



Journal of Property, Planning
Built Environment

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A Study of Local Authority-Private Developer Contractual
Behaviour**

Journal:	<i>Journal of Property, Planning and Environmental Law</i>
Manuscript ID	JPPEL-07-2019-0041.R1
Manuscript Type:	Article
Keywords:	Compulsory purchase, Property development, Private profit, Financial viability, Private to private acquisitions, Relational Contract Theory

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Compulsory Purchase and the State Redistribution of Land: A Study of Local Authority-Private Developer Contractual Behaviour

Abstract

Purpose: The compulsory purchase of land forms the subject of much legal and urban regeneration research. However, there has been little examination of the contractual arrangements between local authorities and private sector property developers that often underpin the compulsory purchase process. This paper examines local authority/private developer contractual behaviour in this context.

Design/methodology/approach: An empirical examination of property development contracts made for the “Silver Hill” project in Winchester, a small city in southern England, and the Brent Cross shopping centre extension in north London. Drawing on Macneil’s (1983) relational contract theory, the paper analyses key contract terms and reviews local authority documentation related to the implementation of those terms.

Findings: The contracts had two purposes: to provide a development and investment opportunity through the compulsory purchase and redistribution of private land; and to grant the private developers participating in the projects freedom to choose if they wished to take up that opportunity. While the contracts look highly “relational”, the scope for flexibility and reciprocity is both carefully planned and tightly controlled. This exposes an asymmetric power imbalance that emerges in and is rearticulated by this type of contractual arrangement.

Originality/value: Empirical analysis of contract terms and contractual behaviour provides a rare opportunity to scrutinise the local authority-private developer relationship underpinning both property development practice and compulsory purchase.

Article classification: Research paper.

Keywords: Compulsory purchase, property development, private profit, financial viability, private to private acquisitions, relational contract theory.

Introduction

This paper investigates the state's power to appropriate land in pursuit of private profit. David Harvey's well-known concept of "accumulation by dispossession" examines the tendency within capitalist societies to generate surpluses of commodities, money and labour without accompanying opportunities for the utilisation of those surpluses (Harvey, 1999; 2003). State and corporate actors, Harvey posits, address this by creating financial growth and investment opportunities by forcibly redistributing assets from one property owning class to another (2003, p. 145). The assets redistributed in this way often include land: If an existing owner or occupier refuses to part with land that a private developer has earmarked for property development, the latter has no means to secure that land unless the state intervenes. As Levien puts it, the redistribution of land from one private owner to another thus often rests upon "the desire of states to help capitalists overcome barriers to accumulation" (2015, p. 149). State bodies that seek to remove these barriers do so, Levien argues, by acting as a type of "land broker" tasked with transferring land to the private owner deemed to be best placed to put it to "profitable" use (2011, p. 463. See also Gray, 2007, p. 79). In the UK, these trends have provoked controversies when local authorities use compulsory purchase to assemble a development site so that private corporations can develop, invest in and profit from that land.

Case law and academic commentary on "private to private" land acquisitions highlights the tensions that can arise when English local authorities use compulsory purchase in ways that appear primarily to favour large corporate interests and that produce an imbalance between public benefits and private profits (Gray, 2011; Waring, 2013; Maxwell, 2017). Other academic work on compulsory purchase of land for private profit asks how those who stand to be dispossessed might counter this trend (Hubbard and Lees, 2018). Some accounts examine the various legal mechanisms at play (Layard, 2010; Hodgkinson and Essen, 2015), although there has been less analysis of the contractual arrangements that local authorities make with private companies to facilitate land redistributions. This is surprising, particularly since, in *R (Archway*

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3 *Sheet Metal Works) v Secretary of State for Communities and Local Government and others* [2015] EWHC
4 794 (Admin), [2015] 2 WLUK 699, Dove J quoted with approval a Planning Inspector's report
5 stating that it would be unusual for a local authority and a developer not to agree detailed
6 contracts for the use of compulsory purchase to facilitate private to private acquisitions
7 (paragraph 17). By providing an in-depth examination of contractual behaviour in this context,
8 the paper shows how contract planning and implementation create opportunities for the
9 reallocation of landownership and the accumulation of private capital rather than concrete public
10 benefits.
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21 To help understand the purpose behind as well as the effect of this behaviour, this paper
22 examines two property development contracts. The first is a contract for the redevelopment of
23 the "Silver Hill" area in Winchester, a small city in southern England. The second is a contract
24 for the construction of an extension to Brent Cross shopping centre and the wider regeneration
25 of surrounding parts of north London. The first development is referred to here as "the SH
26 development" and the local authority, the developer and the contract are, respectively, "SHLA",
27 "SHD" and "the SH Contract". Similar shorthand is used for the second development, which is
28 the "BX development" and the local authority, the developer and the contract are "BXLA",
29 "BXD" and "the BX Contract". These contracts provide an important illustration of the
30 lopsided interface between public and private power because they were designed to facilitate
31 large projects that the developers agreed to fund and build but for which the local authorities
32 agreed to provide the land earmarked for the developments.
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48 The primary focus in this paper is the insights that the SH and BX Contracts provide
49 into the local authority-private property developer dynamic while the parties seek to redistribute
50 private land. Attention is paid to the express terms of the Contracts and what the parties do in,
51 and with, their contractual arrangements. Ian Macneil's relational contract theory, which
52 encourages analysis of contracting parties' interrelations within the context of "common contract
53 behavioral patterns and norms" (2000, p. 879), provides a "set of tools" for examining the
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3 choices parties make when planning and seeking to effectuate an exchange (Mitchell, 2013, p.
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5 177). By drawing on Macneil's work, the paper argues that SHLA and BXLA were useful cogs in
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7 wider processes of accumulation by dispossession. The paper then argues that the SH and BX
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9 Contracts created an unbalanced power dynamic. On the one hand, the paper explains that the
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11 Contracts allowed SHD and BXD to choose whether or not to commence construction. On the
12
13 other hand, the paper shows that SHLA and BXLA had to pursue the compulsory purchase of
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15 private land while waiting for the developers to decide if they wished to do anything with that
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17 land. The implications of this were that SHLA and BXLA had secured control of the land on
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19 behalf of their respective development partners while the developers remained uncommitted to
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21 the development schemes.
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26 The paper's first section introduces the case studies. The second section situates this type
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28 of property development activity within Harvey's concept of accumulation by dispossession and
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30 draws together legal and academic discussions of private to private acquisitions. The section then
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32 summarises Macneil's "common contract norms" and examines the work of academics who
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34 both utilise and criticise Macneil's ideas. The third section begins the analysis of the case studies
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36 and explains what it means to say that the principal commitments in the SH and BX Contracts
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38 were contingent on the satisfaction or waiver of various "conditions precedent". By considering
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40 this in the context of both relationality and accumulation by dispossession, this section contrasts
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42 the looseness of the developers' conditional duty to fund land acquisitions and to commence
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44 construction with the tightness of the developers' control over the transition from
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46 "conditionality" to "unconditionality". The fourth section builds on this by examining the role
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48 the Contracts played in facilitating compulsory purchase despite the inherent flexibility of the
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50 conditional contractual commitments. This section also analyses why these conditional
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52 arrangements drew the local authorities into legally and financially risky actions designed to move
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54 the developments towards unconditionality. The conclusions then reflect on how carefully
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56 planned contractual arrangements allow private developers to escape a project if they perceive
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3 the financial risks are too great. This ability to walk away, however, enables private developers to
4 extract concessions from their local authority partners and deepens the lopsided power dynamic
5 described above.
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9 **Compulsory Purchase, Private Profit and Property Development Contracts**

