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TRANSNATIONAL ACTION FOR PUBLIC PRIVATE PARTNERSHIP

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Revitalisation of Brownfields through PPP

Contractual Organisation of the Cooperation between Public and Private Actors

LEG THÜRINGEN

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Editors	Frank Leipe (project management) Daniela Ott-Wippern Michael Pechan Thomas Zill
Translation	Hoffmann Übersetzungsdienst, Jena
Cover picture	Marko Greitschus / pixelio.de

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1 Introduction

The revitalisation of brownfields is a continuously discussed topic which will not cease to be a current topic in the coming years either. Remote from big metropolitan areas and prime locations, the revitalisation of brownfields constitutes a great challenge to the communities. Practicable instruments are needed to keep the monetary requirements on the public side at a low level. Revitalising brownfields through public-private partnerships (PPP) is an important approach to attain private funds and expertise for that task.

The term PPP is used in its broader sense here - the cooperation of public and private actors, regardless of whether the property is intended for public or private use in the future. This broad definition of PPP goes beyond PPP in the narrower sense. PPP in the narrower sense is defined as the mobilisation of private funds and expertise for the fulfilment of public tasks, e.g. the realisation and operation of public construction projects by private partners.

The question of public obligation does not arise for the municipality with regard to all brownfields within its municipal area, but only for those areas where the future use is in the public interest, and where the market cannot bring about any future use on its own. Brownfields show a potential for revitalisation through PPP whenever they have a considerable potential for economic utilisation at the same time. That means that the costs related to the preparation of the site are about as high as the value of the area after the preparation process. According to the ABC characterisation of the European association for brownfield research, CABERNET, those areas are referred to as category B areas. A certain amount of public dedication can bring about private investments in such areas, resulting in a subsequent utilisation of the site in question.

Public-private partnership does not mean that no contracts are needed. Particularly when it comes to the subsequent utilisation of brownfields, there are often several risks that cannot entirely be excluded in advance. Typical risks tied to the subsequent utilisation of brownfields are possible contaminations of the ground or delays in making such land available. In case of category B areas which are on the periphery of economic viability anyway, the occurrence of those risks can quickly result in the economic inefficiency of the respective project. Thus, the partners are well advised to clearly lay down the risk distribution in a contract.

This text primarily addresses the decision maker on the municipal side who intends to mobilise private know-how and private funds for the revitalisation of brownfields. In that context, the steps of development of a revitalisation project will be discussed, from project preparation over planning, land availability, construction, up to funding. Typical issues related to the individual steps of development of a property will be raised, the possibilities of their implementation in a contract will be shown, and concrete examples will be described. In this way, the decision maker will be provided with guidance within that topic.

At the same time, the development of each brownfield is special. Thus, the following general statements can and shall not be a substitute for legal advice which must always be tailored to the concrete project. For that reason, complete sample contracts will not be included herein. The essential regulations relating to the individual topics will be mentioned instead, illustrated by sample wordings.

The contract structures will be described on the basis of the applicable German federal law and the federal state law additionally applicable in the Free State of Thuringia. Apart from the particularities of federal state law, the basic approach to the cooperation between public and private partners is transferrable to other states as well. To this end, the text at hand is intended as an inspiration for the transnational partners of the ACT4PPP project to adapt the instruments which are presented herein and are particularly suitable with regard to the tasks in their respective states.

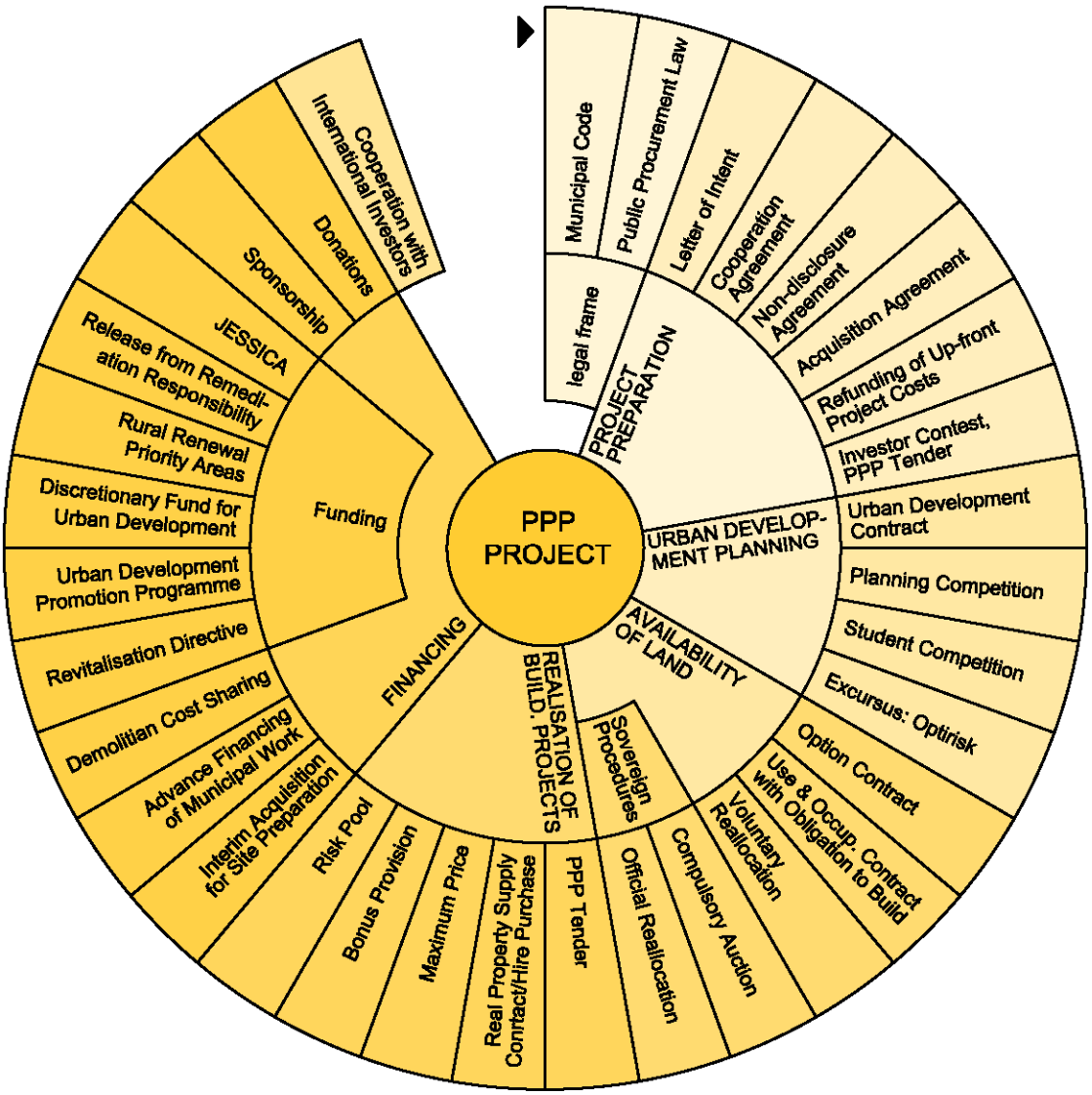

Fig. 1: Contract modules for PPP projects

2 Preliminary Considerations in Terms of Municipal Law

The peculiarities resulting from the "public" element of a possible partnership are to be taken into account as preliminary considerations prior to beginning with the concrete planning and realisation of a PPP project already. This includes primarily those democratic constitutional guidelines originating from the respective relevant municipal code as well as from the regulations in terms of the law on the award of public contracts public procurement law.

2.1 Municipal Code

The state-specific municipal codes particularly govern tasks, competencies, and decision-making processes on the municipal level, i.e. of the municipalities and districts. In Thuringia the Thuringian Municipal and District Code (Thüringer Gemeinde- und Landkreisordnung - ThürKO) in the version as published on 28/01/2003 is currently valid, last amended by section 8 of the law on 22/06/2011 (Law and Ordinance Gazette, p. 99, 134). While the first part of the ThürKO governs the municipal code, the subject matter of the second part is the district code. The third part contains provisions equally applicable to the two other parts, e.g. regulations on government supervision.

As we cannot go into more detail at this point, at least a few important elements shall be mentioned with regard to the first part of the ThürKO which is of primary interest here, namely the municipal code: For example, §§ 2, 3 govern the tasks allocated to the municipality, §§ 18 through 21 govern issues of municipal authority including the authority of municipalities to pass bylaws, § 22, para. 3 governs the basic distribution of decision-making authority among the individual municipal bodies (municipal council, mayor), §§ 26, 27 govern the details concerning committees of the municipal council, and §§ 28 through 32 govern the details concerning the legal status of the mayor, § 29, para. 2 particularly containing information on the mayor's responsibility for tasks. To the extent that the municipality relies on loans to finance a PPP project, the provisions of §§ 63 ff. of the ThürKO on lending are to be observed.

A municipality that intends to tackle a PPP project is obliged to examine, at least based on the regulations above, who (= which municipal body) is in charge of what (= decision and/or execution), to what extent, and in what way (= which concrete rules of procedure under municipal law). These issues do not have to be clarified in the beginning only, but also prior to any upcoming municipal decision in the course of the PPP project to make sure that individual legal acts, for example **contracts under participation of a municipality**, are not already to be considered unlawful for the sake of formality. In fact, not all unlawful contracts under participation of a municipality are null and void; some are and remain unassailably valid despite the unlawfulness. If, however, such a contract was null and void, it would not have any legal effects and would thus not establish any rights or obligations. In addition, work already performed on the basis of an unlawful contract would generally have to be reimbursed to the other party to the contract as it was performed without any legal basis in the first place. Thus, an invalid contract may in an individual case have significant consequences at the expense of the municipality. At this point, these partly difficult issues in terms of administrative law shall not be discussed in detail. If necessary, legal advice should be obtained from a barrister specialised in administrative law.

2.2 Public Procurement Law

2.2.1 Basic Considerations

Municipalities are public principals in accordance with § 98, no. 1 of the German Law against Constraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB). Whenever you procure work for money in the market in order to fulfil demands, you will trigger a **public contract**. (For a definition of "public contract", refer to § 99 of the GWB.) In that case, you will have to observe certain rules forming an increasingly dynamic, complex, separate field of law, namely the public procurement law.

Public procurement law is primarily competition and budget law.

The central regulations in terms of public procurement law on the *statutory* level can thus be found both in the GWB under federal law, particularly in part four (= awarding of public contracts, §§ 97 through 129), and in the respective budget codes under federal state law, i.e. for Thuringia in the Thuringian State Budget Code (Thüringer Landeshaushaltsordnung - LHO) largely applicable to municipalities, particularly in §§ 105, para. 1, no. 2, 55 (= public contracts). The above does, however, not even nearly cover all regulations relevant in terms of public procurement law. Further sources of law can be found in a *multitude of additional rules and regulations*, from provisions under European Community law (various EC directives on the award of contracts) over the Regulation on the Award of Public Contracts under German federal law (Vergabeverordnung - VgV), partially state-specific laws and directives on the award of contracts (e.g. for Thuringia, the Thuringian Law on the Award of Contracts (Thüringer Vergabegesetz [ThürVgG] dated 18/04/2011, Law and Ordinance Gazette, p. 69), and the Thuringian Directive on the Award of Contracts to Medium-sized Businesses (Thüringer Vergabe-Mittelstandsrichtlinie) in the version as newly published on 16/12/2010), up to the so-called official contracting terms for the award of contracts for the performance of construction work (Vergabe- und Vertragsordnung für Bauleistungen - VOB/A), for the award of contracts for the provision of services (Vergabe- und Vertragsordnung für Leistungen - VOL/A), and for the award of contracts for the provision of freelance services (Vergabe- und Vertragsordnung für freiberufliche Dienstleistungen - VOF).

In addition, there is a *jurisdiction on the award of contracts* hardly manageable by now, which is not only practiced by the courts of law, but also and most notably by the so-called procurement chambers of the federal republic and of the individual federal states in a quasi "first-instance" manner. Within its scope of application, the jurisdiction on the award of contracts does only act upon an application filed by an applicant and/or bidder who participates in an award procedure. However, as soon as such an application has been filed, the procurement chambers and/or courts will examine very thoroughly whether or not the public principal has observed the relevant provisions of public procurement law. In any case, such revision procedures result in cumbrous and often expensive delays from the public principal's point of view. Thus, the public principal is well advised to properly prepare the award of public contracts. For example, the Guide for Awarding Contracts (Vergabehandbuch - VHB) published by the German federal government which also contains a number of sample forms can be of help here. The current VHB 2008 from May 2010 can be downloaded as a free PDF file from the website of the German Federal Ministry of Transport, Building and Urban Development (http://www.bmvbs.de/DE/BauenUndWohnen/Bauwesen/Bauauftragsvergabe/Vergabehandbuch/vergabehandbuch_node.html).

A decisive factor with regard to the question to what extent the provisions of public procurement law are to be applied, is the knowledge of the respective estimated (net) contract value, because the public procurement law is divided. It distinguishes between the award of contracts above and below the EC threshold values. The EC threshold values authoritative for municipalities are currently 4,845,000 Euros for construction work and 193,000 Euros for services and freelance services. The European Commission reviews these threshold values every 2 years and adjusts them afterwards. Above the EC threshold values, all provisions of public procurement law must be observed, whereas below the EC threshold values only some of those provisions must be observed. Below the EC threshold values, particularly the GWB and the VgV do not apply, but primarily "only" the VOB/A in case of construction work, the VOL/A in case of services, as well as the Thuringian Directive on the Award of Contracts to Medium-sized Businesses in case of construction work, services and freelance services. In addition, the provisions of the ThürVgG are to be observed in Thuringia in case of estimated (net) contract values of more than 50,000 Euros for construction work in accordance with the VOB/A and more than 20,000 Euros for services in accordance with the VOL/A.

2.2.2 Sales of Land by Public Authorities with Construction Obligation

Since the so-called "Ahlhorn" ruling of the Higher Regional Court of Düsseldorf[1] in the year 2007, the search for private investors who were willing to fill spaces between buildings or develop and build on brownfields used to be difficult for public authorities. The reason was that it was the opinion of the Higher Regional Court of Düsseldorf in the above-mentioned ruling and in later decisions that a contract through which a public authority sells a plot of land to a private investor, and which also contains obligations as regards urban development, constitutes a **"building permit"** which requires a bidding process and is subject to public procurement law[2]. As a result of that ruling, many municipalities would regularly put property purchase contracts which contained obligations (to build) in terms of urban development out to tender on a trans-European level. That required a lot of work, time and expenditures and resulted in a lack of understanding among some private entities involved.

The European Court of Justice[3] did however not agree with that stringent opinion of the Higher Regional Court of Düsseldorf. In fact, it supported the German lawmakers in the year 2010 who had defined in § 99, para. 3 and 6 of the German Law against Constraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB) what is to be considered a building contract and/or a building permit. According to that definition, it all depends on whether the public principal **"directly benefits economically"** from the construction work. That is by far not the case with all property purchase contracts containing obligations (to build) in terms of urban development though. Thus, as a rule, many of those property purchase contracts do no longer require a bidding process due to reasons related to public procurement law today.

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1 First of several comparable decisions of the *Higher Regional Court of Düsseldorf*; ruling dated 13/06/2007 – Contracting 02/07, IBR 2007, 505 ("Ahlhorn airport");

2 Interesting in this context: The lecture of barrister *Harald Bardenhagen*, Seufert Rechtsanwälte, Munich and Leipzig, Germany, with the title "The 'Alhorn Ruling' and its Consequences for the Cooperative Development of Conversion Sites ("Der ‚Ahlhorn-Beschluß' und seine Folgen für die kooperative Entwicklung von Konversionsflächen") within the framework of an expert conference of the University of the German Federal Armed Forces, Munich, Germany, on 27&28/02/2008. Refer to: www.seufert-law.de/publikationen/harald_bardenhagen-der_ahlhorn-beschluss_und_seine_folgen_fuer_die_kooperative_entwicklung_von_konversionsflaechen.pdf

3 *European Court of Justice*; ruling dated 25/03/2010 – Rs. C-451/08

However, it all depends on the concrete individual case in this context - as it does in many other contexts as well. Whether or not the public principal "directly benefits economically" from construction work that is compulsory based on a property purchase contract, must be examined diligently. It is argued that a financial participation of the public principal, e.g. in case of a low property price or the acceptance of financial risks, constitutes an action of the public principal which is relevant in terms of public procurement law and obliges the public principal to put the contract out to tender. Moreover, an obligation to put a contract out to tender may apply in cases subject to state aid law. In case of doubt, a barrister specialised in public procurement law should be consulted.

3 Project Preparation

Public-private partnerships form complex structures causing an extensive and mostly expensive start-up phase. Based on the objectives to be achieved, instruments are applied during the project preparation which open up possibilities to the people in charge to delimit the project scope, to identify and integrate project partners and multipliers, and to assess the achievability of objectives already defined.

Those instruments primarily include the letter of intent, the cooperation agreement, the non-disclosure agreement, the acquisition agreement, the agreement on the refunding of up-front project costs, as well as investor contests and PPP tenders. The individual modules will be described below.

3.1 Letter of Intent

Letters of intent are submitted prior to the beginning of mostly major projects, before the contract negotiations or in the course of the same, by one or several negotiating partners. They are used by the person or people submitting such letter to lay down their negotiating positions in a **generally non-binding way**. Normally, they contain prospects concerning time schedules, further steps of negotiation and essential key points of the intended contract. Relevant negotiation results already obtained prior to the submittal of the letter of intent are summarised as well.

Despite their predominantly non-binding nature without any entitlement to the contract conclusion strived for, letters of intent do contain some legally binding declarations in some cases, i.e. real, litigable obligations such as obligations to inform, obligations to maintain secrecy, and/or duties of confidentiality the violation of which may be sanctioned by contract penalties, or agreements on the financing of advance investments. In some cases – normally upon request of the potential buyer (in the context of intended purchase contracts) – the negotiating partners also agree on **negotiation exclusivity** within the framework of letters of intent.

The exact contents and density of regulation of a letter of intent highly depend on each individual case.

The letter of intent does not only provide **orientation** as to the “route” in terms of law, economy, and time. Above that, it helps e.g. to legitimise potential actors and future project partners, to support project applications, and to facilitate decision-making processes for the respective negotiating partners from a “psychological” point of view.

Especially when dealing with internationally operating contracting parties, various **English terms** are often used in Germany instead of the German term “Absichtserklärung” such as **letter of intent (= LOI)** or **memorandum of understanding (= MoU)**. There is basically no difference between the two terms. The term LOI is often used for a letter of intent submitted by one negotiating partner only, while the term MoU is used for the letters of intent submitted by several or all negotiating partners respectively. In practice, this terminological differentiation is however not strictly adhered to. Thus, multilateral letters of intent are also called LOIs in some instances.

In any case, the commencement of contract negotiations – regardless of whether or not they are supported by a letter of intent with or without binding elements – establishes a

special mutual trust between the negotiating partners the violation of which can result in a liability for damages under the preconditions of the legal concept of the so-called culpa in contrahendo (c.i.c liability = culpa in contrahendo [Verschulden bei Vertragsverhandlungen], see §§ 311, para. 2; 241, para. 2; in conjunction with § 280, para. 1 of the German Civil Code). The mere revocation of intentions stated in a letter of intent alone does normally not result in the above-mentioned c.i.c. liability.

