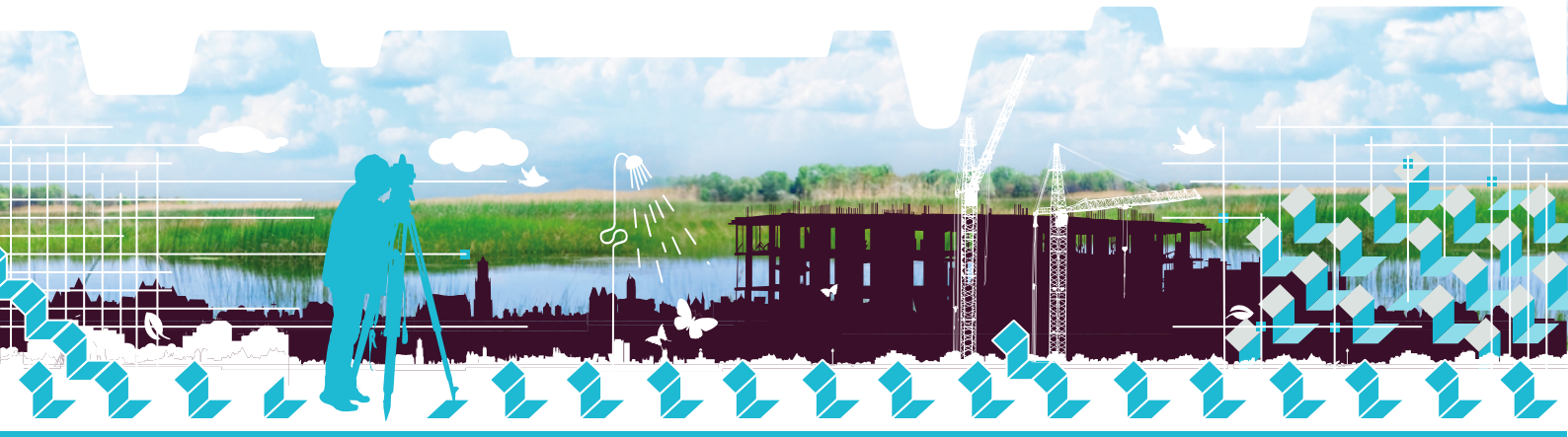
Urban Regions in the Delta



Case Study Utrecht Station Area, the Netherlands: How PPPs Restructured a Station, a Shopping Mall and the Law

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CONTEXT

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Executive summary

Utrecht's central station takes a prominent place in the city. It is located in the heart of Utrecht, somewhat hidden from the public eye, and is flanked by two of Utrecht's most successful commercial undertakings: shopping mall Hoog Catharijne, and exhibition and conference centre the Jaarbeurs. Both the station and the surrounding area are no longer meeting the city's needs. The number of travellers has increased significantly over the years, and is expected to grow further. The population of Utrecht has likewise grown. The addition of new residential neighbourhoods in the southwest of the city has increased the feeling that the rail tracks are a barrier which separates a large part of the city from the old city centre. In addition, the area feels unsafe. A lot of the space underneath Hoog Catharijne lacks a proper function and is not used to its full potential. To alleviate these problems, the whole area will get a facelift. The station, the shopping mall, and the public space will be modernised and expanded to facilitate the growing number of travellers, to ease travel through, to, and from the area, and to offer more and better facilities to Utrecht's denizens and visitors.

The station area comprises 90 hectares. Total investments are estimated at 3 billion euros. In total, there are 27 projects that will be realized, ranging from new office space for the municipality to a mega cinema and the restoration of the old canal. The new station area will include shopping opportunities, leisure facilities, housing, and parking space. The project as a whole should be completed by 2030. The initiative for the project lies with the municipality, which is the competent authority to take all major planning decisions. Nevertheless, the success of the project relies heavily on the cooperation of the private actors, in particular that of Corio, the owner of Hoog Catharijne, the Jaarbeurs, and ProRail, which is responsible for the station. The private actors develop the plans for their own property in cooperation with the municipality. The plans are then recorded in a large number of agreements and contracts. In addition, the municipality cooperates closely with the province, the national government, and to some extent the water board. The different public authorities have to work in concert, because the competencies to plan, regulate and supervise the project's completion are divided amongst them.

CONTEXT focuses primarily on the interaction between governance processes and different sorts of legal rules. There are a number of legal issues which have been complicating the process in Utrecht.

First, the project includes a large number of projects, involves many different actors, and spans a relatively long period of time. To better cope with changing circumstances, the municipality has placed great importance on the flexibility of its plans. To achieve this flexibility, it initially planned to adopt a global zoning plan. The Council of State issued a number of judgments on the acceptability of global zoning plans, though, in which it ruled that in areas with lots of vested interests, a

zoning plan had to include a sufficient level of detail to grant interested parties the required legal certainty. These rulings caused the municipality to give up on the idea of a global zoning plan, and forced it to come up with a different solution. The problem was eventually resolved by changing the planning regime for small parts of the area when the plans for that particular area were finalised. Initially, this was done using the so-called article 19 procedure under the old spatial planning act. Using this procedure, the municipality could grant exemption for the zoning plan for projects that confirmed with the *Structuurplan* it had adopted. After the new spatial planning act came into force, it simply adopted miniature zoning plans as needed, when the plans for a certain area were finalised. The desired flexibility was retained, but the desired legal certainty that inspired the Council of State's decision suffered, especially after the new spatial planning act entered into force.

Another important issue was the *Wet bodembescherming*, which contains rules on how to deal with contaminated soil. These rules put limitations and conditions on the use of the land as well as on what developments can take place. They are fairly detailed, and are traditionally interpreted in a restrictive way. The municipality managed to come up with a solid plan within the boundaries of the law that allowed for the planned developments to continue without requiring excessive amounts of money to be spent: the bio washing machine. The manner in which the municipality dealt with the soil protection act offers a clear example of contextualisation. However, it offers some unexpected information on what that looks like in practice: The municipality has not actively sought to create public support for the bio washing machine, nor did it rely on innovation in the private sector. Indeed, the role of the private partners is very limited. They do contribute financially to the bio washing machine, but the plans were developed primarily by municipal services, and the success of the bio washing machine does not depend on cooperation by the private partners.

Finally, the process was slowed down by European air quality norms as well. This problem was eventually resolved by the national legislator.

The Utrecht station area case indicates the existence of three dilemmas:

The municipality has a desire, and sometimes a need, to stay in control. This has to be balanced against the importance of a broad involvement of actors and shared responsibility for developments. Although the municipality wanted the cooperation of private actors in the realisation of the bio washing machine, it did not dare to depend on it. Thus, it made sure that the project could succeed even without their involvement. Although the private actors showed a certain willingness to cooperate financially to the project, the actual contributions were less than the municipality had hoped for. This was partly due to the municipality starting the negotiations too late. However, the instruments needed to enforce an equitable agreement that seemed otherwise achievable were lacking as well. Likewise, the municipality depends on private actors to make optimal use of the potential of the bio washing machine and the geothermal capacity of the station area, and again, it feels it has insufficient instruments available to steer the use of the soil.

It remains difficult to deal with risk and uncertainty. The effects of the bio washing machine are uncertain. Both its effectiveness and the risks it poses are unknown. Indeed, the water board submitted an official view in which it expressed its concerns for the quality of the second layer of groundwater. Considering the water board's preference for negotiated solutions, this is a serious

signal. The municipality did come up with a solution to deal with the risks posed by the bio washing machine, by setting up an intensive monitoring system. This solution is in line with the Netherlands' official approach of the precautionary principle, which relies at the hand-at-the-tap principle. This principle requires that risky projects are monitored, and stopped immediately if something goes wrong. This is in itself a contextualisation of the European precautionary principle, and it is one example of solving the dilemma between risk prevention and enabling innovation. The reliability of this method for preventing negative consequences is probably increased by the threat of liability.

There is a tension between the requirement of legal certainty and the desire for flexibility. This is most obvious in the desire to adopt a global zoning plan that was frustrated by the Council of State, and the subsequent practice of using article 19 procedures and, after the adoption of the new Spatial Planning Act, so-called stamp zoning plans. There may be a similar problem with the strict definition of the system that was to be used to determine the area for the second phase of the bio washing machine. This definition turned out to be overly strict, because it only allowed for one specific method of determining the boundaries of the area. When this method turned out to be unfeasible, the municipality saw itself out of options until the Soil Protection Act was revised. The illusion of certainty that was provided by the exact method the municipality had determined did no doubt contribute to the overall impression that the bio washing machine was a sound plan though. Pretence of certainty may be useful in contextualisation, because it limits the possibilities for disagreement.

1 Introduction

In the heart of Utrecht, somewhat hidden from the public eye, lies the city's Central Station. It is flanked by two of Utrecht's most successful commercial undertakings: shopping mall Hoog Catharijne, and exhibition and conference centre the Jaarbeurs. The desire to restructure the area has existed for a long time. In the eighties and nineties, plans were made but never executed, grinding to a halt when the financial and political obstacles to their realisation became clear (Bouwman & Bekkering, 2007: 21; Verbart, 2004: 30-33, 39-40).

Our study takes off in 1998, when the area was designated as one of the New Key Projects (*Nieuwe Sleutelprojecten*, or NSPs for short). The New Key Projects are infrastructural projects that are to stimulate the Dutch economy and that are realised in part with state funding. From that point on, the process gained impetus, and the plans that are to become the foundation of the new station area were drafted in the first years of the new millennium.[1]

The project comprises a relatively small area (90 hectares), but the ambitions are high, and vested interests, technical, organisational, financial, and legal issues abound. With the restructuring, the municipality is trying to give a new impulse to the city centre by expanding both the station and the adjacent shopping centre, and by creating a large number of new facilities in its vicinity. In total, there are 27 projects, requiring an investment of 3 billion euros (Source: CU2030). For the realisation of the project, the municipality depends on the cooperation of the private parties that own most of the real estate in the area, and both the Province and the national government take a keen interest in the station area. The case shows ample evidence of the important role of legislation in development projects. The POS (the municipality's dedicated taskforce for the station area) estimates that for all the projects that comprise the restructuring of the station area 4,200 licenses need to be issued. Half of these can be the subject of objections and appeals.[2] Many of these licenses are unproblematic, but during the process, two issues turn out to be of utmost importance – to be threats, even, to the realisation of the project. First, the soil in the area is heavily polluted. When construction takes place, there is a risk the pollution will spread, causing harm to human health and the environment. Under the Soil Protection Act this is prohibited, and initially, the investigative and preventive measures that would need to be taken made some developments prohibitively expensive. Especially the realisation of geothermal heat pumps, which are needed to realise the project's ambitions with regard to reduced CO_2 emissions, was at risk.

Second, the Netherlands as a whole was confronted with a serious problem when its failure to comply with the European norms for particulates put a stop to nearly all developments. It was one

[1] The restructuring of the station area was chosen for the first round of key projects as well, but the project was delayed too much.
[2] Rapport rekenkamer: Project stationsgebied: informatievoorziening aan de gemeenteraad van Utrecht, p. 37.

of the reasons the zoning plan for the area was never adopted. The problem was eventually solved by the national legislator, with a number of projects in the station area serving as pilots. However, the removal of that barrier did not save the zoning plan, which in the meantime had been made obsolete by judgments of the Council of State that shed doubts on its legality.

Location

Utrecht is one of the four cities in the Netherlands. Its main railway station is located in the city centre, and lies at the heart of the Dutch railway system. It serves a limited number of international trains. At the time the project was designated a national key project it was supposed to be one of the stations on the HSL east line. That project has been cancelled, though. Improvements to the existing track have taken place instead. Either way, the number of travellers Utrecht processes each year is still growing. Bordering the station, we find Hoog Catharijne, a highly successful shopping centre, and the Royal Dutch Jaarbeurs (Trade Fair), an exhibition and conference centre with international appeal.

Issues

The current state of the station and its surrounding areas present the city with a number of problems. First, the population of Utrecht has been growing steadily, and is expected to grow further. Likewise, the number of passengers at the station is growing. Both the station itself and the facilities in the city centre are insufficient to serve this number of people. Second, the western half of the city is disconnected from the city centre. The train tracks and the six-lane Catharijnebaan are a barrier that increase the perceived distance to the city centre considerably. Because of the new residential area Leidsche Rijn this problem has become more pressing. Third, there is no cohesion between the old city centre and shopping centre Hoog Catharijne. The station itself lacks recognisability and a clear connection to the public space. Fourth, Hoog Catharijne was plagued by nuisance and crime, and the area is perceived as unsafe after the stores have closed.[3]

Ambitions

The restructuring of the area is to connect the two halves of the city, increase the facilities available to the growing population of the city, to increase the allure and the safety of the area, and to create a more pleasing transition between Hoog Catharijne and the old city centre. The project is one of the largest of its kind and is ambitious in terms of its scope. In addition, the municipality hopes to realize a high level of sustainability. Thus, the realization of the project is challenging from a technical, logistical, political, and managerial perspective. Its success depends on the cooperation of a large number of actors, both public and private, and requires broad support. In addition, though, the applicable legal framework makes any kind of development in the station area difficult, expensive, and in some cases outright impossible, even though it appears these

[3] Although the crime rates have dropped and safety has increased in recent years, even before the actual restructuring of Hoog Catharijne began. Indeed, Corio has received awards for its policy to improve the mall's safety.

obstacles contribute little to realizing the goals underlying the legislation that creates those problems. It has proved possible to overcome these difficulties, however, and indeed, the greatest delays in the process seem to have different causes.[4]

Legal issues

A number of issues are immediately apparent when one looks at the development of the plans for the station area.

Soil contamination

The soil in the station area is severely polluted. The municipality estimates that 180.000 million m^3 are contaminated. A significant part of the pollution consists of VOCls. This kind of pollution disperses easily, and can produce highly toxic gasses. Any underground activity needs to take the presence of pollution into account, and requires research into its consequences and possibly preventive measures. Needless to say, the presence of soil pollution hampers the realisation of the station project. This is both a practical and a legal problem. Whether the manner in which the applicable legislation was drafted presented an extra obstacle to solving the issues will be discussed below.

Need for flexibility in the process

Because of the complexity of the project and its inevitable long duration, the municipality wanted to retain flexibility during the process to allow it to adapt to new circumstances and insights. It had learned its lesson from the failed UCP project, where all details had been sketched out in advance (Bouwman, 28 November 2012). It proved to be difficult to retain the flexibility from the Masterplan. The initial idea of the municipality was to create a global zoning plan based on the Masterplan. The adoption of the zoning plan was initially delayed because of issues with air quality. After that, a number of judgments of the Council of State on the propriety of using a global zoning plan in heavily used urban areas resulted in a more cautious approach. This is in itself a fascinating example of contextualization, and of who decides whether a norm has been contextualized correctly. The legislator had provided municipalities with a flexible instrument: a competence to adopt a global zoning plan, which could or could not be used, at the municipalities' discretion. Whether the instrument should be used thus depended on local circumstances. Although the initial judgment of whether local circumstances warranted the use of a global zoning plan was left to the municipalities (article 10 Wro (Wet ruimteljke ordening, the Spatial planning act)), it turned out the Council of State had fairly specific ideas about when a global zoning plan would be appropriate: the more vested interests in an area, the more detail would be required in a zoning plan. Interestingly, the court based its decision on the principle of legal certainty, which is in itself a very global and general norm (Van Buuren et al., 2010: 6, 58).[5] Indeed, the principle of legal certainty requires that a certain end-result be achieved (that legal subjects know what the legal consequences of their actions will be), which is valuable in and of itself (Buijze, 2013: 271). It is

[4] Verbart (2004: 19–44) provides an extensive description of the failure of the UCP.
[5] ABRvS 27 februari 2002, Gst. 7162 (Leidsche Rijn Utrecht).

quite typically a norm we would not expect to cause problems, because its global, normative nature makes it a good candidate for contextualisation.

