guy C, *Planning for retail development: a critical view of the British experience* (Routledge 2007)

- Guy S, Henneberry J and Rowley S, 'Development Cultures and Urban Regeneration' (2002) 39 *Urban Studies* 1181
- Hampshire Chronicle, 'City picks Friarsgate developer (20 December 2001)' (<http://www.hampshirechronicle.co.uk/news/5612114.City_picks_Friarsgate_developer/> accessed 20 April 2017)
- Harding A, 'The rise of urban-growth coalitions, UK- style' (1991) 9 *Environment and Planning C - Government and Policy* 295
- Harper R, *Inside the IMF: an ethnography of documents, technology, and organisational action* (Routledge 1998)
- Harrington J, 'Time as a dimension of medical law' (2012) 20 *Medical Law Review* 491
- Healey P, 'Urban Regeneration and the Development Industry' (1991) 25 *Regional Studies* 97
- Henderson S, 'Developer collaboration in urban land development: partnership working in Paddington, London' (2010) 28 *Environment and Planning C - Government and Policy* 165
- Henderson SR, 'City centre retail development in England: Land assembly and business experiences of area change processes' (2011) 42 *Geoforum* 592
- Heurkens E, Adams D and Hobma F, 'Planners as market actors: the role of local planning authorities in the UK's urban regeneration practice' (2015) 86 *Town Planning Review* 625
- Hoskins H, 'Contractual obligations to negotiate in good faith: faithfulness to the agreed common purpose' (2014) 130 (Jan) *Law Quarterly Review* 131
- Hull MS, *Government of paper: the materiality of bureaucracy in urban Pakistan* (University of California Press 2012)
- Imrie R and Thomas H, 'The limits of property-led regeneration' (1993) 11 *Environment and Planning C - Government and Policy* 87
- Imrie R and Thomas H, 'Law, legal struggles and urban regeneration: Rethinking the relationships' (1997) 34 *Urban Studies* 1401
- Johns F, 'Financing as Governance' (2011) 31 *Oxford Journal of Legal Studies* 391
- Karadimitriou N, Magalhães Cd and Verhage R, *Planning, risk, and property development: urban regeneration in the England, France, and the Netherlands* (Routledge 2013)
- Keenan S, 'Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration' (2017) 28 *Law & Critique* 87
- Kvale S and Brinkmann S, *InterViews: learning the craft of qualitative research interviewing* (2nd edn, Sage Publications 2009)
- Langstrup H, 'Interpellating Patients as Users: Patient Associations and the Project-Ness of Stem Cell Research' (2011) 36 *Science Technology & Human Values* 573
- Latour B, 'The powers of association' in Law J (ed), *Power, action and belief: a new sociology of knowledge?* (Routledge & Kegan Paul 1986)
- Latour B, *Science in action: how to follow scientists and engineers through society* (Harvard University Press 1987)
- Latour B, *The Pasteurization of France* (Harvard University Press 1988)
- Latour B, 'Technology is Society Made Durable' in Law J (ed), *A Sociology of monsters: essays on power, technology and domination* (Routledge 1991)
- Latour B, 'Where are the missing masses? The sociology of a few mundane artifacts' in Bijker WE and Law J (eds), *Shaping technology/building society: studies in sociotechnical change* (MIT Press 1992)