Letter of Intent
(*Shortened example*)

<*Names, authorised representatives and addresses of the negotiating partners* >

Preamble/preliminary remarks

<*Brief description of the initial situation/interests*>
<*Reference to the purpose of the letter of intent and to the fact that no entitlement to the conclusion of the intended contract can be derived from it* >

§ 1
Essential Contents of the Intended Contract <*in this context: purchase contract*>

The contract intended by the negotiating partners shall contain the following essential key points:

<*E.g.: object of purchase; purchase options; provision on how the purchase price in the intended contract is to be determined; clauses dealing with additional proceeds; key points describing how contaminated sites and similar environmental burdens are to be handled in the intended contract, etc*.>

§ 2
Time Schedule

<*Key points of the intended time schedule: Until when do the negotiating partners intend to have taken which further steps of negotiation?*>

§ 3
Cooperation; Exchange of Information

Both negotiating partners are willing to provide in good faith the advance investments necessary for the contract conclusion and to cooperate in partnership in order to achieve the intended contract conclusion. They will make available to each other all information required for that purpose.

§ 4
Non-disclosure

(1) The negotiating partners will keep this Letter of Intent as well as the contents of the negotiations that took place between them in confidence and will not disclose the same. This applies equally to the documents submitted, knowledge and experiences communicated, and other information made available to the respective other negotiating partner which may exclusively be used for the purposes of this Letter of Intent. The above obligation to maintain secrecy shall continue to be valid <*for a period of … years*> after the expiry of this Letter of Intent. The respective negotiating partners will swear their employees and consultants entrusted with the processing of the intended transaction to secrecy accordingly.

(2) The obligation to maintain secrecy in para. 1 above shall not apply to information which and to the extent that -
<*At this point, various criteria for exclusion can be stated, e.g.:*

- such information are already generally known to the public or become known through no fault of the negotiating partner;
- the disclosing negotiating partner has obtained a written consent to disclosure from the other negotiating partner; (…)>

§ 5
Coming into Effect and Term of the Letter of Intent

This Letter of Intent shall come into effect upon execution by both negotiating partners and expire automatically upon conclusion of the contract intended by the negotiating partners, however, on <*date*> at the latest, unless the negotiating partners have mutually agreed in writing to extend the term of this Letter of Intent.

§ 6
Final Provisions; Non-binding Nature

(1) <*At this point, various final provisions can be included as customary in "real" contracts, e.g. with regard to oral side agreements, written form requirements, severability clauses.*> or:

Previous oral or written agreements between the negotiating partners relating to the subject matter of this Letter of Intent shall become invalid upon its coming into effect.

(2) This Letter of Intent has a non-binding nature with regard to §§ 1 and 2 <*and § 3, if applicable*> above.

<*Place, date, signatures of the negotiating partners*>

3.2 Cooperation Agreement

When a public actor such as a municipality wants to participate in a contest or tender involving the admission to an aid programme, for example, it can be recommendable to ensure the support of a suitable partner already during the application phase. Especially to the extent that the municipality lacks the necessary know-how with regard to the subject matter of the contest or tender, it makes sense to cooperate with external experts often to be found in the private sector. A cooperation agreement organised accordingly should first of all contain a clear assignment of tasks and responsibilities among the public and private partners, transparent duties to inform, but also a provision for the case that the contract is not awarded to the public actor applying for the project. Of course, the remuneration to be paid to the private partner for the work to be performed by that partner must be laid down as well.

Cooperation Agreement
(Shortened example)

< *Names, authorised representatives and addresses of the cooperation partners*>

Preamble/Preliminary Remarks

< *Brief description of the initial situation (i.e. first of all, a reference to the contest and/or other tender initiated by a third party, in which the public actor wants to participate*)>
<*Reference to the purpose of the cooperation agreement*>

§ 1

Services Provided by <Private Actor>

(1) <*Private actor*> will provide the following services to <*public actor*> within the scope of the project mentioned in the Preamble: <*1., 2., 3., etc.*>

The provision of the following above-mentioned services is however subject to the reservation that <*public actor*> is actually awarded the contract: <…>. Thus, if the contract is not awarded, these services under reserve shall be deemed to have not been agreed.

(2) When providing the services, <*private actor*> shall have to observe all <*conditions of the contest/tender*> the <*contest/tender*> is based upon, particularly in terms of technology, economy and time. The above-mentioned conditions are fully known to <*private actor*>.

(3) <*Private actor*> shall have to provide the services intended for the preparation of the proposal such that <*public actor*> is enabled to submit a fully competitive proposal in due time and form.

§ 2
Services Provided by <Public Actor>

<*… As necessary, include the reservation relating to the actual award of the contract here too, as shown in § 1, para. 1.*>

§ 3
Award of Contract

(1) If <*public actor*> is awarded the contract, the parties to the Agreement covenant on this day already that they will jointly process the project in correspondence with the service portions assigned in §§ 1 and 2 above. In that case, the Cooperation Agreement will expire no sooner than upon fulfilment of the tasks.

(2) If <*public actor*> is not awarded the contract for whatever reason, particularly because the contract was awarded to another applicant or because the <*contest/tender*> is cancelled without the contract being awarded at all, this Cooperation Agreement shall expire.

§ 4
Remuneration Arrangement

(1) For the services provided by it in correspondence with the Agreement, <*public actor*> shall pay to <*private actor*> the following remuneration: <*…; net/gross; additional costs?*>

(2) The remuneration earned as per para. 1 above shall be payable as follows: <*…; point in time; separate billing; bank connection of <private actor>*>.

§ 5
Duty to Inform

The parties to the Agreement are obliged to provide the respective other party with information which have been or become known to them and which are needed for the performance of work and services under this Agreement, particularly for the preparation of the proposal, negotiations concerning the proposal, and for the fulfilment of the potential future contract upon award of the same.

§ 6
Confidentiality Clause

<…>

§ 7

Exclusivity

The parties to the Agreement hereby agree on the exclusivity of their cooperation with regard to <*the contest/tender*> this Agreement is based on. Thus, <*private actor*> is not permitted to work for any other <*contestant/tenderer*>, be it directly or indirectly, e.g. through an associated company.

§ 8
Termination

This Agreement can be terminated extraordinarily and without notice only for good cause. In particular, a good cause can be: <…>

§ 9
Miscellaneous; Final Provisions

<…>

<*Place, date, signatures of the parties to the agreement*>

3.3 Non-disclosure Agreement

The forwarding of information classified as non-public or confidential to a potential contractual partner may pose a risk to the owner of such information prior to, during, or after the contract term, especially in view of competitors. Depending on the type, scope, and relevance with regard to the subject matter of the contract, the publication or other communication of the information to third parties may not only jeopardise the project aimed at through the contract, but it may also jeopardise the existence of the business of the information owner. On the other hand, joint projects and related contract negotiations can hardly be realised in a reasonable manner without the mutual exchange of a certain amount of confidential information.

Thus, predominantly commercial investors will often insist on the conclusion of a non-disclosure agreement, executed separately prior to the contract concluded at a later point in time and/or as an integral part of that contract. Non-disclosure agreements are particularly “popular” with companies from the Anglo-American area who will quite frequently present their version of a non-disclosure agreement for execution already in an early phase of project development and contract negotiation. Those non-disclosure agreements (NDA) are often written in the English language and, due to the peculiarities of the Anglo-American legal philosophy, quite detailed in many cases. It should be examined thoroughly from the point of view of German law whether such an NDA can be signed without any objections. Especially the claims for compensation tied to the violation of obligations under the NDA are often significantly higher and thus deviate from what is customary in Germany under German law.

Prior to signing a non-disclosure agreement, the public partner – especially if it is a municipality or district administration – should examine thoroughly to what extent it is actually able to keep information disclosed to it in confidence given its public status, and in what way it can specifically obligate its employees and representatives dealing with that matter.

As para. 3.1 above already contains a (brief) wording on confidentiality as part of the example letter of intent (§ 4), please refer to that section.

3.4 Acquisition Agreement

In many cases, a municipality or another public actor is unable to independently develop and market its own brownfields for various reasons (e.g. due to a lack of financial and/or human resources). In order to still enable such development and marketing, it makes sense to cooperate with an external partner, particularly an expert planner, such cooperation being established by contract on an acquisition basis. That means that on the one hand, the partner is granted the – ideally temporary – exclusive right to develop a project concept for a possible revitalisation strategy for the brownfield. To the extent that the municipality does already have certain ideas in terms of urban planning, these are to be taken into account. At the same time, the partner agrees to contact potential investors. On the other hand, the partner will undertake its tasks – project development and acquisition of investors – in the form of acquisition services, at its own expense and risk, because the partner is promised under the agreement that in case of success it will be involved in the prospective project realisation or otherwise reimbursed for the preparatory effort. At the same time, an acquisition agreement may stipulate that during the term of the agreement the partner shall exclusively work for the municipality and neither directly nor indirectly for any other municipality or any other public actor, as that would result in the risk of the partner "hawking" its concept and contacts to investors.

From a practical point of view, it may however not be easy for the municipality to attract an equally suitable and willing partner for that sort of cooperation on an acquisition basis.

Some of the ideas described above can be used for the preparation of the acquisition agreement. For the rest, various contract structures are possible depending on the individual case.

In any case, the municipality must make sure prior to signing any agreement that such an acquisition agreement can be approved in terms of German regulatory law on the municipal level.

3.5 Refunding of Up-front Project Costs

Up-front project costs are incurred whenever a project needs to be worked on when there is no sound funding and/or an existing sound funding cannot be called up. If it is already foreseeable at the time of contract conclusion that there is a good chance that the project will be realised, an agreement on the refunding (e.g. in the form of a lump-sum payment) of all or part of the up-front project costs incurred can be signed in order to economically substantiate the project idea such that a project decision can be made.

Example case: A is the owner of a plot of land on which B wants to realise a building project (e.g. construction of a nursing home). A and B agree that A shall be the principal and investor and B will lease the erected building in the long term. A plans the building project in close coordination with B. Due to the magnitude and/or the high project costs to be expected, B is to bear a considerable portion of the up-front project costs (e.g. <…>) so as to demonstrate the sincerity of its commitment to the project. Finally, A and B agree to share the financial risk related to the project development.

A is the owner of the plot of land <…> on which B wants to realise the following building project: <…>

A shall erect the building described on the plot of land as principal and investor. Precondition is however that a <*general*> *leasing contract* for the building to be erected <*including a purchase option/compulsory purchase upon expiry of the term of lease, where applicable*> is concluded between A and B until <…>.

The parties to the Agreement agree that various up-front project work and related up-front project costs will be necessary in order to be able to submit a concretised leasing contract <*including a purchase option/compulsory purchase upon expiry of the term of lease, where applicable*>. The up-front project costs will probably amount to <…> EUR and include the following up-front project work/cost items: <…>. Additional up-front project work will be agreed on by the parties to the Agreement in due time prior to implementing any measures causing further costs.

So as to demonstrate the sincerity of its commitment to the project, B agrees to bear 50 % of the up-front project costs. If the intended leasing contract <*including a purchase option/compulsory purchase upon expiry of the term of lease, where applicable*> is concluded by <…> at the latest, the portion of the up-front project costs to be borne by B shall be included in the calculated monthly lease. If however such leasing contract is not concluded by the above-mentioned date at the latest, the portion of the costs to be borne by B shall be payable as a whole <*…days/weeks*> from the aforementioned date.

3.6 Investor Contest, PPP Tender

In addition to the accepted contest procedures described in chapter 4, there is also a number of special forms. These include investor contests and conventional PPP tendering procedures which are normally focussed on financing, management and/or operating issues. In those procedures, less importance is normally attached to the design approach which is in the centre of attention in urban planning and architecture contests. The contents of PPP tenders will be described in more detail in section 6.1.

Based on the assessment matrix of a PPP tender, the interest of a principal to focus the assessment criteria both on cost optimisation and on the safeguarding of the architectural quality will be exemplified here:

In the assessment of proposals, the quality of the design as well as the functional solution are evaluated based on a points-based system. The following points are awarded for the criteria below:

Quality of architecture and design max.	1,100
Programme fulfilment max.	800
Functionality and organisation max.	1,000
Integration in terms of urban planning max.	600
Durability max.	1,100
Maintenance and operating costs max.	1,000
Overall impression max.	400

In this example, the importance of the quality in terms of urban planning and architecture is rated approx. 40 %. The majority of the points – nearly 60 % – are awarded in assessment categories which can be optimised and are thus relevant for financing.

Durability, maintenance and operating costs constitute important cost modules for the operating period of the property. Their portion of 35 % moves the framework away from

customary planning competitions that are characterised by aesthetic and functional considerations, towards an economically oriented assessment focused on the life cycle of the building. The example shown was chosen to illustrate the importance of financing in investor contests and PPP procedures.

Depending on the objectives to be achieved, the principal defines the importance of the individual criteria based on the maximum number of points that can be scored. Hence, the point-based system can be applied in the PPP procedure as a controlling tool for quality, costs, and sustainability.

4 Planning in Terms of Urban Development

In the phase of planning in terms of urban development, the public and private partners have to concretise and coordinate their development-related intentions. From a PPP point of view, the question arises as to how the competences of the public and private partners can be utilised optimally during the phase of planning in terms of urban development.

The subsequent use of a brownfield often requires the preparation of a land-use plan. The public partner has to make sure that the subsequent use of the brownfield fits in the municipal town planning scheme. The private partner has to obtain a building permit for an economically realisable project as quickly as possible. With the **urban development contract**, a proven tool is available in Germany to involve the private partner in the preparation of the land-use plan and to govern the related legal and economic issues between municipality and investor.

In case of demanding design tasks, the question arises as to which procedure should be applied in order to find a design that equally satisfies public and private partners. In that context, the **planning competition** is an important tool to bundle public and private competences in one compact procedure.

When it comes to brownfields where the subsequent use is on the verge of economic inefficiency, sufficient means to enable such a planning competition are normally not available. In that case, colleges can be involved in the form of a **student competition**, and a good basis for the revitalisation of a brownfield can be created using a small budget.

This chapter ends with an excursus to the **OPTIRISK** research project where a special method was developed to optimise the planning in terms of urban development specifically with regard to the subsequent use of contaminated brownfields. The approach is to focus the planning in terms of urban development on the minimisation of preparation costs such that the subsequent use becomes profitable.

4.1 Urban Development Contract

In accordance with § 11 of the German Federal Building Code (Baugesetzbuch – BauGB), municipalities are authorised to conclude urban development contracts.

"In particular, the following can be the subject matter of an urban development contract: 1. The preparation or implementation of urban development measures by the contractual partner at its own expense; including the reorganisation of property-related conditions, soil remediation and other preparatory measures, the preparation of the plans in terms of urban development (…); the responsibility of the municipality for the statutory plan preparation procedure remains unaffected." (§ 11, para. 1, sentence 2, no. 1 of the BauGB)

This creates much room to govern the cooperation between public and private partners in terms of contents and economy. The private partner can undertake to bear costs related to urban development measures, and the public partner can entrust the private partner with the preparation of urban development plans and other individual tasks within the scope of the statutory plan preparation procedure.

In essence, the following needs to be stipulated in an urban development contract:

- Type and scope of the planning contract to be awarded
- Specifications concerning the contents of the plans
- How to coordinate the plans with the municipality
- The individual work items to be performed
- Dates, deadlines and quality features to be observed
- The purpose of the contract and the correlation between the work and the building project
- The appropriateness of the assigned work
- The exclusion of the contractual partners' claim to the enactment of a bylaw on a land-use plan
- Any claims to the reimbursement of planning-related expenditures of the private partner which become useless in case that a legally binding land-use plan is not established

The last two items illustrate the limits of PPP in an urban development contract. While the private partner undertakes to prepare the plans in terms of urban development, its claim to the enactment of a land-use plan by the public partner is excluded.[4] This imbalance can only be lessened by agreeing that the planning-related expenditures will be refunded in case that a land-use plan is not established.

Example: Urban development contract in correspondence with § 11, para. 1, sentence 2, no. 1 of the BauGB on the privatisation of planning services

Urban Development Contract
(*Shortened example*)

§ 1
Type and Scope of the Contract to be Awarded

The project executing organisation has to commission and finance all expert opinions, surveying work and planning services required for the land-use planning procedure with regard to the area marked in red on the map <*Annex…*>. In that context, the provisions below shall be taken into account:

§ 2
Specifications Concerning the Contents of the Draft Land-use Plan

The draft land-use plan shall be drawn up on the basis of the attached master plan <*Annex…*>, taking into account the following parameters: … <*type and extent of use for building, design specifications, etc.*>

§ 3
Planning Coordination with the Town

The planner must draw up the draft in close coordination with the town planning office. The municipality will refer the planner to a contact person.

[4] Under German planning law, a land-use plan would become invalid had the municipality undertaken towards the private partner to enact a land-use plan to begin with. This is due to the consideration that a municipality could no longer freely assess all public and private interests in the course of the land-use planning procedure if it had already undertaken towards the private partner to bring about a certain result of the land-use planning procedure.

§ 4
Services in the Course of the Land-use Planning Procedure

The planner has to ensure an early involvement of the citizens and the involvement of public agencies as per … <*Annex…*> in permanent coordination with the town planning office.

§ 5
Deadlines, Requirements

The preliminary draft of the land-use plan has to be submitted to the town planning office until <*Date…*> at the latest. The preliminary draft of the land-use plan and all following versions of the plan must fulfil the requirements stipulated in the BauGB and in the code of practice. Furthermore, they must be suitable for the public review process and for the involvement of public agencies without limitation. The documents shall be delivered in …copies.

§ 6
Exclusion of Claims of the Project Executing Organisation

It is expressly laid down that no legal title can be derived from the planning contract in favour of the project executing organisation with regard to the establishment of a land-use plan for the area where the project executing organisation wants to build on and market the building plots owned by the same. <*cf. § 1, para. 3, sentence 2 of the BauGB*>. The sovereign rights of the municipality, especially in view of the planning considerations as per § 1, para. 7 of the BauGB and the freedom of choice of municipal bodies during the establishment procedure, including any adoption of bylaws, shall remain unaffected by the above-mentioned obligation following from the commissioning.

4.2 Planning Competition

Definition <*§1, para. 1, RPW (German guidelines for planning competitions) 2008*>: Competitions are calls for submissions aiming at providing the principal with a plan or concept which is selected by a jury based on comparative appraisals. Competitions can particularly cover the following domains and should have an interdisciplinary approach in suitable cases:

- Urban design, town planning, urban development
- Landscape and open space planning
- Planning of buildings and interior rooms
- Planning of civil engineering structures and traffic facilities
- Technical departmental planning

These guidelines can be applied to competitions in the fields of art and design as well. Competitions can relate both to new planning and planning with regard to existing structures. They are carried through in order to obtain excellent solutions for demanding planning and building tasks and to agree on a mutually preferred solution – especially if the decision-makers involved have different opinions – on the basis of the available approaches.

A differentiation is made between urban development competitions and architecture competitions. They are announced as planning or ideas competitions implemented in the form of open or closed competitions and/or two-phase or cooperative procedures based on the German guidelines for planning competitions - RPW 2008.