The case law of the Council of State on global zoning plans made the municipality decide to adopt a different strategy, at least for the time being. It decided to create a so-called Structuurplan, an old instrument available under the former WRO, which could provide the basis for an article 19 procedure to allow for an exemption to the applicable zoning plan. That way, individual projects could be approved one by one, without the whole plan for the area being worked out in detail in advance. Initially, the municipality did intend to adopt a zoning plan for the whole area,[6] but this never did happen. After the new Wro entered into force, the municipality continued to retain flexibility in its approach by the adoption of so-called 'stamp zoning plans' which covered only a small patch of land.

Managing the connections between separate plans

The numerous projects that are part of the renovation of the station area are connected in many ways. Yet, they are legally distinct, which means that the effects of one project are not necessarily taken into account when making decisions about another project.

This issue ties in with the one mentioned above. Global zoning plans are flexible, but were ruled to sometimes be unacceptable from a perspective of legal certainty by the Council of State. Cutting the project in smaller pieces is a way to provide some of the same flexibility, but has presented the municipality with another set of problems. In addition, it is doubtful that the stamp plans provide people with more legal certainty than the global zoning plan the municipality originally intended to adopt.

Air quality and obstructionists

Before 2005, the problems with regard to air quality blocked the adoption of any zoning plan affecting air quality. In particular Council Directive 1999/20/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air proved problematic, as the Netherlands were unable to meet the standard for particulate matter. When the legislator facilitated a more flexible approach, the problems did not disappear. Some people were not convinced the new policy would prevent further degradation of the air quality, and indeed, nearly all planning decisions regarding the development of the area are the subject of legal procedures in which the plans' compliance with the European air quality norms is contested. These are conducted by a number of NGOs concerned with air quality, who share the same driving force: Kees van Oosten. Not everybody is happy with Van Oosten's concern for the public interest, and some media argue he is slowing down developments that everybody wants. Hence, on the independent blog of station area watcher Herbert Boland, he is colloquially known as 'the terminator'. Van Oosten is also the driving force behind the SZOU, the 'Stichting Zelfstandige Ondernemers Utrecht' (the foundation of independent entrepreneurs Utrecht), and fights the municipality in that capacity as well. However, the air quality trump is also played by V&D BV, so even if Van Oosten would take a less activist approach, that would not resolve the problem.

[6] Raadsvoorstel Verlening voorbereidingsbesluit Stationsgebied, 1 juni 2005 (http://www.utrecht.nl/CoRa/Griffie/Raadsvoorstellen/RV2005/raad_2005_094.pdf).

Commercial interests

The remainder of legal procedures seem to be inspired by commercial interests: current renters of Corio property who fear the loss of customers when the routes for pedestrians are changed.

Problem description by end-users

The problems observed by the water board tie in with those mentioned above in many ways. The soil pollution complicates issuing water licenses, and the fact that the plan has been cut up into pieces complicates water management: ideally, the water management of the area as a whole would be addressed integrally, but cutting the area up into many different smaller projects means the water interests get cut up as well.

The water board has been involved in the development of the station area in several ways. First, the water board has been involved in the planning phase by means of the water test (*watertoets)*. The water test requires the municipality to ask the advice of the water board in planning procedures. The eventual decision has to include a water paragraph that reflects how the municipality has taken the advice of the water board into account. Second, the water board is the authority that issues water licenses which are required for, amongst other things, groundwater extraction. Third, the water board has been involved in an informal manner in the planning process.

The water board has experienced several problems and bottlenecks during the process.

First, they have few means available to ensure the realization of ambitions with regard to water, in particular when they attempt to ensure that new projects are climate proof. The legal standards that have to be complied with are relatively low. The ambitions of the water board in this regard have been developed in the Perron H2O project, which has resulted in a report with several creative visions on how water can be dealt with in a constructive way in the project area. However, although the water board and the municipality have been in close contact during the planning phase, there has been no contact between the water board and the private partners, who are the ones that have to execute the plan eventually.

The issue of how to realize ambitions is not only an issue for the water board. There is a sustainability covenant that the municipality, the water board, and the private partners are parties to, which includes a catalogue of sustainability measures that could be implemented in the station area. The covenant is non-binding. It will be interesting to see to what extent the ambitions in both these documents have been or will be realized.

The water board has issued a number of advisory opinions with regard to the area. Some of those were negative (although most issues are smoothed over before the official advice is issued), which led to some discord between the water board and the municipality: a negative advice can provide fodder for legal procedures later on, and therefore the municipality hoped to avoid them.

The fact that the project has been divided into smaller projects poses challenges as well. The Catharijnesingel will need a dyke (*overige waterkering*) once it contains water again. This is planned for 2019. In the meantime, several projects are realized on its soon to be banks. The

realization of these projects should take account of the future Catharijnesingel, but since the water is not there yet, there is no hard legal obligation to do so, and less of an incentive.

In addition, the Catharijnesingel will be a significant addition to the area's surface water. However, earlier projects will reduce the total amount of surface water. This usually requires compensation before the project is executed, and licenses will include an obligation to compensate for the loss of surface water beforehand. It is unclear whether this rule can be deviated from, and under what circumstances. This issue has not been discussed during the planning phase, and surfaced when licenses had to be issued. The licenses have been issued contrary to the water board's (policy) rules.

The water boards' competence to issue licenses for the withdrawal of groundwater is more flexible in practice than it is on paper. For the construction of the underground car park, surface water had to be withdrawn. This withdrawal could not be permanent though, both for quantitative and qualitative reasons. As the plan progressed, it became clear that it was technically impossible to bring the water back after construction was finished. The water board caved and issued the license regardless. However, the objections with regard to water quality were met to some extent by the 'biowasmachine'. This is either an example of successful contextualization, or an example of how certain interests can be harmed during governance processes, depending on the extent to which the goals of the Soil Protection Act (*Wet bodembescherming*, Wbb) are realised.

This issue ties in with the more general problem of soil quality in the area. The city centre is plagued by serious soil pollution, and under the traditional interpretation of the applicable legislation, any sort of development would be severely hampered. Both draining soil water during construction and allowing geothermal heat pumps would most likely result in a violation of the Wbb, and thus be prohibited. At the very least, such projects would require substantive amounts of research and monitoring, making them prohibitively expensive. A creative interpretation of the applicable norms allowed for a solution to this problem.

The water board hopes that the results of the project can help to assess whether it is legally possible to have 'surface water bookkeeping.' Right now, if a project requires surface water to disappear, this needs to be compensated for prior to the body of water being filled up, to ensure that there is 10% surface water at all times. This system is being perceived as inflexible, because other projects that might increase the total amount of surface water cannot be taken into account.

The complaint that the current environmental (in the broad sense) legal framework is too restrictive, and does not offer enough flexibility, is echoed in the station area as well. There are most certainly rules that make what some parties consider desirable developments more difficult, or even impossible. However, at first sight is not immediately obvious that the problems are caused by rules that are too specific, or too instrumental. A more in depth analysis of the exact problems that were encountered is required.

2 Geographical and historical context of Utrecht's station area

Geographic aspects

The station area is a 90-hectare urban area in the city centre of Utrecht. Utrecht itself is located in the middle of the Netherlands, at the most important motor- and railway junction in the Netherlands. International trains connect Utrecht directly with other European cities. The station lies in the heart of the city, which provides Utrecht with clear advantages in terms of accessibility, but which also means the rails cut straight through the city, creating a barrier between the eastern and western halves of the city. In the western half of the city we find Leidsche Rijn, a major VINEX location, which now houses close to 30,000 people and is expected to eventually house 80,000.

The city of Utrecht as a whole houses 316,000; the agglomeration surrounding it is home to 660,000 people. This number has grown considerably in the past decades, and is expected to grow even further in the future.

The station area is defined in the 2006 *Structuurplan*. The area is confined:

- on the east: by the train track between the Daalsetunnel and the Leidseveertunnel, Smakkelaarsveld, the Daalsesingel from the Smakkelaarsveld to the Daalsetunnel, the Catharijnekade between Paardenveld and Vredenburg, Vredenburg, Achter Clarenburg, Rijnkade and the Catharijnesingel;
- on the south: by the Moreelsepark, and a line from east to west over the train tracks, part of the former EKP-terrain and across the Van Zijstweg;
- on the west: by the Merwede channel;
- on the north: by the Graadt van Roggenweg, the Jaarbeursplein, the Van Sijpesteijnkade, and the track between the Van Sijpesteijntunnel and the Daalsetunnel.

The area's most defining characteristic is, of course, the presence of the central station. The station has fourteen platforms, which makes it the largest railway station in the Netherlands in terms of size. It ranks second in number of visitors, behind Amsterdam Centraal, with over 150,000 passengers each day. The station lies at the heart of the Dutch railway system and services intercity trains to the north and the south, commuter services to towns across the Randstad, and a number of international trains. Over 900 trains depart from the station each day. Disruptions at Utrecht may cause large parts of the country's railway network to be affected.

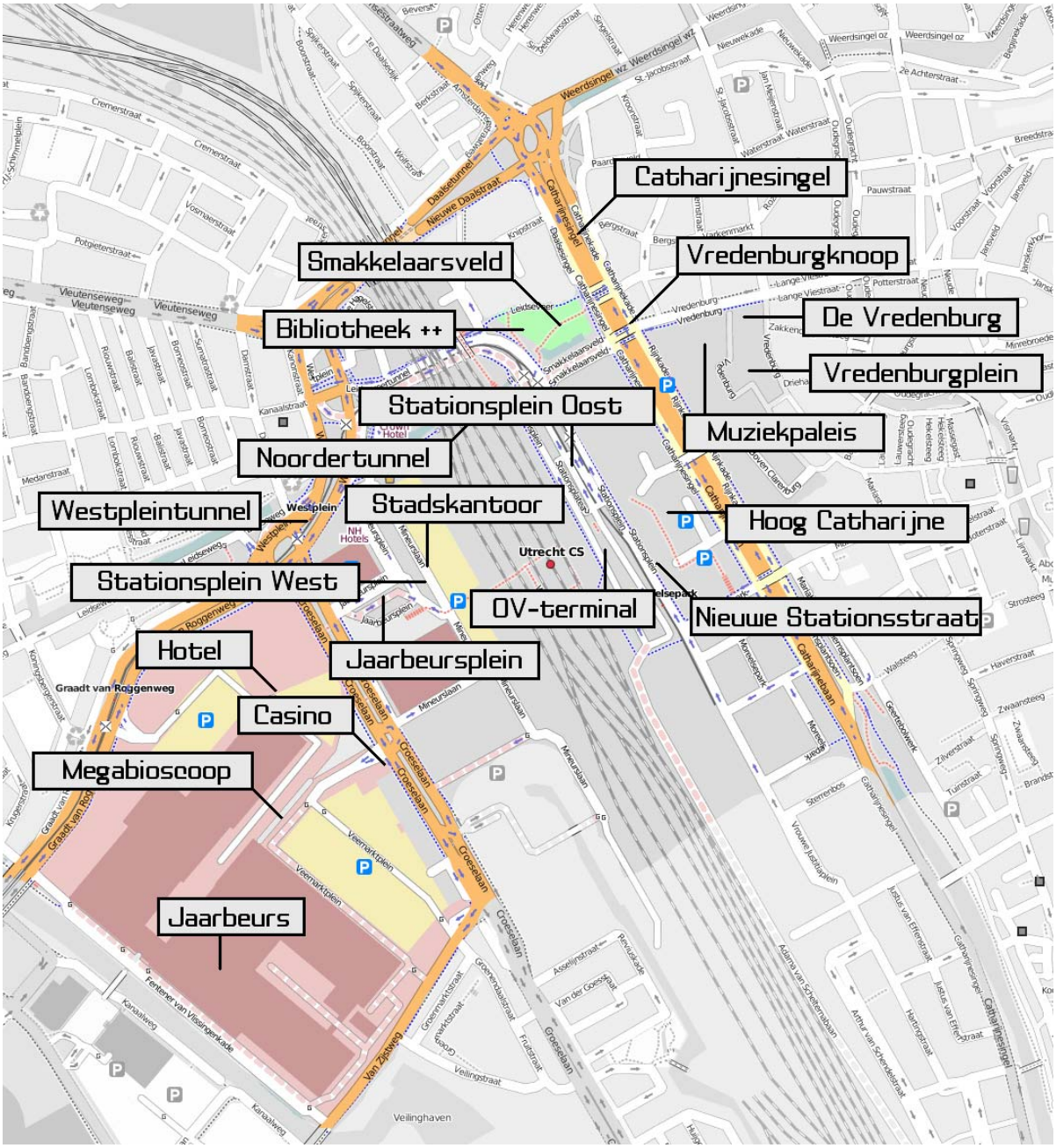

Fig. 1. Projects in the station area. Source: CU2030

In addition to the station, the area includes Hoog Catharijne, a shopping mall extending from the Jaarbeursplein west of the station to Vredenburg in the east. It is home to hundreds of stores, offices, and homes, and includes a cinema and a sports centre. The Central Station and the Utrecht branch of V&D are officially part of Hoog Catharijne as well, but have different owners.[7] In addition, the area contains the Jaarbeurs Utrecht, which accommodates trade fairs, exhibitions, public events, conferences, meetings and other activities. The company aims to develop the multifunctional character of the venue by adding new facilities.

[7] V&D used to be owned by Maxeda, a Dutch retail group that operates in Europe, the Middle East and Dutch dependencies in North America (formerly KBB & Vendex). In September 2010, Vroom & Dreesman was sold to Sun European Partners, an American investment company. It is V&D B.V. that is going to court, though. The Central Station is owned by ProRail.

The station area contains two important waterways: the old Singel, which has been filled up in the seventies, and the Leidsche Rijn. The Leidsche Rijn is a canal from medieval times that was dug to replace the Old Rhine, which became increasingly difficult to navigate. In the 19th century the upper reaches, which led across the terrain of the Jaarbeurs to the Singel, were filled up. The restoration of both of these waterways was an important feature of the Masterplan.

The area is almost completely paved, which means rules with regard to water retention capacity are not as restrictive. When an area is developed or restructured, its capacity for water retention may not diminish, but since the station area's capacity is already very low, this is easily accomplished.