- Latour B, *We have never been modern* (Harvard University Press 1993)
- Latour B, 'On recalling ANT' in Law J and Hassard J (eds), *Actor network theory and after* (Blackwell 1999)
- Latour B, *Reassembling the social: an introduction to actor-network-theory* (Oxford University Press 2005)
- Latour B, *The making of law: an ethnography of the Conseil d'Etat* (Polity 2010)
- Latour B and Woolgar S, *Laboratory life: the social construction of scientific facts* (Sage Publications 1979)
- Law J, 'On the methods of long-distance control - vessels, navigation and Portuguese route to India' in Law J (ed), *Power, action, and belief: A New Sociology of Knowledge? A Sociological Review Monograph* (Routledge & Kegan Paul 1986)
- Law J, 'After ANT: complexity, naming and topology' in Law J and Hassard J (eds), *Actor network theory and after* (Blackwell 1999)
- Law J, *Aircraft stories: decentering the object in technoscience* (Duke University Press 2002)
- Law J, *After method: mess in social science research* (Routledge 2004)
- Law J and Mol A, 'The Actor-Enacted: Cumbrian Sheep in 2001' in Knappett C and Malafouris L (eds), *Material agency: towards a non-anthropocentric approach* (Springer 2008)
- Law J and Singleton V, 'Performing technology's stories - On social constructivism, performance, and performativity' (2000) 41 *Technology and Culture* 765
- Layard A, 'Shopping in the Public Realm: A Law of Place' (2010) 37 *Journal of Law and Society* 412
- Lee N and Brown SD, 'The Disposal of Fear: Childhood, Trauma and Complexity' in Law J and Mol A (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002)
- Leicester City Council, 'Shires West Update - Report of the Corporate Director of Resources, Access and Diversity - Supporting Information - 4 August 2003' (<directory.leicester.gov.uk/media/2538/foia-7791-attachment.doc> accessed 15 April 2015)
- Lexis PSL Property, 'Joint ventures in property transactions - overview' (<<https://www.lexisnexis.com/uk/lexispsl/property/document/393788/5B3H-CJP1-F18C-43M7-00000-00/Joint%20ventures%20in%20property%20transactions%E2%80%9494overview>> accessed 5 September 2017)
- Lezaun J, 'The Pragmatic Sanction of Materials: Notes for an Ethnography of Legal Substances' (2012) 39 *Journal of Law and Society* 20
- Lord Falconer of Thoroton (Minister of State for Housing and Planning), '2001 Speech to the British Retail Consortium. 27 November 2001' (<<http://www.ukpol.co.uk/lord-falconer-2001-speech-to-the-british-retail-consortium/>> accessed 24 July 2017)
- M'charek A, 'Partial Lineages in Diversity Research' in Konrad M (ed), *Collaborators collaborating: counterparts in anthropological knowledge and international research relations* (Berghahn Books 2012)
- Macaulay S, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55
- Macneil IR, 'Values in Contract - internal and external' (1983) 78 *Northwestern University Law Review* 340
- Mason J, *Qualitative researching* (2nd edn, SAGE 2002)
- Mawani R, 'Law's Archive' (2012) 8 *Annual Review of Law and Social Science* 337

- McAllister P, Street E and Wyatt P, 'Governing calculative practices: An investigation of development viability modelling in the English planning system' (2016) 53 *Urban Studies* 2363
- McDowell L, 'Elites in the City of London: some methodological considerations' (1998) 30 *Environment and Planning A* 2133
- McGee K, *Bruno Latour: the normativity of networks* (Routledge 2014)
- McLellan G, 'Travelling with Vehicular Ideas: The Case of the Third Way' (2004) 33 *Economy and Society* 484
- Megarry R and others, *The law of real property* (8th edn, Sweet & Maxwell 2012)
- Minton A, *Ground control: fear and happiness in the twenty-first-century city* (Penguin Books 2009)
- Mitchell C, 'Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal' (2009) 29 *Oxford Journal of Legal Studies* 675
- Mol A, *The body multiple: ontology in medical practice* (Duke University Press 2002)
- Mol A, 'Actor-network theory: Sensitive terms and enduring tensions' (2010) *Kölner Zeitschrift Für Soziologie Und Sozialpsychologie* 253
- Moore V and Purdue M, *A practical approach to planning law* (12th edn, Oxford University Press 2012)
- Mopas MS and Turnbull S, 'Negotiating a Way in: A Special Collection of Essays on Accessing Information and Socio-Legal Research' (2011) 26 *Canadian Journal of Law and Society* 585
- Morrison N and Burgess G, 'Inclusionary housing policy in England: the impact of the downturn on the delivery of affordable housing through Section 106' (2014) 29 *Journal of Housing and the Built Environment* 423
- Murdoch J, Abram S and Marsden T, 'Modalities of Planning: A Reflection on the Persuasive Powers of the Development Plan' (1999) 70 *The Town Planning Review* 191
- Napier A, 'All systems go for Winchester's £130m Silver Hill scheme' *Daily Echo* (6 February 2014)
- Napier A, 'Council chasing £700,000 Silver Hill debt from developer' *Hampshire Chronicle* (11 November 2016)
<http://www.hampshirechronicle.co.uk/news/indepth/silverhill/14881425.Council_chasing_700_000_Silver_Hill_debt_from_developer/> accessed 4 September 2017
- Nappi-Choulet I, 'The role and behaviour of commercial property investors and developers in French urban regeneration: The experience of the Paris region' (2006) 43 *Urban Studies* 1511
- McLellan G, 'Travelling with Vehicular Ideas: The Case of the Third Way' (2004) 33 *Economy and Society* 484
- Osborne T, 'On Mediators: Ideas and the Ideas Trade in the Knowledge Society' (2004) 33 *Economy and Society* 430
- PLC, 'Practice note - Transfer of shares, (Resource ID: 0-107-6683)' (<www.practicallaw.com> accessed 20 July 2017)
- Pottage A, 'The Materiality of What?' (2012) 39 *Journal of Law and Society* 167
- Prior L, 'Doing things with documents' in Silverman D (ed), *Qualitative research: theory, method and practice* (2nd edn, SAGE 2004)
- Prior L, 'Repositioning documents in social research' (2008) 42 *Sociology* 821
- PwC Consulting, 'The next chapter: Creating an understanding of Special Purpose Vehicles' (2011) <<https://www.pwc.com/gx/en/banking-capital-markets/publications/assets/pdf/next-chapter-creating-understanding-of-spvs.pdf>> accessed 5 September 2017