Planning competitions are supervised by the chambers of architects of the German federal states in terms of contents and organisation. Those chambers have normally formed a competition committee available as a contact point to the organiser and to the entity supervising the competition.

As a rule, the participants in planning competitions have to bear considerable costs. In addition, open competitions and two-phase procedures where the number of participants is not limited pose an undefined and mostly high cost risk to the competition participants due to the large number of participants. In case of closed and cooperative procedures, the costs are proportionately borne by the organiser, but as a consequence of the assumed higher chances of winning due to the small number of participants, the competition participants face a high cost risk in this case as well due to the great commitment of the participants.

Owing to the usually high cost risk to be borne by participants in planning competitions, they can generally be considered partnership-based procedures. Planning competitions are often carried through in conjunction with public building projects. Following the public invitation to tender within the scope of the competition and the decision of the privately acting architect, urban planner, and/or landscape architect to participate, a regular contractual relationship is established as per RPW 2008.

Based on the RPW 2008, the competition procedures are implemented as follows:

(1) Open competition <*§ 3, para. 1, RPW 2008*>: Organisers publically announce invitations to tender for the competition. Interested experts who fulfil the professional and personal requirements tied to the participation are free to submit a proposal for solution. Private organisers can limit the circle of participants (e.g. regionally).

(2) Closed competition <*§ 3, para. 2, RPW 2008*>: Organisers publically invite interested experts to bid. The competition announcement or request for proposal respectively must contain the intended number of participants, the supporting documents to be submitted, the method applied to select the participants and, if applicable, the names of participants already selected. The number of participants should be appropriate for the scope and significance of the task the competition relates to. Organisers select the participants from the pool of candidates based on clear, non-discriminating, and qualitative criteria normally related to the specific task. If upon objective selection based on those criteria the number of candidates is too large, the final selection from the remaining candidates can be done by drawing lots. Private organisers are free to select the participants directly or by drawing lots. In case of closed competitions, the names of the selected participants are usually listed in the call for submission.

(3) Two-phase procedure <*§ 3, para. 3, RPW 2008*>: Open and closed competitions can also be implemented in two phases based on the requirements below:

1st phase:
- All eligible people are free to participate.
- Limitation to basic approaches
- The participants for the 2nd phase are selected by the jury upon assessment of the approaches.

2nd phase:
- The number of participants should be appropriate for the significance of the task the competition relates to.
- The jury members remain the same.

(4) Cooperative procedure <*§ 3, para. 4, RPW 2008*>: Whenever the organiser is unable to clearly define a task or the related objectives, e.g. in case of urban development tasks, a cooperative procedure can be applied. Its special feature is the gradual approach to the task and the related objectives through an exchange of ideas between the parties involved. In that process, all participants must be kept on the same level of information. The anonymity can be abrogated by way of exception, e.g. for the presentation of intermediate and final results. In case of competitions announced by public organisers within the area of application of the VOF, the cooperative procedure cannot be applied.

Example: Invitation to tender for the architectural planning competition including urban development ideas concerning the construction of a housing estate suitable for the elderly with 40 apartments on Bachstraße/Ritterstraße in Apolda, Germany, 2009

Organisers: Town of Apolda, Markt 1, D-99510 Apolda, in conjunction with Wohnungsgesellschaft Apolda mbH, Gerichtsweg 2, D-99510 Apolda

Competition supervision: LEG Thüringen mbH, dept. of urban and regional development, Mr. Salberg, Mr. Zill, Mainzerhofstraße 12, D-99084 Erfurt, telephone: +49(0)361/5603-230, fax: +49(0)361/ 5603-336, E-mail: thomas.zill@leg-thueringen.de

Competition task: The 0.7 ha large area the competition relates to is located within the urban renewal area “Historic Centre of Apolda” and comprises both a brownfield measuring approx. 0.4 ha and the urban structures and public spaces surrounding the same. Plausible urban development approaches are to be developed for the area in the ideas part, while in the realisation part a convincing concept in terms of urban development and architecture is to be created for the new construction of a housing estate with at least 40 barrier-free apartments on the central brownfield. Optimal integration in the existing urban environment, well organised external and internal site development, attractive and functional apartments, as well as appropriately designed outdoor areas networked with the building and the adjoining streets and squares, are essential objectives of the organisers.

Type of competition: Closed competition for the realisation including a part concerning urban development ideas in accordance with § 3 (2) RPW 2008

In case of restricted competitions:
a) Intended number of participants: 25
b) Names of participants already selected: Not applicable.
c) 5 of the 25 participants will be determined by the organiser and 20 of them by drawing lots.
d) The selecting committee will select the participants from the circle of candidates based on their qualities in terms of design, economy, and engineering, as well as their experience, economic capacity, and comparable references. If the number of participants fulfilling the criteria exceeds the intended number of participants, lots will be drawn.
e) The selection is done by a committee appointed by the organiser. In addition to each one representative of the organisers, one member of the Thuringian chamber of architects will be on the selecting committee as well. All candidates will be informed about the result of the selection process.
f) Deadline for the receipt of the application documents for participation in the competition: 31/03/2009

Restriction of admissions: Free State of Thuringia. Interested entities from outside that territory who fulfil the conditions of § 4 (1) RPW 2008 may apply for participation with reference to article 59 of the EC Treaty. The competition will be carried through in the German language.

Participants: Eligible are natural persons domiciled within the territory specified here above who are permitted to carry the occupational title of an architect according to the statutory regulations applicable at their place of residence or place of business on the date of the call for submis-

sions. If the occupational title is not regulated by law at the participant's place of residence or place of business, only those applicants fulfil the professional requirements of an architect who hold a diploma, examination certificate, or other evidence of formal qualification in the respective discipline that is definitely accepted under directive 85/384 EEC (EC architects' directive) or 89/48 EEC (EC directive on higher education diplomas) respectively. Moreover, legal persons are eligible to the extent that the object of their enterprise according to the statutes includes structural engineering services in correspondence with the competition assignment. The authorised representative of the legal person and the responsible author of the submitted material must fulfil the demands made on the natural person.

Architects are recommended to cooperate with an urban planner and/or landscape architect. For urban planners and/or landscape architects participating in the competition, cooperation with an architect is obligatory.

Application documents:
- Office profile in accordance with the specified forms, including a binding declaration of participation in the procedure in case of being selected/drawn (The forms are available for download at … as PDF files.)
- Copy of the registration certificate issued by the Thuringian chamber of architects or comparable certificates
- Work samples of projects typical of the applicants' way of working and comparable with the competition assignment. The application documents are to be submitted in the German language and must not be larger than the DIN-A3 format. The work samples are to be submitted on maximally two DIN-A3 sheets printed on one side. The documents will not be returned upon completion of the application procedure.

If one of those documents is missing and/or a form was not filled in completely, the respective applicant will be excluded from the application procedure.

In case of working groups, each member must be eligible. The working group has to nominate an authorised representative who will be responsible for the performance in the competition. If multiple applications of different members of a working group are submitted, all members of that working group will be excluded.

Filing of the application: Until 31/03/2009 (date of the postmark) at the latest to LEG Thüringen mbH, dept. of urban and regional development, Mr. Zill, Mainzerhofstraße 12, D-99084 Erfurt. Application documents will not be returned.

Names of the jury members: Technical jurors: Prof. Michael Mann, Prof. Karl-Heinz Schmitz, Ms. Iris Heinemann, Dr. Ingrid Kühne; local community jurors: mayor Rüdiger Eisenbrand, Mr. Sören Rost, Mr. Holger Prüfer

Number and scope of prizes: The overall competition sum amounts to 56,000.00 €, the following distribution being intended:

1st prize	22,400.00 Euros
2nd prize	14,000.00 Euros
3rd prize	8,400.00 Euros
Total acquisitions	11,200.00 Euros (e.g. 4 x 2,800.00 €) plus 19 % VAT

Binding nature of the jury's decision: Taking into account the recommendation of the jury, the organisers intend to entrust one of the prize winners with the further services at least up to and including work phase 3 and, in case of project realisation, at least up to and including work phase 5 as per § 15 of the German Official Scale of Fees for Services by Architects and Engineers (Honorarordnung für Architekten und Ingenieure – HOAI).

Dates:	Announcement date:	04/03/2009
	Deadline for filing applications:	31/03/2009
	Selection of participants:	06/04/2009

Handover of competition documents:	08/04/2009
Colloquium:	05/05/2009
Submission of competition documents:	10/06/2009
Jury sitting:	28th calendar week of 2009 (probably)

As a result of that competition, prizes were awarded to 4 of the 22 submissions, and an acquisition was awarded to three others. The picture below shows the submission of the architects' office Dieckmann Satzinger Architekten from Weimar, awarded the 2nd prize and currently in the process of implementation:

Fig. 2: Submission to the competition, 2nd prize, design model

4.3 Student Competition

For the revitalisation of brownfields with complex structures, planning competitions are usually conducted. Whenever a fallow site is to be examined in an urban planning or architectural ideas competition already in an early phase of project development, but the funds required for planning competitions as per RPW 2008 are not available, revitalisation ideas can be gathered in the form of student concepts by involving a technical college or university. The mere existence of visionary planning approaches often promotes the planned project development, regardless of financial viability or viability in terms of planning law.

Example: Conversion of the rye mill in Bad Köstritz, Germany, into a culture a leisure hotel, design seminar at the University of Applied Sciences of Erfurt, Germany, department of architecture, professors Michael Mann and Rolf Hempelt, Erfurt, Germany, 2010

The interests of the town of Bad Köstritz, the administrative district of Greiz, the Thuringian

State Office for the Preservation of Monuments and Historic Buildings and Archaeology, the University of Applied Sciences of Erfurt, and of the private owner have led to the implementation of an architectural and urban development ideas competition concerning the conversion of the former rye mill into a hotel. In order to motivate the 40 participating students, a regional financial institution has offered prize money for the best designs.

The results were presented to potential developers of hotels at a public conference. Through the preparation of the project designs, the status of the site was generally enhanced, the idea to subsequently use the brownfield for a hotel was established, and a network of interested parties was created who jointly turned to the realisation of a hotel on that property.

The task was set by the University of Applied Sciences in consultation with the above-mentioned project partners. Excerpt from the task description:

Introduction: The milling of grain is done by a small number of large companies today.
The long transport distances between the harvested grain and the grain mill play a secondary role in that context. A transport distance of a thousand kilometres between the grain field and the baked bread is not uncommon. Regional relationships between farms, their products, and consumers have only been paid more attention to again in recent years.

Task: The former mill in Bad Köstritz is a typical example for the way in which political and economic changes have brought about that buildings are no longer used according to their original purpose. The following task aims at trying to give the complex of buildings a chance for a second use cycle. The focus is on the potential of the location, the town, and the region. With the utilisation as a culture and leisure hotel, we rely on the potential of the growing tourism within the region and on the target group of people interested in culture.
Modest touristic development, building on the existing regional potentials, is to be considered the basis for the further utilisation phase of the mill in Bad Köstritz. The mill is supposed to be converted into a hotel including function room and gastronomic establishment. The target groups to be taken into account with regard to overnight stays are primarily hikers and cyclists as well as cultural travellers.

Design task: The former mill in Bad Köstritz is supposed to be converted into a hotel including gastronomic establishment and function room. Making a decision on what to do with the large former granary will not be easy.
Buildings (map) no. 1, no. 2, no. 5, and no. 6 may be demolished. Although these buildings are the oldest, they are problematic with regard to the subsequent use as a hotel. (e.g. small height between floors) Buildings no. 3 (granary) and no. 4 (mill) must be preserved as they form the main part of the mill complex and represent the originality of the architecture in the neo-Romanic style of historism.
The existing residential buildings marked on the map as no. 9 and no. 10 are not included in the scope of the task.

Plot and development: The plot of land will be made ready for building coming from Heinrich-Schütz-Straße. All supply and disposal lines are available there. Main entry and access for parking should be on that side. The area to be processed is bordered by Heinrich-Schütz-Straße in the east, the mill stream in the north and the two existing residential buildings in the south. The residential buildings are not included in the scope of the task. The garden (map - no.14) may be covered with buildings. The existing trees are to be taken into account.

Parking: In view of the target groups the hotel is intended for (hikers, cyclists), the number of parking spaces for passenger cars is reduced. An overall number of 22 parking spaces is to be accounted for on the plot. werden an der südlichen Grundstücksgrenze (Garagen Nr.11) nachgewiesen [Anm. d. Übers.: Satz im Ausgangstext unvollständig!]. In addition to the parking spaces for passenger cars, 50 bicycle parking spaces are required. It should be possible to park the bicycles in a protected area (weather protection).

Free space: The design of the free spaces is included in the scope of the task. The area of free spaces to be processed covers the entire premises, incl. the areas surrounding the two residen-

tial buildings, the garden, and the bank area up to the mill stream. The design of the free spaces should be low-key and appropriate with regard to structure and type of use. To the extent possible, existing trees are to be preserved.

The best results of the 6-month design seminar are shown on the following page. Three works were awarded a prize. The prizes were handed over to the students by the Sparkasse Gera-Greiz on the occasion of the conference on 10/11/2010. The press reported on the project in detail.

Fig. 3: Student concepts for the conversion of the rye mill in Bad Köstritz into a hotel

4.4 Excursus: OPTIRISK

Contaminated brownfields can often not be used because the required costs for demolition and decontamination as well as the risks tied to problem sites exceed the attainable proceeds by far.

Normally, a development strategy coordinated with the prospective project actors is needed for that sort of sites. That requires knowledge on the situation at the problem site and an analysis of the development potential in terms of urban development and energy.

In a multistage process and through the application of project-specific modules, the optirisk® brownfield development tool opens up manifold possibilities concerning the reactivation of those old sites.

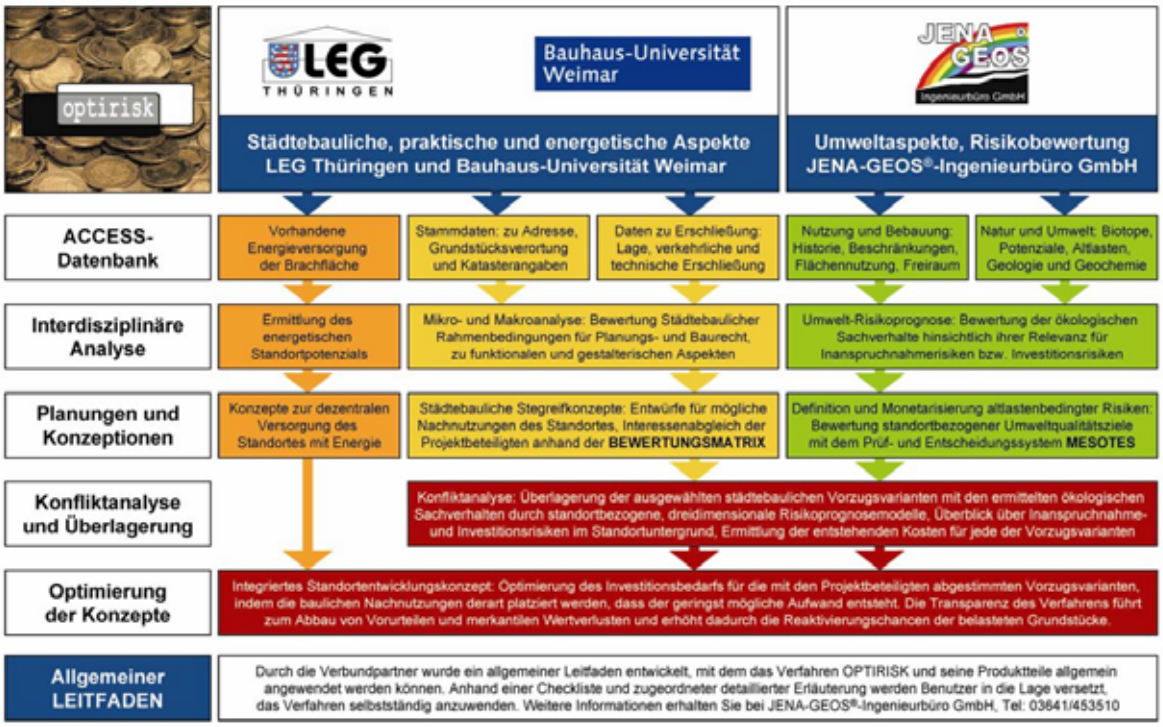

Fig. 4: Sequence and contents of the work steps in optirisk®

The aim of **optirisk®** is the optimisation of site development for ecologically burdened, fallow plots of land. The results are *'integrated site development concepts'* optimising the investment requirement and thus improving the chances of burdened land to be reactivated. In a first step,
a) the most suitable urban planning concept is developed,
b) the appropriate objective in terms of environmental quality (decontamination) is defined, and
c) options for the utilisation of renewable energy sources are derived

for the respective site.

During the subsequent conversion of the urban development concept into an *'integrated site development concept'*, the spatial configuration of the contaminant loads and the energetic potential are taken into consideration such that the expenses for site development are minimised to the extent possible.

Tools

a) Urban construction: Using the system for the analysis of urban development concepts, various interests of potential decision-makers can be coordinated. Urban development concepts, even when aiming at different types of use, are compared objectively such that the optimal concept is found from the point of view of superordinate plans and overall town development concepts. The premises from the 4 areas 'townscape and landscape', 'building structures and spatial patterns', 'possibility of conflicts' and 'upgrading/stabilisation potential' are examined in a matrix and weighted in a site-specific manner.

b) Environment: With the 'MESOTES' (ancient Greek for 'to be moderate', 'to be proportionate') method, site-related environmental quality objectives are defined in accordance with the principle of *proportionality*. As a result, the hazard elimination measures necessary and appropriate according to environmental legislation and administrative discretion (liability risks or risks of claims) can be distinguished from other investment risks and presented in a risk forecast model. The monetary expenses related to ecological circumstances and required for the realisation of the respective urban development concept – also with regard to various foundation depths – can be derived from the risk forecast model.

c) Energy: In the context of the redevelopment of old sites, options will open up which promise energy efficiency, sustainability and profitability. Examples are the use of long-term heat storage facilities in combination with CHP or solar heat. For example, the heat stores could be placed wherever excavation work is necessary. Applying the EPASch decision-making algorithm, options for the use of renewable energies can be derived for the specific site, taking into account the intended subsequent use.

Integrated site development concepts

Based on the available risk forecast model, **optirisk®** optimises the urban development concept such that the costs for the elimination of the risks of claims and the investment risks are minimised as far as possible. In that process, the structural design must however not be strained to the extent that it loses its functional and aesthetic character.

Cost burdens arising from the elimination of the risk of claims can partly be abolished by way of optimising the urban development concept.
For that purpose, the old site issues must however be taken into account in an early phase of the weighting and planning processes dealing with urban development. The *integrated site development concepts* developed on that basis enable the optimisation of investment needs and thus the improvement of the reactivation prospects of ecologically burdened land.

Finally, **optirisk®** is not an automated tool. It is not a substitute for expert knowledge of the disciplines involved; but it combines them. In practice, **optirisk®** has proven itself particularly with regard to small and medium-sized sites intended for commercial use. Benefits are the quick applicability and transparency. In case of larger or more complex sites, GIS is recommended. When using that system, it is possible to use individual topics of a prepared site atlas in the synopsis for a computer-assisted derivation of the *integrated site development concept*.