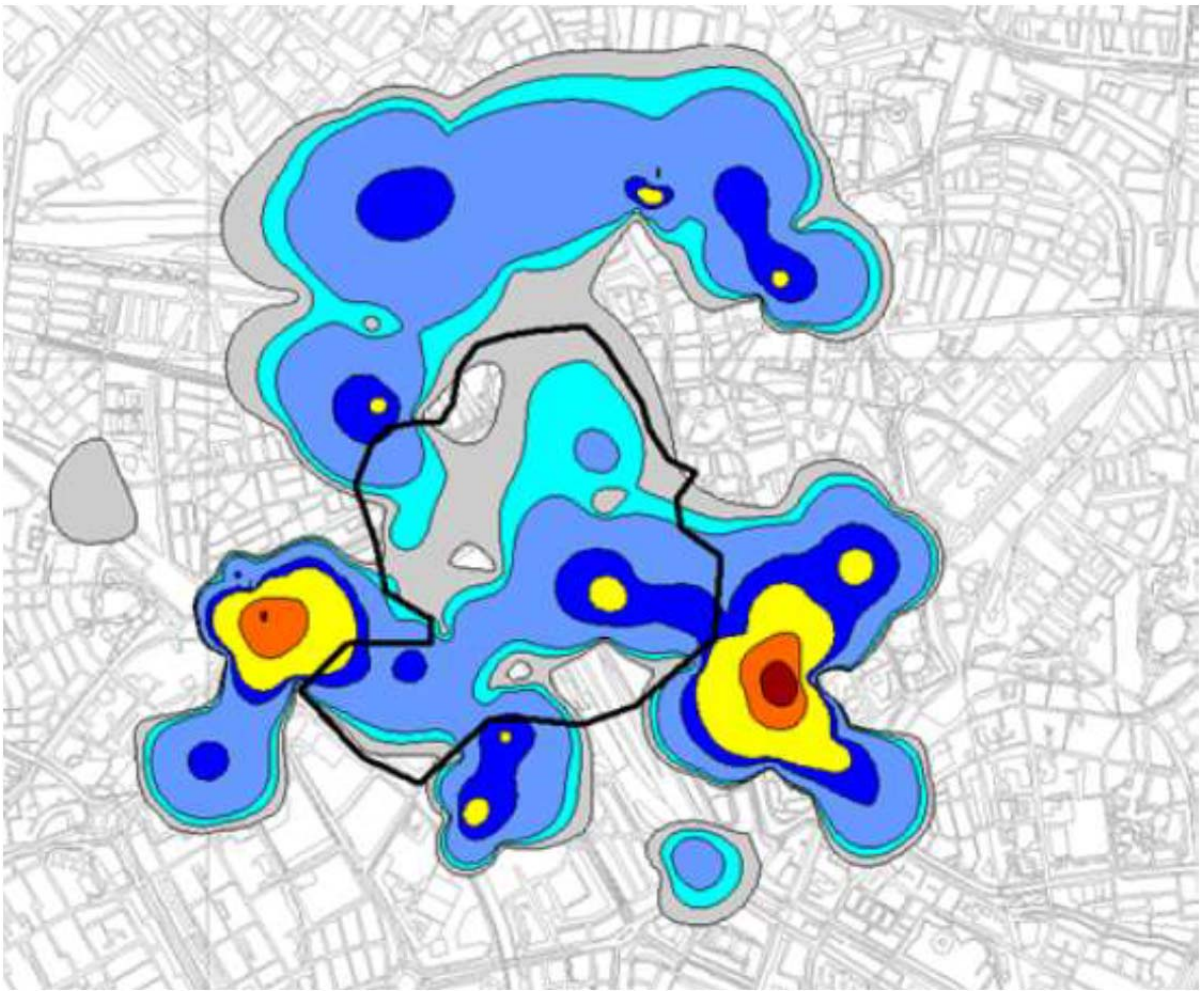

Fig. 2. Soil pollution in the city centre. The red and yellow areas are the most contaminated. Source: municipality of Utrecht

The condition of the soil and the water it contains is bad. The groundwater is divided in two layers, which are separated – at least in most places – by an impenetrable layer of clay. The top layer is available for prudent use, whereas the lower layer is saved for potential future water shortages and as a drinking water reservoir. The top layer is polluted. An estimated 180 million m^3 of soil is contaminated. In the topmost layer of the soil, individual cases can be distinguished, but below 5 metres, the 'plumes' of pollution blend together, and it has become impossible to determine who caused which pollution. Because the applicable legislation deals with distinguisha-

ble *cases* of pollution and is based on the principle that the polluter pays, its application is somewhat problematic. Following the approach of the Soil Protection Act would be prohibitively expensive, technically very difficult, and impractical. An important part of the pollution consists of VOCls. This kind of pollution disperses quickly, and when it deteriorates, vinylchlorids are released, which are toxic. On the plus side, VOCls are biodegradable.

History

In the first half of the 20th century, the once proud city of Utrecht had turned into a sleepy provincial town. But that situation did not last long. In 1973, Utrecht saw the opening of Hoog Catharijne, a new, ambitious shopping mall located directly next to the station. The modern shopping mall had some unique aspects: it was located above ground level, allowing pedestrians to avoid the traffic streams on the streets underneath the mall. The idea may have worked slightly too well: the public space underneath Hoog Catharijne was largely neglected, and it became an unwelcoming part of the city. The project was an economic, if not an aesthetic, success though. It has become the most successful shopping mall of the Netherlands and attracted new business and activities to the city. Even its failures may have their upsides: the mall is thought to have contributed to the preservation of the old city centre (Verbart, 2004: 25).

Accompanying the construction of Hoog Catharijne, the inner city was made more accessible for traffic. This meant the creation of traffic lanes through the city and the filling up of the Singel. The traffic lanes were an improvement in terms of accessibility by car, but they increased the depth of the divide between the two halves of the city.

The early developments provided an economic boost to the city, but also created problems. The city was divided in two halves, the transition between Hoog Catharijne and the old city centre did not work, the station itself was unrecognizable and difficult to navigate, and the area was unsafe after stores closed.

The owner of Hoog Catharijne soon wanted to develop Hoog Catharijne further: the first plans to update Hoog Catharijne were drafted in the eighties. The designation of Utrecht as a VINEX location ensured that the municipality has a stake in the redevelopment of the area as well: part of its housing assignment must be realized in the vicinity of the station. Today, the increasing number of travellers necessitates the expansion of the station. In the early nineties, the municipal council agreed to the Masterplan Utrecht City Project. Utrecht City Project is a collaboration of the Municipality and the private parties who own the real estate in the area. Within the UCP, plans are developed in relative isolation. The UCP ends in 1996, and in 1997 its follow up, the Administrative Platform Utrecht Centre Project, sees the light. In 2000, the Jaarbeurs and Corio leave the Platform after disagreements about how the public space should be financed. In 2000, Leefbaar Utrecht, a party that has been very critical about the plans for the station area all along, wins the elections. They argue for more citizen participation, and take the initiative for what would become the 2001 referendum.

It was the outcome of the referendum that provided the basis for the Masterplan, which was adopted in its final and revised form in 2004. The Masterplan has since formed the basis for the development of the station area.

3 Legal and policy framework

Policy ambitions

The municipality has both a motto and a mantra pertaining to the restructuring of the station area. Its motto is ‘doing nothing is not an option’, and its mantra is ‘repair, connect, and give meaning’ (*herstellen, verbinden, betekenis geven*). When completed, Utrecht’s station area should be liveable and safe, accessible, and capable of fulfilling its regional function and its function as the ‘Railport of the Netherlands’.

Fig. 3. Mixed functions in the city centre. Source: CU2030

Liveable and safe

The station area should provide people with a feeling of safety. Crime rates should go down. To achieve this, areas will be easy to oversee and well ordered. They will have their own identity, with specific facilities and functions (giving meaning). The intensive use of space and the blending of functions will create a lively atmosphere. Cooperation will be well organized and there has to be sufficient supervision.

Regional function

To strengthen the regional function of Utrecht, investments in public spaces with their own identity, atmosphere, and quality are needed. The economic potential is increased by improving the conditions for establishing offices and stores, and by creating high-end housing and facilities. By increasing the number of facilities and adding new cultural and leisure facilities, the pressure on the old city centre will be relieved.

Accessibility

The accessibility of the city centre should be improved. Travel by public transport, bike, or foot should be pleasant and supple. For those travelling by car, routing and information about parking should be logical and clear. A pleasant transfer for travellers arriving, departing, or simply passing through Utrecht is to stimulate them to spend more time in the city during their next visits.

Railport of the Netherlands

To realize the full potential of Utrecht as the railport of the Netherlands, a new OV-terminal will be realized. The terminal should be easily accessible, well organized and pleasant for travellers, spacious, light and clear, and safe. More concrete, the problem of the barrier between the two halves of the city that is the train track will be resolved; the west side of the station will get a full-fledged entrance; the station area will get an attractive architecture; the station area will become safe; the station area will be easily accessible and offers enough parking space and public transport. To realize the plans, the municipality depends on the cooperation of private partners who own most of the real estate in the area. The actual plans have been developed in close cooperation with the State (ministries of VROM and V&W), the Province of Utrecht, the Trade Mart, NS Vastgoed, Corio (the owner of Hoog Catharijne) and ProRail.

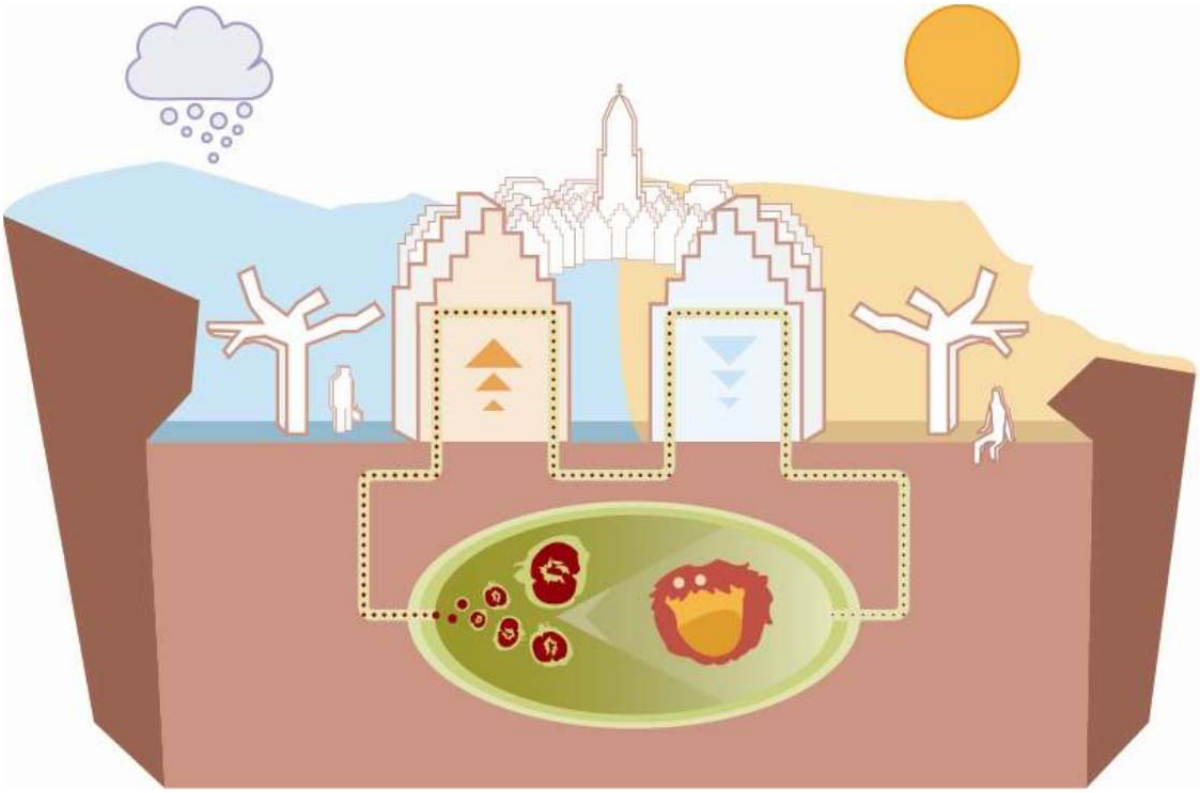

Fig. 4. Illustration of the bio washing machine, which uses geothermal pumps to speed up the natural breaking down of VOCIs. Source: municipality of Utrecht

Sustainability

In addition to these ambitions, the station area must become sustainable. There are a variety of instruments, or rather technical means, that are to achieve this goal. For the case study, the most

interesting ambition – because it is the most legally challenging one – is the use of geothermal heat pumps, which are to realise a CO_2 reduction of 6 million tons a year. Incidentally, the use of the pumps will cause the groundwater to circulate, which will speed up the natural degradation of the VOCl present in the soil. If necessary, nutrients can be added to speed up the growth of the bacteria that break the pollution down. In this way, the municipality and its partners can hit two birds with one stone: the geo-thermal heat pumps will provide green energy, and will help clean up the pollution that is present in the station area.

Legislation

The number of laws and regulations that has some bearing on the development of the station area is immense. We will therefore focus on the legislation that is relevant to the water management in the area. Both spatial planning and water management are complex. Before we enter into the actual legislation that regulates the process, the following diagram gives a quick overview of who is responsible for what.