10 A local authority intending to use compulsory purchase can make a Compulsory Purchase Order
11 (CPO) if it believes that “development, redevelopment or improvement” of the affected land is
12 “likely to contribute” social, economic or environmental benefits to the area (Town and Country
13 Planning Act 1990, section 226(1)(a) and (1A)). Section 226(4) of the 1990 Act states that a local
14 authority that has “made” a CPO does not have to develop, redevelop or improve the affected
15 land itself, although a local authority cannot begin acquiring that land until the Secretary of State
16 for Housing, Communities and Local Government (the SSHCLG) has “confirmed” the CPO
17 (Acquisition of Land Act 1981 (ALA 1981), section 2). If any affected landowners or occupiers
18 object, the SSHCLG will appoint a Planning Inspector to chair a Public Inquiry (ALA 1981,
19 section 13A). After the Inquiry, the Inspector will report to the SSHCLG who can either
20 confirm, modify and confirm or refuse to confirm the CPO (ALA 1981, section 13A(5)).
21 Following confirmation, the local authority can “exercise” the CPO and any dispossessed owners
22 or occupiers will receive compensation.
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41 In November 2011, SHLA made a CPO for the SH development to enable the
42 acquisition of a doctors’ surgery, a health centre, shops, offices and warehouses in central
43 Winchester (Thorby, 2012, paragraph 2.3). Three affected landowners objected (Thorby, 2012,
44 paragraphs 5.2-5.70) but, following a Public Inquiry, the Secretary of State confirmed the CPO
45 on 20 March 2013. When local authorities seek confirmation for a CPO designed to facilitate
46 property development by a private company, they often publish redacted copies of their
47 contracts to demonstrate their partner’s commitment both to fund the compensation of
48 dispossessed owners and occupiers and to construct the project within an agreed timescale
49 (Winter and Lloyd, 2006, p. 791) [1]. SHLA/SHD signed the SH Contract on 22 December 2004
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3 and, in it, agreed that SHLA would compulsorily purchase the land required for the development
4 (clause 10). In return, SHD agreed to construct a development incorporating 90,000 square feet
5 of retail floor-space, 364 homes (of which 35% were to be “affordable housing”) and a new bus
6 station (SH Contract, clause 5.3). The version of the SH Contract submitted to the CPO Inquiry
7 contains redactions focussed on financial details, such as the minimum annual rent that SHD
8 would pay to SHLA for a 200-year lease of the assembled development site (SH Contract, clause
9 11.2.3 and appendix 5). These redactions suggest limitations to the Contract’s usefulness as
10 research material, although SHLA did not redact the conditions precedent that suspended SHD’s
11 duty to commence construction. Consequently, the published version of the SH Contract
12 provides rich insight into the arrangements that existed between SHLA and SHD to facilitate
13 compulsory purchase and redistribution of the affected land. The SH Contract also provides rich
14 data because SHLA agreed contract variations following confirmation of the CPO. These
15 variations were highly controversial and formed the subject of High Court legal action in *R*
16 (*Gottlieb*) *v* *Winchester City Council* [2015] EWHC 231 (Admin), [2015] 2 WLUK 359, which
17 ultimately led to the termination of the project. This paper’s fourth section discusses this legal
18 action, which highlights the legally and financially risky actions that a local authority might take
19 to demonstrate contractual solidarity with a private sector development partner.
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41 The second contract analysed here was made on 3 March 2015 between BXLA and
42 BXD. BXD is a joint venture consisting of companies owned by Hammerson plc and Standard
43 Life plc (Mike McGuinness, Evidence submitted to BX CPO Inquiry (MM evidence), paragraph
44 2). The former is a multi-national property developer and the latter is a multi-national investment
45 company. As of March 2015, Hammerson and Standard Life jointly owned Brent Cross
46 shopping centre on a series of leases from BXLA due to expire in March 2162 (MM evidence,
47 paragraph 2.2). The BX Contract, which BXLA published in redacted form prior to the BX CPO
48 Inquiry, was for the compulsory purchase and redistribution of land adjacent to the shopping
49 centre and the construction of a shopping centre extension, a new bus station, 280 new homes
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3 and the transport infrastructure necessary for wider regeneration in the area (Cath Shaw,
4 Evidence submitted to BX CPO Inquiry (CS evidence), paragraphs 6.2-6.7). On the same day
5 that BXLA/BXD agreed the BX Contract, they also agreed a supplementary contract in which
6 BXD promised to indemnify BXLA for costs it would incur in using compulsory purchase (the
7 BX Indemnity Contract).
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14 At the same time as agreeing the BX Contract, BXLA contracted with another private
15 property developer for the wider regeneration of Brent Cross (CS evidence, paragraph 2.3).
16 BXLA also sought the construction of a new railway station in Brent Cross to service both
17 developments (CS evidence, paragraph 3.41). In April 2015, BXLA made a CPO to acquire the
18 land for both the shopping centre and wider regeneration projects. That land included the site of
19 the existing Brent Cross bus station, various commercial premises and industrial buildings as well
20 as homes, sheltered accommodation and a day care centre (Clegg, 2017, paragraph 2). 68 owners
21 and occupiers of the land required for the shopping centre extension presented objections
22 (Clegg, 2017, summary). These included the owners and occupiers of private homes and local
23 businesses. Despite these objections, the SSHCLG confirmed the CPO on 7 December 2017
24 (LBB, 2018, paragraph 1.43). The contract for the shopping centre extension is studied here
25 because BXLA envisaged that this project would facilitate construction of the wider regeneration
26 project and the railway station (CS evidence, paragraph 5.9). The BX Contract is also topical
27 because, in July 2018, Hammerson announced that BXD intended to delay construction of the
28 shopping centre extension but not to abandon the project (Hammerson plc, 2018).
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48 While the SH and BX Contracts relate to different types of project, there are significant
49 similarities in their contents. In particular, both Contracts articulated the contracting parties'
50 shared desire to achieve confirmation for the CPOs that would enable assembly of the
51 development sites. Consequently, the Contracts provide a rare opportunity to scrutinise the local
52 authority-private developer relationship that often underpins compulsory purchase. To
53 investigate what the parties did in and with the Contracts, this paper considers documents
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3 produced at the respective local authorities' meetings and documents produced at both CPO
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5 Inquiries [2]. While the SH and BX Contracts may not be typical of all such contracts, the
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7 findings provide multiple insights into the interlocking processes underpinning the production
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9 and use of property development contracts for private to private acquisitions.
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12 **Capital Accumulation, Compulsory Purchase and Relationality**