5 Availability of Land

A central problem tied to the planned subsequent use of brownfields is often that the parties interested in that subsequent use cannot dispose of the land concerned. In that context, the issue of the availability of land is not only an issue that may need to be clarified for urban development and public funding reasons. It is obvious that it is simply more practicable when one of the actors interested in the subsequent use can actually dispose of the fallow land. Particularly prospective private investors will normally expect that the legal situation is clear or is at least expected to be clarified in the near future.

The term “availability” does not generally mean that the land must be owned. In individual cases, it can be sufficient to be by far less entitled to the land, e.g. as it is the case with existing hereditary building rights or limited real property rights (e.g. easements on real estate [§§ 1018 ff. of the German Civil Code] or limited personal servitudes [§§ 1090 ff. of the German Civil Code]). In exceptional cases, a long-term use and occupation contract under the law of obligations may be sufficient. Of course, in all those cases of “non-ownership”, it all depends on the exact contents of the respective entitlement, particularly on whether or not the intended type of subsequent use which often involves the erection of buildings and structures is permitted. As a rule, ownership of the land is considered “optimal”.

Whenever the land is not available, the question arises as to how such availability can be achieved. As a first step, it is necessary to identify the legal position concerning property which is often unclear, and to find the right contacts. Problems related to inheritance law or – mainly in case of former commercial use – insolvency law will complicate the work. As soon as the correct contacts are found, the further process will depend on their willingness to cooperate. In case that people previously entitled to dispose of the land are not willing to cooperate, various sovereign instruments are available to the municipality which can be used to obtain the entitlement to dispose of the land. Instruments that come into question are official reallocation as per §§ 45 ff. of the BauGB, enforcement against the landed estate based on notices of public charges in case of outstanding public charges, or, as the last resort, compulsory acquisition as per §§ 85 ff. of the BauGB. Furthermore, a case of pre-emption as per BauGB or other public-law regulations may be pending which the municipality can make use of in order to exercise its right of pre-emption and acquire the property in that way. However, depending on the resistance of the people previously entitled to dispose of the land, the options described can take a long time. Private investors, on the other hand, are often unable and unwilling to wait that long for a legal settlement. Thus, the municipality interested in a potential private investor should (in a joint effort with the investor, where applicable) try to come to an amicable solution with the third person entitled to dispose of the land.

If they are successful and that third party cooperates “voluntarily”, or in case that the municipality already owns the fallow plot of land the investor is interested in, the initial situation is relatively unproblematic. In those cases, all parties involved basically agree from the outset to enable the investor to buy the property, or to grant the investor another way to use it. Depending on the specific case, the conclusion of purchase contracts[5], for the most part, and occasionally barter agreements and voluntary realloca-

[5] This can be a “regular” property purchase contract or one of the following example “variants”: purchase contract subject to conditions precedent, contract including a purchase option in favour of the municipality/investor, notarial acceptance of a notarial offer previously submitted to the municipality/investor, purchase within the scope of a real property auction

tion contracts, or (mere) leasing contracts are available options. Despite its sovereign character, official reallocation in correspondence with §§ 45 ff. of the BauGB does constitute a proven means that can be successful without major problems to the extent that all parties involve do cooperate.

From the variety of possibilities, the following instruments – partly with typical stipulations – are introduced to show how land could be made available: Option contract, use and occupation contract with obligation to build, voluntary reallocation, and – from the domain of sovereign procedures – compulsory auction by order of the public actor, and official reallocation.

5.1 Option Contract

Based on an option contract, one contractual partner grants to the other (= owner of the option) the right for a specific period of time and under specific conditions (= option) to put into force a main agreement (= in this case: property purchase contract) by way of a unilateral declaration and without any further effort of the contractual partner granting the option. For that case, the parties to the option contract have mutually laid down the provisions of the main agreement in advance, so that it is solely up to the owner of the option to decide whether the main agreement with the previously defined contents will be signed or not.

The option contract gives the person who is granted the option the time and security he/she needs to make further project-related preparations which often cause costs already, e.g. clarification of funding and tax issues, coordination with public authorities, measures related to human resources, and/or object-related planning.

A purchase option within the framework of a complex development project is often combined with an administrative agreement and terms of use. Depending on the contents, such an agreement can enable the potential buyer and owner of the option – at least in the internal relationship – to be in the legal position of the potential seller, including all rights and obligations. This can absolutely be in the interest of the potential seller as he/she wishes to sell the real property.

Option Contract
(*Shortened example*)

<Notarial entry clause, including the data of parties A and B>

Preliminary Remarks
<…>

Part A
Option Contract

§ 1
Real Property Data

<…>

§ 2
Purchase Option

(1) With this Option Contract, A grants B the right to put into force the Real Property Purchase Contract included in Part B of this deed by way of a unilateral declaration (= purchase option).

(2) In case that B does not exercise the granted purchase option by way of a written declaration submitted to A until *<date>* at the latest, the option will expire. The timeliness of exercise depends on the receipt of the declaration by A. A copy of the exercise notice shall be submitted to the attesting notary, without this being a precondition for the validity of the exercise of the option.

(3) In case that B is unable to exercise the option within the period prescribed due to circumstances he/she is not responsible for, the parties to the Contract will agree on an appropriate extension of time.

<Further §§, e.g. with regard to who bears the costs related to the deed, etc.>

Part B
Real Property Purchase Contract

§ 1
Entry into Force

This Real Property Purchase Contract will enter into force only and as soon as B exercises the option granted in accordance with § 2 of the Option Contract included in Part A above in due form and time.

<Further §§ customary in real property purchase contracts, taking into consideration the peculiarities of the individual case>

5.2 Use and Occupation Contract with the Obligation to Build

This contract structure deals with the following situation: The public partner is the owner of a plot of land intended by the public partner for building and long-term use by the same. At the same time, the public partner cannot and/or does not want to be the principal and investor, yet the public partner does not wish to sell the land to an investor. The public partner looks for a private investor instead who will not only erect the desired building, but is also willing to let the building to the public partner thereafter for an extended period of time, e.g. 20 years. This construct is possible even though the private partner is not and will not be the legal owner of the building (§§ 93, 94, 946 of the German Civil Code), because in the use and occupation contract with the obligation to build the private partner is granted the right to act as lessor. The long-term letting simultaneously serves the private partner as a way to refinance the investment, while the public partner does not need to burden its budget with high investment costs but can gradually acquire the beneficial ownership of the building until the end of the long leasing term by paying a monthly lease.

Such a contract contains a multitude of subject matters to be governed as it constitutes a combined planning, financing, building, and hire purchase model. Thus, only a few selected contract modules can be included here in shortened versions so as to give a first impression. In case that a public and a private partner decide in favour of such a model, obtaining thorough legal advice is strongly recommended.

Example clauses (shortened) of a use and occupation contract with the obligation to build:

- Preliminary remarks <*description of the initial situation*>

- A is the owner of the following real property <…>.

- B undertakes to erect the following building – ready for use – in its own name and at its own expense on the land of A in accordance with the ideas and specifications of A: <*more detailed description*>. § 951 of the German Civil Code shall be excluded.

- The following dates are agreed: <…>.

- With regard to the erection of the building, B shall be responsible for obtaining and observing the necessary official and other consents (permits, approvals and the like) at its own expense. The same shall apply to the preservation of the building for the term of this Use and Occupation Contract and to the extent that the parties to the Contract do not agree otherwise.

- During the construction phase, A and third parties commissioned by A shall be authorised to enter the building site at their own risk at any time and to inspect and survey the progress of the construction work.

- B will make changes to project planning and execution only upon the prior written consent of A. Furthermore, A and B shall cooperate trustfully at all times. If any circumstances come to the knowledge of one of the contractual partners which may disturb the performance in accordance with the Contract, that party shall inform the other contractual partner about that without delay.

- In case that in and/or on the property there are harmful soil changes or polluted areas as per German Federal Soil Protection Act the removal or other treatment of which is necessary or ordered by a public authority, B shall be responsible for the removal or other treatment. A shall bear all related costs to the extent that they are additional costs B would not have incurred without the soil issues; the costs that would have been incurred in any case will be borne by B.

- As of < *[date/end of period], alternatively: Designation of the concrete event, e.g. beginning of site mobilisation>,* B will be granted a gratuitous right of use for the real property of A so that B is enabled to let the building to A upon completion, which is something B is obliged to do. The right of use shall end with the expiry of the leasing contract for the lease of the finished building by B to A, separately concluded between A and B on this day <*Note: The leasing contract should be signed at the same time as the Use and Occupation Contract and, for example, focus particularly on regulations concerning the beginning and the duration of the leasing contract [e.g. 20 years], on the "destiny" of the building and possible economic consequences following regular termination or early termination of the leasing contract as a result of an extraordinary termination without notice [the right to ordinary termination is to be excluded], on insurance and obligation to bear the costs for that matter, and on the duty of care. In addition, provisions must of course be laid down for possible case-specific peculiarities.>*

- For the period of use, B shall have the duty of care unless the leasing contract for the lease of the finished building by B to A, separately concluded on this day, stipulates otherwise. <*Note: It is also recommendable for B to grant a liability exemption to A, in case that third parties lodge claims for damages against A for reasons B is responsible for.>*

5.3 Voluntary Reallocation

Especially when it comes to industrial brownfields resulting from the structural changes after the reunification of Germany in the year 1990, an investor can be confronted with a multitude of obstacles when he/she intends to buy the land:

- The manufacturing firm was liquidated and, where applicable, insolvency proceedings are still pending.

- The land boundaries are not in correspondence with real use, building boundaries, or land improvement.
- Plots are owned by different (original) owners and differently encumbered in the land register.

If that sort of obstacle occurs, the private investor will be unable to assess the time and funds required in order to purchase all plots. Joint efforts of municipality and private investor will be necessary to still make an investment in the brownfield possible.

Whenever several land owners are involved, and the land boundaries need to be reorganised, the instrument of voluntary reallocation should be considered. Preconditions for voluntary reallocation are:

All owners and all holders of registered rights (e.g. banks) are
- known,
- available and capable of acting, and
- willing to collaborate under reasonable conditions.

As soon as only one of the preconditions above is not fulfilled by any one of the parties involved, voluntary reallocation will be out of the question. A sovereign procedure would have to be applied instead.

Voluntary reallocation means that the private and public partners agree on a reorganisation of the plots under private law. When coming to an agreement under private law, the public and private partners are generally free to agree as they see fit. Of course it makes sense to implement the reallocation based on the German Federal Building Code (§§ 45 ff. of the BauGB).

On the basis of reallocation as per German Federal Building Code, the partners may:
- combine their plots to form one “reallocation mass”,
- allocate the future public areas to the public partner or public agency respectively,
- allocate the building areas to the private partners, and
- compensate each other on a monetary level to balance excess or insufficient allocations.

In contrast to an allocation based on the German Federal Building Code, a voluntary allocation can be realised very quickly. Ideally, the entire reorganisation can be done in only one contract authenticated by a notary and containing the elements below:

- The partners establish a partnership under the German Civil Code (Gesellschaft bürgerlichen Rechts – GbR).
- The parties assign their plots within the development area to the GbR, thus becoming the owner.
- All plots within the reallocation area are combined to form one plot.
- The combined plot is newly subdivided in accordance with the intended urban development and allocated to the individual parties.
- Excess or insufficient allocations are settled through compensation payments among the parties.
- The GbR is closed again.

That type of contract could be structured as follows:

Reallocation Contract
(*Shortened example*)

< Notarial entry clause, including the data of parties A, B, C, etc.>

Preliminary Remarks

Parties A, B, C, etc. are owners of different plots of land within the urban area described below <…>.

The parties to the Contract have agreed to contribute their plots of land to the reallocation procedure governed by this Contract in order to bring about a reorganisation of land holdings in the mentioned urban area without having to initiate an official reallocation procedure based on the German Federal Building Code.

Given the above preconditions, the parties to the Contract agree as follows:

§ 1
Contribution of the Plots of Land

1. Description of the plots of land

(1) The parties contribute the following plots of land to the reallocation procedure which are shown graphically on the as-built map attached as Annex 1 to this deed:

- Party A: <*more detailed description of the plot of land*>
- Party B: < *more detailed description of the plot of land* >
- Party C: < *more detailed description of the plot of land* >
etc.

2. Real portions of the total area of the plot of land

(2) The total area of contributed plots of land as per para. 1 above amounts to <… *m²*>. The respective contributed plots of the parties to the Contract account for the following actual portions of the total area:

- Party A: <… *m²*>
- Party B: <… *m²*>
- Party C: <…*m²*>
etc.

The parties to the Contract agree that the above portions shall be authoritative for the further allocation procedure.

3. Contribution to the partnership under the German Civil Code

(3) The parties to the Contract participate in the established partnership under the German Civil Code (collective ownership) based on the surface percentage of the respective plots of land contributed by them. The same price per square metre of <…*€/m²*> shall be applicable to all plots of land involved (contribution value).

(4) The parties to the Contract henceforth contribute the mentioned plots of land to the partnership under the German Civil Code so that upon transfer of property and registration in the land register the partnership under the German Civil Code becomes the owner of the plots of land contributed.

(5) The parties to the Contract hereby declare the transfer of property.

§ 2
Combination

The partnership under the German Civil Code will merge and combine the mentioned plots of land to form one plot. Party A is hereby authorised by the other parties to file the applications required for the implementation of the combination in the land register.

§ 3
Subdivision of the Plots of Land

The partnership under the German Civil Code will then subdivide the plots of land combined before in accordance with § 2 above, based on the site plan attached as Annex 2 and the update certification to be drawn up accordingly, and file an application for implementation of the subdivision in the land register. Party A is hereby authorised by the other parties to file the required applications for subdivision in the land register.

§ 4
Allocation of the New Plots of Land

(1) The partnership under the German Civil Code will then allocate the individual plots of land newly formed by way of subdivision to the parties to the Contract based on the reallocation list attached as Annex 3, the reallocation map attached as Annex 4, and in correspondence with the following provisions: *<At this point, stipulations can be included on advance allocations of public areas and the allocation of additional areas or allocations for the purpose of compensation and the like.>*.

(2) Excess and insufficient allocations following from the reallocation list will be balanced on a monetary level among the parties to the Contract as stated below. <…>.

<Subsequently, further §§ can be included, e.g. on the transfer of ownership and/or guarantee issues. Finally, the customary notarial final provisions should be added.>

<Another notarial deed for the transfer of property with regard to the newly formed plots of land will be required if – as is the case in this example – it is not already laid down in the initial contract.>

Voluntary reallocation can be quicker, more flexible and more cost-efficient compared to an official procedure, as long as all parties involved do cooperate. Within the scope of PPP, an attempt to bring about a voluntary reallocation will be the first choice. Only if that option does not yield the desired results, the sovereign procedures will be considered in a second step.

Example of the Pörz Brewery in Rudolstadt, Germany

The premises of the former Pörz Brewery in Rudolstadt comprise numerous parcels. Said Pörz Brewery had become insolvent, and the major part of the area was purchased by a private owner later on. In addition, several private entities and the municipality of Rudolstadt own portions of the development area. As a result of the former use as a brewery, a stream runs across the area.

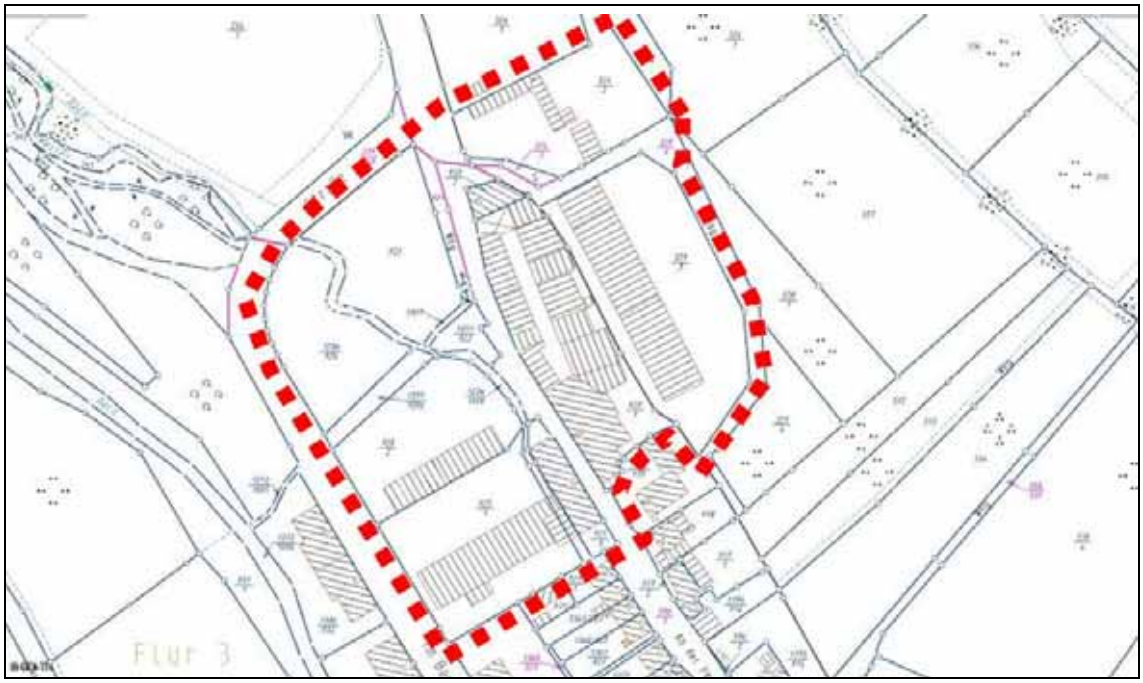

Fig. 5: Site map of the Pörz Brewery, Rudolstadt

In order to be able to subsequently use the brownfield, the stream must be redirected, the traffic areas must be rearranged, and the building areas must be reparcelled in a reasonable manner. If the ownership structure was managed by the usual route by partitioning parcels and subdividing premises, numerous small plots would be created. Costly and time-consuming surveying work would be necessary.

Due to the multitude of parcel boundaries and ownership structures that need to be modified simultaneously, voluntary reallocation is recommendable here by way of which the previous cadastre and land register situation can be transformed directly into the desired new cadastre and land register situation.

5.4 Sovereign Procedures

At first glance, procedures that include elements of sovereign compulsion (in the following referred to as sovereign procedures) appear to be the exact opposite of PPP. In sovereign procedures the public actor, e.g. the municipality, does play a dominant role. The public actor solely uses legal instruments available so as to enforce certain objectives in the public interest, also if it is against the interests of a private third party. Looking more closely, sovereign procedures are indeed proven means to literally prepare the ground for the fruitful cooperation with potential private partners/investors as the directions of action of sovereign procedures are varied: The sovereign procedure initiated by the public partner is not directed against the future private partner. The legal positions affected by the sovereign procedure are rather those of a private third party which the public partner wishes to change to the benefit of the private investor at least indirectly.