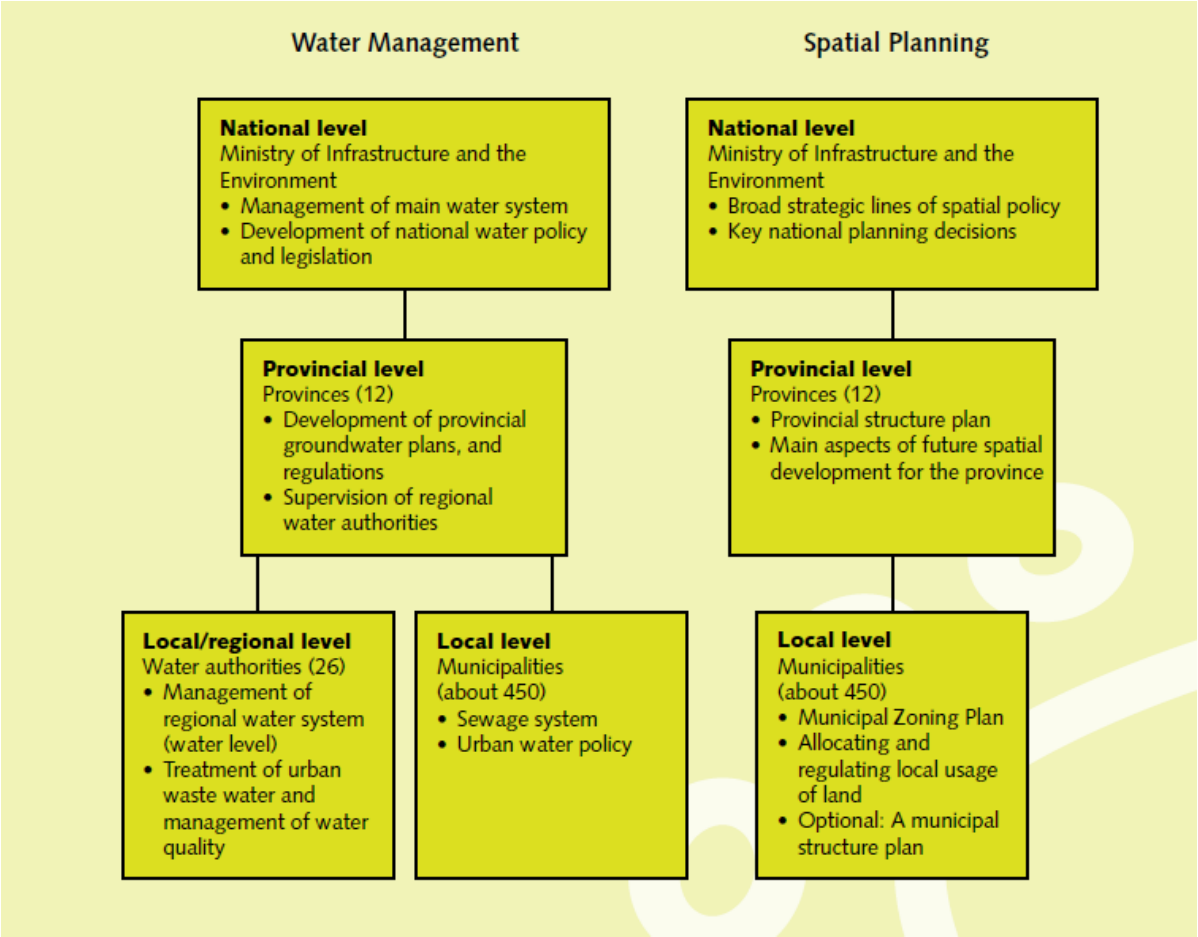

Fig. 5. Water management and spatial planning in the Netherlands. Source: Helpdesk Water

On the European level, the most important directives are the Water Framework Directive and the Groundwater Directive. Of secondary importance are the Directive on the assessment and man-

agement of flood risks; the Water pollution directive; and the Environmental Impact Directive. In addition, national authorities will have to comply with the general principles of EU law as well as the principles that guide European environmental law. The latter include the precautionary principle, the principle that preventive action should be taken, that environmental damage should as a priority is rectified at the source, and the polluter pays principle (Van Rijswick & Havekes, 2012: 80). These principles have been worked out in the directives, and although they do not have direct effect, they can aid in the interpretation of the rules contained therein (Van Rijswick & Havekes, 2012: 81). They offer (part of) the rationale for more specific rules, and can therefore be expected to be useful in the process of contextualisation as described by Borgers (2012: 163).

On the National level the Water Act 2009 (*Waterwet*) is the main instrument to regulate water interests. However, the Water Act entered into force in 2009, well after the launch of the project. Therefore, some of the predecessors of the Water Act are relevant as well. The Water Act replaced the Water Management Act (*Wet op de waterhuishouding*); the Surface Water Pollution Act (*Wet verontreiniging oppervlaktewateren*), the Seawater Pollution Act (*Wet verontreiniging zeewater*); the Groundwater Act (*Grondwaterwet*); the Land Reclamation and Tidal Flats Act (*Wet droogmakerijen en indijkingen* or '*Wet van 1904*'); the Flood Defence Structures Act (*Wet op de waterkering*); and the 'wet parts' of the Public Works (Management) Act (*Wet beheer rijkswaterstaatswerken*) and the Water Management and Public Works Act (*Waterstaatswet*). In addition, part of the Soil Protection Act (*Wet bodembescherming*, Wbb) has been integrated in the *Waterwet*. The old Groundwater Act was applicable when the bio washing machine was brought into the world and is especially relevant because it was a crucial element of the argument made for the area-oriented approach that the Soil Protection Act seemed to prohibit. The latter law was, and still is, particularly relevant to the case.

Finally, both the general principles of proper administration and the General Administrative Law Act (*Algemene wet bestuursrecht*, Awb, further referred to as the GALA) are important, as they limit the discretionary room awarded to public authorities in other legislation. Case in point is legal certainty, which limited the discretionary room available to local authorities when using the discretionary room available in the Wro (Spatial Planning Act).

Environmental principles have not been included in Dutch law, because the legislator feared they would influence decision-making (Van Rijswick & Havekes, 2012: 83). As a result, the courts rely heavily on procedural review, and substantive review rarely takes place.

On the Provincial level, there are the Waterverordening provincie Utrecht 2009 and the Waterverordening Hoogheemraadschap De Stichtse Rijnlanden 2009.

The water board has adopted the Keur van het Hoogheemraadschap De Stichtse Rijnlanden 2009, which contains further rules on water management, licenses, and taxes. The water boards have legislative power, and can adopt their own regulations as long as they are compatible with higher legislation (article 59(1) Water Act). Several regulations are based on the Keur, most importantly the Besluit algemene regels Keur Hoogheemraadschap De Stichtse Rijnlanden and the policy rules Beleidsregels op grond van de Keur van het Hoogheemraadschap De Stichtse Rijnlanden 2009. Strictly speaking, policy rules are not binding in the way legislation is binding, but article 4:84 GALA requires that public authorities comply with them unless this would have disproportionate

consequences for an interested party. Deviating from policy rules thus requires sound motivation.[8]

At this point, it is not necessary to discuss all these regulations in detail, but is clear that there is abundant and detailed regulation on all aspects of water management from a variety of sources. Four topics merit further discussion though: the water test (*Watertoets*), the water license, the restrictive system of the Wbb, and the standards with regard to the use of discretionary room.

Water test

The water test is an instrument to ensure that water interests are taken into account at an early stage in spatial planning processes. Based on the Spatial Planning Decree (*Besluit ruimtelijke ordening*, Bro), the water test is compulsory for zoning plans, project decisions, exemptions to zoning plans, *inpassingsplannen*,[9] and *buitentoepassingverklaringen van een beheersverordening*.[10] The process is shown in figure 6.

The idea of the water test is to involve the water manager in a much earlier stage of the process than would otherwise be the case. Thus, prior to the actual decision-making phase, he is consulted in the idea phase, the initiative phase, and the development and advice phase. The water manager is responsible for communicating relevant information about the water system and the issues that should be taken into consideration, and should point out at an early stage what licenses need to be issued and what problems may be encountered there. In the development and advice phase, this results in a water advice.

Thus, at the beginning of the actual decision-making process, the water interests should already be sufficiently clear.

The project's initiator is obliged to include a water paragraph in his eventual decision in which he explains how the water manager's concerns have been taken into account in the final decision. The water manager has no real instruments to force the initiator to take his point of view into account in the planning stages. Formal objection and going to Court are thought to damage the relation with the project's initiator and are not considered a usable tool (interview Goos Boelhouwer). This is different if a license is required for a specific project or development, in which case the water manager (or another authority), can simply refuse to issue it. However, the water manager does have soft power. In the design and advice phase he writes an official water advice, which is public. A negative advice gives fuel to potential appellants, and the municipality really wants to avoid it (interview Boelhouwer).

[8] Hence, if a public authority decides to adopt policy rules, it reduces its flexibility. However, adopting policy rules on the use of discretionary powers is highly desirable from the perspective of legal certainty, and might sometimes be required under EU law (Buijze, 2013: 139; Prechal & De Leeuw, 2007: 55–56). The tendency towards requiring policy rules can be an obstacle to a strategy where wide discretionary powers are awarded to allow for contextualisation.
[9] A zoning plan adopted by the national government or the province that overrules municipal zoning plans.
[10] An exemption to a *beheersverordening*, which is a 'zoning plan light' for areas where no spatial developments are expected to occur.

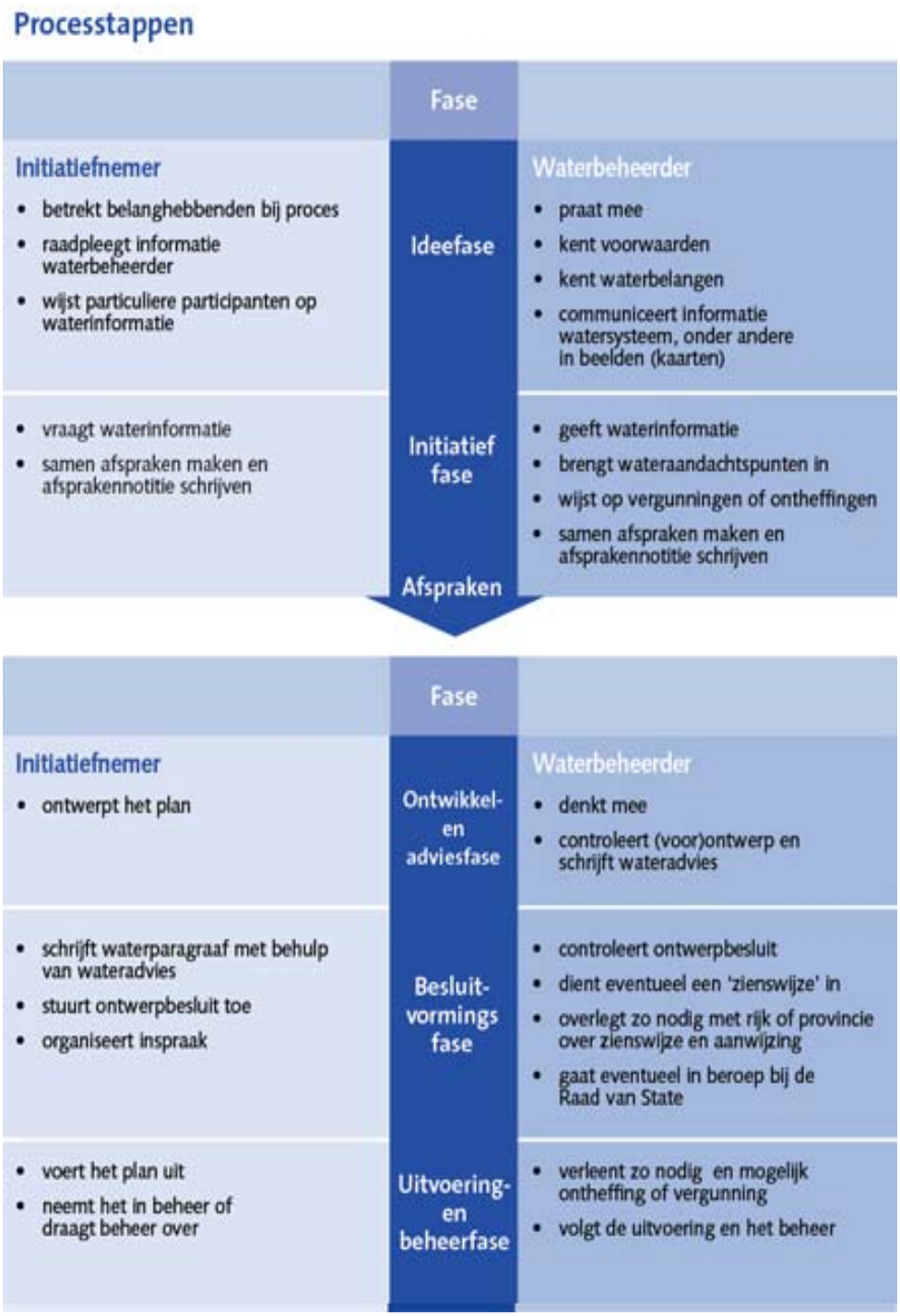

Fig. 6. The water test. Source: HelpDesk Water

Water license

For actions that affect water systems, one may require a water license. The water license replaces the old licenses that were divided over six older laws. Especially relevant is the license based on the old Groundwater Act for the extraction of underground water.

Before 2009, the Province used to be the competent authority for issuing these licenses. The license was regulated in the Groundwater Act, which only regulated quantitative aspects of groundwater regulation.

In 2009, the Water Act entered into force. This law has a much broader purpose than the old Groundwater Act, and as such, the licensing system for groundwater extraction can be said to serve broader purpose now as well: both quantitative and qualitative aspects of underground water management are taken into account under the new law.

In the *Keur*, which is applicable since 2009, it is determined that licenses for permanent drainage will not be issued. Water that is extracted during construction work for example must be reinfiltrated after. Because as we shall see, the Soil Protection Act does not in principle allow the reinfiltration of polluted water, the *Keur* complicates things further.

Licenses can also be required for activities near a *waterkering*, a kind of dyke. This is regulated in the Keur. There is no possibility to require a license for an activity near a future *waterkering* though.

Soil Protection Act

The Soil Protection Act (*Wet bodembescherming*, Wbb) aims to protect and increase the soil quality in the Netherlands. New pollution must be prevented whenever possible, and old pollution must be cleaned up if it poses a threat to humans or to the environment. When soil water is moved, the competent authority must be notified of this based upon article 28 Wbb.

The Wbb contains different regimes for old cases of pollution (before 1987) and new cases of pollution. Both old and new pollution is approached from a case by case perspective. The Wbb assumes that generally, one can identify a 'case' of pollution, originating from a distinguishable source, that can be separated from other cases (*gevalsbenadering*).

Old pollution does not necessarily need to be cleaned up. Articles 36 and 37 determine whether cleaning is required, and article 38 determines what the situation after cleaning should be. Generally speaking, pollution must be removed if it poses a threat to humans or the environment, taking into account the current or intended use of the land. Based upon article 28 Wbb, the authorities must be notified of any intent to move or diminish existing pollution. GS will then determine whether there is a serious case of pollution, which requires it to be cleaned. The starting point is that polluted water cannot be moved, and moving it requires it to be cleaned. However, public authorities vary in the flexibility with which they apply these rules. Some do not allow any movement of pollution, while others are more lenient (Kremers, 2008).

The regime for new cases of pollution is less detailed, but more strict. Article 13 Wbb imposes a duty of care upon everyone who uses the soil in a way that might lead to pollution, is obliged to take all measures that can reasonably be required of him to prevent this pollution, or, if pollution occurs, to remove it and mitigate its consequences to the extent possible (translation mine).

Article 13 Wbb:
Ieder die op of in de bodem handelingen verricht als bedoeld in de artikelen 6 tot en met 11 en die weet of redelijkerwijs had kunnen vermoeden dat door die handelingen de bodem kan worden verontreinigd of aangetast, is verplicht alle maatregelen te nemen die redelijkerwijs van hem kunnen worden gevergd, teneinde die verontreiniging of aantasting te voorkomen, dan wel indien die verontreiniging of aantasting zich voordoet, de verontreiniging of de aantasting en de directe gevolgen daarvan te beperken en zoveel mogelijk ongedaan te maken. Indien de verontreiniging of aantasting het gevolg is van een ongewoon voorval, worden de maatregelen onverwijld genomen.

Old cases of pollution that have spread naturally are not considered new cases, and do not trigger the application of article 13 (Kremers & Herms, 2008; ABRvS 19 September 2007, nr. 200608353/1). However, when pollution is spread intentionally, this becomes different (Kremers & Herms, 2008; ABRvS 26 November 2008, nr. 200709053/1). This means that when water is extracted and brought back into the soil, which happens during construction and when using geothermal heat pumps, article 13 applies. This means that preventive measures should be taken to stop polluted water from infiltrating the soil, and that any resulting pollution should be cleared up.