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14 To facilitate ongoing accumulation, Harvey explains, capital must be capable of circulation and
15
16 reorganisation in pursuit of surplus value, or profit. This, however, produces contradictions. On
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18 the one hand, for example, many capital accumulation strategies presuppose “a solid legal
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20 foundation” for the preservation of private property rights (Harvey, 1999, p. 18). On the other
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22 hand, the constant pursuit of private profit produces a tendency towards centralisation as
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24 “[l]arger-scale capitalists [...] gobble up the smaller”, often through institutional arrangements
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26 facilitated and managed by the state (Harvey, 1999, p. 139). This manifests, in some instances, in
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28 the state’s willingness to use compulsory purchase to reallocate otherwise fixed landholdings
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30 from relatively unproductive individual owners to more economically powerful private
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32 companies capable of producing investment opportunities and putting land to its purportedly
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34 most productive use (Fox-Rogers *et al*, 2011, p. 661).
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39 The activities examined here involve local authorities seeking to acquire privately-held
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41 land from unwilling sellers to facilitate projects intended, at least partially, to benefit large-scale
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43 private companies. The Supreme Court considered this type of activity in *R (Sainsbury’s*
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45 *Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437. Two
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47 supermarkets, Tesco and Sainsbury’s, had identified a site in Wolverhampton, in central England,
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49 as suitable for retail and residential development but, while both had acquired landholdings in
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51 the site, neither would countenance selling their interests to the other (per Lord Collins,
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53 paragraphs 17-18). To resolve this, both retailers suggested that Wolverhampton City Council
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55 (Wolverhampton) use compulsory purchase to consolidate the landholdings. Tesco owned a
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57 much smaller proportion of the site (around 14%, compared to around 86% in the ownership or
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3 control of Sainsbury's (per Lord Mance, paragraph 100)) but offered to use projected profits
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5 from the development to "cross-subsidise" separate development elsewhere in the city.
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7 Wolverhampton consequently chose Tesco as its development partner and agreed to make a
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9 CPO to acquire Sainsbury's interests and transfer the assembled site to Tesco. However, on a 4:3
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11 majority, the Supreme Court quashed Wolverhampton's resolution to use compulsory purchase
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13 because the council had unlawfully based its decision on the opportunity for redevelopment of
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15 the second site in the city.
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19 For this paper's purposes, *Sainsbury's* is important for what it says about compulsory
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21 purchase for property development when a consequence is "private" gain. If the CPO examined
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23 in *Sainsbury's* had been confirmed, Tesco would have profited from the operation of a
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25 supermarket but would have also acquired a valuable land interest from an unwilling seller. Lord
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27 Walker characterised this as a "private to private" acquisition:
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31 The land is to end up, not in public ownership and used for public purposes, but in
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33 private ownership and used for a variety of purposes, mainly retail and residential.
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35 Economic regeneration brought about by urban redevelopment is no doubt a public
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37 good, but "private to private" acquisitions by compulsory purchase may also
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39 produce large profits for powerful business interests, and courts rightly regard them
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41 as particularly sensitive (paragraph 81).

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43 By discussing "ownership" and "purposes" in these terms, Lord Walker distinguishes
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45 compulsory purchase that results in private ownership of land that then generates substantial
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47 profits for already powerful private companies and compulsory purchase that results in public
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49 ownership of land that is then used for "public" goods. On each side of this superficially neat
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51 dichotomy, the acceptability or otherwise of the activity seems clear. As Gray has put it, for
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53 example, there appears to be a "deep immorality" inherent to any "forced confiscation of a
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55 cherished domestic residence" for "the predominating purpose of corporate profit" (2007, p.
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57 83). However, the distinction between an acceptable and an unacceptable CPO becomes blurry
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59 when the project offers some form of general "public benefit" but is led by a private company
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61 that thus gains a specific opportunity for substantial private profit (Waring, 2013, p. 240).