The scenario is basically as follows: In private projects, particularly building projects, it is normally the sole responsibility of the private investor to make sure that the land is available for his/her investment. However, when it comes to the revitalisation of brownfields, especially when intended projects are on the verge of economic inefficiency, this

is often not feasible. Particularly in the case of brownfields formerly used for commercial purposes, the owner is often insolvent and either no longer capable of acting or merely through an insolvency administrator. A few typical examples are:

- The real property is part of the insolvency estate and blocked because of the pending insolvency proceedings.
- The real property was released from the insolvency estate, but the previous owner is unavailable.
- The insolvency proceedings were closed without making a decision on the real property, and the company was deleted from the commercial register so that the company registered in the land register as the owner of the real property is no longer available.
- The real property is encumbered with land charges that exceed its value by far.

In such cases, the public partner is capable of relying on instruments which are not available to the private partner to make the real property legally available. In that way, the public partner creates the preconditions for the private partner to be able to invest.

However, both partners should bear in mind that sovereign procedures can also be tough and time-consuming, depending on the resistance of the affected third party. In those cases, it is recommendable to stay "on the ball" and – with the help of a legal advisor, if necessary – exhaust all options consistently and as promptly as possible.

In the following, the possibilities available to the public partner within the scope of foreclosure law and official reallocation will be exemplified in the form of an outline.

5.4.1 Compulsory Auction

A compulsory auction applied for by the municipality can be the tool of choice to make a fallow plot of land available for an investment whenever the current owner is not capable of acting at all or to a limited extent only (e.g. community of heirs, insolvency, etc.), or when a sale is constricted due to burdens entered in the land register such as high land charges and registered rights.

Precondition on the part of the municipality applying for a compulsory auction is – as is the case with every compulsory execution measure (including that of compulsory auctions) – that the municipality must hold an enforcement order. That is the case, e.g. when the municipality is the holder of a monetary claim under public law against the owner which has not been paid by the owner despite its maturity. Thus, primarily outstanding payments related to notices on the assessment of public charges come into consideration, e.g. tax on real property, land improvement contributions or road improvement contributions. The statutory referral order is as follows: § 38, para. 1, no. 4 of the Thuringian Administrative Service of Process and Execution Act (ThürVwZVG), in conjunction with § 322, para. 1, s. 2 of the German Fiscal Code (AO), in conjunction with §§ 866, para. 1, 869 of the German Code of Civil Procedure (ZPO), in conjunction with §§ 1 ff. of the German Law on Judicial Foreclosure and Forced Administration of Property (ZVG). Attention is to be paid to § 322, para. 4 of the AO: *"Compulsory auction (…) shall be applied for by the law enforcement authority only if the amount of money has been found to be uncollectable by enforcement against the movable property."* The latter is normally the case when it comes to insolvent owners.

Of course, the municipality may also act on the basis of a mortgage (e.g. land charge) entered in its favour in the land register with regard to the brownfield in question.

In the cases mentioned, the owner will normally no longer pay any tax on real property or other municipal charges. If immediately enforceable public charges such as unpaid tax on real property, road or land improvement contributions are the case, the municipality may apply for the execution of a compulsory auction.

The favourable priority public claims have within the framework of compulsory auctions by law is particularly beneficial for a municipality: On the basis of § 10, para. 1, no. 3 of the German Law on Judicial Foreclosure and Forced Administration of Property (ZVG), they are classified in the so-called 3rd ranking category. The enforceable public claim – maximally 4 years old, and in case of recurring payments not older than 2 years – will be satisfied before any non-public claims entered in the land register. In addition, the encumbrances entered in sections II and III of the land register will expire under the preconditions of § 52 of the ZVG – even if the auction proceeds are insufficient for their settlement.

Thus, compulsory auctions of the 3rd ranking category are the tool of choice for the municipality whenever a plot of land is encumbered with land charges exceeding the value of the real property itself.

Of course, the municipality may also act on the basis of a mortgage (e.g. land charge) entered in its favour in the land register with regard to the brownfield in question. However, when it comes to fallow land formerly used for commercial purposes, mortgages of higher priority as that of the claims of the municipality were normally entered in the land register already. If the satisfaction of those mortgages of higher priority was not possible using the auction proceeds, they still remain in force. Buying a plot of land still encumbered with land charges in a compulsory auction is much less attractive for a private investor.

A municipality files for the execution of a compulsory auction by sending an informal, sealed application to the competent local court. A serviceable address of the debtor must be stated. For example, if the compulsory auction is applied for due to unpaid tax on real property, the claim to such tax on real property can be enforced for the past two years. In that case, a certified abstract of title not older than three months, a certified copy of the latest property tax assessment, and a document furnishing proof of the effective service of the property tax assessment must be enclosed. The municipality may entrust a barrister with the filing of the application.

The costs of the proceedings have to be advanced by the municipality being the applicant. To the extent that the compulsory auction results in any proceeds, the costs of the proceedings will be refunded to the municipality. Among other things, the amount of the costs of the proceedings depends on the value of the object as the court will commission an appraisal of fair market value. The local court will provide information about the anticipated amount of the costs of the proceedings for the respective object.

From the date of application, the proceedings will take about a year. As a first step, the local court will make a decision to bring about the compulsory auction. After that, the local court will commission an expert to determine the fair market value. Then the parties involved will be heard. Afterwards, the local court will make a decision with regard to the fair market value of the real property. On a first date, the real property will be auctioned, and on the distribution date, the proceeds will be distributed among the debtees.

The compulsory auction procedure is an important tool for a municipality to bring fallow plots of land back into the circulation of land. The effort to be made by the municipality in terms of financing and administration is small, but the effect is great. The crucial advantage of a compulsory auction from rank category 10 I 3 is that the encumbrances entered in the land register will be deleted regardless of size and debtee, and that the real property will thus become economically attractive again.

An example: Shoe factory FC Ebert, Stadtilm, Germany

Within the framework of ACT4PPP, the town of Stadtilm wishes to convert the brownfield of a former shoe factory for a new type of use. A private investor who has already built a retail sales facility on the neighbouring property would like to use the brownfield for an extension.

Fig. 6: Brownfield Site in the city, the administration of the shoe factory

However, the owner of the real property is insolvent, and the real property itself is encumbered with land charges far in excess of its fair market value. The costs of demolition and redevelopment alone exceed the fair market value of the reconditioned real property. Thus, there is no financial margin to negotiate the redemption of the land charges with the bank. Under these circumstances, it would be impossible for a private investor to revitalise the brownfield.

In this particular case, the municipality and the investor did find a way within the framework of ACT4PPP to still make the real property available. In 2009 the municipality filed an application for the compulsory auction from rank category 10 I 3 due to unpaid tax on real property for the two years before amounting to about 2,600 € and bought the real property for the lowest bid of 9,000 € at the auction in 2010. Claims of

the municipality in the amount of 2,600 € had to be deducted from those 9,000 €. Hence, the municipality had to spend an amount of about 7,000 € plus other additional costs for land charges and enforcement in order to purchase the real property free of encumbrances. In view of the difficult initial ownership structure and the encumbrances entered in the land register prior to the compulsory auction, this is a very positive outcome for the municipality.

5.4.2 Official Reallocation

Reallocation in accordance with the German Federal Building Code (§§ 45 ff. of the BauGB) is also referred to as compulsory barter procedure. Through the reallocation, "plots of land with and without buildings and structures (…) can be reorganised such that plots are formed to suit the intended use for building or other purposes in terms of location, shape and size."[6] Reallocation measures are often implemented when agricultural areas are transformed into building land. By way of the reallocation, the ownership structures and property boundaries are reorganised in a way that an orderly urban development is enabled.

What are the benefits of brownfield development through public-private partnerships?

The private investor needs to be able to freely purchase all plots of land necessary for the development of the brownfield. This is often quite difficult, particularly when it comes to brownfields comprising several plots held by different owners. Just one plot within a larger brownfield which cannot freely be purchased can render the development of the entire site impossible – the so-called "savings land".

At this point, the public partner can make the subsequent use of the brownfield possible for the private partner by way of an official reallocation. As a result of such a reallocation, an available, unbroken plot of land can be created for the benefit of the private investor. The reallocation is recommendable whenever the investor can freely purchase the majority of the plots concerned and merely a few plots are unavailable because

- an owner is unknown or undetermined,
- an owner is not available or not capable of acting,
- a plot of land is held by several co-owners who are unable to come to an agreement about the sale,
- a plot of land is encumbered with registered rights which would prevent the development, or
- an owner is unwilling to sell.

In the first three cases, i.e. when the owner is unknown or unavailable, or when the members of an owner community are at odds with each other, a representative for the reallocation procedure can be appointed by the guardianship court or, in case that a party involved is under age, by the family court (§ 207 of the BauGB). The corresponding application will be filed by the reallocation department being the competent public authority. The officially appointed representative will act on behalf of the owner and can sell the real property to the investor or waive the allocation of a plot of land within the framework of the reallocation procedure, receiving a monetary compensation instead.

[6] § 45, sentence 1 of the BauGB.

In case that rights have been entered in the land register conflicting the planned urban development, the reallocation department can abrogate those rights (§ 61, para. 1 of the BauGB), if necessary, against payment of a monetary compensation (§ 61, para. 2 of the BauGB).

If the owner of "savings land" is unwilling to sell, a plot of building land of equal value can be allocated to him/her within the scope of the reallocation procedure – even against that person's wishes. For that reason, the reallocation is clearly different from the instrument of dispossession. Dispossession aims at a change in ownership. Reallocation aims at creating a form and location of the plots of land concerned which is in correspondence with the planned urban development. Thus, the reasons given for the reallocation must never imply that the owner of the savings land is supposed to be dispossessed. In that case, the proceedings would be illegal and could easily be averted in court. Consequentially, it is to be made clear that within the scope of the reallocation, an owner who is unwilling to sell will be allocated a plot of land of equal value. Said plot of land may however be situated such that the project intended by the investor will be possible without that plot of land as well.

Reallocation is an important and elegant instrument that can help to overcome obstacles in the acquisition of real property. The disadvantages of reallocation are the following:

1. A reallocation procedure takes relatively long and requires a lot of time and effort.

2. In order to conduct a reallocation procedure, the municipality has to form a special reallocation committee (§ 46, para. 2, no. 1 of the BauGB in conjunction with §§ 1 ff. of the Thuringian Ordinance on Reallocation Committees [Thüringer Umlegungsausschussverordnung – ThürUaVO] dated 22/03/2005, Law and Ordinance Gazette 2005, 155). This will either require a lot of time and effort, or the municipality delegates the reallocation to another public authority (§ 46, para. 4 of the BauGB). In order to accentuate the specific interests of the municipality in the context of the revitalisation of a brownfield, the task should be dealt with by the reallocation committee of the municipality.

3. The reallocation procedure is subject to clear statutory provisions. In particular, the added value must be equalised within the scope of the reallocation (§ 57, sentence 5 of the BauGB). Thus, the manoeuvring room of the partner is highly restricted from the point of view of PPP. The municipality must observe the statutory requirements governing reallocation measures. The reallocation committee does not have to observe the instructions of the mayor. Hence, the municipality and the investor are practically unable to lay down any contractual agreements concerning the sequence of the reallocation procedure and particularly concerning the settlement amount.

Despite the above-mentioned disadvantages, reallocation is an important means to make land available to a private investor for major projects involving the subsequent use of brownfields. In the first instance, it is the task of the private partner to freely purchase the majority of the plots of land. It is the task of the municipality being the public partner to see to the implementation of the reallocation procedure. Any related contractual agreements between the partners will normally not apply as the reallocation process is standardised on the statutory level.

6 Realisation of Building Projects

The realisation of building projects through PPP is the core element of the classic PPP business model. The erection of buildings and structures is normally combined with further elements from the fields of funding and operation. That combination is based on the central concern of a PPP project to achieve the optimisation of the overall costs applying a life cycle approach. In the life cycle approach the costs from project development over erection and operation up to the disposal and/or recycling of buildings and structures that are no longer usable are taken into consideration. This method of consideration is highly important as the majority of the costs are incurred during the 20, 30, or even 50 years of operation.

The holistic consideration of building-related investments is becoming more and more important these days. This is attributable to regulations being tightened every year by increasing the requirements related to the energy balance of buildings, to rising commodity and energy prices, as well as targeted statutory provisions on government aid imposed on the level of the federal republic, the individual federal states, and the European Community.

The tool used to build that comprehensive structure for the long-term cooperation between public and private partners is the **PPP tender**. The objective of such a tender is to identify the most suitable partner for the realisation of the planned measure. Within the scope of the tender, that project partner is obligated in a multi-level process. The contractual basis for the cooperation between the public partner and the private partner is the PPP contract.

A PPP contract can be structured in many ways. The structure of the different models depends on the ownership structure, the objective, the different tasks of principal and contractor, and on the distribution of risks.

As examples for the multitude of combinations based on which private and public partners can cooperate, parts of a **real property supply contract** and of the associated **real property hire purchase agreement** based on the so-called owner model will be shown on the following pages (see 6.2 below).

The risks of PPP contracts will be borne by the most suitable partner in terms of risk assessment and risk control. For PPP tenders where risks need to be borne which are hard to calculate due to the existence of framework conditions that cannot be assessed, such as unknown soil conditions (contamination with hazardous waste and/or ammunition, unknown load-bearing capacity, cavities), the introduction of a **maximum price** has proved itself. Capping the building costs helps to distribute the financial risks by limiting the risk for the partner who is responsible for pricing. Costs in excess of the defined maximum price will be distributed in accordance with the mode laid down in the contract.

The introduction of a **bonus provision** in PPP contracts is interesting for both parties to the contract as any underspending with regard to the planned budget will be distributed among both partners. When the bonus provision is included in the contract, a **risk pool** for overspending will normally be established as well.

The briefly described PPP contract modules for the realisation of building projects will be elaborated on below.

6.1 PPP Tender

There is a number of ways in which a PPP tender can be structured. In the following, an example variant will be described where the turnkey construction of a real estate is to be realised by way of alternative ways of project funding such as hire purchase, surrender of use, or leasing.

The PPP tender is preceded by a (pan-European, where applicable) competition for participation as per VOL/A in the course of which the participants in the negotiated procedures are selected. Due to the high complexity and the effort required for the preparation of a proposal, it is often necessary to conduct a competition for participation so as to limit the number of participants.

The tender is normally composed of the call letter and the following parts:

I. General terms of application for the award of contract
II. Tender letter for alternative project funding including annexes
III. Special provisions on alternative project funding
IV. Bidding documents for construction work including annexes

I. General terms of application for the award of contract

In the terms of application, the framework conditions and objectives tied to the planned award of contract are described as well as the procedure and the requirements with regard to the proposal to be submitted and with regard to project planning. In addition, the bases of assessment are described, and information on the fiscal effects of the funding model is provided. Information on the utilisation of low interest refinancing funds, restraints of competition, as well as working groups and subcontracting should also be part of the general terms of application (see “2.2 Public Procurement Law”).

II. Tender letter for alternative project funding including annexes

The tender letter contains the contract offer form for alternative project funding and a number of annexes which must be completed and deal with the reference interest rate with the focus on amortisation, the description of the funding model, the payment schedule of interim financing, the method of calculation for interest rate determination and adjustment, the financial close, construction and project management and, where required, it includes further forms relating to the contract offer and dealing with the property company, movable property funding, possible additional proposals relating to funding and/or construction/immovable property.

III. Special provisions on alternative project funding

In the special provisions, the subject matter of the contract and the implementation of the contract are structured, and the framework conditions for the performance of the building work are laid down. Moreover, the duration of the contract and the terms of payment, warranty claims and claims for damages, securities and penalties are stipulated, and statements are made with regard to the plot of land, overpayments, economic promotion of small and medium-sized enterprises, installations and structural alterations as well as publications and contracts with foreign contractors.
Annexes attached to the special provisions should include a performance bond and a warranty bond, a tabular summary of work and cost distribution as well as a sample agreement on construction and project management.

IV. Bidding documents for construction work including annexes

Following a general introduction, the building task is described in detail: Number of jobs, space allocation plan, structural model for the trades including requirements as to location and equipment. The building plans including land register folio and cadastral map, the demolition permit, a set of as-is maps, as well as the building forms including the breakdown of the fixed lump sum price based on cost modules, and the forms with the additional proposals related to construction should be attached as annexes.

Non-committal sample: Example structure of an "alternative project funding" proposal including annexes

Name and address of the bidder: *<Name and address>*

Date of submission: *<Date, time>*

Bid adjudication period ends on: *<Date>*

Tender Letter

Re: Letter dated.....

We offer to complete the work described for the prices we have stated below. The Euro (€) shall be the obligatory currency for our proposal including all contract conditions as well as contract implementation.

Our proposal will be valid until the end of the bid adjudication period. Our proposal is composed of:

1 Form - Contract Offer for Alternative Project Funding
1.1 Annex 1 - Confirmation of Reference Interest Rates with the Focus on Amortisation
1.2 Annex 2 - Commentary on the Funding Model
1.3 Annex 3 - Payment Schedule of Interim Financing
1.4 Annex 4 - Calculation Method for Interest Rate Determination and Adjustment
1.5 Annex 5 - Payment Schedule of Financial Close
1.6 Annex 6 - Construction and Project Management
1.7 Form - Bidder Statement on the Property Company
1.8 Form - Bidder Statement on the Project
1.9 Form - Movable Property Funding
1.10 Form - Additional Proposals Concerning the Funding
1.11 Form - Additional Proposals Concerning Old Immovable Property

2 Bidding Documents for Construction Work
2.1 A Plans
2.2 B Specifications, Explanatory Reports, Time Schedule
2.3 C Forms - Building Work
2.3.1 Form - Calculation of Areas as per DIN 277
2.3.2 Form - Building Parameters in Terms of Energy Management as per EnEV (German Energy Saving Regulation)
2.3.3 Form - Data for the Determination of Building Maintenance Costs
2.3.4 Form - Breakdown of the Fixed Lump Sum Price for New Construction (DIN 276)
2.3.5 Form - Breakdown of the Fixed Lump Sum Price for Reconstruction (DIN 276)
2.4 Form - Additional Proposals Concerning Construction Work *<where relevant>*

3 Special Provisions on Alternative Project Funding

4 Draft Contracts

We have received all tender documents as stated in the table of contents and checked them for completeness. We have found that no sheets are missing. We have taken account of the Special Provisions on Alternative Project Funding and the provided Bidding Documents for Construction Work related to the award of contract, and we accept them as a material part of the contract with legally binding effect.
We hereby declare that we have fulfilled our statutory obligations to pay taxes and social contributions, and that we fulfil the preconditions under trade law for the performance of the work offered.

We are aware that a conscious misstatement may result in our exclusion from further contract awards.

Place, date, stamp, and signature:

If the tender letter is not signed, the proposal will be deemed not submitted!