Thus, the Wbb requires serious old cases of pollution to be cleaned up, and requires new cases to be prevented, or if that has failed, to be cleaned up regardless of their seriousness. Although existing pollution is not necessarily a problem, it can become so when water has to be drained for construction or to facilitate a geothermal heat pump, because in those cases the stricter rules for new cases of pollution are triggered.

Where the case-by-case approach is impractical, the Wbb offers some wiggle room. Article 42 facilitates the cleaning of a cluster of cases at the same time, provided that GS finds there is sufficient coherence within a group of cases, or there is a case of pollution within the borders of a different case of pollution. There is discretionary room here for GS in determining whether a cluster approach is justified, but the borders within which it can make that determination are somewhat unclear.

The cluster approach is moreover intended for a cluster of cases. If individual cases cannot be distinguished, the law technically does not offer room for a cluster approach (Kremers & Herms, 2008).

Article 38 offers the possibility to divide the cleaning operation in phases.

Essentially, the Wbb blocked most of the desired developments in the station area. The use of geothermal heat pumps was out of the question, as was underground construction. Indeed, any construction site where water drainage would be required during construction was problematic, as the drainage could carry a risk of dispersing existing pollution. Re-infiltrating the used water is prohibited, or at least heavily regulated. Permanent extraction is not an option because the *Keur* prohibits it, and it would cause problems with regard to groundwater quantity.

4 Key actors

National Government

The state has a stake in the development of the station area in several ways. First, the area has been designated as a new key project. The key projects are a tool for the national government to realize its economic policy and to ensure that the Dutch economy remains competitive. To this end, areas like airports and city centres, which are perceived as key sites for attracting international service industries, are to be developed into high quality areas for living and working. As a key project, the redevelopment of the station area is partly funded by the national government. Second, Utrecht functions as a pilot project for the new, area-oriented approach to the management of soil pollution. As such, it provides input for the national legislator, who wants to revise the *Wet bodembescherming*, which is experienced as cumbersome.[11] Some projects in the area have also been used as pilots for the adaptation of the legislation on air quality, which put nearly all spatial development in the Netherlands to a stop for a short period. In both cases, legal rules were seen as too restrictive. Interestingly, not only the local actors felt this way, the national government did as well. In other words, the perceived lack of contextualisability of the applicable norms was perceived as a problem on the national level as well.

National Key Projects

The key projects were a response to three perceived problems: first, the departure of the middle class from the cities, where they were replaced with immigrants; second, the Europeanization of the economy, which led to the idea that in the future competition would take place between city regions, and to the fear that the Dutch city regions were insufficiently able to engage in that competition; and third, the problems with mobility and congestion, which were to be addressed by stimulating the use of public transport and the development of VINEX neighbourhoods in strategic locations (Van der Wouden et al., 2009: 13-14). To this end, the national government decided to invest in urban development, to ensure an internationally competitive environment in the most important urban areas. Utrecht was initially selected as one of the key projects. However, due to the failure of the Utrecht City Project, the project was moved to the second wave of key projects. Thus, in 1998, Utrecht became one of the new key projects (Van der Wouden et al., 2009: 18).

The approach of the national government to the new key projects was slightly different. The quality of the cities had been much improved. However, mobility and congestions remained an issue. One of the infrastructural innovations that were to remedy this problem was the HSL (High Velocity Train) (Van der Wouden et al., 2009; 19). The perceived potential of the HSL in increasing the attractiveness of the cities it visited was large, but only for a short while. The HSL East, which stopped in Utrecht and Arnhem, was cancelled. Both stations were retained as NSPs in spite of that.

[11] One revision has already taken place and entered into force on the 1st of July 2012. A more integral revision is on its way, and foreseen for 2015.

With the second generation of key projects, the government aimed to improve the 'spatial-economic dynamics' in cities as well as the quality of life they provided. It also aimed to intensify the use of space in cities and to reduce car mobility (TK 1997-1998, 25 180, nr. 4: 73).

The operational goals were:

1 The creation of fast and efficient train connections between the main urban nodes of the country.
2 Focus on spatial quality and integrated urban development (Savini et al., 2010: 16).

Province

In its long-term strategy, the province of Utrecht aims for sustainable development. Like the national government and the municipality, it hopes to attract brainy industries, and it feels that high quality cities and landscapes that provide a pleasant living environment are essential to achieve this.

"The province of Utrecht is situated at the Northern wing of the Randstad, one of the strongest and most densely populated economic key areas of Europe. It is one of the urban networks that will propel the economic and social developments forward in the next decades. Our area forms a logistic junction of the important development axes along the A1, A12 and A2 highways. Because of the trend of changing main ports into brain ports, we are increasingly becoming a meeting place for knowledge and creativity.

We owe this chance to the three cornerstones of the region: our leading position in knowledge and culture, our central location, and the quality of our cities and landscapes. On the flank of the Randstad we form a connecting zone between the urban dynamics on the one hand, and the peace and quiet and space of the Eastern part of the Netherlands on the other. This position provides us with the relaxed urban nature and the quality of life that makes this area so appealing. These are the success factors of the past and the future.

We focus our attention on the development of our function as a meeting place in the knowledge-based society and the sustainable economy that lies ahead. Because that is where our strength lies and because this is the only way to break away from the negative effects of the current over-pressure. The shift to sustainable development is necessary to maintain the balance of qualities. Without such a shift we will become inaccessible in the long term; social cohesion will decrease, the quality of our landscapes will be affected and we will depend too much on scarce fossil fuels. It is essential to cherish the meticulous balance between the pillars of knowledge/culture, location and city/landscapes."

The Province has a more direct stake in the development of the station area in several ways. It contributes to the realization of the provincial ambitions with regard to housing and the creation of office space. In addition, the Province promotes the sustainable development of the province of Utrecht, and the station area offers opportunities in this respect.

Importantly, as one of the signatories of the declaration of intent and the soil covenant, the Province is invested in the area-oriented approach to soil management. This is especially relevant because it was the competent authority to decide on water extraction under the Groundwater Act, which was applicable to the extraction of groundwater before 2009. As such, it had committed itself to realize a number of goals (to clean emergency locations, where soil pollution poses risks to human beings or the environment; to clean up large scale soil pollution; and to promote the sustainable use of the soil), while at the same time being obliged to refuse permits for water drainage in the station area under the strict regime of the Wbb. A strict interpretation of the Wbb also frustrates the province's sustainability goals because it adversely affects the possibility to have geothermal heat pumps in the station area.

Municipality

The policy ambitions of the municipality have been discussed above. Its investment in the development of the station area is strengthened further through the agreements with the private partners: if the municipality breaches its contracts, the threat of liability and damages looms.

Water Board

The Water board aims to ensure 'safe dykes, dry feet, and clean water.' It protects water quality and regulates water quantity. The Water board, like the other actors, has an interest in sustainability, which has a fairly specific meaning here: it wants to ensure that it will be able to deal with the effects of climate change in the future. This means that the capacity for water retention and water assimilation must be increased. The station area could potentially play a role in this. Several innovative proposals were done during the Perron H2O project. There are no legal instruments to force other actors to execute such measures, and the actual obligations incumbent on them are limited, because the station area is already mostly paved, and there isn't really any risk that its water retention capacity will diminish.

The private actors

Most of the station area is owned by private parties. The area cannot be developed without their cooperation. Luckily, most of the private owners have a keen interest in the restructuring of the station and its surroundings.

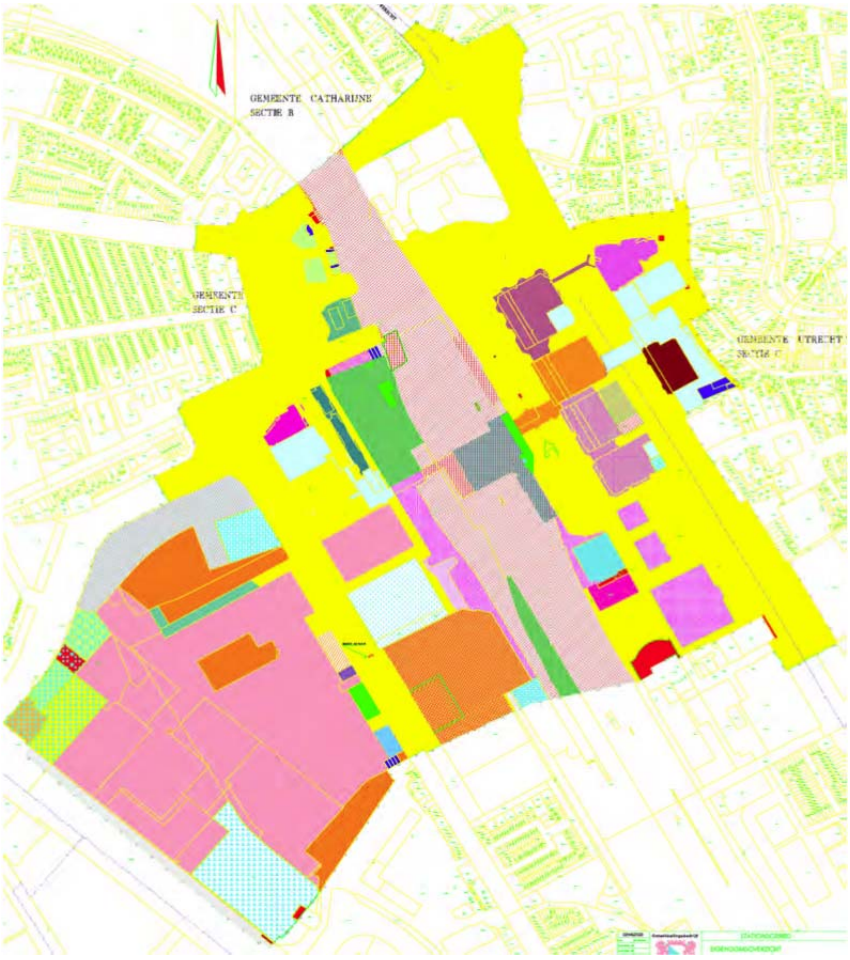

Fig. 7. Ownership of the station area. Source: CU2030.

Corio

Corio's prime interest is to create New Hoog Catharijne, 'a retail destination that will measure up to the top rank of European shopping centres in terms of both its appearance and tenant mix'. (Corio, 2005: 79). It hopes to make Hoog Catharijne the Netherlands' number one shopping destination (Corio, 2005: 39).

Corio, according to a special on the renovation of Hoog Catharijne that it published in its 2005 annual report, sees ample opportunities to strengthen the shopping centre further by means of a wider range of shops and by projecting a better appearance both externally in its relationship with the historic city centre and internally in the form of a modern retail environment with all the conveniences that enable people to pass the time pleasantly (Corio, 2005: 79). Indeed, visitors of New Hoog Catharijne are going to be 'spoilt in a way that people are nearly unaccustomed to in the Netherlands' (Corio, 2005: 81). Corio sees room for an expansion of the available retail space, as it is frequently approached by retailers with requests for new shop units or extensions to existing ones. The addition of leisure facilities and the expected growth of travellers at Utrecht CS further increase the complex' future visitor numbers.

It will invest 250 million euros in the project, which consists of an extension of Hoog Catharijne by 35.000 m^2 of retail space, over 200 residential units, parking facilities and leisure elements.
In its 2006 annual report, Corio emphasizes that it is in its interest to use sustainable materials in its shopping centres (Corio, 2006: 24).

Corio's 2007 annual report has a section on water use: "Water is mostly used in our shopping centres for air conditioning, heating, toilet facilities and the irrigation of planted areas. Corio takes active steps to minimise water consumption by monitoring usage and constantly seeking ways to save water, and is also trying to increase the amount of water it recycles, for example by collecting rainwater."

From Corio's annual report 2007:
During 2006 and 2007, an energy monitoring system was brought into use at the Hoog Catharijne shopping centre in Utrecht. This system is connected to all the meters in the center (the main meters as well as the meters of individual tenants) and can measure the usage of water, electricity, heat and air conditioning. This information is used to charge service costs to tenants, and can be used to identify excessive consumption and problems. An added advantage is that the information enables systems to be customized, reducing the amount of material wasted. The system also provides information on the tenants' systems and equipment, which can be used to advise tenants on maintenance and modifications when necessary. In a follow-up step, tenants were provided with advice on how to reduce their energy consumption.

Corio is also the owner of the shopping centre in Leidsche Rijn. The agreements between the municipality and Corio have included agreements on both shopping centres, which has led to some concern in the municipal council about the consequences of failure to realize one of the projects' for the realization of the other.[12]

Jaarbeurs

The Jaarbeurs has the ambition to be the major meeting centre in the Netherlands (Jaarbeurs, 2006: 8). To this end, it wants to diversify its activities in Utrecht. It wants to reduce the number of square metres of exhibition space, in favour of building a variety of other facilities, including a cinema complex, a casino and a hotel. By doing so, the Jaarbeurs hopes to increase occupancy rates and to offer its customers a conference, meeting and fair location of the highest quality (Jaarbeurs, 2005: 9). This is facilitated not only by its own development activities, but also by other developments in the station area, which will increase the number of visitors to the city and its attractiveness to potential customers of the Jaarbeurs. In addition, the Jaarbeurs depends on the public partners to ensure its accessibility. The Jaarbeurs emphasizes its strong sense of social responsibility, and its willingness to do more in terms of the environment than the law requires it to do (Jaarbeurs, 2010: 29).[13]

The annual reports of the Jaarbeurs show frustration with the length of the proceedings as well as the complexity of the legal procedures that must be followed (Jaarbeurs, 2006: 8; 2007, 7-8;

[12] Raadsvergadering 24 November 2005. See also the advice of De Brauw Blackstone of 12 October 2007.
[13] The Jaarbeurs has been awarded with prizes for its green entrepreneurship.

2008: 7; 2010: 10-11). Although the Jaarbeurs' own plans were facilitated with the entry into force of the *Nationaal Actieplan Luchtkwaliteit* in 2009,[14] the company depends for its success on infrastructural projects that have to be executed by, or in cooperation with, other partners. This is particularly true for the entrance to the station and the Jaarbeurs square (Jaarbeurs, 2009: 13). In 2011, the Jaarbeurs and the municipality sign an agreement to speed up the development of the east side of the station.

To summarize: the Jaarbeurs wants to realize a number of new facilities as quickly as possible, and shows disappointment in the duration of the process. It expresses its content with the manner in which the municipality has handled the accessibility of the city centre (Jaarbeurs, 2011: 33; 2008: 7).

ProRail

ProRail is responsible for the construction, maintenance, management and safety of the Dutch rail network, including the stations. At the launch of the project, the Central Station lacked the capacity to handle the predicted number of travellers in the near future. The plans for the station aim to increase its capacity from 35 million travellers a year to 100 million.

ProRail monitors its own compliance with environmental regulation, and observes that it does not always succeed to comply with the rules (ProRail, 2010: 43). Culprits are the Wet Milieubeheer, Wet Geluidshinder and the Gebruiksbesluit. Most of the infringements are detected by ProRail itself.

ProRail aims to actively limit the nuisance caused by noise and vibrations. To this end, ProRail has developed two instruments to monitor noise problems: the *Geluidsregister* (Noise Register), and the SoundCheck. The Noise register is a piece of software, which calculates the legal noise norms (*geluidsproductieplafonds*). The SoundCheck compares the noise made by the tracks with the legal norms, both ex ante and ex post (ProRail, 2011).