Raco M and Henderson S, 'Flagship Regeneration in a Global City: The Re-making of Paddington Basin' (2009) 27 *Urban Policy and Research* 301

Raco M, Henderson S and Bowby S, 'Changing times, changing places: urban development and the politics of space - time' (2008) 40 *Environment and Planning A* 2652

Rakoff TD, *A time for every purpose: law and the balance of life* (Harvard University Press 2002)

Ricciardiello C, 'Is There a Place for Judicial Review in Procurement Challenges?' (<<http://www.sharpepritchard.co.uk/files/resources/LCR%20procurement.pdf>> accessed 4 September 2017)

Ricoeur P, *Memory, history, forgetting* (University of Chicago Press 2004)

Riles A, 'A new agenda for the cultural study of law: Taking on the technicalities' (2005) 53 *Buffalo Law Review* 973

Riles A, '[Deadlines]: Removing the Brackets on Politics in Bureaucratic and Anthropological Analysis' in Riles A (ed), *Documents: artifacts of modern knowledge* (University of Michigan Press 2006)

Riles A, *Collateral knowledge: legal reasoning in the global financial markets* (University of Chicago Press 2011)

Rooke C, Cloatre E and Dingwall R, 'The Regulation of Nicotine in the United Kingdom: How Nicotine Gum Came to Be a Medicine, but Not a Drug' (2012) 39 *Journal of Law and Society* 39

Royal Institute of Chartered Surveyors, 'Financial viability in planning. RICS guidance note' (2012) <<http://www.rics.org/uk/knowledge/professional-guidance/guidance-notes/financial-viability-in-planning-1st-edition/>> accessed 26 February 2018

Ruddick G, 'Lloyds' property companies collapse into administration under £500m debts' *The Daily Telegraph* (<<http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/6948268/Lloyds-property-companies-collapse-into-administration-under-500m-debts.html>> accessed 11 April 2015)

Rydin Y, 'Using Actor-Network Theory to understand planning practice: Exploring relationships between actants in regulating low-carbon commercial development' (2013) 12 *Planning Theory* 23

Schwandt TA and Gates EF, 'Case Study Methodology' in Denzin N and Lincoln Y (eds), *The Sage handbook of qualitative research*, 5th edn (Sage 2018)

Scott D, *Omens of adversity: tragedy, time, memory, justice* (Duke University Press 2014)

Serres M and Latour B, *Conversations on science, culture, and time* (University of Michigan Press 1995)

Silbey SS, 'After legal consciousness' (2005) 1 *Annual Review of Law and Social Science* 323

Silverman D, *Interpreting qualitative data: a guide to the principles of qualitative research* (4th edn, SAGE 2011)

Smyth S, 'The privatization of council housing: Stock transfer and the struggle for accountable housing' (2013) 33 *Critical Social Policy* 37

Star SL, 'This is Not a Boundary Object: Reflections on the Origin of a Concept' (2010) 35 *Science Technology & Human Values* 601

Star SL and Griesemer JR, 'Institutional Ecology, Translations and Boundary Objects - Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 *Social Studies of Science* 387