Form - Contract Offer for Alternative Project Funding

<Project title>

Binding offer of the bidder(s)

1. Subject Matter of the Contractual Relationship
<E.g.: "We will perform and finance the new construction of the local government office building as a turnkey project, including the planning and arrangement of the open spaces, applying an alternative kind of project funding. The full particulars are governed by the enclosed agreement.">

2. Funding Model/Contract Duration
<Description of the funding model; reference to annex, where applicable>
<Funding period>

3. Beginning of Leasing/Use
<Details on planning and construction periods, where applicable>
<Undertaking with regard to the submission of the documents for the application for a building permit>
<Beginning of use, where applicable "…on…at the latest">

4. Buildings
<E.g.: "The buildings to be let by the bidder to the local government are in correspondence with the requirements and standards laid down in the Bidding Documents for Construction Work.">

5. Details on Payments for the Buildings
<E g.: "In return for the new construction of the local government office building, the Principal shall pay instalments (hire purchase, leasing or other instalments) from the beginning of use.">

5.1 Mode of Payment
<Maturity of calculated instalments>

5.2 Construction Costs
<Presentation of composition and scope of the construction costs; reference to Bidding Docu-

ments for Construction Work >

5.3 Costs of Intermediate Construction Funding
< Presentation of composition and scope of the costs of intermediate construction funding and of the interest>

5.4 Builder Activities, Construction and Project Management, Interest on Building Rights, Property Acquisition Tax

5.4.1 Additional Charge for Builder Activities
<Agreement on/calculation of an additional charge>

5.4.2 Construction and Project Management
< Agreement on/calculation of an additional charge>

5.4.3 Costs of One-off Payment of Interest on Building Rights
< Agreement on/calculation of interest on building rights>

5.4.4 Property Acquisition Tax
<Agreement on the payment of property acquisition tax>

5.5 Calculation Basis for Funding

5.5.1 Overall Investment Costs
<Calculation>

5.5.2 Rent Calculation Basis
<Calculation>

5.6 Information on the Calculation of the Instalments for the Real Property
<Calculation>
<Where applicable, information on KfW (German Reconstruction Loan Corporation) interest rate>

5.7 Amount of the Instalment for the Buildings
<Where applicable, reference to the payment schedule in the annex>

5.8 Lump Sum Administration Fee
<Agreement on/calculation of the lump sum administration fee>

5.9 Other Lump Sums from the Beginning of Use
<Other lump sums, where applicable>

5.10 Fixed Costs from the Beginning of the Contract
< Presentation of composition and scope of the fixed costs>

5.11 Estimated One-off Transaction Costs
<Notary, legal charges, etc.>

5.12 Estimated Ancillary Leasing Costs per Half Year
<Trade tax, tax on real property, insurance, etc.>

6. Residual Value/Residual Debt Related to Buildings
<Calculation of residual value; annex, where applicable>

7. Interest Adjustment
<Agreement on interest adjustment, where applicable; annex, where applicable>

8. Final Statement
<E.g.: "All costs – even if attributable to the proposal-specific contract arrangement – were taken into account in the proposal above. We expressly acknowledge that we will not be able to retroactively claim any additional costs or expense items with the exception of any costs beyond our control.

We expressly confirm that all required information which may have an influence on the economic efficiency of the proposal were taken into account in the proposal above and in the annexes clearly identified as parts of the proposal. Contact for enquiry calls: Ms./Mr. … , Tel:. …

Signature: …">

Fig. 7: Design model of the draft to illuminate the bidding in the ppp-process

6.2 Real Property Supply Contract Including Hire Purchase

The public property owner and the private investor conclude a contract for the construction of a building as a turnkey project, including comprehensive facility management services, for a term of usually 20 years. The ownership of the erected building will be transferred to the public property owner already upon the construction by operation of law. The contractor is granted a right of use and ownership for the erection and lease-back of the object. Planning services, construction works, and facility management are essentially governed by the law applicable to works and/or services.

The contractor is paid a remuneration scaled based on annual instalments. It is composed of the overall investment costs, the costs incurred in relation to the acquisition and financing of the object, any incidental expenses such as an administrative fee, as well as risk premiums and the profit of the contractor. In the example presented herein, the building is "let" to the public property owner for the above-mentioned period of time,

the rent having to cover the remuneration for the erection of the building. On the other hand, the rent is used by the contractor for loan redemption to his/her financing bank.

Thus, the remuneration to be paid to the contractor in instalments is really a scaled wage claim as far as the acquisition of the building to be erected is concerned. Dogmatically, the remuneration to be paid in instalments is a form of lending, in this case in the special form of hire purchase. Hire purchase is not really letting. It is rather another type of financial assistance based on the law governing loan contracts which is applicable accordingly.

Please note that the structure of the sample contract included below merely constitutes a recommendation referring to basic provisions of a PPP contract. That scheme makes no claim to be complete. The provisions must be adapted to the respective circumstances in a very project-specific and funding-specific manner. Any liability for their application in individual cases is hereby expressly excluded.

Real Property Supply Contract Including Hire Purchase
(*Shortened example*)

between

<Parties to the contract: principal and contractor>

this Contract is concluded as follows:

Preamble

<Presentation of the ownership structure in accordance with the cadastral map>
<Description of the objective of this contract: Erection, leasing for the purpose of financing>
<Granting of the right of use and ownership to the contractor>
<Where applicable, reference to the treatment of partial contracts with regard to value-added tax >

§ 1
Subject Matter of the Contract, Type of Use

<Description of the project; naming of main work/services: Erection of the building (reference to annex, where applicable) and leasing to the principal>
<General obligations of the parties to the contract>

§ 2
Adherence to the Agreed Wage Scale, Selection of Subcontractors

<Agreement on the right to involve third parties and the related obligations (e.g. obligations related to selection procedures, duty to inform, adherence to the agreed wage scale by third parties, etc.)>

§ 3
Contract Implementation

<Presentation and description of contract implementation and agreement on the necessary provisions: Planning services; building services on the one hand, use of the object on the other>
<Reference to dependence on approvals from public authorities and, where applicable, municipalities>
<Agreement on collaterals (guarantees, bonds, land charges, etc.); safeguarding of contract

fulfilment>
<Where applicable, reference to the "Special Provisions for Alternative Project Funding">
<Authorisations, e.g. to check the progress of the construction work and to inspect documents, other rights to inspect, give instructions, and obtain information>
<Changes to work/services, additional services, interruptions>
<Provisions on the duty of care>
<Provisions on the administration of the object>
<Where applicable, reference to the conclusion of further contracts (e.g. construction and project management contract, facility management>
<Inclusion of necessary records and documents from the award procedure; inclusion of required statutory regulations (VOB, DIN ISO, TÜV, VDI, etc.)>
<Where applicable, nomination of contacts for work flow coordination and/or site management by both parties> …

§ 4
Term, Acceptance and Delivery, Penalty

<Definition of the term of the contract, deadlines and dates>
<Acceptance conditions, transfer of liability>
<Provisions on penalties>

§ 5
Payment of Remuneration, Basis for Assessment of the Instalments

<Basic stipulation of loan conditions (description of hire purchase)>
<Presentation of the basis for calculation of the instalments; reference to overall investment costs and relevant other costs>
<Extension agreement, where applicable>

§ 6
Calculation of Instalments

<Calculation of the remuneration>
<Presentation and calculation of the instalments>
<Stipulation of the mode of payment; payment schedule>
<Fixed interest periods>
<Possibility to change the instalment amount>

§ 7
Incidental Costs

<Provisions on incidental costs (administrative fee, incidental and operating costs of the object)>

§ 8
Payment Arrangements

<Deadlines, payment date, etc.>

§ 9
Maintenance

<Burdens and obligations; where applicable, reference to maintenance contracts to be concluded>

§ 10
Installations, Modifications

<Agreement on authorisations, provisions on the obtainment of approvals>

§ 11
Liability for Defects

<Provisions on defects liability; preclusive time limits, assignment of claims>

§ 12
Risk Assumption, Liability

<Provisions on the transfer of risk; where applicable, liability exemptions (except claims under §10)>

§ 13
Insurance

<Provisions governing the responsibility for insurances>

§ 14
Withholding, Abatement

<Agreement on relevant rights>

§ 15
(Sub)Letting

<Permissibility of letting/subletting>

§ 16
§ Confidentiality

<Protection of company and business secrets>

§ 17
Termination

<Right to terminate for good cause; consequences of contract termination; calculation of claims which may result from the termination>

§ 18
No Return of the Object on Termination of the Contract

<Along the lines of: "If this Contract expires ordinarily when the term ends and at the same time as the contract granting the right of use, the lessee shall not be required to formally hand over and/or return the rental object to the lessor. The same applies to the termination of this Contract by way of termination as per § 15.">

§ 19
Cession

<Provisions on the transfer of rights, particularly the sale/assignment of claims>

§ 20
Access

<Right of access of the contractor in the capacity as lessor>

§ 21
Handling of Legal Disputes

<Information on legal disputes with third parties in connection with the project and on the result and the binding nature of the result>
<Amicable settlement of legal disputes between the parties to the contract; arbitration, where applicable; arbitration clause>

§ 22
Final Provisions

<Where applicable, reservation of further and/or final mutually agreed contract data>
<No subsidiary agreements; requirement of written form in case of modifications/supplements>
<Severability clause>
<Where applicable, repeated express inclusion of annexes as parts of the contract>

Place, date	Place, date
Beneficial owner	Property owner
Annexes <*e.g.:*	*Annex 1 - Building Plans and Specification/Rental Object, Rev.: …,* *Annex 2 - Agreements on Construction and Project Management* *Annex 3 - Method of Calculation of Interest Determination/Adjustment* *Annex 4 - Outflow of Funds Schedule* *Annex 5 - Payment Schedule>*

6.3 Maximum Price

In order to distribute the financial risk tied to large-scale building projects in tendering procedures involving working groups, a tenderer often awards contracts for planning and construction work in the internal relationship with a general contractor (GC) based on a ceiling stipulated in the general subcontract, the so-called maximum price.

So as to make the risk controllable for the GC and to minimise internal billing, it is customary to pay the GC a fixed price for the planning and building work to be provided by the GC. In that case, the tenderer will not gain detailed insight into the billing of the GC work.

The requirement that all work for which the GC awards subcontracts to third parties must be transparent, and that any savings must be distributed in accordance with the bonus provision, results in an increase in billing work in the internal relationship. However, it also helps to make sure that the tenderer is not damnified due to a lack of insight into the cost structure of the GC.

The GC will realise the turnkey building project for the guaranteed maximum price of … € net - in words … EUROS and … CENTS - plus the statutory value-added tax applicable at the time of the conclusion of the contract. In case that the statutory value-added tax is increased, the resulting difference shall be reimbursed to the tenderer by the GC.

The maximum price comprises:

- The planning and building work to be performed by the GC "…" at a fixed price of … € (net)". The following trades shall be included: ... The above-mentioned work is not subject to the bonus provision.
- The planning and building work not to be performed by the GC "…" in the amount of … € net. These costs are subject to the bonus provision.

The GC is irrevocably obliged to adhere to the guaranteed maximum price stated above. This

shall apply also in case that wages and material prices and/or charges are increased in the fields of main and secondary contract work in the future.

6.4 Bonus Provision

The bonus provision is a provision governing the bonus allocation between principal and contractor in case of savings in construction. It is stipulated in addition to the agreed maximum price and is intended as a motivation for cost saving. Which specific provision is appropriate depends on the respective building project and the responsibilities of the parties to the contract. There are numerous constellations. The variant presented below is based on a nearly equal status of principal and contractor.

The bonus provision applies to situations where the total billing amount is below the maximum price fixed for subcontractor work.

When the total billing amount is below the maximum price of the subcontractors (additionally commissioned work excluded), the cost differential will be distributed among principal and contractor as follows:

Cost saving of up to 5 %	principal 60 %, contractor 40 %
Cost saving of 5-10 %	principal 50 %, contractor 50 %
Cost saving of > 10 %	principal 40 %, contractor 60 %

6.5 Risk Pool

The risk pool is an instrument used to buffer risks and unexpected costs when working groups are involved in tendering procedures with a fixed maximum price. The risk pool is used for unexpected costs no member of the working group is responsible for.

Particularly when it comes to tendering procedures which are subject to a rough price competition, the risk pool has both positive and negative effects as the financial risks of the working group are reduced, but at the same time the tender sum is increased which makes it difficult to be awarded the contract put out to tender.

The risk pool shall be limited to a maximum of … € (gross).

The risk pool to be formed by the bidder will be created for the following risks:

Work that may become necessary due to claims and requirements of third parties, to the extent that they were not caused by the GC and/or the Principal and/or they were not foreseeable and calculable in the process of maximum price determination; risks resulting from deficiencies in planning and specifications, to the extent that they were not caused by the Contractor and/or the Principal; risks related to the building ground, to the extent that the Principal is not indemnified by the community/municipality and the Contractor has not assumed them.

The Contractor will inform the Principal about the occurrence of any such risks within 5 working days. Principal and Contractor shall be entitled to each one half of the unused portion of the risk pool.

7 Funding

ACT4PPP is focused on the revitalisation of brownfields referred to as “B areas” in the CABERNET model. Those are areas where the anticipated land value after the revitalisation approximately equals the costs of processing. As the revitalisation of those areas is on the periphery of economic viability, they were previously out of the question for subsequent use.

Mobilising such areas through PPP can also be considered the art of establishing sound funding. In the following, different modules will be discussed which can help lifting the funding of the subsequent use above the threshold of economic viability.

One essential obstacle for the subsequent use of brownfields are the risks in terms of time and financing tied to the development of a site up to the status of a greenfield site which are difficult to estimate. At that point, **interim acquisition by the municipality for the purpose of site preparation** can help to provide critical services, often supported by public aids.

If the high costs of site preparation are the only critical point with regard to the funding, and if the municipality does not want to bear that alone, it is recommendable to pay a **contribution to the removal expenses** to the investor which can be raised in various ways.

Last but not least, a variety of **funding instruments** is available to cover unviable costs related to site preparation. The use of aid money for viable private investments is tied to certain peculiarities though. For example, the public partner can influence the decision of the body granting the subsidies only indirectly, so that public subsidies can only be included in a funding concept with reservations. Relevant funding instruments to be mentioned at this point are:

- Revitalisation directive,
- Urban development promotion programme,
- Discretionary funds in urban centres,
- Rural renewal,
- Release from remediation responsibility,
- JESSICA, and
- Sponsorship and donations

7.1 Interim Acquisition for the Purpose of Site Preparation

Interim acquisition can become necessary, for example, when the buyer is willing to purchase a certain real property only under the condition that the brownfield must have been revitalised already, but neither the buyer nor the seller are able to remove the brownfield for any reason whatsoever. In that case, an interim buyer must take care of the preparation of the site.

The crucial issue with regard to the revitalisation of brownfields is funding based on the availability of subsidies and credit terms. As a rule, municipalities are granted better credit terms than private investors and are thus more suitable applicants for available subsidies such as urban development promotion programmes, rural renewal, or funds under the revitalisation directive.

In addition, municipalities may be granted aid money for funding-related expenses incurred in relation to borrowing for the interim acquisition of real property within the scope of the urban development promotion programme. This can be an important funding instrument for the revitalisation of brownfields. In this context, we would like to refer to the planned introduction of a law on fund-based aid on the basis of the JESSICA initiative of the European Union in Thuringia, the utilisation of which may require the interim acquisition by a municipality (see paragraph 7.4.6).

In cases of state-wide interests of higher priority, it is currently possible for the public or private developer controlling the land development to act as an interim buyer in order to stay in control of complex processes and, where applicable, to be able to organise them more efficiently.

In the following example, it was the intention of the land developer to act as an interim buyer due to the complexity of the project, the necessary involvement of several regional authorities, and the work steps to be taken within the framework of a balance of intervention and compensation related to the opening-up of a large area for development. An aggravating factor was that the seller was in the process of liquidation.

Declaration on the joint development of a brownfield as a compensation area for extensive intervention and/or interventions in the overall appearance of the landscape

Declaration
(*Shortened example*)

between <…>.,
represented by <…>,
in the following referred to as “Seller”,

and <…>,
represented by <…>,
in the following referred to as “Interim Buyer”,

and the municipality of <…>,
represented by the mayor, <…>,
in the following referred to as “Buyer”.

Preamble

The subject matter of the agreement is the planned renaturation of <…> as a compensation area for the prospective interventions in the currently developed large industrial area <…>. The purpose of this agreement is to describe the joint development objective of the project partners and to define important financial key points of the project. The project sub-steps presented are to be considered recommendations of action and mostly require the additional support of further prospective project partners.

§ 1
The Pool of Compensation Areas

The federal government has set the objective to reduce the claiming of unsealed areas in Germany from currently approx. 113 ha/day down to 30 ha/day until 2020. This objective can only be achieved if the future sealing of surfaces is compensated by removing hard surfaces or structures from brownfields. As a means to control the removal of hard surfaces or structures from brownfields, the interim buyer creates a pool of compensation areas within the framework

of regional management where all currently processed brownfields are listed. Both the integration of promotion tools and the coordination with communities, authorities and investors will cause a high amount of expenditures the funding of which forms the basis for all planned measures.

§ 2
The Procedure

The renaturation of the brownfields will be done by way of commercial demolition of the buildings on surfaces to be returned into a pervious condition, disposal of the demolition waste, removal of underground debris and sealing structures, and upgrading of the pervious surface by way of planting in accordance with the intended biotope as defined by the local nature conservation authority. The costs incurred for demolition, removal of underground debris and disposal are currently expected to be covered using funds under the Joint Agreement for the Improvement of Regional Economic Structures (Gemeinschaftsaufgabe – GA) for the most part. The remaining co-payment portion of the Buyer in the amount of at least 10 % of the total cost is normally not eligible for subsidisation and must be borne by the Buyer.

The following procedural steps were already taken:

- Nomination of the brownfield by the Interim Buyer from the Thuringian brownfield cadastre and inclusion of the brownfield in the pool of compensation areas
- Examination of the Buyer in terms of spatial planning, development planning and special direct costs to determine the suitability of the brownfield as a compensation area
- Examination by the local nature conservation authority (Untere Naturschutzbehörde – UNB) in terms of environmental protection
- Determination of the owner's willingness to sell
- Involvement of an interested resident in the participation in the measure and determination of his/her interests
- Site inspection by Interim Buyer, UNB, professional planner and Buyer
- Determination of the upgrading potential by the UNB
- Preparation of the cost estimate for demolition, removal of underground debris and disposal by the professional planner; determination of promotion possibilities by the Interim Buyer
- Rough cost estimate relating to the expenditures for the removal of hard surfaces or structures, upgrading and tending by the landscape planners, rough cost computation by the Interim Buyer

The following procedural steps still need to be taken:

- Seller and Buyer declare in writing vis-à-vis the Interim Buyer that they intend to sell or buy respectively.
- The brownfield situation is clearly determined by way of an expertise and supported by precise removal costs.
- The Interim Buyer prepares the promotion strategy and agrees on it in writing with the funding authority.
- The UNB defines the intended biotope; the landscape planner determines the achievable ecopoints.
- The Buyer is informed about the co-payment portion not eligible for subsidisation.
- The Interim Buyer determines the commercial viability of the expenditure per ecopoint and makes a decision on the project.
- The Buyer decides to bear the co-payment portion not eligible for subsidisation, to delete a mortgage entered in the land register as an alternative purchase price, and to take over the area upon upgrading.
- The landscape planner establishes the compensation within the scope of development planning on … for planned interventions.
- The Interim Buyer prepares mutually dependent purchase option agreements between Seller and Interim Buyer and between Interim Buyer and Buyer.
- Simultaneous conclusion of both purchase option agreements
- The Interim Buyer files the funding applications.
- Upon receipt of a positive administrative decision on the funding, the measure will be

implemented.
- Transfer of ownership of the upgraded area to the municipality
- In case that the upgraded area is to be included in the eco pool (necessary when the compensation happens before the intervention), appraisal of the upgrading

Brownfields to be renaturalised cannot be used subsequently for economic purposes as the area will be redesignated as an area outside the master plan area upon renaturation. Any sale for the current fair market value is thus to be excluded as a rule. It is generally assumed that the brownfield will be purchased for the symbolic price of 1 €. Upon consultation, Seller and Buyer may however agree on a different purchase price.