ProRail promotes the sustainability of its stations and developed an instrument to measure the sustainability of stations and to identify opportunities for improvement together with the NS in 2010. The station in Utrecht has been subjected to this scan, and the results will be used to further improve its sustainability.

ProRail is also a member of SusStation, a collaboration of ProRail and similar companies in Germany, France, and the UK, that works towards sustainable stations. Through this collaboration, ProRail has been able to get European subsidy for solar cells on the roof of the station.

ProRail identifies few problems with regard to the redevelopment of the station. In its annual report of 2008, it indicates that procurement procedures for its station projects advanced with difficulty, due to tension in the markets. The same report mentions an anecdote about the stations'

[14] National Action Programme for Air Quality. The actual building activities remain very limited up till now. The Jaarbeurs hopes it will be granted a number of building licenses at the end of 2012, so that construction can start in the first quarter of 2013. The removal of the air quality barrier was not enough to speed up the process on the west side of the station.

neighbours protesting against the replacement of old fences along the train tracks. The fences were from 1872 and their removal was legally unproblematic, but due to the protests an alternative solution was sought and found, where the original fencing was retained as much as possible.

It's not all sunshine and roses though. ProRail has recently taken the municipality to Court over the high safety standards it has set for the escalators in the station hall. According to ProRail, this is the first time a standard this strict has been set in the Netherlands for this type of escalator. Indeed, it argues the standard is unnecessary strict, in part because it goes further than what is required based on EU regulation (NEN norm). The municipality argued it was justified in setting the stricter standard, because these particular escalators will be used in case of an emergency as an escape route, and the court of first instance has confirmed this. The case has served before the Council of State issued its judgment last April. The Council ruled that the normal safety standards were sufficient, and that the municipality was wrong to require even sturdier escalators. The European Directive that sets safety standards for machinery is an example of full harmonization, and it is standing case law of the European Court of Justice that member states cannot impose higher safety demands in such cases. However, the Directive does contain a procedure for member states to challenge the validity of the safety standards decided upon on the EU level. That procedure had not been used though. In addition, the Directive contains an article that allows member states to set some additional standards. The Dutch legislator had failed to implement this article though, so this exception clause cannot be used in the Netherlands.[15] The judgment has implications for this type of escalator throughout the Netherlands, as ProRail can now no longer be obliged to use the more expensive variety in other stations.[16] ProRail had already ordered a small number of escalators that confirm with the strict standards to prevent jeopardising the renovation of the station.

NS Vastgoed

NS Vastgoed used to be the real estate branch of the Netherlands Railways. It has since been merged with NS Stations into NS Poort. It holds significant amounts of land near stations, including near Utrecht central station, and is developing office space there. NS Vastgoed is the owner and developer of the new City Office, which is one of the first projects to be finished.

Stichting Stop Luchtverontreiniging Utrecht

The 'Foundation Stop Air Pollution Utrecht' aims to stop air pollution. It advocates a strict interpretation of the applicable regulation and measurement systems that err on the side of caution. It has conducted several procedures before the Council of State and believes that the new Dutch legislation on air quality violates the European directives. The man behind the foundation is Kees van Oosten, a well-known local activist, whose faith in the municipality's ability to govern the process in the station area is small.

[15] ABRvS 13 April 2013.
[16] Bouwput Utrecht, 25 January 2012.

SZOU

The Stichting Zelfstandige Ondernemers Utrecht (Foundation of Independent Entrepreneurs Utrecht) is another mindchild of Van Oosten. Whether the foundation has any actual relation to retailers in the old city centre is subject of debate.[17] The SZOU maintains that the expansion of stores in Utrecht is superfluous, that the existing supply is sufficient to meet future demand, and that existing retailers and the old city centre will suffer from the competition of New Hoog Catharijne.

The *Utrechtse Stichting Behoud Cultureel en Archeologisch Erfgoed* tries to preserve the cultural and archaeological heritage of the city. It went to court to prevent the demolition of the old music centre Vredenburg. Again, Van Oosten is the driving force behind the foundation.

He is also involved in the *BOCP – Bewoners Overleg City Project,* the *Bomenstichting* (tree foundation) and the *Stichting Stedenbouwkundig Herstel Stationsgebied Utrecht,* all of which have been involved in legal procedures against the municipality.

Initiatiefgroep Bevaarbare Leidse Rijn

This action group has a clear mission: to ensure that the Leidse Rijn becomes navigable. This would mean the Singel, when it is recreated, will be connected to other bodies of water, and the possibilities for pleasure trips will increase significantly. Initially, the municipality resisted the initiative. Its policy norms for navigable water resisted making the Leidse Rijn navigable. The face of the action group is Guus Haest, who took measurements himself and came up with alternative calculations. The action group appears to have convinced the municipality, and in the current plans, the Leidse Rijn will indeed become navigable.

Ontwikkelgroep Lombok Centraal

The Ontwikkelgroep has representatives of a large number of societies and organisations: Molenerf de Ster, Trek Lombok door tot het spoor, Bevaarbare Leidsche Rijn, Geldmuseum Heemschut, Stadsherstel, Schuttevaer, Bewonersgroep Leidseweg eo, Oud-Utrecht, Cuypersstichting, Bewoners van Munt en Hommel, ULU Moskee, winkeliersvereniging Lombok, Lombox, Stichting Maanzaad, Stichting Klank and wijkraad West. It has participated intensively in the development of the west side of the station. The membership of the Ontwikkelgroep overlaps to a significant degree with that of the Initiatiefgroep.

Several other societal organisations have been involved. The Fietsersbond advises on the accessibility of the station area for cyclists, both as construction takes place and in the eventual end situation. The Vogelbescherming Nederland advocates the interests of birds in the area. It has concluded an agreement with the municipality on 5 February 2010.

[17] http://dnu.nu/column/5686-over-overbewinkeling

5 Decision-making

The decision-making process is complex, and involves many actors. It is useful to separate the process into a number of separate tracks. These tracks do impact each other though, and the manner in which this happens is relevant as well.

New Key Project

In 1998, the Utrecht station area was designated as a New Key Project (Nieuwe Sleutel Projecten NSP). This means the State is involved in its development in four ways: national investments, in particular in infrastructure, will be timed in accordance with the key projects; there is budget of 1,5 billion euros for the stations and spatial quality (for all six projects together; the central government will concentrate its quarters around the key projects ('launching customer'); and the government architect provides advice and support. In Utrecht, the Ministry of I&M contributes 275 million euros to the new public transport terminal, and 54.5 million euros for urban development.[18]

The management of decision-making processes was a key priority for the projects (Savini et al., 2010: 17). To align local and national authorities, a specific decision making procedure was applied to the projects, consisting of 4 phases: an exploration phase, where the project was defined as an NSP, a fact finding phase, including the definition of the content and financial aspects and intentional agreements between national and local governments, a plan making phase, where the local authorities elaborated the master plan after which the national authorities would have to approve it, and the financial agreements phase, where public private agreements would be implemented and grants would be allocated (Savini et al., 2010: 17).

In 2003, the fact-finding phase was concluded and the municipality and the ministries of VROM and V&W signed an intention agreement, which contained agreements on basic principles, ambitions and cooperation as well as the conditions under which the national government will contribute to the plans. The conclusion of the agreement was the official start for the planning process.

In July 2003 the initial plans were reviewed. A number of changes were made based on the advice of the government architect, including the shape of the buildings on the Jaarbeursplein and on the west side of the rail. The actual impact of these revisions appears to be limited, since the plans for the west side of the station remain highly fluid until this day.

[18] Press release ministry of I&M, 24 January 2011, http://www.rijksoverheid.nl/nieuws/2011/01/24/schultz-van-haegen-geeft-startschot-nieuw-utrecht-cs.html.

In 2004, the municipality and the ministries concluded an implementation agreement, which sets down the government contribution.

In 2007, the NS, the state, ProRail and the NSP municipalities concluded a framework agreement on the financial contribution of the NS and the execution of the projects.

The designation of the station area as an NSP provided an incentive to get the project going. To qualify for state funding, the municipality and the private parties had to get their act together. After the implementation agreement was concluded, the partners had to live up to their promises to get the funding. Thus, the NSP programme provided a clear time frame for the early steps in the process. Its impact on the substantive decisions regarding the station area appears to be more limited.

Participation of private parties

The municipality depends on private partners for the realization of its plans. Corio, NS Vastgoed, and the Trade Mart have been involved in the planning procedure right from the start. The municipality and the private partners jointly presented the plans that were to be the subject of the 2002 referendum to the Utrecht citizens. Vision 1 was mostly the result of the efforts made within the UCP, which was a close cooperation between the municipality and the private partners. After the presentation of the initial plans, agreements of varying legal status were signed throughout the process.

In 2004, after the adoption of the updated master plan, the parties signed an intention agreement.

In March 2006, they signed development agreements.

In 2009, they signed an intention agreement on sustainability. The Water Board also signed the agreement.

In May 2011, the municipality and the Jaarbeurs signed an agreement to speed up the process of development at the east side of the station.

At various moments, the parties have signed implementation agreements for individual projects. As the contents of the agreements were being negotiated, the outlines of the official decisions the municipality had to take became clear. Thus, the stamp zoning plans in the administrative tracks serve to enable the private actors to realize the plans they have agreed upon with the municipality in the implementation agreements. On the other hand, the municipal council is not always content with the level of detail in the proposed zoning plans. Example in point is the recent protest by GroenLinks against the fact that the glass floor in the building over the Singel was not guaranteed in the zoning plan.

The interests of the private partners seem to be well protected. However, both the non-binding nature of some of the agreements and the limits set to what the municipality can settle in contracts are sometimes experienced as problematic in the municipal council.

The contacts with the private partners are maintained primarily by the POS. Utrecht's Court of Audit has indicated that because of this construction, the municipal council has insufficient information about and impact upon the design of individual projects to allow it to properly execute its task as a representative of the public interest.[19]

The implementation agreements are binding, and thus determine in principle what the station area is going to look like. However, the municipality is still bound by the law when taking the administrative decisions that implement these contracts, and the contents of the contracts cannot be used as a justification to deviate from legal norms. If it does conclude a contract that it cannot comply with, the private parties can sue for damages, but they cannot force the municipality to stick to the contract. Similarly, if the private parties violate the contract, the municipality can sue for damages, but it is difficult to force the private parties to comply with the contract. This is relevant for those issues that are agreed upon in contracts, but cannot be included in the zoning plan.

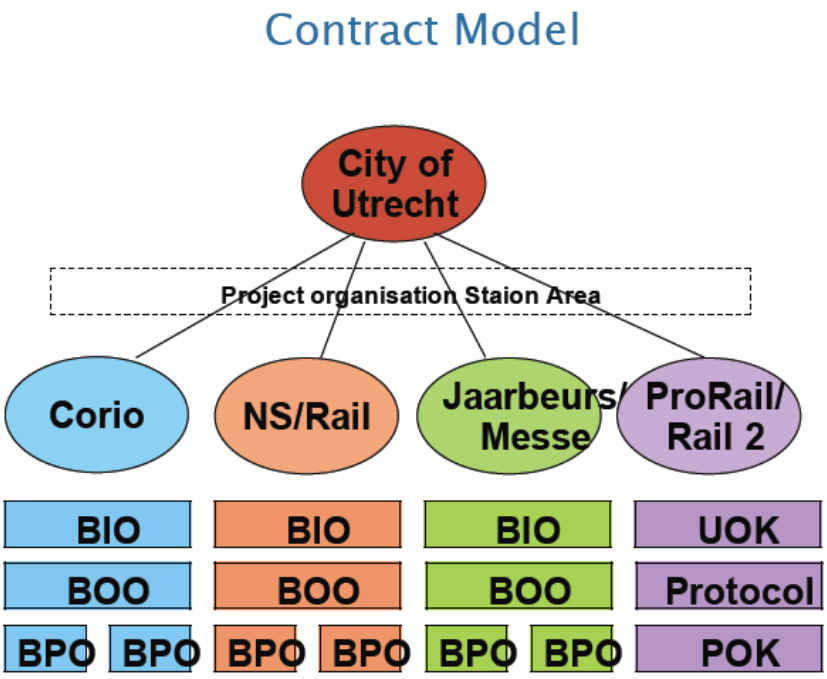

Fig. 8. Cooperation with private actors. Source: CU 2030

Towards a concrete plan

The 1998 designation as one of the NSPs meant that the municipality had to come up with a plan for the development of the station district. Due to the strong presence of the critical Leefbaar Utrecht party in the municipal council, the public participation in the development of the station area was increased significantly, and after the failure of the UCP it was decided that there had to be a referendum to decide on the future direction of the project.

[19] Rapport rekenkamer: Project stationsgebied: informatievoorziening aan de gemeenteraad van Utrecht.

The first step towards the referendum was to design two distinct visions for the station area. Although the design process was unregulated, there has been extensive public participation (Participatierapport 2001). Despite that, the visions that were eventually presented in the referendum were quite similar to the one resulting from the UCP and the alternative proposed by Leefbaar Utrecht (Verbart, 2004: 42). The visions (1 and A) were the subject of a referendum on 15 May 2002. The selected vision (A) has been the basis for the Masterplan. Plan A makes less intensive use of space, and is more expensive than the alternative.

After the choice for vision A has been made, it had to be developed into a more concrete plan. Again, there has been extensive public participation during this trajectory where vision A is developed into the Masterplan.

The initial Masterplan was adopted in 2003. After that the municipality provided another opportunity for everyone to submit their views. In 2004, the updated Masterplan is adopted, which contains a number of changes compared to the original plan.

Although the Masterplan is very global in nature, and intentionally so, there are some fundamental choices that have been made during its development.

First, the design avoided dependence on too large a degree of complexity in shared land ownership and shared use by completely different users. Shared ownership and shared use were not excluded a priori, but unlike with the UCP, such situations were not unavoidable. The flexibility of the plans on this point is shown in the eventual realization of the Stadskantoor, which departs from the starting point of individual units of development (Bouwman & Bekkering, 2007: 23).

Second, there was discussion about the scale of potential developments. It was argued that the existing Hoog Catharijne had a negative influence on the surrounding public space. Although the Masterplan did allow for the so-called XL-scale in parts of the area, this was conditional upon design conditions governing the way the building complex relates to public space, such as the inclusion of publicly accessible functions, passageways between streets and squares of transitional spaces between the street and office floors (Bouwman & Bekkering, 2007: 23).

The applicable legal framework was not an obstacle to making these choices. Indeed, planning law provides sufficiently flexible instruments to implement this policy.

The third element that was up for discussion was whether to build over the railway tracks. One of the arguments against doing so were the strict safety regulations that would apply because of the transport of hazardous substances. However, the decisive arguments were technical and financial: the first floor above the tracks would be eight metres above ground level, which would not be a realistic option because of the extent and complexity of the operation; the cost of lowering the railway yard was calculated to be 720 million euros (Bouwman & Bekkering, 2007: 23).