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3 *Alliance Spring Co Ltd v First Secretary of State* [2005] EWHC 18 (Admin), [2005] 1 WLUK
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5 228 exemplifies the problematic linkage between compulsory purchase and private profit. The
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7 case involved Arsenal Football Club, a member of the English Premier League, based in
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9 Islington, in north London. Islington Council made a CPO to facilitate the construction by the
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11 club of a stadium that would be larger than their pre-existing facility, as well as homes,
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13 commercial premises and community buildings (paragraph 5). The CPO would enable the
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15 acquisition of land owned by various small businesses, some of which objected. The Planning
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17 Inspector adjudicating at the consequent Public Inquiry recommended that the Secretary of State
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19 should refuse to confirm the CPO because, according to the Inspector, the primary purpose was
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21 not to bring social, economic or environmental benefits to the area but was to satisfy both
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23 Arsenal's expansionary ambitions and the council's desire to ensure that the club did not relocate
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25 elsewhere in London (quoted at paragraphs 10-13). The Secretary of State chose, nevertheless, to
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27 confirm the CPO because he upheld the council's contention that the CPO's primary purpose
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29 and intended effect was to regenerate under-utilised land (quoted at paragraph 17). In the High
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31 Court, Collins J said that the Inspector and the Secretary of State had both been right to consider
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33 the CPO's purpose and its likely effect but that he agreed with the Secretary of State's
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35 conclusions (paragraph 23).
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41 The practices examined in *Alliance Spring* have, however, proven controversial. Fox-
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43 Rogers *et al*, for example, note that state involvement in capital accumulation activities focused
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45 on the built environment has facilitated the "mass production of downtown shopping districts,
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47 riverside regeneration schemes and sports stadia", even when the purported public benefits are
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49 contested (2011, p. 648). In relation to the CPO discussed in *Alliance Spring*, Gray has
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51 commented that the full range of specific community gains that Arsenal offered never
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53 materialised (2011, pp. 26-27). Nevertheless, Collins J's decision in *Alliance Spring* was
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55 unsurprising because administrative and judicial decision-makers tend to uphold the use of
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57 compulsory purchase to facilitate economic development projects as long as developers
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3 promoting those projects promise some form of general public benefit (Waring, 2013, p. 247).

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5 Despite this, distinguishing between a legitimate and an illegitimate compulsory purchase for
6 private to private acquisitions has remained “far from straightforward” (Maxwell, 2017, p. 1350)
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8 both because the notion of a sufficiently “acceptable” public benefit is “ill-defined” (Waring,
9 2013, p. 240) and because identifying if the primary beneficiary is a private company or the
10 community at large is a difficult task. Rather than adding to the literature that seeks to define
11 nebulous concepts such as public benefit, this paper argues that a means to scrutinise the
12 acceptability of compulsory purchase for private to private acquisitions lies in a detailed
13 examination of the contractual relations that often underpin these acquisitions.
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23 Macneil’s relational contract theory provides a framework for this analysis. For Macneil,
24 some contractual arrangements are relatively “discrete” whereas others are more “relational”
25 (2000, p. 895). A fully discrete arrangement would be “100 percent planned” and would require
26 effectuation of the parties’ consent to complete implementation of that plan (1980, p. 60). This
27 type of transaction would also be fully “presentiated” in that the parties agree to fix their future
28 dealings in accordance with their present intentions. Macneil argues, however, that no fully
29 discrete or presentiated transactions can exist because more “relational” behaviours always pull
30 against the strict implementation of a pre-agreed plan (1983, pp. 350-351). The more relational
31 norms that Macneil identifies are role integrity, contractual solidarity, flexibility, trust and
32 harmonization with the social matrix (1983, pp. 361-366). Macneil’s categories of contractual
33 behaviour are not presented as a “sophisticated” or “exhaustive” theory (2000, p. 880) but they
34 do provide a means to analyse the give and take of complex and enduring relations produced
35 “among people in the course of projecting exchange into the future” (1983, p. 341. Footnotes
36 omitted. See also Blandy *et al*, 2018). The point, as Mitchell puts it, is “that ongoing contractual
37 relations may be expected to display the norms in various combinations and to different degrees
38 of strength” (2013, p. 178. Footnote omitted).
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3 Academic commentary on Macneil's work has acknowledged the merit in the argument
4 that all contracts are relational (Scott, 2000, p. 852), although Macneil's critics have pointed out
5 that "relationality" is hard both to define and to operationalise in law (Eisenberg, 2000, p. 814;
6 Kimel, 2007, p. 239). These critics posit that contract law should not be reimagined to enable
7 courts either to treat more relational contract terms as legally enforceable or to assist contracting
8 parties who agree more relational contracts yet find themselves in disputes. The extent to which
9 courts should regulate contract terms based on relational behavioural norms nevertheless
10 remains a live debate (Mitchell, 2013, pp. 180-197), although the purpose here is not to add to
11 that discussion. Rather, this paper shows what the configuration of Macneil's common contract
12 norms in property development contracts says about the parties' bargaining positions and the
13 effects of the terms that they write into their agreements. Using Macneil's categories of
14 contractual behaviour in this way is not an entirely novel exercise because others have also
15 studied the common contract norms to better understand specific types of long-term, complex
16 contractual relations. The way that Vincent-Jones (2006) draws out "imbalances" between more
17 relational behaviour and the intensification of discrete norms in contractual arrangements
18 involving public bodies is particularly instructive. For Vincent-Jones, the common contract
19 norms provide a methodology for evaluating how long-term contractual relations are performing
20 (2006, p. 30). Applied in the context of compulsory purchase for private to private acquisitions,
21 this mode of contract analysis helps to show why some configurations of the contract norms
22 impose high levels of prescription on local authorities while operating flexibly for the private
23 property developers engaged in these projects.