The Buyer shall refund the costs of the interim acquisition of the brownfield from the Seller as well as the costs incurred in relation to interim funding to the Interim Buyer, to the extent that Seller and Buyer agree on a purchase price other than 1 €.

§ 3
Contaminated Sites

The industrial brownfield is marked as an area of potential concern in the Thuringian cadastre of contaminated sites. Thus, parts of the brownfield yet to be determined will have to be made subject to contamination analyses in the form of an expertise prior to the beginning of the contract negotiations. The costs for said expertise will equally be borne by the project partners.

§ 4
Intent

With the conclusion of this Agreement, the project partners undertake to bring the project forward in accordance with the possibilities available to them and to implement the procedural steps listed in § 2.

§ 5
Deadlines

After the Interim Buyer has decided for the project, the project partners will jointly establish a time schedule under the leadership of the Interim Buyer. This Agreement shall become null and void in case that the Interim Buyer receives a negative project decision. (See § 2 (5).)

§ 6
Site Data

The upgradable area of the plot of land measures approx. 5,000 m². The removal of hard surfaces or structures, the removal of underground debris, backfilling, planting of plants from forest tree nurseries, 3 years of tending, as well as ancillary expenses, expertise and planning will cause additional costs for the renaturation of the industrial brownfield which are supposed to be refinanced via the pool of compensation areas.

Additional costs for the purchase of land, demolition work above ground, disposal and removal of contaminants will not be refinanced via the pool of compensation areas. Those costs will be borne by the Buyer.

§ 7
Modifications, Place of Jurisdiction

Oral side agreements to this Agreement were not made. Modifications and supplements to this Agreement may be made, but they will be valid only after all project partners have consented in writing upon having been informed. Unless an exclusive place of jurisdiction is predetermined, Erfurt, Germany, shall be the place of jurisdiction for all legal disputes which may arise from this Agreement.

……	……	……
Seller	Interim Buyer	Buyer

7.2 Advance Financing of Municipal Work

With the Investment Facilitation and Housing Land Act (Investitionserleichterungs- und Wohnbaulandgesetz) which has entered into force on 01/05/1993, the federal lawmakers have enabled municipalities to make the planning beneficiaries bear the burdens incurred in relation to urban planning work.

The city council of Munich, the capital of the Free State of Bavaria, then established the framework conditions for the implementation of the new legal instruments in Munich with the enactment of "Socially Fair Land Use" (Sozialgerechte Bodennutzung – SoBoN) on 23/03/1994. SoBoN has been applied by the city of Munich ever since.

This means basically that the growth in value is determined for the plots of land concerned by establishing area development plans and other urban development bylaws, and the investor (planning beneficiary) is obliged by the city of Munich to bear up to two thirds of the estimated growth in value of the plots of land concerned prior to the implementation of the area development planning procedure so as to equalise the financial burden – be it in the form of an amount of money, assignment of land, or the performance of actual work related to that burden, e.g. road construction, erection of kindergarten or school buildings, etc.

A controlling instrument as SoBoN can only be applied by cities, regions or states which are "besieged" by countless investors and where real property values grow permanently. One of Munich's main interests is to keep housing prices stable and to enable socially responsible urban housing (subsidised housing rate: 30 %). In Thuringia an instrument such as SoBoN would not be practicable due to a lack of investment pressure!

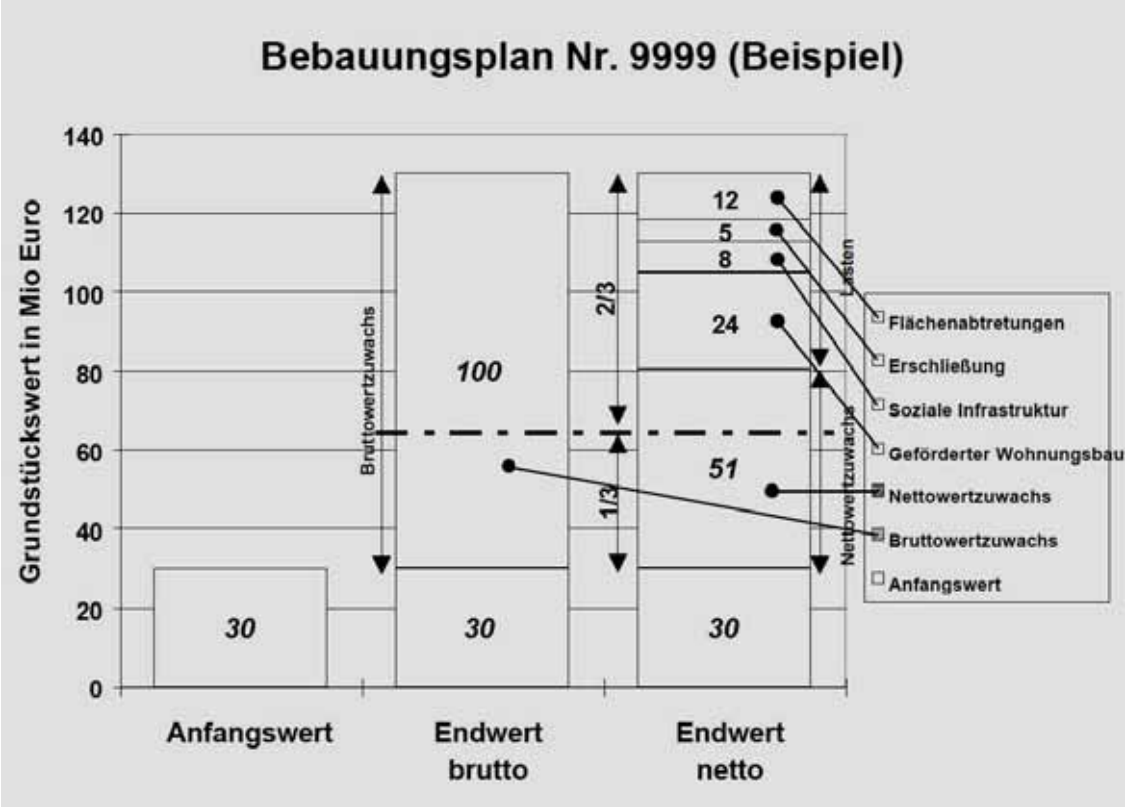

Fig. 8: Real property value model based on SoBoN for a land-use plan (German example)

Abstract from the rules of procedure of Socially Fair Land Use (SoBoN) of the city of Munich, as amended on 26/07/2006

…
The planning department shall make sure that procedures for the preparation and implementation of area development plans and other urban development bylaws which cause both planning-related burdens for the state capital of Munich and a significant increase in land value **will only be established and/or prompt the initiation of procedures and decision-making by the city council to the extent that the planning beneficiaries have undertaken in advance**
a) to erect buildings and structures in accordance with the specifications and regulations under planning law within a reasonable period of time,
b) to promote housing construction, particularly social housing, and/or take measures to safeguard a complex economic structure, and
c) **to bear the causal costs and burdens triggered by the planning projects in accordance with the stipulations contained in the rules of procedure**.
…
2. Scope of the Undertakings

The planning beneficiaries shall bear the burdens arising in connection with the planning work, taking into account the principle of appropriateness, and undertake to erect buildings and structures in accordance with the specifications under planning law within a reasonable period of time, taking into account any changes to the general economic situation where applicable.

It is generally assumed that the principle of appropriateness is taken into account by leaving at least one third of the planning-related growth in real property value to the planning beneficiaries as an incentive for investment and for the recovery of their individual costs, including an appropriate inclusion for risk and profit. In case that the burdens remain below that ceiling, a larger

portion will be left to the planning beneficiaries accordingly. This limitation serves for the protection of the planning beneficiaries, as burdens exceeding that limit could also be appropriate.

If in an individual case the overall circumstances justify the assumption that despite the fact that the planning beneficiary receives at least one third of the planning-related growth in value the overall economic burdening of the planning beneficiary is inappropriate, this must be taken into consideration when defining the scope of the required burden-sharing.

The planning beneficiaries are responsible for describing their overall economic burdening and to furnish proof of the same where applicable. In that case, the contributions can be reduced to a reasonable extent as long as the funding is secured otherwise.

Whenever the parties involved wish to depart from the above, a decision of the city council shall be required.

When the planning beneficiaries have assumed the required burdens, no further contributions will be demanded. For example, the land improvement contribution and the contribution to the sewer construction costs will not be charged.

The growth in land value (gross increase in value) is calculated based on the difference between the land value of the plots before re-planning (initial value) and after re-planning (future value). Objective values valid for everyone can be assumed.

For the **initial value**, the land value of the plots within the land-use plan perimeter prior to re-planning is determined. In that process, areas with development rights are not evaluated based on the status quo in terms of development rights (without taking into account development prospects). In case of areas that are not building land, the evaluation is performed on the basis of experience data relating to prospective building land uninfluenced by development. The evaluation must be based on the price situation at the time of basic approval (cf. section 6 below).

This is compared to the **future value** for the entire land-use plan perimeter. In that process, the land value of net building land exempted from improvement contributions is determined based on the data related to building law and the intended land-use plan. Traffic areas, green areas, and public purpose land are taken into account based on the initial value (i.e. value as per status quo in terms of building law and/or prospective building land - level I). The evaluation must be based on the price situation at the time of the conclusion of the legally binding agreement (basic agreement, cf. section 6 below) with the planning beneficiaries. Changes in value which may occur at a later point in time will not be taken into consideration, and on the other hand, the amount of the burdens to be borne will not be subject to adjustments either. This serves primarily for the long-term calculability of building projects.

3. Projects Subject to the Assumption of Costs

The “Socially Fair Land Use” procedure is applied to **urban development measures within the framework of area development plans and urban development bylaws** which cause both planning-related burdens for the city and a significant increase in land value. Rehabilitation land-use plans and urban development measures are not taken into account because they are governed by different statutory regulations …

7.3 Demolition Cost Sharing

The development of brownfields often involves increased costs. Normally, old sites can only be developed by way of restructuring. In addition to the improvement costs, other costs are incurred for demolition work and, in most cases, for the removal of contaminants. The demolition of old buildings is eligible based on a number of directives, but

usually the immense demolition costs prevent the development whenever they exceed the proceeds from project development.

Where the development is in the interest of many potential partners, the development of a site can be set into motion by way of joint project development, including the assumption of the costs incurred.

For that purpose, the anticipated costs of demolition and disposal must be estimated in the course of the preparation of the project development concept. Affected parties as well as potential supporters of the project need to be contacted. Moreover, a funding concept is to be drawn up and, where applicable, applications for subsidies are to be filed and/or money is to be raised from sponsors. Depending on the specific case, further steps may become necessary. They include the achievement of land availability, the participation in any procedures under planning law already pending or yet to be initiated, the search for investors, investor relationship management, and other things.

Example: Model project for the valorisation of brownfields – subproject Bad Lobenstein sanatorium:

The former sanatorium in Bad Lobenstein, Germany, is located both in the immediate vicinity of the town centre and in the direct neighbourhood of a well-tended park. When combining this location with the current trends in spatial development (back to the city) and the demographic change (decrease and aging of the population), trying to find a subsequent use in the field of housing for the elderly suggests itself for this brownfield with a well-preserved, partly listed building fabric.

Precondition for the targeted search for investors intended for the site was that the main features of the possible development of the real property had to be demonstrated as well as the costs of implementation and funding possibilities. In Bad Lobenstein the municipality lacked the time and money required in order to have comprehensive development concepts prepared to address investors in a targeted manner. In this particular case, the county savings bank Kreissparkasse Saale-Orla was addressed. The bank supported the model project and provided the service of estimating the costs of the revitalisation of the site by way of demolition and disposal of the non-preservable building fabric.

The Thuringian state administration office in its capacity as the granting authority provided qualified information on possible subsidies from the promotional programme of the Free State for urban development and housing construction. All information combined have led to the first development approaches. Thus, the town was able to have substantiated talks with real property owners and investors so as to achieve a subsequent use of the site in correspondence with the desired urban development.

7.4 Aid

A number of aid programmes is available for the revitalisation of brownfields. The integration of subsidies in public-private partnerships is a special case because on the one hand, the municipality as a contractual partner can file an application for support, but on the other hand it can normally not warrant to the private partner that a third party will actually grant the aid in a certain amount and at a particular point in time. If the aid is intended as a funding module, the contractual obligation of the municipality can only be related to what is really within its field of responsibility, e.g. to include a municipal co-payment in the respective budget year and to file applications for support in due time.

Important promotion instruments for the revitalisation of brownfields which will be briefly described below are the following:

- Revitalisation directive, urban development promotion programme, discretionary funds, rural renewal priority areas,
- Release from remediation responsibility, and
- JESSICA

7.4.1 Revitalisation Directive

The revitalisation of brownfields mostly begins with the demolition of fallow and desolate building fabric. In order to minimise the related up-front costs for project development and/or new utilisation, the Free State of Thuringia, for example, grants subsidies in the amount of 60 % of eligible costs, both to private and municipal applicants. The basis for this is the political objective to reduce the claiming of areas previously not built-up, to eliminate urban development deficiencies, and to direct subsidies into projects which contribute to the improvement of the (touristic) attractiveness of a region. Apart from the demolition itself, the clearance and disposal of demolition waste is eligible too, however, with the exception of contaminated areas. On an innovative note, the preparation of technical concepts and development concepts for brownfields is subsidised as well.

Based on the “Revitalisation” promotion directive, applications for support can be filed annually, the applications for support received within one year being assessed on a regional level (fields of activity of the regional LEADER campaign groups, predominantly related to specific rural districts) based on their importance for the development of the rural area.

The budgets available per region are limited. As a rule, not all applications for support can be allowed. Thus, subsidisation cannot be warranted even if the eligibility is formally given under the directive. In this context, project calculation is subject to certain risks. Private projects and municipal projects compete against each other, and the budgets for the municipal domain are mostly higher. The right to file an application for support depends on the ownership structures. This is to be observed particularly in the context of PPP projects, as, for example, reclaims are to be expected if a change in ownership occurs within a certain period of time. Caution is to be exercised in case of applicants who are farmers or agricultural enterprises. Depending on the intended subsequent use of the revitalised area, subsidisation may either be granted or excluded.

This promotion directive is tied to the eligible areas within the LEADER regions of Thuringia and is not applicable in larger cities and other formally defined redevelopment areas.

7.4.2 Urban Development Promotion Programme

In Thuringia, the directive on the promotion of urban development measures (Thüringer Städtebauförderungsrichtlinien – ThStBauFR, dated 01/01/2008, published in the Thuringian Government Gazette no. 27/2008) is applicable. The scope of promotion comprises various programmes financed from the ERDF or EAFRD, federal or state funds. Cities and communities are the primary recipients of grants, but they can pass subsidies on to third parties (private applicants). Communities receive aid money amounting to 2/3 of the eligible costs, but may reduce their co-payment portion by way of applica-

tion in individual cases. Private applicants receive a 100 % refund for unviable costs which must be calculated individually. The revitalisation of brownfields is the subject matter of the promotion purpose and thus interesting for PPP project development related to brownfields.

It is generally to be noted that the promotion is related to unviable costs for non-marketable, economically inefficient projects the realisation of which is still important for reasons relevant in terms of urban planning and development. In this way, fallow, non-marketable potentials are transformed into marketable projects, supported through public promotion.

In order to receive funds, areas must be defined in correspondence with the promotion programme, which then constitute the eligible areas. Those assisted areas need formally defined urban development concepts or other planning-relevant basic statements.

The individual measures must be included in a promotion programme within the framework of an annual programme application. Said annual application will be examined, and subsidies will be announced. Depending on the available budget funds, they can be granted to the extent that the application for allowance is filed in a next step of the two-stage application procedure.

The possibility of receiving an allowance for funding costs incurred in relation to lending for the purpose of the interim funding of eligible project expenses, e.g. interim acquisition of real property by a municipality, is interesting particularly for PPP projects.

In formally defined rehabilitation areas as per § 142 of the BauGB, individual projects aiming at the revitalisation of brownfields can be supported. Basis for the support is the joint federal and state government programme “Urban Rehabilitation and Development Measures”.

In urban restructuring areas as per § 171 b of the BauGB under the joint federal and state government programme “Urban Restructuring East” (mostly development areas in the GDR/prefabricated housing areas), deconstruction measures can be subsidised as long as the quarters are upgraded and intact urban structures are preserved. This includes both partial deconstruction (reduction of floors or building parts) and complete demolition of empty residential buildings which are no longer needed, incl. commercial spaces in buildings primarily used for housing. In addition to the direct deconstruction costs, the eligible costs also include compensation payments or losses in value which will be borne by the municipality when buildings and structures are removed, as well as costs incurred for the simple preparation of a property, e.g. greening and planning costs.

The state programme of the Free State of Thuringia “Grants to Communities for the Adaptation to the Particularly Difficult Processes Related to the Demographic Change in Rural Areas” constitutes a supplement to the joint federal and state government programmes “Smaller Towns and Communities” and “Urban Restructuring East”.

It is to be pointed out that in the case of the urban development-related deconstruction of permanently empty residential and service buildings, the co-payment portion of the municipality does not need to be made. There are no applicable use-related restrictions with regard to the previous use or the intended subsequent use.

Based on the joint federal and state government programme “Smaller Towns and Communities”, those formalities apply to measures in rehabilitation areas and areas under investigation for the preparation of a rehabilitation area, urban development zones, preservation areas, areas under the programme “Urban Restructuring East” or “Social Town”, or by resolution of a municipality. Precondition is however that a development concept or strategy coordinated on an inter-municipal and/or regional level is available. Moreover, small and medium-sized towns in rural, thinly populated regions are preferred.

7.4.3 Discretionary Fund for Urban Development Promotion

A special form of cooperation between public and private partners within the framework of PPP is the discretionary fund that can be established on the basis of the joint federal and state government programme “Active Town and Neighbourhood Centres”. At least 50 % of this discretionary fund are fed with money from economy, property and site development associations, private or additional money from the municipality (outside the Urban Development Promotion Programme). The rest is funded using money from the Urban Development Promotion Programme (1/3 German federation, 1/3 federal state, 1/3 municipality). A local body decides on the allocation of the money.

Central service areas are to be supported, including the revitalisation of vacant buildings and brownfields. Other preconditions for support are to be observed as well.

7.4.4 Rural Renewal Priority Areas

In addition to the possibilities based on the “Revitalisation” directive, demolition measures in acknowledged rural renewal priority areas can be supported in Thuringia based on the directive “Promotion of Integrated Rural Development”. Both municipal (funding rate: 65 % of gross amount) and private project initiators (funding rate: 35 % of gross amount) are entitled to file applications here as well.

However, the projects must fit in with the objectives of rural development planning which forms the basis for the recognition of a community as a priority area. Separate applications for support which will be examined subsequently have to be filed for each individual project. A community will be designated as a priority area when it files a corresponding application and is acknowledged as a priority area by the Ministry of Agriculture, Forestry, Environment and Nature Preservation of the Free State of Thuringia after having passed several levels of examination. The period of validity is normally 5 years.