Finally, the designers of the Masterplan have aimed to make it as independent as possible of high expectations regarding the proposed development mix. Hence, fluctuations in the economic climate have been provided for, at least in terms of planning (Bouwman & Bekkering, 2007: 24).

The Masterplan was supposed to provide the basis for a zoning plan. This idea was frustrated by the European regulation on air quality. The idea of a global zoning plan was also rejected following a number of judgments of the Council of State about the level of detail that must be included in a zoning plan for a crowded urban region.

The problems with air quality were partially resolved by designating the station area as a pilot project in the search for solutions to this problem. Eventually, the problems were tackled by the adoption of the Nationaal Actieplan Luchtkwaliteit, which allows for easier contextualisation of air quality norms. Note that projects that had an adverse effect on air quality were already possible under the old regime, provided that compensatory measures were included in the project plan. The new regime merely provided more flexibility with regard to when and where compensation was provided. It also made it more difficult to ensure that compensation actually took place (RIVM congress, March 2013).

Instead of adopting a global zoning plan, in 2006, the municipal council adopted a *Structuurplan*, an instrument under the old Wro that can provide a justification for an exemption to the zoning plan under article 19 of that law. The *Structuurplan* then formed the basis for the realization of concrete projects.

In 2009, the new Wro (*Wet ruimtelijke ordening*, spatial planning act) entered into force, and new projects were based on zoning plans for small areas. The *Structuurplan* and the article 19 procedure disappeared and the (tentative) legal certainty that was provided by the *Structuurplan* disappeared with them.

The current plans contain some elements that were not in the 2004 Masterplan. Two of those are particularly striking: First, there is a third connection between the eastern and western halves of the city, the so-called Rabobrug. This was not included in the original plan due to a lack of funds.

Second, the denizens of Lombok, led by Guus Haest, have campaigned for a navigable Leidsche Rijn. Despite initial resistance of the municipality, which used stringent measurements to determine navigability and concluded it could not be achieved, the campaign eventually succeeded when Haest c.s. took their own measurements. The restoration of the Leidsche Rijn was part of the Masterplan, but had disappeared again when the *Structuurplan* was adopted. Currently, the navigable Leidse Rijn is in the planning again, although the variety chosen is a compromise. However, the arguments against the fully navigable Leidse Rijn that the action group is striving for are technical and financial in nature, and (no longer) legal.[20]

The bio washing machine

Legal norms, especially legal norms that are excessively detailed and inflexible, are relatively invisible in large scale planning, which is guided mostly by the ‘good spatial planning’ norm from the Wro. Thus, it is useful to zoom in on one aspect of the process, where legal norms did prove to be a barrier to development, and review the process that led to the removal of that barrier.

[20] http://www.lombox.nl/Referendum/bevaarbareleidscherijn.html#_0702; Herbert Boland, http://www.bouwpututrecht.nl/bu/2007/08/29/bevaarbare-leidsche-rijn-deel-2/

The plans for the station area included an underground parking lot, and a number of geothermal heat pumps that were to reduce the CO_2 emissions in the area. Both activities would require the extraction of groundwater. For the pumps, the water had to be reinfiltrated. The water extracted for the construction of the parking lot would have to be reinfiltrated as well, because permanent extractions were not allowed under the Water Board's *keur*. However, for the practical realisation of the project, reinfiltration was not necessary. Indeed, it turned out that permanent extraction was necessary to make the underground parking lot possible. Either way, the extraction of the water required a license.

The municipality would benefit directly from the realisation of the bio washing machine. It owned a substantive amount of the polluted ground and bore the responsibility for complying with the Wbb with regard to it. To realise the projects on publicly owned land, the municipality either had to realise the bio washing machine or had to comply with the Wbb in the traditional way, which would be very expensive, if not technologically impossible. In addition, delays would be costly. Because the separate projects in the station area are intertwined, delays in the municipality's projects would lead to delays in the projects of the private partners, who might then try to sue for damages.

In addition, the agreements between the private partners and the municipality included a division of tasks. It was up to the municipality to ensure the licenses for the separate projects could be issued timely. Delays would cost money, and those costs would fall for the most part upon the municipality. Unfortunately, the traditional interpretation of the Wbb seriously hampered the issuing of licenses. Underground construction was impossible under the traditional interpretation of the Wbb. In addition, the Wbb prevented, or at least made excessively difficult, the realization of geothermal heat pumps, which were one of the methods the municipality wanted to use to realize its intended CO_2 reduction. The municipality had to come up with a plan.

This plan was the bio washing machine, which thus originated with the municipality itself. Because the legal and technical departments of the municipality worked together intensively during the process, technical and legal aspects were interwoven from the start. No alternative technical solutions were considered and there were plans than were eventually rejected because of legal problems.

In January 2007, the SO Milieu & Duurzaamheid (a municipal service) launches a process that aims to resolve the legal blockades that flow from the Wbb.

In July 2007, the Ministry of VROM indicates that it is willing to cooperate to create a short-term solution for the station districts.

On 16 November 2007 the Ministry indicates it wants to use the Utrecht case as a pilot, which will provide the basis for an adaptation of the *Circulaire bodemsanering* 2006 (the circular on soil decontamination).

On 21 May 2008, the Ministry of VROM, the VNG (Union of Dutch Municipalities) and IPO (interprovincial consultation organ) sign a declaration of intent to jointly work towards an area oriented approach to soil contaminations.

On 12 May 2009, the municipality adopts the policy document ‘Beschermen, verbeteren en benutten: Naar een gebiedsgerichte aanpak van grondwaterverontreinigingen in de ondergrond van Utrecht’. This document forms the basis for the adoption of the policy rule ‘toetsingskader (randvoorwaarden) meetbare en controleerbare prognose van het saneringsverloop’.

On 10 July 2009, several ministers, IPO, VNG, and the union of Water Boards, sign the Covenant bodemontwikkelingsbeleid en aanpak spoedlocaties.

On 13 March 2010, the Minister of VROM, the Province of Utrecht, the Municipality, the Water Board, Corio, NS and ProRail sign the Intentieverklaring Bodem, WKO en Biowasmachine Stationsgebied Utrecht.

In March 2010 the municipality adopts a cleaning plan, based upon a novel, more liberal interpretation of articles 38, 40 and 42 Wbb that makes optimal use of the policy space available to it. The interpretation is supported by the Ministry.

The plans only concern VOCl contaminations. With regard to other contaminations, there is still an obligation to do research, an obligatory cleaning plan, and a prohibition to further disperse pollution. These obligations are reduced using the mechanisms provided in the Crisis and restoration law (Chw), which enters into force on 31 March 2010.

On 9 July 2010, the Council of Ministers adopt the first Order in Council in which area-oriented soil management in the Utrecht station area is designated as an innovative projects under chapter 2, section 2 of the Chw. This means that a number of laws can be deviated from. The project still has to comply with EU norms though.

On 12 January 2012, the municipality adopts a policy rule ‘afwijking wet bodembescherming in Stationsgebied Utrecht en omgeving’, based upon the Chw.

On 1 July 2012, the Wbb is adapted to facilitate the area-oriented approach. The legislator acknowledges the change is a stopgap though. A more integral revision will take place in 2015, in concert with the new *Omgevingswet*.

The idea for the bio washing machine originated with the municipality, which sought support for its plan with the province and the national government. The latter supported the project and supplied the municipality with legal advice from Edward Brands of the national lawyer (*landsadvocaat*). In exchange, it got to use Utrecht as a pilot for the adaptation of the Wbb. The municipality neglected to involve the water board at an early stage. The water board did subsequently submit an official view in which it voiced its concerns about the risks that pollution would leak to the second layer of groundwater – the drinking water reserve. The municipality has discussed the problems with the water board and the difference in opinion has been resolved. Extensive monitoring – and if necessary bringing the project to a halt – must prevent the second layer from getting contaminated.

The municipality tried to gain the support from the large private owners as well, but was only partially successful. Most of the parties were positive about the bio washing machine, and applauded the initiative. Unfortunately, this did not lead to them lending their financial support. The

private parties could afford to negotiate for a long time, whereas the municipality was under significant pressure to find a solution quickly. In the end, the private parties contributed relatively little, while they profit disproportionately from the bio washing machine. However, cost recovery for cleaning soil pollution has always been difficult under the Wbb, and the lack of financial support for this novel interpretation was no step backwards.

The argument the private parties offered for their lack of willingness to contribute financially was interesting though. They said that in principle, they were willing to contribute. However, they did not want other interested parties to profit from the bio washing machine without likewise contributing. In other words: they would not tolerate free riders. The municipality was unable to guarantee that: it was unable to determine all the parties that would profit from the initiative at one time or another, and it did not have the instruments to force presently unknown parties to contribute to the initiative as they become known.

Apart from this, the municipality did not actively try to create support for the bio washing machine. The compulsory announcements have been made, the decisions have been published, but apart from that there has been no communication to the general public or relevant NGOs. The municipality decided to take this route because the bio washing machine is a technologically complicated project, which has very limited consequences for most users in the station area. Although the project is absolutely defensible, it is based on an interpretation of the Wbb that has not been officially approved by the Council of State. Additional publicity would increase the risk that the bio washing machine would be challenged before the court, with uncertain circumstances.

The solution that was eventually adopted was a reinterpretation of the applicable legislation, in the spirit of the law. This was not the only alternative that was considered, though. The municipality's legal service provided four alternative solutions. Two of those sought to make use of what room was available in the Wbb. The other two solutions were basically to wait for either the European or the national legislator to solve the problem. Although both were indeed working on legislation that would facilitate the desired approach, these options were not viable because they would take too long.

In addition to the problems with the Wbb, the municipality considered the possibility that it would be held liable by landowners whose property would be contaminated by the spreading pollution. However, to successfully sue for damages, their property would have to diminish in value. The municipality did not deem this likely, because the pollution was so far below the ground level. Thus, liability rules had no adverse effect on the realisation of the bio washing machine.

In other cases it has become clear that the programmatic approach carries the risk that compensatory measures that have to be taken to allow for developments that could not otherwise go through are not taken. The bio washing machine to some extent shares that risk. The actors must ensure that the plan is actually realised and not merely an excuse to allow developments that would spread pollution. The municipality has tight reigns over the process and has avoided that the success of the process depends on the (future) development of the private parties. Instead, it has ensured from the start that the realisation of the bio washing machine was not dependent on private parties creating and using geothermal heat pumps.

6 Legal contextualisation

The case provides some beautiful examples of contextualization. The Wbb was interpreted within the available policy space in a creative and liberal way to facilitate the bio washing machine, with full regard for the interests that law seeks to promote and protect. The classic discretionary competence to adopt a global zoning plan turned out to be less discretionary than expected. The action committee for a navigable Leidse Rijn achieved a revision of the municipalities' norms for navigable water, and realized a substantial change to the eventual plan. Local authorities try to go above and beyond what minimum norms require when they feel a particular context requires so, but are met with resistance. The inflexible air quality norms were replaced with a legal regime that did allow for contextualisation.

Some legal regimes do seem to hamper successful contextualisation. The current legal framework appears to be unable to allow public authorities, in particular the water board, to safeguard future interests. General, open norms, like those requiring legal certainty or good spatial planning, appear well-suited to contextualisation at first, but lead to a focus on procedural justice rather than substantive values, and to uncertainty before the Council of State.

Re-interpreting the Wbb

The most spectacular example of successful contextualization is without a doubt the introduction of the area-oriented approach to soil water management. The legal basis for this approach is found in a creative interpretation of article 13 Wbb, and the application of the Crisis- en restoration law. This interpretation was supported by a solid policy on how to tackle VOCl pollution.

Nevertheless, the Wbb has been adapted to facilitate the area-oriented approach – an indication that the approach under the old Wbb was somewhat shaky, or at least too risky for municipalities desiring a high level of certainty about their decisions being Council-of-State proof. From the MvT: 'Het wetsvoorstel is vooral bedoeld om een aantal lopende en in voorbereiding zijnde initiatieven te faciliteren' (TK 2010-2011, 32 712, nr 3). (The proposal is primarily intended to facilitate a number of projects that are already being executed or prepared.) This supports our hypothesis that new legislation is created to solve acute problems encountered in practice rather than to create real flexibility. However, an integral revision of the Wbb will be done in the near future. This revision should be in line with the more encompassing revision of environmental and spatial law as a whole, and offer a more flexible, principle-based approach. The immediate revision of the Wbb is more than just the Pavlov reaction of a legislator out to prove its own importance, though. Although the municipality's interpretation of the Wbb is without a doubt attractive, the Council of

State has threatened to annul all decisions where an individual case cannot be discerned (Peter Kiela, 9 December 2012).

We saw that based on article 13 SPA and the case law of the Council of State, the extraction and reinfiltration of polluted water, which can result in the dispersion of existing pollution, is subject to a duty of care; that existing pollution may not be dispersed; and that although article 42 Wbb allows a cluster approach, this is only feasible when individual cases can be discerned.

Enabling the area-oriented approach required two things. First, article 42 had to be reinterpreted to allow an integral approach to those instances of pollution where individual cases could no longer be discerned. Second, the duty of care included in article 13 had to be interpreted in a way that allowed for the pollution to get worse before it got better: although the bio washing machine will eventually clean up the VOCl pollution, this is a lengthy process. In the meantime, the system will disperse existing pollution, and soil that was previously uncontaminated will become so.

The municipality wants to adopt an area-oriented approach to cleaning up the pollution in the city centre. The general system of the Wbb resists such an approach: it requires that individual cases of pollution are dealt with.

To deal with several cases of pollution at the same time, article 42 provides the cluster approach. Using the cluster approach is facultative, but is only possible when the norm conditions are met. With regard to those norm conditions, article 42 provides jurisdictional discretion. It is left up to GS to determine whether the cluster approach is feasible. The only requirement is that the cases must be coherent. But as we have seen, it is impossible to distinguish individual cases of pollution in the station area. If there are no cases, they cannot be coherent enough to justify the cluster approach. This issue is still touched upon by Kremers & Herms in their 2008 publication in *Bouwrecht*. In their 2009 article about the area oriented approach in the station area, the argument does not reoccur. Instead, they argue that since there is jurisdictional discretion in judging whether there is enough coherence to justify a cluster approach, the municipality is free to use the cluster approach, as long as it determines that the required coherence is there. The municipality's policy documents for the handling of VOCl's in the station area does seem like a sufficient motivation to determine that a cluster approach is justified. However, this approach follows the spirit of the law, but is not entirely in line with its letter.

Article 13 imposes a duty of care to prevent and remove new pollution. This article applies to the bio washing machine, since artificially moving old pollution counts as new pollution. It is not evident that article 13 allows for an approach where existing pollution is dispersed even further, even when this is part of the process of cleaning up the pollution (Kremers & Herms, 2009). Based on the case law, article 38 Wbb, and the *Circulaire bodemsanering*, a certain amount of dispersion may be acceptable. However, all preventive measures that can reasonably be required to prevent this must be taken. The question is, of course, what can reasonably be required.