24 **Conditionality: Planning for Compulsory Purchase and Land Redistribution**

25 The compulsory purchase and redistribution of land earmarked for the case study developments
26 required long-term and complex contractual arrangements. The mechanisms in the Contracts for
27 the delivery of development on the affected land consisted of a series of "conditions precedent",
28 an "Unconditional Date" and a "Long-Stop Date". Both Contracts stated that the Unconditional
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3 Date would be the date of “satisfaction” or “waiver” of the last condition precedent (SH
4 Contract, clause 1.1.73; BX Contract, clause 1) but both also stated that the Long-Stop Date
5 would allow either party to terminate the relationship if “unconditionality” had not occurred.
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10 **[Insert Table 1]**

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12 Table 1 states the planned effect of the respective Unconditional Dates, the contents of
13 the conditions precedent and the agreed Long-Stop Dates. BXLA/BXD agreed that, before
14 unconditionality could occur, BXD needed full planning permission for the development (the
15 Planning Condition), road closure and traffic management orders (the Highways Condition) and
16 agreements with utilities companies for the installation of various services (the Infrastructure
17 Condition). Unconditionality also depended upon BXD obtaining agreements for lease for an
18 agreed proportion of the proposed retail area (the Pre-let Condition), third-party investment to
19 fund construction costs (the Funding Condition) and an agreement with a building company for
20 construction of the development (the Tender Condition). In addition, unconditionality required a
21 confirmed CPO (the CPO Condition) and, if the CPO did not enable the acquisition of all the
22 required land, sale agreements between BXD and the owners of any outstanding landholdings
23 (the Land Assembly Condition). Finally, the commitments in the BX Contract were conditional
24 on BXD producing an appraisal showing that the proposals were financially viable in terms that
25 BXD deemed acceptable (the Viability Condition). The SH Contract contained similar
26 conditions, although unconditionality also depended upon SHD confirming that on-site ground
27 quality would not diminish profitability (the Site Survey Condition) and settling an agreement to
28 sell the affordable housing component of the development to a registered social housing
29 provider (the Affordable Housing Condition).
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52 The BX and SH Contracts also stated the agreed consequences of unconditionality. In
53 the BX Contract, for example, BXLA/BXD agreed that, if each condition precedent had been
54 satisfied, BXLA would compulsorily purchase and then transfer the land to BXD in exchange
55 for an annual ground rent (BX Contract, clauses 5.2.3(a) and 15.1. See also LBB, 2014,
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3 paragraphs 9.12-9.14). BXD would fund the compulsory purchase (BX Indemnity Contract,
4 clause 10.3) and, following land exchange, commence construction (BX Contract, clause 6.2.1).
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6 After construction concluded, the parties would share profits accruing from the development
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8 (BX Contract, schedule 4) [3]. In addition, however, BXLA/BXD had agreed a “time-in-
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10 between” the contract date and the deadline for unconditionality that was initially open-ended
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12 because the parties tied it to confirmation of the CPO. SHLA/SHD, by comparison, fixed the
13
14 deadline for unconditionality. This nevertheless made the commitments in both Contracts highly
15
16 flexible: the time-in-between allowed the developers to obtain planning permission, negotiate
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18 agreements for lease with prospective tenants, and to seek variations to the planning permission
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20 before they had to fund land acquisitions or commence construction.
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26 Flexibility is, as Macneil has observed, essential to long-term contractual relations (1983,
27 p. 363). The conditions precedent discussed above provided a means to manage emergent risks
28
29 and uncertainties. Waiver clauses in both Contracts then provided additional flexibility by
30
31 allowing the developers to choose if they wished to proceed with the development opportunities.
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33 Table 1 states the conditions in the Contracts that could be waived. Importantly, neither
34
35 Contract granted either local authority a right to waive a condition precedent. BXLA agreed,
36
37 instead, that BXD could waive the Funding, Pre-let, Tender and Viability Conditions. The
38
39 “unwaivable” Land Assembly Condition in the BX Contract stated that BXLA could not insist
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41 that BXD commenced construction unless either a confirmed CPO or agreements for sale
42
43 enabled full assembly of a development site. Presumably, however, BXD would have neither
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45 sought nor ever intended to exercise a right to waive that Condition because the BX Contract
46
47 was not designed to expedite building work but to redistribute land and provide capital
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49 accumulation opportunities. The three other “unwaivable” conditions related to external
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51 regulatory requirements that BXD would, presumably, also have never countenanced waiving.
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57 Unlike BXLA/BXD, SHLA/SHD agreed an unwaivable Funding Condition. No public
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59 records explain this differential treatment, although the companies acting jointly as BXD were
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3 FTSE-100 corporations who may have been confident in their capacity to self-finance the
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5 development and for whom a waivable condition would provide an option to start construction
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7 either with or without a third-party funding agreement. SHD, on the other hand, was originally a
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9 subsidiary of a smaller company that relied primarily for its funding on debt finance from a
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11 single bank (Steve Tilbury Evidence submitted to SH CPO Inquiry (ST evidence), paragraph
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13 3.4). SHLA may, therefore, have wanted an unwaivable condition to ensure that it would not be
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15 required to exercise a confirmed CPO unless SHD had a signed funding agreement in place.
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19 The respective contracting parties also agreed different Viability Conditions. These
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21 Conditions meant that the developers would not have to start building or fund the CPOs unless
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23 viability appraisals projected a target financial return. BXD could waive the Viability Condition
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25 whereas SHD could not, although the practical implications of this difference seem limited
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27 because the Conditions still gave both developers significant control. Tying unconditionality to
28
29 prospective profitability also exposes a current tension in property development practice. Recent
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31 academic criticism points to the inadequacy of local authority scrutiny of the modelling of
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33 projected development profits and the role those models perform in enabling developers to
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35 minimise their obligation to provide public gains while maximising their private profit
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37 (Christophers, 2014). This is problematic in relation to compulsory purchase because SHD and
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39 BXD both provided evidence at the CPO Inquiries indicating that satisfaction of the Viability
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41 Conditions was imminent (Martin Perry, Evidence submitted to SH CPO Inquiry (MP evidence),
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43 paragraph 14.8; MM evidence, paragraph 5.20). Following both Inquiries, however, the
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45 developers then reported that the projects were no longer sufficiently profitable for construction
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47 to commence on the pre-agreed terms (*Gottlieb*, paragraph 70; Hammerson plc, 2018, p.10).
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49 What this shows is that both Contracts were designed to remain highly conditional and to shelter
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51 both developers from the market risks inherent to the pursuit of private profit.
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57 Waivable Pre-let Conditions in the Contracts provided similarly one-sided flexibility. The
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59 Pre-let Condition in the SH Contract could be satisfied through agreements for lease amounting
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3 to “not less than 70% of total yearly rents of ground and first floor retail units” (MP evidence,
4 Appendices, p. 24). This Condition consequently gave SHD further control: If the confirmed
5 CPO provided the land required and SHD was both confident that it would achieve its profit
6 target and was ready to start construction then there would be no need to insist on satisfaction of
7 the Condition. Alternatively, and as an affected landowner at the CPO Inquiry pointed out, if
8 SHD wanted to suspend the moment at which unconditionality occurred, it could insist on its
9 need to satisfy the Pre-let Condition even though SHLA had secured a confirmed CPO
10 (summarised in Thorby, 2012, paragraph 5.42).
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21 These conditions precedent and the accompanying waiver clauses illustrate the
22 asymmetric power dynamics that arise when a local authority seeks to “broker” private to private
23 acquisitions. When they signed the Contracts, the developers gained time in which to address the
24 emergence of predictable and unknown risks and ensured that their local authority partners
25 could not instruct them to start building before the developers had obtained planning
26 permission, road closure orders, agreements for lease, a suitable viability appraisal and so on.
27 Moreover, each developer could impose the decision to waive or seek satisfaction of a condition
28 precedent on the local authority, exposing the hierarchical relations between the parties and
29 suggesting an imbalance in the configuration of the common contract norms in the developers’
30 favour. On the other hand, SHLA and BXLA were each subject to high levels of prescription
31 and both agreed binding obligations requiring them to make and seek confirmation for the
32 CPOs that would redistribute the land. Compulsory purchase is, as Layard observes (2010, p.
33 422), complex for local authorities to navigate but, by fixing their future dealings in this way,
34 SHLA and BXLA each promised to remove one of the key uncertainties inherent to property
35 development. In doing so, they gave each developer both a development opportunity and a
36 scheme through which the developers could decide to take or leave that opportunity.
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Preserving the Relation: Dates, the Public Interest and Power Imbalances