7.4.5 Release from Remediation Responsibility

With regard to commercial properties which were contaminated with harmful substances prior to 01/07/1990, the owners/investors can be released from the resulting financial risks. The basis for that is the indemnity clause of art. 1, § 4, para. 3 of the Environmental Protection Framework Law of the GDR which was included in the Unification Treaty in a modified form and newly formulated and significantly extended in the German Act on the Elimination of Obstacles to Investment (Investitionshemmnissebeseitigungsgesetz – InvHBesG). The area of application of that act is the territory of the former GDR.

The "General Treaty for the Final Funding of the Rehabilitation of Contaminated Sites in Thuringia" between the Free State of Thuringia and the German Federal Agency for Specific Tasks Resulting from the German Reunification has been governing the contaminated site management in the Free State of Thuringia since its conclusion on February 24th, 1999.

Precondition for a release from remediation responsibility is the existence of an application for the release from remediation responsibility. It must have been filed until March 28th, 1992. If such an application exists, the authorities involved in the procedure are examining the further preconditions – planned investment, creation of jobs, confirmed suspected contamination – for a positive notice of exemption.

That notice specifies all conditions for the refunding of the costs for the measures agreed on with the exempting authority. After the release from remediation responsibility, the claims asserted vis-à-vis the German federal states will be shared based on a ratio of 60 (German federation) to 40 (federal states). For ecological large-scale projects a cost apportionment of 75 (German federation) to 25 (federal states) was laid down. These costs are reduced by the amount borne by the company – normally 10 per cent of the expenditures incurred.

7.4.6 JESSICA (Joint European Support for Sustainable Investment in City Areas)

With the "JESSICA" initiative the EU pursues the long-term objective of transforming the nature of support from subsidies into loans. An opportunity to gather experiences in that context is already given in the 2007 – 2013 period.

The subsidies from the ERDF structural fund can be used within the scope of urban development funds so as to invest in urban development projects via loans or credits with favourable conditions, via participations or guarantees. In addition to further public contributions, these funds can also be fed by private investors. The urban development funds are revolving and have a sustainable effect due to the refluxes, because the fund will remain available for new urban development projects beyond the end of the 2007 – 2013 period. The fact that the fund institution will be able to use the refluxes at its sole discretion and independently of the tight stipulations of the ERDF formalities is particularly attractive.

However, the refluxes will have to be generated as proceeds from the supported projects, including interest and fund management fees where applicable. Compromises can be made with regard to the amount of the return on investment which does not need to be in line with the market as far as the public portion is concerned. Thus, the urban development fund will not be able to replace the classic grant-in-aid funding. In the pursuit of integrated urban development there will continue to be projects which cannot do without grant-in-aid funding. Mixed calculation combining grant-in-aid funding and the utilisation of an urban development fund would be an option as well.

This approach constitutes a sustainable and innovative financing alternative to the previously customary subsidies. Precondition is that the project to be financed is located within an area for which there is an integrated urban development concept or any other proof of conformity with the strategic objectives of urban development can be furnished. JESSICA enables the development of brownfields ideally, including clearance

and remediation of contaminated sites, and distributes both funding and risks on the shoulders of the private and public partners.

With JESSICA the EU intends to introduce private capital and know-how into urban development projects. At the same time, it is to be achieved that public funds initiate private investments, and that the PPP approach is enhanced. The use of public funds is made more efficient. By way of integrating financial institutions, their expert knowledge will be mobilised as well.

The application of subsidies is a means of funding which is capable of paving the way for the realisation of previously "non-marketable" projects by providing funds from an urban development fund. As a rule, a differentiation is to be made though as to whether private capital is used on the fund level or on the project level.

The ERDF support is made up of 75 % EU funds and supplemented through co-financing by the respective federal state. JESSICA does not make any additional funds available, but it opens up a way to utilise grants flexibly. This may also be done by establishing a holding fund to support various urban development funds which can again cover several projects.

The Thuringian Operational Programme for the Application of the European Regional Development Fund (ERDF) for the 2007 – 2013 period opens up the prospect for cities with a population of more than 10,000 to implement projects within the framework of JESSICA, enhancing the functional stabilisation and upgrading of urban areas which will continue to be important in the future. The actual realisation will take place in the course of the concrete programme implementation.[7]

Thuringia plans to establish an urban development fund providing interest-free loans to communities. The fund is supposed to comprise 20 million € and be fed by 75 % ERDF money and 25 % state funds. According to information provided to the media by the Ministry of Construction, Land Development and Traffic of the Free State of Thuringia on 12/08/2011[8], a draft of the Thuringian Support Fund Act (Thüringer Förderfondsgesetz – ThürFöFG) has been prepared. Said draft bill is to pave the way for the creation of an urban development fund which directs funds from the current EU promotion period into project support in a revolving fashion and is capable of supporting urban development projects in the long run. Refluxes can be used for urban development projects in a targeted and sustainable manner and are not integrated in the general state budget. With regard to contents, the reallocation/development of brownfields or the modernisation of urban infrastructure (schools and kindergartens) is to be implemented, for example. More detailed elements will be implemented through the adaptation of the Thuringian urban development promotion guidelines. Upon their entering into force, communities will be able to file applications for the granting of a loan to help financing urban development projects probably from the beginning of 2012. The Thuringian urban development fund is superordinate and not part of the project level and can be utilised in cities from a population of 10,000.

With regard to PPP cooperation projects and the original intention of JESSICA, it is to be noted that the Thuringian urban development fund has been focussing on the granting of municipal loans. Nevertheless, a loan from the Thuringian urban development

[7] Cf. Free State of Thuringia, Ministry for Economy, Technology and Labour (Ed.), "Operationelles Programm EFRE Thüringen 2007 – 2013" ("Operational Programme ERDF Thuringia 2007 – 2013"), passed on 26/10/2007
[8] http://www.thueringen.de/de/tmblv/presse/pm/57554

fund can be integrated as a module in the financing of PPP projects, provided that the objectives of the Thuringian urban development fund are complied with in terms of contents.

It should be critically noted that despite all the benefits (safeguarding of EU funds beyond 2013, relief of the state budget), 100 % of the burden of funding is borne by the communities and moved into the future. Whether the communities will be capable of raising the financial resources to be able to make use of this funding option remains to be seen. Financially strong municipalities have a clear advantage when it comes to this funding variant, whereas in some municipalities it may not be possible to initiate the development of sites in this way. This is another reason why the classic grant-in-aid funding will still be needed in urban development, particularly with regard to brownfields.

7.5 Sponsorship and Donations

In general usage and comprehension, the terms “sponsorship” and “donations” are often used as synonyms. Both concepts involve a “giver” and a “taker” of support, be it of the material or immaterial kind, yet they are fundamentally different instruments. In terms of tax law aspects, the two funding methods are clearly to be differentiated as well. Another important factor is the motivation for their application and/or the use of sponsorship or donations.

Both supporting and funding methods are based on the idea that activities of a responsible body are supported by a partner, be it in the form of allowance in money, allowance in kind or services on own account. The essential difference is that donations are made voluntarily and without any reward, whereas sponsorship is a communication instrument of companies/institutions. Within the scope of sponsorship, support is provided for a reward clearly defined between the partners in advance. In contrast, donations can also be made anonymously.

Many promotion programmes are based on the principle of combining the grant/support with portions to be contributed by the party filing an application for support. Financing the own contribution via private partners (third parties) by way of donations or sponsorship is an attractive option in case of a tight budgeting situation or other funding shortfalls. Municipalities and other bodies responsible for a project can build their funding with the help of donations or sponsorship, but on the other hand, they must deduct those budgets from the total sum the support is related to. In this way, a cooperative, joint funding method can be built for the revitalisation of brownfields.

Assuming that a project for which an application for support is to be filed has a volume of 100,000 € (gross), the funding rate is 65 % (grant applied for = 65,000 €), the own contribution is 35,000 €, and the party filing the application for support receives a donation of 10,000 € from a third party – that latter sum would have to be deducted from the total sum before the grant can be calculated and the application can be filed on this basis. With regard to the above example this means that the 10,000 € made available by the third party have to be deducted from the overall project costs of 100,000 €. Now the grant can be applied for based on the remaining 90,000 € (in this case: 65 % of 90,000 € = 58,500 €).

The grant is reduced accordingly, and the party applying for the support will always have to make its own contribution.

7.5.1 Sponsorship

The application of sponsorships within the scope of funding models for activities and projects is possible under the precondition that contributions are defined between the partners in the form of a contract. The sponsoring party expects a clearly defined reward which can be verified. Furthermore, the effect of sponsoring as a marketing instrument of a company will be evaluated. Sponsorship always means communication and presentation of a trademark, product, or company. An image is built or cultivated; a certain target group is addressed.[9]

The organisation of sponsorship agreements in terms of contents varies as regards type and scope, depending on the "branch" and on the objectives pursued. Including a sample contract at this point would go beyond the scope of this script. Anyone who wishes to obtain more detailed information on this subject should obtain one of the various form books with sample contracts available on the market and select one that (also) includes sponsorship agreements. Based on the purpose of this script, merely a few exemplary contract clauses can be shown below.

Example: A few selected, basic sponsorship clauses *(shortened)*

- Under this Contract, party A (= sponsor) shall support party B by making the payments mentioned in § <…> for the purposes of B mentioned in § <…>. In return, B shall be obliged to provide the considerations/advertising services described in more detail in § <…> to party A (= sponsor).

- The sponsor shall contribute the following for the benefit of B: <…>.

- B shall contribute the following in return for the benefit of the sponsor: <…>

- B will use the payments made by the sponsor exclusively for the purposes stated *<in the Preamble, or alternatively: in § …>*. B shall provide information on the utilisation of the money to the sponsor any time upon request. *<Note: In addition, B could even be required to submit a report on the expenditure of funds to the sponsor, in which case the specific conditions [date, form, and the like] would have to be defined.>*

- If B does not use the money made available by the sponsor as specified in the Contract, B shall be obliged to repay the funds received.

- B shall be obliged to observe the interests of the sponsor to a reasonable extent and to be loyal towards the same at all times. B will inform the sponsor without delay about all circumstances which could be of importance for the sponsorship, particularly about circumstances which could jeopardise or impede the purposes aimed at with the sponsorship.

< Note: Moreover, dates and terms should be agreed [esp. contract durations, termination options. In addition, the parties could mutually undertake to keep the contents of the sponsoring agreement, esp. the amount of money made available by the sponsor, in confidence>.

7.5.2 Donations

The characteristic features of donations are voluntariness and generosity without gaining any rewards. The opportunity alone to support a person, a people, a country, a pro-

[9] cf. http://wirtschaftslexikon.gabler.de/Definition/sponsoring.html, 04/07/2011

ject with money, tangible means, medicine or even time, and to be able to help, are in the foreground when it comes to donations. Recipients of donations are aid organisations, political parties, non-profit associations, foundations, or other organisations active in the fields of politics, religion, culture, social matters, economy or science. A donation is tax-deductible both for private persons and companies. That is to be considered an actual benefit for the donor.

On a project-related basis, communities can also accept donations which must be booked accordingly in the budget and used for the specific project. An interesting option for a company is to make donations to a foundation established by that company. The donation is tax-deductible, and the donor can be sure that the donation will be used as intended.

Particularly with regard to private entities, donations are often connected with an altruistic intention, but the causes are not always combated. Since a donation is not tied to any performance on the part of the recipient and his/her only commitment is of an ethical nature, the receipt of a donation can also cause the recipient to switch over to a passive attitude and to stop showing own initiative for the improvement of the situation. A donor has no control over the utilisation of his/her donation. It happens that donations are misused. So-called seals of approval can create trust and furnish proof of the proper utilisation of the donations as intended by the donor.

8 Aspects of Cooperation with International Investors

When cooperating with international investors in PPP projects – i.e. with investors from foreign countries – various "soft" factors initially play an important role in creating a positive climate for negotiations. Speaking the language of the potential partner and taking into account the cultural differences compared to our own conventions will increase the chances of establishing a successful business relationship.

However, that sort of deals must also be built on a sound legal basis. Someone who knows the foreign law will understand the requirements of the business partner more easily. One should bear in mind though that the planned investment has to take place on German territory, which is why the foreign investor can be expected to understand the German legal philosophy as well. Another factor which must not be ignored is that in many cases the foreign investor has to rely on consultants specialised in German jurisdiction and tax legislation anyway, so that from a legal standpoint it does not seem to be inappropriate to expect that he/she accommodates himself/herself to the German legal system and not the other way around. In most cases, a municipality (especially a small one) does not have the means or experience required to deal with foreign legal systems, nor is it capable of "preparing" for a multitude of such legal systems. That means that a clause governing the **applicable law** and the **place of jurisdiction** must be included in contracts with foreign investors at any rate. Such a clause could have the following wording:

Example: Clause governing applicable law and place of jurisdiction

§ <…>
Final Provisions

(1) <…>.

(2) This Contract shall be governed by German law with the exception of the provisions of private international law *<and the United Nations Convention on Contracts for the International Sale of Goods [Note: To the extent that the scope of application of the same is even relevant for the contract concerned]>*.

(3) The parties agree on *<German location, note: Preferably that of the court having jurisdiction over the public partner>* as the place of jurisdiction unless another place of jurisdiction is provided for by law which would have to be respected accordingly.

Particularly when it comes to large-scale investments in an international context, the private partner may want to make sure that any legal disputes will not be settled by a public court of law but by a board of arbitration in accordance with §§ 1025 ff. of the German Code of Civil Procedure (Zivilprozessordnung – ZPO). In that case, the contract will either include an **arbitration clause** (§ 1029, para. 2, 2nd alt. of the ZPO), or the contract will be supplemented by a separate **arbitration agreement** (§ 1029, para. 2, 1st alt. of the ZPO).

Example: Arbitration clause *(shortened)*

§ <…>
Arbitration Clause

(1) All legal disputes of whatever nature which arise from or in connection with this Contract, including this arbitration clause, and which cannot be settled amicably by the parties to the Contract, shall be finally and bindingly decided by a board of arbitration. Resorting to the general courts of law shall be excluded. The board of arbitration and the arbitration proceedings shall be governed by the provisions below. To the extent that no provisions have been stipulated, §§ 1025 ff. of the ZPO shall apply.

(2) *<Detailed provisions>*

Finally, it should be noted that foreign investors, especially from the Anglo-American area, like to sign **letters of intent** and **non-disclosure agreements**. Please refer to paragraphs 3.1 and 3.3.

9 Conclusion

The ACT4PPP project focuses on the preparation of brownfields for subsequent use through a public-private partnership in cases where the development is on the periphery of economic viability (B areas according to CABERNET). When a market cannot bring about the subsequent use of brownfields on its own, this can be due to a multitude of causes. Outside the regional centres, Thuringia has a relatively low land price level and low demand. Hence, the economic margin necessary to buy a brownfield and to turn it into a greenfield site through demolition, rehabilitation and development planning as a first step is quite narrow.

Under the framework conditions mentioned above, knowing all the ways to involve private partners in the development of brownfields is all the more important for a municipality. In the opinion of the authors, there is unfortunately no ideal way to revitalise brownfields. However, the more instruments the municipality knows, the better the cooperation between public and private partner can be adapted to the particularities of a specific case. As a result, more brownfields can be made ready for subsequent use.

Municipality and private partner have to observe the municipal and district code and the procurement law as a special framework condition for their cooperation. This can increase the expenditures on the part of the municipality and limit the scope within which flexible solutions involving private partners are feasible. For example, when a public authority sells a plot of land to a private investor and that sale is tied to a certain obligation in terms of urban development, it is to be examined whether such sale is subject to an obligation to call for tenders. With regard to the subsequent use of brownfields where the problem is that the projects are hardly viable, a wider scope would be desirable. This would however require the lawmakers to change certain provisions.

The start into contractual cooperation between public and private partners is the letter of intent. It helps to build trust between the partners without creating any direct economic consequences. In addition, there is a variety of contractual structures with different economic consequences based on which public and private partners can define their cooperation. The basic question with all contract models is how the private partner with his/her competences can be involved in the subsequent use. For example, where the intended subsequent use involves a public building project, a classic PPP tender will be of interest.

Furthermore, the availability of land is a central issue with regard to the subsequent use of brownfields. In case that the property is available, but the question of economic viability of the investment has not been clarified yet, the private partner will be in a dilemma: On the one hand, the investor does not want to burden himself/herself with a potentially uneconomical brownfield, and on the other hand, he/she would like to make sure that he/she will be able to actually purchase the property as soon as the economic viability has been verified. In that case, an option contract can be concluded. However, it is often the case with brownfields that the land is not available for various reasons. One reason can be complicated or unclear ownership structures. The property could also be encumbered with land charges which often exceed the fair market value of the land by far so that a normal purchase would be uneconomical. The private partner will quickly be unable to cope in view of the above-mentioned problems. The municipality does have tools to make the property available for an investment in cooperation with the private partner. The compulsory auction of the 3rd ranking category initiated by the municipality is one of those tools which is capable of achieving a great effect with a

relatively small effort, and which has been used successfully by the authors for several brownfields in the past. The instrument of reallocation requires more competence and effort. It can be agreed by contract between the public and private partners, or it can be executed in the form of a sovereign procedure on the basis of the German Federal Building Code. The transitions between contractual arrangement and sovereign action can be overlapping depending on the specific situation.

The realisation of public building projects on brownfields through a PPP tender in the narrower sense was described briefly earlier. PPP tenders in the field of structural engineering have already been documented extensively in specialist literature. In the context of the revitalisation of brownfields, the PPP tender is interesting whenever the involvement of the special competences of private partners implies advantages and the economic viability of the development can be enhanced through PPP.

Finally, the issue of funding was discussed above. It often requires a particularly great extent of creativity to make sure that difficult projects are actually realised at the end of the day. Interim acquisition of the property by the municipality can sometimes be the most efficient way to turn the brownfield into a greenfield site using subsidies. In addition, it helps the municipality reduce the risks for the private partner which can always occur in connection with the demolition and, where applicable, the rehabilitation of brownfields. In anticipation of the future value added to the property, on the other hand, the private partner can provide the municipality with advance financing to cover expenses related to the upgrading of the property. Precondition is, however, that a considerable increase in land value can really be anticipated. Hence, this is normally only an option in conurbations with a high demand for building land.

The central question with many brownfields in Thuringia is whether it will be possible to finance the removal expenses from the anticipated land value after the demolition work. If this is not the case, public funding of the removal costs can help. In Thuringia, various promotion programmes are available depending on the location. All in all, the need for subsidies exceeds the available volume. When it comes to the assumption of costs for the rehabilitation of soil contaminations, the situation is similar.

Fund models promise to open up new prospects for the public-private funding of brownfield development. Within the framework of the JESSICA initiative, an urban development fund is planned for Thuringia as well. Initially, it will however be limited to interest-free municipal loans provided for urban development projects. Thus, making available both private capital and public capital from funds for the development of brownfields constitutes one of the future challenges.

The conclusion to be drawn is that obstacles related to the revitalisation of brownfields can be overcome by way of public-private partnership in many – but not all – cases. Precondition is the thorough knowledge of the exercisable (contractual) instruments and their accurate application by the actors involved.