- Strathern M, 'On Space and Depth' in Law J and Mol A (eds), *Complexities: social studies of knowledge practices* (Duke University Press 2002)
- Tait M, 'Room for Manoeuvre? An Actor-network study of Central-Local Relations in Development Plan Making' (2002) 3 *Planning Theory & Practice* 69
- Tait M and Jensen OB, 'Travelling Ideas, Power and Place: The Cases of Urban Villages and Business Improvement Districts' (2007) 12 *International Planning Studies* 107
- Tate LE, 'Growth-management implementation in Metropolitan Vancouver: lessons from actor-network theory' (2013) 40 *Environment and Planning B - Planning & Design* 783
- The Elections Centre, 'Winchester City Council. Election Results. 1973-2012' (<<http://www.electionscentre.co.uk/wp-content/uploads/2015/06/Winchester-1973-2012.pdf>> accessed 31 July 2017)
- The Office of the Deputy Prime Minister, *ODPM Circular 06/2004. Compulsory Purchase and The Criche Down Rules* (2004)
- Trakman LE and Sharma K, 'The binding force of agreements to negotiate in good faith' (2014) 73 *Cambridge Law Journal* 598
- Tsang EWK, 'Generalizing from Research Findings: The Merits of Case Studies' (2014) 16 *International Journal of Management Reviews* 369
- Turok I, 'Property-led urban regeneration - panacea or placebo' (1992) 24 *Environment and Planning A* 361
- Valverde M, *Everyday law on the street: city governance in an age of diversity* (University of Chicago Press 2012)
- Valverde M, 'The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty' (2012) 21 *Social & Legal Studies* 3
- Valverde M, 'Studying the governance of crime and security: Space, time and jurisdiction' (2014) 14 *Criminology & Criminal Justice* 379
- Valverde M, *Chronotopes of law: jurisdiction, scale and governance* (Routledge 2015)
- Vice S, *Introducing Bakhtin* (Manchester University Press 1997)
- Vincent-Jones P, *The New Public Contracting: Regulation, Responsiveness, Relationality* (Oxford University Press 2006)
- Vincent-Jones P, 'The New Public Contracting: Public Versus Private Ordering' (2007) 14 *Indiana Journal of Global Legal Studies* 259
- Walby K and Larsen M, 'Getting at the Live Archive: On Access to Information Research in Canada' (2011) 26 *Canadian Journal of Law and Society* 623
- Wang P, 'Brexit and the WTO Agreement on Government Procurement ("GPA")' (2017) 26 *Public Procurement Law Review* 34
- Watt P and Minton A, 'London's housing crisis and its activism: Introduction' (2016) 20 *City* 204
- Waverley Borough Council, 'East Street Farnham. Compulsory Purchase Order Statement of Case. September 2012' (<http://www.waverley.gov.uk/downloads/file/3297/brightwells_cpo_statement_of_case> accessed 28 March 2017)
- Waverley Borough Council, 'East Street, Farnham Regeneration - Appendix O - Report to the meeting of the Executive held on 14/01/2003' (<<http://waverweb.waverley.gov.uk/live/wbc/newcomdb.nsf/f0688ddc4711c8578025761c004fe22b/8452d29b96cc9f22802575ae00369d84?OpenDocument>> accessed 22 March 2017)

Waverley Borough Council, 'Frequently Asked Questions on Brightwells Farnham Regeneration Scheme'

(<http://www.waverley.gov.uk/info/200349/view_and_comment/516/brightwells_farnham_regeneration_scheme/3> accessed 20 July 2017

Waverley Borough Council, 'Minutes of the meeting of the Executive held on 24 July 2002'

(<<http://waverweb.waverley.gov.uk/live/wbc/newcomdb.nsf/f0688ddc4711c8578025761c004fe22b/8882dbd8708a56eb802575ae0036a267?OpenDocument>> accessed 12 November 2017

Waverley Borough Council, 'Planning Brief for the East Street Area of Opportunity Farnham. February 2000'

(<http://www.waverley.gov.uk/download/downloads/id/3308/planning_brief_february_2000.pdf> accessed 28 March 2017

Webley L, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer HM (eds), *The Oxford handbook of empirical legal research* (Oxford University Press 2010)

Welch C and others, 'Corporate elites as informants in qualitative international business research' (2002) 11 *International Business Review* 611

Whitehouse L and Bright S, 'The Empirical Approach to Research in Property Law' in Bright S and Blandy S (eds), *Researching property law* (Palgrave 2016)

Wilson Bowden Developments Ltd, 'Silk Street, Macclesfield viability appraisals: February 2014 - May 2014' (<<http://wakeupmacc.org.uk/wp-content/uploads/2015/02/Silk-Street-viability-assessment-May-2014.pdf>> accessed 30 August 2017

Winter P and Lloyd R, 'Regeneration, compulsory purchase orders and practical related issues' (2006) *Journal of Planning and Environmental Law* 781

Woolgar S and Lezaun J, 'The wrong bin bag: A turn to ontology in science and technology studies?' (2013) 43 *Social Studies of Science* 321