Contractual behaviour during the case study developments highlights the nature of one-sided flexibility in private to private acquisitions. But the developments are also notable for how the conditional contractual arrangements travelled to the respective CPO Inquiries to instil a persuasive sense of progress despite the inherent flexibility of the conditions precedent and the waiver clauses discussed above. The underlying issues show how local authorities, as Harvey might put it, “lay themselves open to whatever the superior powers of monopolized capital wish or need to do” (2003, p. 130). This section thus examines the legally and financially risky actions that local authorities might find themselves compelled to take when they subordinate themselves to private capital accumulation strategies.

The Inspectors adjudicating at the SH and BX CPO Inquiries considered the making of both the CPOs and the statutory orders that would satisfy the Land Assembly, Road Closure and Highways Conditions in the respective Contracts (Thorby, 2012, paragraph 1.4; Clegg, 2017, paragraph 1.2). In 2015, the SSHCLG issued guidance to local authorities seeking confirmation for a CPO [4]. That guidance states that, to obtain confirmation, a local authority should demonstrate a sufficiently “compelling case in the public interest” (MHCLG, 2019, paragraph 2; ODPM, 2004, part 1, paragraph 17), which, as the case law discussed earlier suggests, requires the prospective fulfilment of some form of “public purpose”. SHLA and BXLA each highlighted this public interest aspect by pointing to the likely creation of local jobs, the leveraging of further private sector development and investment, and the provision of on-site housing, transport infrastructure and civic spaces (CS evidence, paragraphs 7.12-7.14; ST evidence, paragraphs 6.3-6.5).

A local authority seeking confirmation for a CPO must, however, do more than simply show that the CPO will enable certain public goods. While a local authority need not ensure that construction will begin on affected land “immediately”, it should demonstrate that it has a “clear idea” how the land will be used (MHCLG, 2019, paragraph 13; ODPM, 2004, part 1, paragraphs

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3 18-19). The CPO rules also state that a “general indication of funding intentions, and of any
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5 commitment from third parties, will usually suffice to reassure the Secretary of State that there is
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7 a reasonable prospect that the scheme will proceed” (MHCLG, 2019, paragraph 106. See also
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9 ODPM, 2004, Appendix A, paragraph 16(iii)). The necessary level of third-party commitment
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11 was an issue in *Archway Sheet Metal Works* [2015] EWHC 794 (Admin), [2015] 2 WLUK 699,
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13 another north London stadium-led regeneration case. The applicant in that case argued that the
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15 CPO to be used to reallocate their land was unlawful because the developer, Tottenham Hotspur
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17 Football Club, had not made contractual arrangements with the council in terms similar to those
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19 discussed in this paper (paragraph 15). The applicant further complained that the Secretary of
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21 State had not addressed this alleged shortcoming when he confirmed the making of the CPO
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23 (paragraph 71). Dove J found, however, no error of law and concluded that the Secretary of
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25 State had communicated various justifications for his belief that there was a reasonable prospect
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27 that Tottenham would construct the buildings planned for the site (paragraph 77). The Secretary
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29 of State was also justified, according to Dove J, in concluding that the absence of a contract
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31 committing the club to commence construction was unproblematic in the context of positive
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33 financial viability appraisals and a public statement from Tottenham’s chairman expressing
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35 commitment to the project (quoted at paragraph 10).

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41 *Archway Sheet Metal Works* indicates, therefore, that the extent to which contractual
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43 arrangements will be necessary to solidify a belief that there is a reasonable prospect that a
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45 scheme will proceed depends on the circumstances. SHD and BXD did use their Contracts in
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47 this way to present an alluring internal cohesiveness to the planned transition from loosely-
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49 defined conditional commitments to the settled state that would follow the Unconditional Date.
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51 In doing so, they presented unconditionality as the inevitable culmination of a smooth and
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53 predictable process: “My experience is that a successful CPO process provides the certainty
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55 upon which the other [conditions precedent] can be progressed to satisfaction” (MM evidence,
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57 paragraph 5.14. See also MP evidence, Appendices, p. 28). Both Inspectors then concluded that,
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3 since the Contracts stipulated the provision of various environmental, social and economic
4 goods (Thorby, 2012, paragraphs 7.8-7.18; Clegg, 2017, paragraphs 12.10-12.37) and because
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7 unconditionality was likely to occur (Thorby, 2012, paragraphs 7.23-7.24; Clegg, 2017, paragraph
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10 12.41), there was a compelling case in the public interest justifying compulsory purchase.