Kremers & Herms indicate that the interpretation of the scope of the duty of care is complicated by the fact that the legislator has failed to indicate clearly what the purpose of that duty is. Nevertheless, they identify a number of factors that affect the weight of the duty of care: professional parties are subject to more obligations; if it would be impossible to know that an activity causes pollution, there is no requirement to prevent it that can be derived from the duty of care. In addi-

tion, if there is a different regulation which explicitly also aims to protect the quality of the soil, one can assume that when those rules are followed the duty of care has been complied with. In such cases, the legislator has taken the interests underlying the Wbb into account, and has determined what reasonable measures to protect the quality of the soil are.

Kremers & Herms argue that the Groundwater Act offers such a regulation, which is remarkable, because that law is only concerned with quantitative aspects. Indeed, the explanatory notes (Memorie van Toelichting, MvT) explicitly state that the law does not aim to regulate quality, and that there are different legal instruments for that. More convincing are their arguments that the intended use of the land is not affected by the dispersion of pollution, and that the process of cleaning up the pollution is not hampered.

The duty of care also requires new pollution to be removed. Again, this is subject to a reasonableness exception. Kremers & Herms argue that it could be unreasonable to require all pollution to be removed, in those cases where this is technically impossible, or undesirable.

Article 38 (3) and (4) Wbb allow for cleaning operations to be executed in phases, provided the interest of soil protection does not preclude this. Because the phased removal of the VOCl pollution in the area aims to improve the soil quality in the long run, this condition is met.

Thus, the Wbb could be interpreted in such a way to allow the area-oriented approach.

The reinterpretation of the Wbb was not sufficient, though. The municipality's policy only applied to VOCls. For other pollution, the case-by-case approach still held sway. Perhaps it would have been possible to create a more comprehensive approach under the Wbb, but the municipality has not tried that: it was under great pressure to provide a timely solution to the VOCl problem, and so that is what it did. However, pollution other than VOCls is not as dispersed. This means individual cases can be distinguished, which makes it more difficult to argue that a departure from the Wbb is justified.

The Crisis and restoration law brought solace. Under the first Order in Council based upon the Chw, the area-oriented approach in the station district was designated as an innovative project in the sense of chapter 2 section 2 of the Chw. The policy rules enacted by the municipality based on the Order have changed the regime of the Wbb. The process of notification has been simplified, the area-oriented approach has been facilitated, dispersion of pollution is now allowed, and procedures have been simplified.

Although the Chw offers the opportunity to deviate from national legislation, it cannot set aside EU norms. Fennis (2012) examines whether the area-oriented approach in the station area complies with European principles of environmental law. She concludes that the approach can be criticized based on various environmental principles. Most of the objections can be taken away, but the precautionary principle and the standstill principle offer fairly sound arguments against the approach.

Another legal weakness of the bio washing machine is the effect is has on water the groundwater level. Because water is pumped around, the level will rise in some areas, and fall in others. This is

dangerous for the monumental trees in the station area, which are vulnerable to high groundwater levels.

Whether the legal argument supporting the project would have stood up to scrutiny by the court is unsure. The municipality expects that the legal arguments supporting the project would have stood up to scrutiny by the court because it was prepared very carefully and in close consultation with the ministry and the State Advocate. However, nobody challenged any decisions involved in the project so there's no absolute certainty about that. The broad support for the bio washing machine has turned out to be more important than its perhaps less than airtight legal underpinning.

Although the area-oriented approach is generally considered a success, there are some doubts about whether this is a case of providing flexibility, or whether the applicable norm is simply lowered. At the very least, the position of third parties is affected, now that pollution can spread freely to their property. However, because the pollution is located at great depth, it can be argued that they do not suffer any real disadvantage. Although there is no absolute certainty about future developments, the intensive monitoring set up by the municipality should ensure that this remains so.

To make the bio washing machine as legally sound as possible, its effects are monitored intensively. Although this is necessary to comply with the precautionary principle, the monitoring system would probably have been implemented regardless of that obligation. The municipality wants to prevent adverse consequences and minimise risks, and feels monitoring is appropriate and necessary to realise that. Because the municipality is paying for the monitoring system, there are no problems enforcing this obligation.

Although contextualising the Wbb was relatively successful, during the realisation of the bio washing machine the municipality encountered some obstacles it had not foreseen. The bio washing machine was to be realised in two phases. The exact borders of the area included in the second phase were to be determined at a later point, using a predetermined method. When push came to shove, it became clear this method did not work due to technical problems. Unfortunately, the municipality had bound itself to use this method, and it was unable to determine the phase two area, thus violating its own rules. The problem was eventually resolved when the amendment to the Wbb entered into force, which included more lenient rules for determining the area to be included.

Although the bio washing machine is being realised, the municipality feels it has insufficient instruments available to optimise it. Ideally, licenses for groundwater extraction and geothermal heat pumps would be issued to those parties who make an efficient use of the available soil energy. However, the province cannot take this into account when issuing licenses. Retracting licenses is difficult, even if the holder makes no use of it. Refusing a permit on the ground that someone else will make more efficient use of groundwater is not possible.

Success factors

There is a number of factors that appears to have contributed to the successful contextualisation of the Wbb:

- There were tangible gains for all parties involved. The area-oriented approach saved millions of euro, and facilitated geothermal heat pumps with clear environmental benefits.
- The municipality was under pressure to come up with a solution due to contractual agreements with the private partners. Failure to contextualise carried a financial penalty.
- Waiting for the legislator to solve the problem was not an option. The time constraints the municipality faced forced it to opt for contextualisation.
- There was consensus about the weaknesses of the Wbb and the need for the area-oriented approach amongst all levels of government.
- The goals of the Wbb were clear. It was also clear that a strict interpretation of the rules in the Wbb would have an adverse effect on the realisation of those goals, and it was possible to argue that the deviant interpretation of the Wbb would in fact contribute more to their realisation.
- The reinterpretation of the Wbb was framed as an environmentally friendly alternative to an existing interpretation that failed to achieve results in terms of improved soil quality. The bio washing machine is presented as innovative and desirable, and has garnered a lot of interest throughout Europe. It is presented as something one could not possibly object to.
- Nobody has gone to court over the bio washing machine.

However, the contextualisation of the Wbb also shows a number of weaknesses in the contextualisation approach.

- The division of the (financial) benefits can be criticised. The private partners were for the most part responsible for the research that would have to be conducted and for any preventive or curative measures that the Wbb required. They have realised considerable savings, while the municipality carried most of the risk.
- The success of contextualisation is dependent on the cooperation of the Council of State. If it refuses to apply the spirit rather than the letter of the law, no amount of public support and good governance can save a contra legem decision.
- Contextualisation is not necessarily an attractive option. In Utrecht, waiting for legislation was not an option. The existing rules would have to do, so a creative interpretation was more or less the only option. If contextualisation had not been necessary, the municipality would have chosen the less risky option, and would have waited for the legislator.
- Contextualisation was not enough. Although the area-oriented approach had been justified with regard to VOCl's, the case-oriented approach still had to be applied to all other sorts of pollution. The legislator saved the day when the Chw was adopted, but that was a bit of a lucky coincidence. The carefully crafted argument that applied to VOCl's could not be applied to other sorts of pollution, because of the very fact that it were the specific characteristics of this particular problem that determined the best solution that complied with the spirit of the law. In other words: contextualisation takes time and is complicated, and there is a large number of rules that may need to be contextualised.

7 Dilemmas

There are a number of issues where the municipality seems to struggle with the choices it has to make.

The first issue that catches the eye is that of the desire, and sometimes the need, for control, which has to be balanced against the importance of a broad involvement of actors and shared responsibility for developments. Although the municipality wanted the cooperation of private actors in the realisation of the bio washing machine, it did not dare to depend on it. Thus, it made sure that the project could succeed even without their involvement.

Although the private actors showed a certain willingness to cooperate financially to the project, the actual contributions were less than the municipality had hoped for. This was partly due to the municipality starting the negotiations too late. However, the instruments needed to enforce an equitable agreement that seemed otherwise achievable were lacking as well.

Likewise, the municipality depends on private actors to make optimal use of the potential of the bio washing machine and the geothermal capacity of the station area, and again, it feels it has insufficient instruments available to steer the use of the soil.

The second issue is how to deal with uncertainty. The effects of the bio washing machine are uncertain. Both its effectiveness and the risks it poses are unknown. Indeed, the water board submitted an official view in which it expressed its concerns for the quality of the second layer of groundwater. Considering the water board's preference for negotiated solutions, this is a serious signal. The solution adopted by the municipality, intensive monitoring, is in line with the Netherlands' official approach of the precautionary principle. This hand-at-the-tap principle requires monitoring of risky projects, which should be stopped immediately if something goes wrong. This is in itself a contextualisation of the European precautionary principle, and is one example of solving the dilemma between risk prevention and enabling innovation. The reliability of this method for preventing negative consequences is probably increased by the threat of liability.

Finally, there is a tension between the requirement of legal certainty and the desire for flexibility. This is most obvious in the desire to adopt a global zoning plan that was frustrated by the Council of State, and the subsequent practice of using article 19 procedures and, after the adoption of the new Spatial Planning Act, so-called stamp zoning plans. The same issue is discussed extensively in the Buiksloterham report (Dembski, 2013).

There may be a similar problem with the strict definition of the system that was to be used to determine the area for the second phase of the bio washing machine. This definition turned out to

be overly strict, because it only allowed for one specific method of determining the boundaries of the area. When this method turned out to be unfeasible, the municipality saw itself out of options until the Soil Protection Act was revised. The illusion of certainty that was provided by the exact method the municipality had determined did no doubt contribute to the overall impression that the bio washing machine was a sound plan though. Pretence of certainty may be useful in contextualisation, because it limits the possibilities for disagreement.

Appendix: discretionary room

Because in Context we focus on the ability of local actors to adapt legal norms to local needs, the actual amount and nature of the discretionary room awarded to local actors is one of the most relevant characteristic of those norms. What is meant by discretionary room is not immediately clear, and the exact meaning of the concept varies between jurisdictions (Forowicz, 2011: 4-7). Nevertheless, there are some distinctions that can be made between different types of discretionary power that, although not undisputed, may prove useful to our research.

The first is classic discretion, similar to Dutch *beleidsvrijheid* en German *Ermessen*. The second is jurisdictional discretion, similar to Dutch *beoordelingsruimte* and German *Beurteilungsspielraum* (Craig, 2012: 403-405).

The first category is the most straightforward. Norms of this kind allow give their addressee permission to do something, or to refrain from doing something, but leave the final decision on whether to act upon this permission up to him. Mayors may close coffee shops (but do not have to), licenses may be refused (but do not have to be). In these cases, local authorities can set their own priorities and are able to balance different interests against each other.

The second category does not give the norm's addressee the freedom to balance interests. Instead, it imposes an obligation. In this case, public authorities have to do something. They cannot choose whether or not to use the power they have been given. However, either the conditions that should be met for the obligation to apply or the exact nature of the obligation that is imposed are open to further interpretation. Such norms can be further subdivided into two categories, dependent on who has the final responsibility for their interpretation. Sometimes, this is the administration. In such cases, the courts, when confronted with a case, will accept the administration's interpretation. At other times, it will be the courts. In those cases, the courts will fully review the administration's interpretation of a norm, and may replace it with their own interpretation if they disagree. The legislator can indicate its intent to leave the interpretation of a particular rule to the administration by using certain terminology. Courts also tend to practice restraint when the administration has to make complicated economic and social decisions, and when it lacks specific knowledge necessary to evaluate the situation that the administration did possess. Despite the best intentions of the legislator, using this kind of vague norm is not always an efficient way to ensure flexibility for the administration. In the end it is up to the courts whether to practice full review or judicial restraint.

Craig distinguishes a third category of discretionary norms, where discretion is 'framed in mandatory terms': “where the relevant legislation provides ‘if X, you shall do Y’ and Y entails a specific measure there will be no room for any meaningful discretion once the conditions have been met.

There are however other instances where the content of Y, the mandatory obligation, is cast in more general terms, thereby leaving some measure of discretion as to how it should be fulfilled. This is exemplified by the Common Agricultural Policy. Article 40 TFEU states that a common organization of agricultural markets shall be established, and in that sense imposes a mandatory duty. Article 40 TFEU further provides that the common organization is designed to attain the objectives set out in Article 39 TFEU. These objectives include an increase in agricultural productivity, a fair standard of living for the agricultural community, stable markets, availability of supplies, and fair prices for consumers. The many detailed rules made pursuant to the CAP are designed to attain these objectives. It is however clear that the objectives in Article 39 that guide implementation of the common organization of markets are set out at a high level of generality and that there can be tensions between, for example, a fair standard of living for farmers and reasonable prices for consumers. What we have is an obligation to establish a common organization of agricultural markets, coupled with a broad range of objectives that are to inform the way in which this is done. It is therefore unsurprising that the EU courts have repeatedly held that the Commission and Council have discretion in determining the priority between these objectives when making rules under the CAP, and in determining the best way that the overall objectives can be achieved"(Craig, 2012: 403-405). This is one of those cases where it is not quite clear what the norm requires, and the decision is left to the administration. We can thus distinguish between classic discretion on the one hand, and on the other jurisdictional discretion where it is up to the administration to determine which action is required, and jurisdictional discretion where it is up to the administration to determine whether the conditions for the application of a norm apply.

Roberto Caranta differentiates between discretion linked to the weighing of conflicting private and public interest, discretion involving complex factual evaluations and discretion involving the interpretation of complex and/or unclear legal rules (Caranta, 2008: 194). These more or less correspond to Craig's categories, where Caranta's first category corresponds to the classic discretion that Craig observes.

At this point, it seems prudent to distinguish between whether norms provide flexibility and whether they can be contextualized. If a legal norm provides jurisdictional discretion of any kind to local authorities, it can be – or rather, has to be – contextualized. Such norms require interpretation and the interpretation will depend on the specific circumstances of the case. They do not provide much flexibility though. After the norms are interpreted, and the administration has determined either what has to be done, or whether the norm conditions apply, they are obliged to comply with the norm as they have interpreted it. The freedom provided by the room for interpretation is limited, and the interpretation must remain consistent. When the courts fully review the administration's interpretation, the actual room for flexibility is further decreased. Discretionary room does not, in short, in all cases allow local authorities to make their own policy appraisals.

The field appears to be asking (also?) for flexibility in the sense of having the possibility to deviate from norms that are considered to be too strict, usually conditionally (e.g. if compensation is provided, or if there are significant benefits to breaching the norms), or simply by making the norms aspirational rather than binding.

Even when there is discretionary room in the true sense of the word, that is, classic discretion, administrative authorities have to comply with a host of general procedural and substantive obligations, including the general principles of proper administration (Netherlands, France has the

similar principles *generaux du droit administrative*) and human rights law, and often also the general principles of EU law. These rules limit the range of substantive decisions they can take, and regulate the decision-making procedure. Although these rules will tend to be general in their scope, they might be problematic due to uncertainty about their interpretation by the courts or because of the stringent demands they place on decision-making procedures.

Poignant examples are the principle of due care, which requires the administration to take into account all relevant interests and information when making a decision, and the duty to give reasons, which requires the administration to motivate any decision it takes. More substantive principles are the principle of proportionality, the principle of equality, and the principle of legal certainty. In the Netherlands, these principles have been codified in the GALA.

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Urban Regions in the Delta

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