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12 On the recommendations of the respective Inspectors, the Secretary of State confirmed
13 each CPO. SHD and BXD had thus obtained both the right to the land required for the
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On the recommendations of the respective Inspectors, the Secretary of State confirmed each CPO. SHD and BXD had thus obtained both the right to the land required for the developments and the regulatory documents necessary for construction. Allen has argued that CPO rules give public bodies significant power to control negotiations over compulsory purchase for private to private acquisitions (2008, p. 89) but this paper suggests that the combined effect of the CPO rules and the conditional nature of some property development contracts incentivises only such commitment, on the part of private developers, as is necessary to get confirmation for a CPO. The case study developments illustrate this because unconditionality in the SH and BX Contracts did not follow automatically from confirmation of either CPO. While both Inspectors had been persuaded that unconditionality would follow in a sufficiently timely manner, the respective developers had made it clear that the other conditions precedent had been neither satisfied nor waived so SHLA and BXLA had to wait to be told when to exercise the CPOs and if building would start.

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This outcome does not mean, however, that the SH and BX Contracts rendered SHLA and BXLA entirely passive. Instead, both local authorities took legal and financial risks to preserve their contractual relations and to maintain the sense of movement towards unconditionality. After obtaining confirmation for the SH CPO, SHLA agreed to vary the SH Contract to remove the requirement that SHD should provide affordable housing and a new bus station. This led to the High Court action in *Gottlieb* [2015] EWHC 231 (Admin), [2015] 2 WLUK 359, in which Lang J concluded that these variations changed the SH Contract so “materially” as to amount to the formation of a new public works concession contract (paragraph 70). This meant, for public procurement law purposes, that SHLA should have

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3 conducted a tendering exercise during which other developers could bid to enter into contractual
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5 relations with SHLA (paragraphs 141-142). SHLA had agreed the variations “because the
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7 Council accepted the Developer’s representations that the project was not viable on the original
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9 contractual terms” but had not initiated a tendering process despite the evident risk of legal
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11 action for breach of public procurement law (paragraph 70). The 2014 variations were,
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13 consequently, void, although subsequent case law has suggested that *Gottlieb* may have been
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15 wrongly decided. In *R (Wylde) v Waverley Borough Council* [2017] EWHC 466 (Admin), [2017]
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17 PTSR 1245, Dove J indicated that Lang J should have refused the claimant in *Gottlieb* permission
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19 to challenge SHLA’s decision to vary the Contract (*Wylde*, paragraph 42). This point has not been
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21 tested further, however, and the fact remains that SHLA risked a legal challenge when its Cabinet
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23 approved those variations.
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28 As well as varying the public goods provision in the SH Contract, SHLA also twice
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30 extended the contractual deadline for unconditionality. SHLA/SHD had agreed that, if
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32 unconditionality had not occurred by 31 December 2009 (the Final Long-Stop Date), either party
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34 could terminate the Contract. To give SHD more time to secure funding, however, SHLA agreed
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36 a new Final Long-Stop Date of 31 August 2014 (WCC, 2010, paragraph 3.4) before extending
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38 the Final Long-Stop Date again to June 2015 (*Gottlieb*, paragraph 109) to allow SHD to redesign
39
40 the development and complete the land acquisitions following CPO confirmation (WCC, 2013,
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42 paragraph 3). The latter extension produced the variations considered in *Gottlieb*. Following the
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44 High Court’s decision, the Final Long-Stop Date was thus June 2015. By January 2016, SHD had
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46 not satisfied or waived the conditions precedent but neither party had exercised their right to
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48 terminate. Instead, SHLA awaited the “CPO Exercise Date”. A local authority must exercise a
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50 confirmed CPO within three years of confirmation (section 4, Compulsory Purchase Act 1965;
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52 section 5A, Compulsory Purchase (Vesting Declarations) Act 1981). There is no scope for
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54 extension so an “unexercised” CPO lapses on that date. The SH CPO Exercise Date passed in
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3 March 2016 without unconditionality or CPO exercise occurring, so SHLA then terminated the
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5 SH Contract (WCC, 2016, Item 5 Resolution 1).
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7 The deadline for the SH Contract to become unconditional had, consequently, only
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9 become strict when linked directly to land assembly. Making termination rights automatic and
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11 tying them, from the outset, to a CPO Exercise Date might thus change the nature of a
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13 contractual relationship founded on satisfaction or waiver of conditions precedent. As Table 1
14
15 shows, BXLA/BXD did this when they agreed the BX Contract. However, for BXLA, the
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17 Contract had, paraphrasing Vincent-Jones (2006, p. 158), a significant “quality of bindingness”
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19 even when it remained highly conditional. This is because the development was part of a wider
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21 regeneration project involving a new railway station. BXLA/BXD had been negotiating the
22
23 terms on which compulsory purchase and land redistribution would take place since 2003 (CS
24
25 evidence, paragraph 5.12) and they had initially envisaged that BXD would fund the railway
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27 station from profits accruing from the Brent Cross shopping centre extension (CS evidence,
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29 paragraph 5.14). In 2015, however, BXLA agreed to fund the railway station costs with a grant
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31 from the UK government and by borrowing money against anticipated tax receipts from the
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33 shopping centre extension (CS evidence, paragraph 5.17). To record this, BXLA/BXD amended
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35 the BX Contract (Note on Brent Cross Shopping Centre Property Development Agreement and
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37 Associated Revisions (submitted to BX CPO Inquiry)) and this commitment to borrow against
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39 future tax receipts appears, consequently, to have functioned as an incentive to encourage BXD
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41 to proceed with the development. Borrowing against future tax receipts is, however, a precarious
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43 strategy for preserving a contractual relation and presents a “peculiarly exposed cutting edge” if,
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45 as Harvey points out, there is no guarantee that private capital will follow where public funds
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47 have led (1999, p. 409). Moreover, the SSHCLG confirmed the BX CPO on 7 December 2017,
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49 which means the Long-Stop Date in the BX Contract is 7 December 2020. While this date
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51 provides a metaphorical line in the sand, at the time of writing, the project has stalled. This
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53 provides a stark illustration of what “relationality” can mean in the context of property
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3 development contracts for private to private acquisitions. The BX Contract obliged BXLA to be
4 sensitive to the circumstances in which BXD would both acquire the land and commit to
5 commence construction but, in return, BXD allowed BXLA to bear the risks of significant
6 infrastructure investment. Developers like BXD thus appear well-placed to obtain further
7 concessions from local authorities prior to agreed Long-Stop Dates.
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14 **Conclusion**

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16 This paper is about how complex long-term contracts address uncertainties inherent to both
17 compulsory purchase and property development. The SH and BX Contracts enabled the
18 respective developers to manage change in a way that minimised their exposure to the risk of
19 financial losses that might accrue from an unprofitable development. But the case studies also
20 show how far some local authorities might go in “brokering” property development activity. The
21 Contracts stated the baseline specifications for the projects studied here and stipulated the terms
22 on which the local authorities would use compulsory purchase for private to private acquisitions.
23 Compulsory purchase law thus had a significant impact upon both key contract terms and the
24 way that the parties used the Contracts at the respective CPO Inquiries. However, the
25 mechanisms contained in the Contracts for redistribution of the land and the start of building
26 work were qualified by a series of conditions precedent to be satisfied before the local authorities
27 could require the developers to start building.
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43 The conditional nature of the Contracts means that the arrangements between the
44 respective local authorities and their private development partners look highly “relational”.
45 Norms such as flexibility, solidarity and trust appear to have predominated. On closer inspection,
46 however, elements of the Contracts were more “discrete” and “presentiated”. Vincent-Jones
47 points out that planning is essential in long-term contractual relations (2006, p. 350), but that
48 planning must be fair, balanced and adjustable. The parties to the Contracts studied here,
49 however, agreed contractual mechanisms that gave the developers tight control over the
50 movement from “conditionality” to “unconditionality” and that meant flexibility was entirely on
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3 the developers' terms. SHD and BXD could compel the local authorities to secure confirmation
4 for CPOs but could then postpone or withdraw from the projects if prospective profitability
5 reduced. Both developers also ensured that the local authorities could only withdraw from the
6 projects if the developers had not obtained planning permission and other technical documents,
7 if the land assembly efforts failed or if the developers decided not to waive conditions precedent.
8 Moreover, the developers ensured that the local authorities could not require the developers to
9 start building until the developers were themselves ready to do so. While it is unsurprising that
10 private developers bearing the principal financial risk should seek control over the moment at
11 which they became obliged to fund land acquisitions and commence construction, this
12 preoccupation meant that the pursuit of private profit and investment opportunities
13 underpinned the contractual behaviour. The SH and BX Contracts thus linked state
14 redistribution of land to a capitalistic market logic. Examination of the Contracts reveals a
15 consequent tension between flexibility, contractual solidarity and reciprocity on the one hand
16 and, on the other, an asymmetric power imbalance that emerges in and is rearticulated by the
17 contractual arrangements. This paper shows that close scrutiny of contractual behaviour is
18 essential to understanding the power dynamics operative whenever a local authority agrees to
19 redistribute private land for development by a private company.

Notes

1. SHLA/SHD published the SH Contract and other CPO documents on SHLA's website.

While SHLA has since closed the webpage, the Contract is, as of 5 January 2020,
downloadable in four parts from

https://www.whatdotheyknow.com/request/a_copy_of_the_contract_between_h. The

author has the Contract and CPO documents on file.

BXLA/BXD published the BX Contract and other CPO documents in a repository managed
by Persona Associates (<http://www.persona-pi.com/>). References to the BX Contract in this

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3 paper are to document CD/C20 in the repository. Persona Associates has closed the
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5 repository but the author has the Contract and CPO documents on file.
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8 2. Minutes of and reports considered at SHLA and BXLA meetings are available through the
9
10 local authorities' online repositories.
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12 3. Schedule 4 refers to "overage", which is the payment by the developer to the local authority
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14 of a share of profit above a pre-agreed level (see also WCC, 2005, paragraph 20).
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16 4. The government has made minor amendments to that guidance (MHCLG, 2019). This paper
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18 considers CPOs made pursuant to both previous guidance (ODPM, 2004) and the later
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20 guidance.
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Table 1: The Unconditional Date, the Long Stop Date and the conditions precedent in the SH and BX Contracts

	SH Contract	BX Contract
Effect of “the Unconditional Date”	<p>Developer can request that local authority exercises confirmed CPO (clause 10.2)</p> <p>Developer receives a licence allowing access to the land to start building (clause 9)</p> <p>Either party can terminate if construction has not started within nine months (clauses 6.3.1 and 24.1)</p>	<p>Developer can request that local authority exercises confirmed CPO (clause 5.2.3(a))</p> <p>Local authority shall transfer the assembled site to the developer through a long lease (clause 15.1)</p> <p>Either party can terminate if construction has not started within 12 months (clauses 6.2.1 and 8.3)</p>
Deadline for unconditionality (“the Long Stop Date”)	22 December 2009 (clause 1.1.50)	Three years after the CPO is confirmed (clause 1)
Conditions precedent capable of waiver	<p>Title Condition</p> <p>Pre-let Condition</p> <p>Site Survey Condition</p> <p>Road Closure Condition</p>	<p>Funding Condition</p> <p>Pre-let Condition</p> <p>Tender Condition</p> <p>Viability Condition</p>
Conditions precedent incapable of being waived	<p>Planning Condition</p> <p>Funding Condition</p> <p>Affordable Housing Condition</p> <p>Land Assembly Condition</p> <p>Viability Condition</p> <p>(SH Contract, Schedule 2)</p>	<p>Planning Condition</p> <p>Highways Condition</p> <p>Infrastructure Condition</p> <p>Land Assembly Condition</p> <p>CPO Condition</p> <p>(BX Contract, Schedule 1; MM evidence: paragraphs 5.1-5.9)</p>